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The State Report Citation of the Cases in the PACIFIC R VOL. 43.

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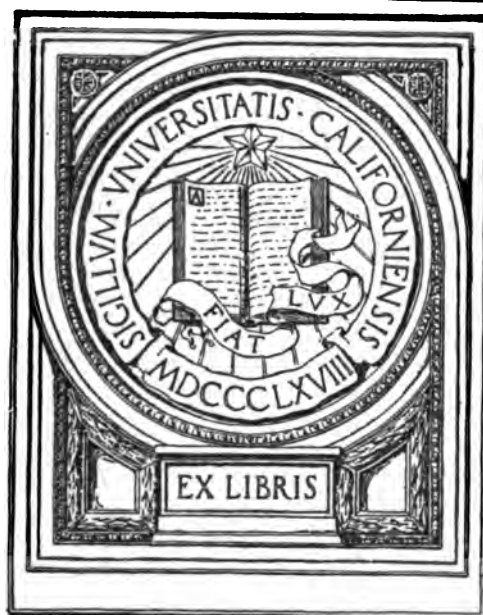
tion: The case of *People v. Shaw* is in Pac. Rep., vol. 43, p. 503. It can be the State Report by giving the citation "98" (Reporter page column) in this table, i. e., "111 Cal. 171."

ble is the reverse of the "THIRD LABEL TABLE," which enables the user a case in the Reporter when cited as State Report. This enables him to cite any case in the Reporter as fr Report.

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THE  
PACIFIC REPORTER,  
VOLUME 43,

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON,  
COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING,  
UTAH, NEW MEXICO, OKLAHOMA, AND COURTS OF  
APPEALS OF COLORADO AND KANSAS.

PERMANENT EDITION.

JANUARY 20.—MARCH 26, 1896.

WITH TABLE OF PACIFIC CASES IN WHICH REHEARINGS HAVE BEEN DENIED.

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PACIFIC REPORTER, VOLUME 43.

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OF THE

**COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.**

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<sup>1</sup>Supreme Court Utah Territory. Adjourned sine die Dec. 30, 1893.<sup>2</sup>Deceased Nov. 22, 1893.<sup>3</sup>Supreme Court State of Utah. Qualified Jan. 4, 1896.

# COURT RULES.

## SUPREME COURT OF KANSAS.

Adopted February 4, 1896.

### Sessions.

1. Court will meet for the hearing of causes in every month except August and September, each session beginning on the first Tuesday of the month.

### Certification and Correction of Records.

2. **CLERK'S CERTIFICATE TO TRANSCRIPTS.** Transcripts may be certified by the clerk of the district court substantially in the following form:

State of Kansas, County of \_\_\_\_\_:

I, \_\_\_\_\_, clerk of the district court for said county, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above-entitled cause.

In testimony whereof, I have hereto set my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, Clerk.

3. **CORRECTION OF ERRORS IN TRANSCRIPTS.** For the purpose of correcting any defect in a transcript, either party may suggest the same in writing, and upon good cause shown obtain an order that the proper clerk certify to this court the whole or part of the record required. If the defect be not admitted by the adverse party, the suggestion must be accompanied by an affidavit showing the existence of the alleged defect.

4. **CERTIFICATION OF CASE-MADE.** A certificate of the settlement of a case-made may be in substantially the following form:

I, the undersigned, judge of the district court of \_\_\_\_\_ county, Kansas, hereby certify that the foregoing was presented to me as a case-made in the action above entitled [here recite the facts with reference to the appearance of parties and the suggestion of amendments], and I now settle and sign the same as a true and correct case-made, and direct that it be attested and filed by the clerk of said court.

Witness my hand at \_\_\_\_\_ in \_\_\_\_\_ county, this \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, District Judge.

Attest: \_\_\_\_\_, Clerk.

### Commencement of Proceedings.

5. **FEES—SECURITY.** No cause shall be docketed, except one brought by the state, until the plaintiff in error or appellant shall pay to the clerk \$5 advance fees; nor shall any civil cause be docketed until security for costs shall be given, approved by the clerk,

conditioned for the payment of all costs for which the party instituting the proceeding may be liable.

6. **ORIGINAL CASES—AFFIDAVIT.** In all original actions or proceedings instituted in this court it shall be necessary for the plaintiff or applicant for the writ to state fully by affidavit the reasons why the action or proceeding is brought in this court instead of one of the several inferior courts having concurrent jurisdiction.

7. **RECORD—PAGING—COPY.** Counsel for the plaintiff in error shall number the pages of the petition in error, and the record, before filing the same; and the clerk shall prepare for the court a copy of the same, numbering the pages as in the original, unless a copy has been furnished by the plaintiff in error as allowed by statute.

8. **FILES—HOW KEPT.** The papers filed in each cause shall be kept in a package, on which shall be indorsed the title and number corresponding with those on the appearance docket and journal, where the orders in such cause are entered.

### Assignment of Errors.

9. **ASSIGNMENT OF ERRORS IN CRIMINAL CASES.** In all appeals in criminal cases the appellant must attach to and file with the transcript of the record an assignment of errors, which shall distinctly specify each ground of error relied upon and the particular ruling sought to be reviewed. Any error or ruling not so specified will be deemed to be waived.

### Courts of Appeals.

10. **DISCRETIONARY CERTIFICATION.** In all cases of final jurisdiction of the courts of appeals, a review by this court shall not be deemed a matter of right but of exceptional judicial discretion. In any such case the aggrieved party may file with the clerk, within 40 days after entry of the judgment of the court of appeals, a certified copy thereof, and of the opinion and syllabus, if any shall have been filed, to be paid for by the party requesting the same. Such aggrieved party shall at the same time file a petition in

error in a civil action, or an assignment of errors in a criminal case, particularly setting forth the precise point or points in which it is claimed the court of appeals erred, and if this court shall deem the allegations of error sufficiently meritorious to warrant a review, the court will, within 60 days after the entry of such judgment, make an order directing such case to be certified to this court upon the copy of the record, which shall be transmitted by the clerk, who will retain the original; but if no such copy has been made, then he shall prepare one and transmit it, the fee therefor to be taxed as other costs. When such order is made, the clerk of this court will issue summons in error, upon security for costs being given, as in other cases. The petition or the assignments of error with the copies filed at the same time will be treated as if attached to the copy of the record when it shall be received by the clerk of this court. On a refusal to order the certification of any case for review, a short entry thereof will be made by the clerk of this court, and the additional costs shall be certified by him to the clerk of the proper court of appeals, to be collected as other costs in the original case.

**11. CERTIFICATION OF RIGHT.** In all cases where an appeal or a proceeding in error from a court of appeals is a matter of right, the procedure shall be the same as in like appeals and proceedings in error from the district courts to this court, as far as applicable, but the provisions of the next preceding rule as to the original record and copy thereof, and the copies of the judgment, opinion and syllabus shall also be applicable to the class of cases referred to in this rule.

#### Briefs.

**12. BRIEF—SHALL CONTAIN.** Counsel for plaintiff in error or appellant shall file 10 printed copies of his brief in the cause. It shall contain: (1) A full statement of the essential facts of the case; (2) a specification of the errors complained of, separately set forth and numbered; (3) the argument and authorities in support of each point relied on, in the same order, with pertinent references to the pages of the record. The brief of the appellee or defendant in error shall contain: (1) Any points made challenging the sufficiency of the record, or the plaintiff's right to be heard; (2) a full statement of any additional facts shown by the record and deemed essential, with pertinent references to the pages thereof; (3) citations of authorities and discussions of alleged errors in the same order as in plaintiff's brief.

**13. PRINTING—TYPE—PAGES.** Briefs shall be printed from long primer or small pica type, the size of the type page to be 22 by 41 pica ems on a leaf 6 by 9 inches, corresponding with the Kansas Reports. The

clerk shall deliver one copy of each brief to the librarian to be bound, indexed and placed in the state library.

**14. SERVICE—FILING.** In each civil cause counsel for plaintiff in error shall furnish a copy of his brief to opposing counsel and file 10 copies with the clerk at least 30 days before the argument; and the counsel for defendant in error shall furnish a copy of his brief to opposing counsel and file 10 copies thereof with the clerk at least 10 days before the argument. Proof of service must be filed with the clerk prior to the argument. In case of a failure to comply with this rule, the court may continue or dismiss the cause, or affirm or reverse the judgment.

**15. SERVICE—STATE CASES.** In all causes in which the state is a party, or interested, counsel shall serve their briefs on the attorney general, such service to be made as provided in rule No. 14, but in all criminal causes counsel for the appellant shall furnish a copy of his brief to opposing counsel and file 10 copies thereof with the clerk at least 15 days before the argument; and counsel for the appellee shall furnish a copy of his brief to opposing counsel and file 10 copies thereof with the clerk at least five days before the argument.

#### Motions.

**16. WHAT MUST BE IN WRITING—NOTICE OF.** Orders for amending or completing records, or for reviving, reinstating, or dismissing causes, will be made only upon written motions stating fully and specifically the grounds therefor, and at least 10 days' notice thereof must be served upon the opposing counsel. Such motions, together with the proof of the service of notice, must be filed with the clerk three days before the time fixed for the hearing.

#### Hearing of Causes and Motions.

**17. ASSIGNMENT—ADVANCEMENT.** Causes will be assigned for hearing in their order upon the appearance docket, except as otherwise provided by law; but a cause may, upon motion, be heard out of its regular order for sufficient reasons. The motion to advance a cause must contain a statement of the nature of the action and the reasons for advancement, and the same will be considered without argument.

**18. CAUSES FROM COURTS OF APPEALS.** Causes originally certified by this court to the courts of appeals and brought back again for review will be assigned for hearing, as near as practicable, in the order to which they would have been entitled if they had remained in this court. Other causes from the courts of appeals will not be entitled to any precedence over cases brought from the district or other courts to this court.

**19. TRIAL DOCKETS — FOR ATTORNEYS.** On the first of each month the clerk will send to the attorneys interested a printed copy of the trial docket for the second month following, showing the day on which each cause will be heard. He shall notify them of all orders of the court in each cause.

**20. CONTINUANCE.** A continuance in a civil cause, unless for good reason shown, will carry it to the heel of the docket. A continuance in a criminal appeal will carry it to the next assignment.

**21. SUBMISSION ON BRIEFS.** Attorneys wishing to submit their causes upon briefs may avoid the inconvenience of personal attendance at court by filing a written order with the clerk to so submit. In all such cases their briefs, with proof of service, must be on file.

**22. ARGUMENTS — TIME ALLOWED.** One hour only, except with the consent of the court, shall be consumed in the oral argument of a cause by counsel for either party. Oral argument upon motions will be limited to 15 minutes on each side.

#### Rehearings.

**23. PETITION FOR.** An application for a rehearing shall be by petition signed by counsel, particularly setting forth the grounds thereof and showing, either that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not called either in the brief or oral argument—or which has been overlooked by the court—and the question, statute or decision so overlooked must be distinctly and particularly set forth in the petition, which must be filed within 20 days from the date of the decision. No argument or brief will be allowed on the petition, but if the application is granted the case will be assigned for rehearing and such time given for argument or brief as the court may allow.

#### Sureties for Costs.

**24. EXECUTION AGAINST.** Execution on a judgment for costs having been returned unsatisfied, the clerk may notify the sureties for costs, or their executors or administrators, of such return, and that, unless said costs are paid within 10 days after

receipt of said notice, a motion will be made for a judgment against them. If good cause shall not be shown why the same ought not to be done, judgment may be entered against said sureties, or their executors or administrators, for the amount remaining unpaid for which the plaintiff in error may be liable; and execution may be issued on such judgment as in other cases.

#### Fees and Costs.

**25. WHAT NOT ALLOWED.** In all original actions in this court no fees or costs will be allowed or taxed for the mileage of any witness for any distance outside of the county where the court is held, unless the subpoena under which the witness attends has been issued upon the special order of the court, or a justice thereof.

#### Withdrawal of Records.

**26. WITHDRAWAL OF RECORDS.** The clerk shall not permit any record or paper to be taken from his custody except by attorneys interested in the cause, and who shall receipt for the same. He shall not permit any record to be taken from his office until the copy required by rule No. 7 has been completed and compared. He will allow no one except the reporter to take an original opinion from his office before such opinion has been reported. All records and papers that may be taken from the clerk's office must be returned on or before the first day of the next session.

#### Attorneys.

**27. ADMISSION OF.** Any practicing attorney of the district court will, on motion, be admitted to practice in this court; and any practicing attorney of any state or territory, having professional business in this court may, on motion, be admitted upon taking the oath prescribed by law. All motions for the admission of attorneys must be presented at the morning hour, immediately after the first call of the docket. Each attorney, on being admitted, shall pay \$3 to the clerk, who shall furnish him a certificate of admission and a printed copy of the rules.

**28. FINAL RECORD.** A full record shall be made of all causes in which the court has original jurisdiction. A full record of other causes shall not be made except at the request and cost of the party desiring the same.

## RULES OF PRACTICE OF THE SUPREME COURT OF OKLAHOMA.

I. Court will meet in regular sessions the first Tuesday in January, and the first Monday in June, each year. All causes will be heard by the court on the days for which they are assigned.

### SECURITY FOR COSTS.

II. No cause shall be docketed, nor process issued thereon (except causes wherein the territory or the United States is appellant), until the plaintiff in error or appellant shall pay to the clerk, ten dollars advance fees; nor shall any civil cause be docketed until security for costs shall be given, approved by the clerk of the supreme court, conditioned for the payment of all costs for which the plaintiff in error may be liable.

### PLEADINGS.

III. Counsel for appellant, or plaintiff in error, shall number the pages of the petition in error and the record, before filing the same.

IV. Counsel shall file ten printed briefs in each case; six copies for the court and four for the reporter and librarian. The briefs must refer specifically to the page of the record which counsel desire to have examined.

V. The clerk will deliver one copy of each brief to the territorial librarian, to be bound and indexed and placed in the territorial library. That the briefs may be of uniform size, and thus capable of being bound in uniform and convenient volumes, counsel are requested to have such briefs printed in pages corresponding in size and form to the pages of the Oklahoma Reports.

VI. In each civil cause, counsel for plaintiff in error shall furnish a copy of his brief to counsel for defendant in error at least thirty days before the first day of court, and the counsel for defendant in error shall furnish a copy of his brief to counsel for plaintiff in error at least ten days before the first day of said term. Proof of service of the briefs must be filed with the clerk of the court seven days prior to the first day of said term. In case of a failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or affirm or reverse the judgment.

VII. In all criminal appeals in which the territory or the United States is a party, and in all civil causes in which the territory or the United States is a party, or in which any of the property of the territory or of the United States is involved, counsel shall serve their briefs upon the attorney-general or the United States district attorney—such service to be made as in civil cases, as provided in rule VI. concerning the service of briefs on other counsel.

### COURT CALENDARS.

VIII. Prior to the commencement of each term of court, the clerk will send to the attorneys interested a printed copy of the trial docket for the term following, showing the day on which each cause will be heard. All attorneys interested shall be notified by the clerk of all orders of the court concerning each case.

### ARGUMENT—NOTICE OF.

IX. Attorneys desiring to make oral arguments shall serve notice on the clerk of their intention at least seven days prior to the first day of the term. If no such notice is served causes will stand submitted on the printed briefs. No oral argument will be heard on motions. One hour only, except with the consent of the court, shall be consumed in the oral argument of a cause by counsel for either party.

### ASSIGNMENT OF CAUSES.

X. Causes will be assigned for hearing in their order upon the appearance docket, except as otherwise provided by law; but a cause may, upon motion filed therefor, be heard out of its regular order, for special and sufficient reasons set out in such motion.

### CONTINUANCE.

XI. A continuance in a civil cause, unless otherwise expressed in the order, will carry it to the heel of the docket. A continuance in a criminal appeal will carry it to the next term of court.

### RECORDS.

XII. Of all causes in which the supreme court has original jurisdiction, a full record shall be made. Of other causes, no full record shall be made except at the request and cost of the party desiring the same to be done.

XIII. The papers filed in each cause shall be kept in a package, on which shall be endorsed the title and number of the cause, the number on the package always corresponding with the number on the appearance docket, and with the number on the margin of the journal where the orders in such causes are entered.

### COPIES OF RECORDS.

XIV. Counsel of record in any cause may at all times have free access to all files in the office of the clerk of the court, but no files shall be taken from the office of the clerk except upon the written application of an attorney of record in the cause, and all



papers so taken must be receipted for at the time the same are received, and must in all instances be returned within a period of ten days from the time when they are received by counsel. But the clerk shall, prior to the time any papers are removed, at the expense of the party applying, make copies of all records removed from the office of said clerk. A failure to comply with this rule shall subject the party so in default to a proceeding for contempt; but no files shall be taken from the office of the clerk during the sessions of the supreme court.

#### EXECUTIONS.

XV. Execution on a judgment for costs having been returned unsatisfied, the clerk may notify the sureties for costs, or their executors or administrators, of such return, and that, unless said costs are paid within ten days after receipt of said notice, motion will be made for a judgment against them. If good cause shall not be shown why the same ought not to be done, judgment may be entered against said sureties, or their executors or administrators, for the amount remaining unpaid, for which the plaintiff in error may be liable; and execution may be issued on such judgments as in other cases.

#### MOTION—NOTICE OF.

XVI. Orders for amending or completing transcripts and cases made, or for reviving, reinstating or dismissing causes, will be made only upon written motions, stating the grounds thereof; and at least two days' notice thereof must be served upon the opposing counsel.

#### LICENSING ATTORNEYS.

XVII. Any practicing attorney of the district courts will, on motion, be admitted to practice in this court. Any practicing attorney of any state or territory having professional business in this court may, on motion, be admitted for the purpose of presenting any cause in which he appears as counsel. All motions for the admission of attorneys must be presented to the court at the morning hour of its session, immediately after the first call of the docket for the day. Each attorney, on being admitted, shall pay three dollars to the clerk, who shall furnish such attorney a certificate of admission and a printed copy of the rules.

#### REHEARING—TIME AND MANNER OF APPLICATION.

XVIII. The manner of applying for a rehearing shall be as follows: "Within fifteen days after an opinion is filed, a party desir-

ing a rehearing shall give actual notice in writing to the opposing party, or to his attorney, of his intention to make such application, and, within thirty days after the filing of an opinion, shall place on file in the clerk's office five printed copies of the petition."

XIX. Application for a rehearing of any cause shall be made by petition to the court signed by counsel, briefly stating the grounds for a rehearing and the authority relied on in support thereof. When a rehearing is granted, notice shall be given to the opposite party of the time when such rehearing will be had, and one-half hour only shall be allowed counsel for argument upon an application for rehearing.

#### REHEARING—SUPERSEDEAS—STAY OF PROCEEDING.

XX. Any of the justices of this court may, in vacation, issue an order which shall operate as a supersedeas in any case which has been submitted to this court for hearing and judgment, whenever a re-argument of the same shall, in their opinion, be advisable.

XXI. When an opinion in any case is filed in vacation, and a petition for rehearing shall be presented to either of the justices of this court, and he shall certify that there is probable grounds for granting a rehearing, all further proceedings authorized by the judgment of this court shall be stayed until the next term of the court.

XXII. Upon the affirmance of judgment, executions may issue at the option of the party, from this court, or if such party elects, a writ of procedendo shall be issued to the court below upon the payment by the successful party of the costs made by him in this court.

#### MOTIONS.

XXIII. Motions may be made immediately after the decisions of the court are announced, but at no other time, unless in case of necessity, or in relation to a cause when called in course. Oral argument will not be heard upon any motion, except as provided in rule IX.

XXIV. All special motions shall be made in writing and filed with the clerk, together with the reason in support thereof, at least one day before they shall be submitted to the court. Objections to motions must also be in writing; oral arguments will not be heard.

XXV. "When a motion is intended to be based on matters which do not appear by the record the facts must be disclosed and supported by affidavit."



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**WHEELER v. DONNELL.** (L. A. 91.)<sup>1</sup>  
(Supreme Court of California. Jan. 8, 1896.)  
COURT—APPELLATE JURISDICTION—PROCEEDINGS  
FOR REMOVAL OF PUBLIC OFFICER.

A proceeding under Pen. Code, § 772, providing for the removal of a public officer for misconduct, on accusation presented to the superior court, in which proceeding, in case the accusation is sustained, a judgment for \$500 is also to be rendered for the informer, is not appealable to the supreme court, as a "case at law" involving a demand in excess of \$300. Beatty, C. J., and Temple, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Accusation filed by one Wheeler against J. A. Donnell. From the judgment dismissing the accusation on a demurrer being sustained, Wheeler appeals. Dismissed.

R. H. Chapman and W. T. Kendrick, for appellant. Allen & Flint and Garrison & Goodrich, for respondent.

**GAROUTTE, J.** This is a proceeding brought against J. A. Donnell, district attorney of Los Angeles county, by accusation under the provisions of section 772 of the Penal Code, alleging misdemeanors in office. The accusation was tried upon the complaint and answer, and judgment was rendered upon the merits exonerating the accused and dismissing the complaint. This is an appeal by the accuser, Wheeler, from said judgment. Respondent has moved to dismiss the appeal upon the ground that no appellate jurisdiction in such cases is vested in this court, and this is the only point here involved. In *Re Curtis* (decision filed Sept. 4, 1895) 41 Pac. 793, the question here involved was directly presented, and this court dismissed the appeal for lack of jurisdiction to entertain it. The reasoning upon which the conclusion was there arrived at is entirely satisfactory to us, and it would hardly seem that further consideration of the subject is necessary. That decision is based upon the broad proposition that the proceeding is a criminal one, not prosecuted by information or indictment, and therefore without the appellate jurisdiction of this court. That this proceeding is a criminal one, and in its nature a prosecution for crime, is evident by every section of the Penal Code found in the chapter where this

accusation is authorized. In addition to this, section 15 of the Penal Code declares: "A crime or public offense is an act committed or omitted in violation of the law forbidding or commanding it, and to which is annexed upon conviction either of the following punishments: \* \* \* (4) Removal from office." In a case like the present one, if the charges are substantiated, the court must enter a decree that the party accused be deprived of his office, and also enter a judgment in favor of the informer for the sum of \$500. It is now sought to avoid the effect of the rule declared in the *Curtis* Case by claiming the present proceeding to be a case at law in which the demand, exclusive of interest, amounts to \$300. Conceding a demand is here involved amounting to \$300, such fact of itself is not sufficient to vest this court with jurisdiction. A demand in that amount must be in a "case at law," and here we have no such case. There are many misdemeanors punishable by imprisonment and fine of \$500, and it might, upon similar lines of reasoning, be urged that there was a money demand of \$500 involved in such cases, and appellate jurisdiction for that reason be vested in this court; but in *People v. Johnson*, 30 Cal. 98, this court, in construing the provision of the constitution as to its appellate jurisdiction, said: "In view of this clear and precise division of the subject-matter, aside from the ordinary import of the words 'cases at law,' it is clear that those words only refer to civil, as distinguished from criminal, cases. Equity cases are first provided for, then civil cases at law, then probate cases, and lastly criminal cases." This accusation charges a misfeasance in office, and fixes the penalty at removal from such office and fine. As a matter of policy, the law declares that this sum of \$500, which is nothing more nor less than a fine, shall go to the informer; and that this money goes to the informer, rather than into the county treasury, is wholly immaterial. Again, the main purpose of the act is to secure the removal of the officer guilty of unlawful conduct, and the money judgment provided for is purely incidental to that purpose. *Smith v. Ling*, 68 Cal. 324, 9 Pac. 171. This is even more fully apparent when we consider that an accusation presented by the grand jury is not followed by any money judgment in

<sup>1</sup> For opinion on rehearing, see 43 Pac. 578  
v. 43: no. 1—1

case a conviction results, and also from the further fact that the entire sum goes into the pockets of the informer. In *Woods v. Var-num*, 85 Cal. 639, 24 Pac. 843, it is held that the accused is not entitled to a jury trial. If the case was one at law, involving more than \$300, such a judgment could not stand. Aside from the money judgment provided by the section, the proceeding has no single element of a "case at law." It is in no sense a proceeding in the nature of *que warranto*, as was held to be the nature of the action in *People v. Perry*, 79 Cal. 105, 21 Pac. 423. The subject of litigation in that case was title to the office. In all essentials, that was a case at law. A question of conflicting claims to an office was there presented, and usurpation was charged. There title was denied. Here title is admitted. It was not held in that case that, by reason of a \$5,000 fine being authorized by the statute, therefore this court had appellate jurisdiction; but it was held that a money demand exceeding \$300 being involved, and the action being substantially a *quo warranto* proceeding, and in its nature a case at law, therefore appellate jurisdiction was vested in this court. For the foregoing reasons, the appeal is dismissed.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

We dissent: BEATTY, C. J.; TEMPLE, J.

#### GUTTERY v. WISHON. (Sac. 74.)

(Supreme Court of California. Jan. 8, 1896.)

Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by Guttery against Wishon. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Daggett & Adams, for appellant. E. W. Holland, C. L. Russell, G. W. Zartman, and Davis & Allen, for respondent.

**PER CURIAM.** This is a motion to dismiss an appeal. Upon the authority of *In re Curtis* (Cal.) 41 Pac. 793, and *Wheeler v. Donnell* (L. A. 91), this day decided (43 Pac. 1), the appeal is dismissed.

#### PEOPLE v. SHAUGHNESSY. (Or. 40.)

(Supreme Court of California. Dec. 26, 1895.)

##### BUNCO GAME—LARCENY

1. One who obtains possession of another's money by inducing him to put it up on a lottery operated in a bunco game, and with the assurance that the money would be returned after a certain number of drawings, the owner not intending to part with his title, is punishable for larceny.

2. Though, on a trial for grand larceny committed in the execution of a bunco game, the court read to the jury section 332 of the Penal Code, which has reference to fraudulently obtaining money by device, trick, etc., the error was cured by following charges to the effect that the person obtaining money from another by fraud or artifice, with the intention of stealing it,—the owner not intending to part with his title,—is guilty of larceny.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

John Shaughnessy was convicted of larceny, and appeals. Affirmed.

A. B. Treadwell, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

**SEARLS, C.** An information was lodged against John Shaughnessy, the defendant and appellant here, by the district attorney of the city and county of San Francisco, charging him with the crime of grand larceny, alleged to have been committed at said city and county on the 1st day of September, 1894, by the felonious stealing, taking, and carrying away \$2,080, etc., the personal property of one Charles Anderson. He was arraigned, tried, convicted, and sentenced to serve a term of four years in the state prison at Folsom, Cal. From this judgment, and from an order denying his motion for a new trial, the defendant prosecutes this appeal.

A general outline of the case, as made by the prosecuting witness, Charles R. Anderson, may be stated thus: In July, 1894, said Anderson made the acquaintance of the defendant, Shaughnessy, who professed to be familiar with games and gaming, and who was without money, while Anderson had, or professed to have, some \$4,000. The prosecuting witness had a wheel of fortune manufactured, and there were negotiations between the parties looking to a trip to South America for gambling purposes; Anderson to furnish the capital, and defendant the skill, the profits to be divided. About the last of August a third man, a stranger named Sampson, appeared on the scene, made the acquaintance of the parties, and professed to come from South Africa, where he had made money. Defendant professed to have seen Sampson's funds, and to know that he had large means. Thereupon the three agreed to form a copartnership, to go to South Africa, open a saloon, and engage in gambling. An agreement was prepared, and on September 1st the parties started down town to execute this agreement. On Grant avenue they stopped at a saloon, at the request of Sampson, to take a drink, where said Sampson was informed he had drawn a prize in a lottery. The parties then went to the lottery office, Anderson objecting, but is induced by the others to go upstairs, and to the room where the lottery is carried on. They there find a man in charge, who informs Sampson he has drawn \$112, of which sum he pays him \$110, and, after some discussion, gives him lottery tickets for the \$2, with which he draws a prize of some \$20, receives more tickets which he divides with Anderson, and they proceed to another drawing, whereupon Anderson is informed he has drawn an "approximate prize" of \$500, but that to make it absolute some five other drawings were necessary, and in the meantime, and as the drawings progressed, the lottery company had a right to demand that cer-

tain assessments be put up, as evidence of good faith, all of which assessments were to be returned to the player at the end of the drawings, together with the prizes won, if any. Special drawings were then had, during which the banker called upon Anderson for deposits. He seems to have been in doubt, but was assured by defendant and Sampson that they understood the game, and that it was "square and fair," and was assured by defendant that "it is all right. You won that \$500, and you better stick to it." Again he was assured that the money he put up was to be returned in any event, and "that he need not have any fears on that score," etc., whereupon, after going out repeatedly for more money, he placed in all upon the table some \$2,080, only to be told that at the sixth and last drawing, with but a single chance against him, he had lost. The lottery man refused to return his money, and, upon his attempt to regain it, he was seized by defendant and Sampson, and held while the banker secured it, they giving as a reason for so doing that they had seen one man killed in such an attempt, and did not wish to witness another such tragedy. We have not attempted a description of the *modus operandi* of the game, but refer to the description as given by an expert in *People v. Rose*, 85 Cal. 378, 24 Pac. 817, as conveying a fairly accurate delineation of the method pursued in the case at bar. We need not pursue the subject by showing the devices used by defendant and Sampson to prevent Anderson from calling in the police, and to lull him into silence until Sampson and the so-called banker left the city. It is sufficient to say there was evidence sufficient, if credited by the jury, to show a conspiracy on the part of defendant, Sampson, and the manager of the lottery, to cheat and defraud the prosecuting witness of his money by what is familiarly known as the "bunco-game."

The contention of counsel for appellant is that defendant is informed against for larceny, under section 464 of the Penal Code, and that the evidence, if it shows the defendant to be guilty of any crime (which is not admitted), proves it to be that of fraudulently obtaining money by device, trick, etc., by the use of cards, as defined by section 332 of the Penal Code, and, while it is "punished as in case of larceny of property of like value," is not made larceny by the Code, and that a conviction of larceny cannot be had for a violation of said section. The question is not whether defendant could have been indicted or informed against under section 332, and convicted upon the evidence presented, but whether, under an information charging grand larceny in the usual form, he was properly convicted. There is a class of cases in which a party may properly be charged and convicted of either larceny, or under section 332 of the Penal Code. *People v. Frigerio*, 107 Cal. 152, 153, 40 Pac. 107. As was said by the court in *People v. Tomlinson*, 102

Cal., at page 23, 36 Pac. 506: "Where one honestly receives the possession of goods upon a trust, and, after receiving them, fraudulently converts them to his own use, it is a case of embezzlement. If the possession has been obtained by fraud, trick, or device, and the owner of it intends to part with his title when he gives up the possession, the offense, if any, is obtaining money by false pretenses. But where the possession has been obtained through a trick or device, with the intent at the time the party receives it to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the offense is larceny;" citing *People v. Raschke*, 73 Cal. 378, 15 Pac. 13; *People v. Johnson*, 91 Cal. 265, 27 Pac. 663; *People v. Laurence*, 137 N. Y. 547, 33 N. E. 547; *Com. v. Lannan*, 153 Mass. 287, 28 N. E. 858. This rule in reference to larceny prevails alike in England and the United States. In *Reg. v. Russell*, 2 Q. B. 312, decided in 1892, Coleridge, C. J., said: "If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, this is larceny." *People v. Smallman*, 55 Cal. 185, and *People v. Rae*, 66 Cal. 425, 6 Pac. 1, are to like effect. The evidence in the case at bar fully sustains the position that the prosecuting witness did not intend to part with his property in the money, and that it was obtained by the rankest kind of fraud. We repeat the testimony of Anderson: "All the money we would be called upon to put up during these drawings, at the end of the drawing, would be returned to us in full, in addition to any prizes we might win in the mean time,—would be paid over to us; but, if we failed to put up the money that the lottery company called for, that the company would not be called upon to pay, as that was all the percentage he had." At the end of the game, the witness says, "I saw that I was swindled, and jumped up and tried to grab for my money. Shaughnessy [defendant] and Sampson grabbed me by the arms, and pulled me back from the table, while the lottery man pocketed the coin." This testimony is without conflict, except that defendant testified that his motive was to prevent a difficulty.

Counsel also assigns as error the reading by the court below to the jury of the 332d section of the Penal Code. The court stated to the jury as follows: "The contention on the part of the people, as I understand it, is that this money, if taken at all from the prosecuting witness, was taken by fraud, trick, and device. The provision of our statute is as follows." The court then quoted section 332, Pen. Code. Had it stopped here, it would have been error, for the reason that the fraudulent obtaining of money by the methods specified in that section is not

necessarily larceny; but we must read the instructions of the court together, and as a whole, and the court further instructed as follows: "The law is that when, by means of fraud or artifice, or any other kind of contrivance, the possession of property is fraudulently obtained from another, and the party obtaining this possession acquires it by means of this fraud and artifice, with the intention feloniously of stealing it when he gets possession of it, then the crime is larceny, provided the owner of the property, who has thus deposited and loses its possession, still remains the owner of the property, and has not parted with his title. One of the questions, therefore, for the jury to consider in this case, is whether there was a parting of the title on the part of the prosecuting witness. To state the rule again: If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, that is larceny. Gentlemen of the jury: I again inform you that you are the exclusive judges of the facts, of what has been proven in the case, and of the credibility of the witnesses. It is for you to say—First, whether an offense has been committed; and, secondly, whether the defendant had any part in the commission of it." When thus taken together, and in connection with the other instructions given in the case, the law was properly interpreted by the court. The instruction of the court upon the question of a reasonable doubt and a moral certainty are not open to just criticism. Upon the whole record, the defendant appears to have been fairly tried and properly convicted, and the judgment and orders appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

BUTLER v. ASHWORTH et al. (No. 15,984.)<sup>1</sup>

(Supreme Court of California. Dec. 30, 1895.)

JUDGMENTS FOR SAME TORT—SATISFACTION—COSTS.

1. A landowner sued the city and the officers thereof, in separate actions, for damage to her land from a broken sewer, alleging, in the suit against the city, neglect to repair, and, in that against the officers, negligence in making the repair, but in both, as the efficient cause of damage, the same overflow of sewage from the broken sewer. Judgments for damages were had in both actions, that against the city being the greater. *Held*, that a satisfaction of the judgment against the city was a satisfaction of that against the officers, since they were for the same tort.

2. Where one has sued persons jointly lia-

ble for a tort in separate actions, and obtained judgments in both for damages and costs, one judgment being greater than the other, on satisfaction of the greater an order directing satisfaction of the lesser must include the amount awarded therein for costs; Code Civ. Proc. § 1023, providing that in such a case no costs can be allowed the plaintiff in more than one of the actions.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Hannah Butler against Thomas Ashworth and others, city officers, for damage caused by the overflow of a sewer. There was a judgment for plaintiff for damages and costs, and defendants moved to have the judgment declared satisfied by payment of a judgment obtained against the city for the same injuries. From an order directing satisfaction as to damages, but not as to costs, all parties appeal. Reversed, with directions.

Geo. B. Merrill, for plaintiff. John H. Durst, Humphreys & Welch, John T. Humphreys, W. C. Burnett, and L. G. Burnett, for defendants.

VAN FLEET, J. Plaintiff brought an action against the city and county of San Francisco alone, to recover damages to her property caused by a broken sewer. The complaint was in two counts,—the first upon the breaking of the sewer, and the neglect to repair the same, and the second upon the negligent and improper manner in which the break was repaired; the proximate and efficient cause of damage assigned in each count being the inundation of plaintiff's premises by the overflow from the broken and choked-up sewer, and the damages alleged in each count being identical as to time, manner, and extent. In that action plaintiff recovered a judgment for \$1,190 and her costs of suit. Within two years after the bringing of that action, and before the satisfaction of the judgment therein, plaintiff brought the present action against the defendant Ashworth, as superintendent of streets of said city, and the other defendants, as his deputies, wherein, in a single count, exactly similar in all substantial respects to the second count in the first-named action, she sought damages accruing to her property through the breaking of said sewer, the immediate cause of damage assigned being the same overflow as that alleged in the previous action, and the damages alleged being as to time, manner of infliction, and in amount the same. In this action plaintiff also recovered a judgment for the sum of \$800 damages, and \$394 costs of action. Subsequent to the recovery of this last judgment, on the 1st day of August, 1893, the judgment in the said action against the city and county was fully paid, satisfied, and discharged. Thereafter the defendants in the present action moved the court below for an order restraining and enjoining the

<sup>1</sup> For modification of opinion, see 43 Pac. 386.

plaintiff therein from issuing or levying execution under the judgment therein, and that said judgment be ordered satisfied of record, upon the ground that plaintiff, by the payment and satisfaction of the judgment in her said action against the city and county of San Francisco, had been fully compensated for the identical injuries herein counted upon, and was entitled to no further relief in the premises; that both of said actions were brought for the same cause of action, and against several parties, who might have been joined as defendants in one action, and who were all openly within the state at the time of the commencement of the said first-named action. At the hearing of this motion, the facts substantially as above recited were made to appear, and the court made an order granting the motion as to the \$800 damages recovered, but denied it as to the sum of \$394 costs. Both parties excepted to the order of the court, and they both appeal,—the plaintiff from so much of the order as deprives her of the \$800 damages, and the defendants from that part denying their right to satisfaction of the judgment as to the costs.

It is a just and well-established doctrine that there shall be but one satisfaction accorded for the same wrong. If one be injured by a tortious act, he is entitled to compensation for the injury suffered; and, if several persons are guilty in common of the tort, the injured one has his right of action for damages against each and all of the joint tortfeasors, and may, at his election, sue them individually or together. But, when the injury arises from a single act, he cannot, by suing each wrongdoer alone, convert a joint into a several trespass, and thereby secure more than one compensation for the same injury. If he sue one alone, and is paid damages for the wrong, his remedy is at an end, and he is barred from further recovery against the others. 1 *Suth. Dam.* p. 214; *Stone v. Dickinson*, 5 *Allen*, 29; *Urton v. Price*, 57 *Cal.* 270; *Tompkins v. Railway Co.*, 66 *Cal.* 163, 4 *Pac.* 1165.

But the plaintiff, in support of her appeal, claims that this wholesome rule has no application to this case, for the reason, as she contends, that the cause of action stated in her suit against the city and that stated against these defendants are not the same, and that the defendants in the two actions are in no sense joint tortfeasors. That the act relied upon as producing the injury in the action against the city was the delay in making repairs to the sewer,—a mere omission; while these defendants are charged with an act of commission,—the making of repairs in such a negligent manner as to directly conduce to the injury complained of. While the second cause of action stated in the complaint against the city was the same as that relied upon in this case, it is claimed that the record shows that no issue

was joined thereon, and that it was solely upon the first count that plaintiff recovered in that action. Assuming this last fact to be true, which the record, however, fails to show, it is, nevertheless, perfectly apparent that plaintiff's contention is more specious than sound, and that there exists in fact no real difference between the causes of action stated in the two actions. Formal differences there may be, but in matters of substance there are none. In both actions the inducing, proximate cause of damage and injury alleged is the invasion of her premises by the overflowing sewage, caused by the broken and choked condition of the sewer. That is the essential fact alleged alike in both counts of her action against the city, and in the complaint in this case. That is the fact constituting the gist of the action in both cases, and, as we have seen, it was one and the same overflow; in other words, the same fact which produced the alleged damage in both cases. The mere fact that the sewer broke produced no injury to plaintiff, nor did the fact that it was negligently repaired. It was in causing the sewage to overflow plaintiff's premises, and that alone, which induced the injury and gave plaintiff her cause of action. This was the fault of the city and the defendants, her officers, alike. Whether it was caused by their joint or several acts is immaterial. It would be subordinating substance to mere form to say that these two actions do not, under the circumstances, rest upon one and the same cause. This being so, and it appearing that plaintiff had been once compensated for the injury suffered, the court below was right in denying her a second award of damages for the same act.

But it follows, from this conclusion and the language of our statute, that the order of the court did not go far enough. Section 1023 of the Code of Civil Procedure provides: "When several actions are brought \* \* \* for the same cause of action against several parties who might have been joined as defendants in the same action, no cost can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were at the commencement of the previous action openly within this state, but the disbursements of the plaintiff must be allowed him in each action." The facts bring this case strictly within that provision, and made it the duty of the court below to include the costs in its order directing satisfaction of the judgment.

The order appealed from is reversed, and the court below is directed to modify its order so as to direct and require the satisfaction of the judgment in full, including both damages and costs.

We concur: GAROUTTE, J.; HARRISON, J.

**PEOPLE v. KNIGHT. (Cr. 42.)**

(Supreme Court of California. Dec. 31, 1895.)

**RAPE—WITNESS—CROSS-EXAMINATION—EVIDENCE—INSTRUCTIONS.**

1. On a prosecution for rape, a physician who testified for the prosecution that penetration would produce the conditions of the parts discovered by his examination could be cross-examined as to whether all such conditions could not have been caused by other things, though he had stated that a certain instrument would cause certain of the conditions.

2. Where, on a prosecution for rape, prosecutrix testified that she was 7 years of age when she came to the state, and that at the time of trial she was 10 years of age, and on cross-examination stated that she did not know when she came to the state, she could be asked by defendant what she gave as her age to her school teacher after coming to the state.

3. Where, on a prosecution for rape of one who lived with defendant and his wife, prosecutrix testified that the reason she did not complain until several days after the offense was committed was because defendant had made her afraid of him by throwing things at her and scolding her, questions put to her by defendant to determine when this treatment commenced should have been allowed.

4. In such case she could be cross-examined as to whether defendant ever said anything to her about having intercourse with her.

5. In such a case, prosecutrix having testified that the wife went out and left her alone in the house with defendant, and that she was afraid of him, she could be asked on cross-examination why she did not go out with the wife.

6. On a trial for rape, under an indictment alleging several acts of intercourse with one who lived with defendant and his wife, after prosecutrix testified that she was compelled by threats of the wife to tell her of the offenses, and that the wife suspected it from finding her trembling, she could be cross-examined as to whether the wife saw her trembling after the first offense, or after the last, or how many times she saw her thus.

7. On a trial for rape of one who lived with defendant and his wife, where a physician who examined prosecutrix 12 days after the offense, testified that the hymen was entirely absorbed, and that, from indications, it might have disappeared long before, and prosecutrix testified that her only excuse for not making immediate complaint was her fear of defendant, prosecutrix could be cross-examined as to whether any person had intercourse with her before defendant,—especially where defendant claimed that the charge was concocted by his wife.

8. Where, on a prosecution for rape, defendant claims that the charge was concocted by his wife, it is error to exclude circumstantial evidence to support that claim.

9. On a prosecution for rape of a 10 year old child, an instruction asked by defendant on the question whether the child made any outcry at the time of the commission of the crime is properly refused.

Commissioners' decision. Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Jesus Knight was convicted of rape, and from the judgment and an order denying him a new trial he appeals. Reversed.

E. Rousseau and E. J. Emmons, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

HAYNES, C. Appellant was convicted of the crime of rape, and sentenced to imprisonment at Folsom for the term of 19 years; and he now appeals from said judgment, and from an order denying his motion for a new trial. The offense is charged to have been committed upon Felis Aldama, a girl of 10 years of age, the granddaughter of appellant's wife. Appellant complains of numerous rulings of the court below upon questions of evidence, and of alleged errors in instructions given and refused, and also specifies as a ground of reversal that the evidence was not sufficient to justify the verdict.

Drs. Rogers and Taggart made a physical examination of the prosecuting witness some time after the last alleged outrage, but how long after is uncertain. The examination was made on September 7, 1894. Trinidad Grijalba, the officer who arrested defendant, and who appears to have made the complaint, first heard of it, as he "guesses," on September 2d, but how long before that date the last of the four alleged acts of intercourse occurred is not precisely fixed. The girl testified upon the trial that she told her grandmother "about a week after the last time," but how long a time elapsed after she told her grandmother before it was communicated to Grijalba nowhere appears. Assuming that it was communicated to Grijalba at once, at least 12 days elapsed after the last of the four occurrences before the examination was made by the physicians. The physicians testified to certain conditions of the parts as they found them at the time of the examination, and both concluded that the producing cause must have occurred some time before the examination, but how long they could not tell. Dr. Rogers was asked by the district attorney whether penetration by a man would cause such bruises and inflammation as he found, and he answered, "Yes; on a child of that age." He was afterwards cross-examined by counsel for defendant, and that was followed by a redirect examination by the district attorney. Counsel for defendant, upon recross-examination, asked the following question: "All of the spots, and the disappearance of the hymen, and all the irritation you saw there, could have been made by various other things, could it not?" This question was objected to as being incompetent, irrelevant, and immaterial, and not proper cross-examination. The Court: "I think that question has been answered once. Let the objection be sustained. Gentlemen, you cannot cross-fire on a witness this way." It is true, some questions had been put to the witness partly covering the points of the above interrogatory. One went only to the red spots testified to by the doctor, and another to the use of a particular instrument,—the finger; and, as to the latter, the doctor replied that it would not cause the injuries. The question here, however, covered all the injuries and appearances, and embraced every instrument or means of pro-

ducing the injuries, aside from that which the prosecution sought to prove by the witness had caused it. The objection to the question should have been overruled.

Fellis Aldama, the prosecuting witness, testified that she was born in Lower California, where her parents still reside; that she was 7 years old when she left there; that since she came to this state she had lived part of the time with an aunt, and the remainder of the time with her grandmother; and that she was 10 years old. None of these facts, except her age, and that she lived with her grandmother, were brought out on the examination in chief, which was exceedingly brief, and which gave no hint of the time when the occurrences to which she testified took place,—not even the year in which they occurred. Under these circumstances, counsel for the defendant asked when she first came to Sumner, but she was unable to tell. She was then asked as to whether she went to school, and to whom she went, and, having named a teacher, was asked the following question: "What age did you give her as your age when you went to school,—when she took your age down?" An objection to this question was improperly sustained by the court.

The witness gave as a reason for not telling her grandmother what had occurred that she was afraid; that she was afraid of him before these occurrences; that "he was always scaring me and my grandma, and making us afraid"; "he was always scolding us and throwing things at us." She was then asked, "When did he first commence throwing things at you?" and to this question an objection was sustained. Several other questions, of a similar character, put for the purpose of ascertaining when the defendant's bad treatment commenced, were also excluded. "Q. Did he ever talk to you about having anything to do with you?" An objection to this question was also sustained. Again, the witness testified that her grandmother went out, and left her in the house with the defendant, and that she was afraid to stay with him, and was then asked, "Why did not you go out with your grandmother?" An objection to this question, and to others of similar import, were also sustained. She further testified, upon cross-examination, that she told nobody but her grandmother. "Q. Did she say anything to you that made you tell it? A. Yes, sir. Q. What did she say? A. She told me she mistrusted something, and why didn't I tell her, and she wanted me to tell her. Q. Did she threaten you? A. Yes, sir. Q. Did she take out a knife, and threaten to kill you with it? A. Yes, sir. Q. What did you do that made her think there was something wrong? A. Because she found me trembling in the kitchen. Q. Did she see you trembling that way after the first time?" To this question it was objected that it was incompetent, irrelevant, and immaterial, and calls for a conclusion.

The Court: "It calls for a fact, but, whether the fact has any bearing on the case or not, let the objection be sustained. We must get through with this case sometime." Objections were also sustained to each of the following questions: "Did she ask you whether or not there was anything the matter with you after the first time? Did she discover there was anything the matter with you until after the fourth time? How many times did she say she found you trembling?" We think all these questions were proper, and that the rulings of the court were erroneous, and unreasonably restricted the cross-examination of the witness. An objection was also sustained to the following question to this witness upon cross-examination, "Had anybody else done so before?" It is true that, if the defendant had committed the act charged, the fact that some one else had done so before would be wholly immaterial. But Dr. Rogers had testified to certain conditions of her person, and, among other things, he was asked the following question: "In regard to no appearance of the hymen, would that indicate recent rupture, or a long time before? A. It was entirely absorbed, and that might have disappeared before. The indications are that it would have disappeared before. The margins of the rupture had entirely disappeared." So far as can be determined from the testimony of the girl, the alleged acts of intercourse with the defendant followed each other with intervals of only a few days; and, if viewed solely in the light of the evidence of the doctor, it is by no means clear that the question was either immaterial or irrelevant. Besides, she testified that she did not tell her grandmother because of her fear of the defendant; and if, in reply to the question, she had admitted that the defendant was not the first person who had intercourse with her, and she had not disclosed the fact, it would go far towards discrediting her statement of the reason for not informing her grandmother of defendant's conduct. Or if, on the other hand, she had disclosed such prior assault by another, and if the claim of defendant's counsel that this prosecution was incited by the grandmother of the child without cause, the condition of the child as found by the doctor, though produced by another, could readily be used to fasten the crime upon the defendant. In view of these facts which may have existed, and not because the prior crime of another absolved the defendant, if he were in fact guilty, the objection should have been overruled.

In regard to defendant's effort to introduce evidence that the charge against him was concocted by his wife, the grandmother of the child, the court and counsel seem to have misunderstood each other from the beginning to the end. Under some of the propositions of counsel, the evidence should have been admitted, and, under some of the statements of the court, it might have been

admitted. The colloquy is too long to be stated here, but one or two paragraphs may be stated: At folio 142 counsel said: "We want to prove that the grandmother has concocted the story, and has trained this child to swear to it. We don't suppose we can prove all those things, but, from what we think we can prove, we want the jury to infer the rest." We suppose that counsel meant that he could prove certain circumstances, from which the main fact must or might be inferred. In other words, he confessed his inability to prove by direct evidence the ultimate fact, but that he expected to be able to prove it by circumstantial evidence. The fact itself being material and relevant, any evidence, whether direct or circumstantial, tending to prove the ultimate fact, was competent. In one of the statements of the court, reference was made to the question of a conspiracy between the grandmother and the child, but a subsequent statement shows that the court did not use the word "conspiracy" in the sense that the child aided in concocting the story. The court said: "If you state to the court that your intention is to connect this child with it, either as an active participant, or an instrument in the hands of the grandmother, I will permit that question. Mr. Rousseau: I will make this statement about it, that we cannot prove the actual training, but we can prove it from the circumstances only. The Court: Do you propose to show to this jury that the grandmother has educated the child up to this story? Mr. Rousseau: Yes; I cannot show the actual training. The Court: Then it is an inference you want the jury to draw? Mr. Rousseau: Yes; it is an inference. The Court: Let the objection be sustained." Other parts of the colloquy, which covers several pages of the transcript, show that, when counsel said he could not show the "actual training," he meant that he did not have direct or primary evidence of the fact. One step in the proposed evidence was the alleged jealousy of the grandmother, the wife of the defendant. What other facts counsel expected to show, tending to sustain the alleged training of the child, does not appear. His offer, however, embraced in his statements above quoted was proper, and he should have been allowed to introduce any competent evidence, whether direct or circumstantial, which tended to prove the ultimate facts stated.

In relation to the instruction requested by defendant touching the point whether the girl made any outcry, it need only be said that, being under the legal age of consent, her consent to the act could not change its character. If it were shown that she did cry out, it would, of course, tend to corroborate her story, while the failure to do so would not necessarily show that the defendant was not guilty, since her silence would, in the absence of other circumstances, only tend to show her consent. It may be said,

however, that her condition, as testified to by the physicians, would render it highly improbable that these acts could have been perpetrated without producing such pain as to cause her to cry out, unless prevented by threats or other means; and, while such circumstances would furnish proper grounds for an argument to the jury, it is not perceived that any proposition of law is involved, making an instruction directly upon the point necessary, while all that could be properly said was covered by the more general instructions given.

Questions touching the affidavits presented in support of the motion for new trial need not be noticed, in view of the conclusion we have reached. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: VANCLIEF, C.; SEARLES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

SEHORN v. WILLIAMS, County Auditor.  
(No. 18,356.)

(Supreme Court of California. Dec. 31, 1895.)  
COUNTIES — CLAIMS — DUTY OF AUDITOR TO DRAW WARRANT.

1. County Government Act (St. 1891, p. 322), § 113, requires a county auditor to draw warrants for claims "legally examined, allowed and ordered paid by the board of supervisors," when he has received, as required by section 20, subd. 4, a properly certified list of the claims allowed. Section 45 requires warrants drawn by order of the county supervisors to specify the liabilities for which they were drawn, and when they accrued. *Held*, that it is the duty of a county auditor to draw his warrant for a claim on a certificate of supervisors giving the name of the claimant and amount of the claim, and stating that it has been duly allowed, though it does not state what the claim was for, nor when it accrued.

2. County Government Act (St. 1891, p. 311), § 41, requiring a claim against a county to be itemized, "giving names, dates and particular services rendered," before it can be allowed, is directed to the board of supervisors alone, and does not control the county auditor in drawing warrants for claims allowed.

Department 1. Appeal from superior court, Glenn county; Seth Millington, Judge.

Application by W. A. Sehorn against one Williams, county auditor, for writ of mandamus to compel defendant to draw a warrant for a claim duly allowed against the county. From a judgment allowing the writ, defendant appeals. Affirmed.

Charles L. Donohue, for appellant. Ben. F. Gels, for respondent.

HARRISON, J. The plaintiff presented to the board of supervisors of the county of Glenn a claim for \$60, properly itemized and verified, for services rendered by him under a contract with the county for carrying meals



to the county jail; and the same was allowed by the board at its session May 10, 1893, and ordered paid out of the common fund, and the auditor was directed to draw his warrant for said sum in favor of the plaintiff. Upon a demand by the plaintiff for said warrant, the defendant, who was the auditor of the county, refused to draw the same, and thereupon the plaintiff instituted this proceeding for a mandate compelling him to draw the warrant.

Section 113 of the county government act (St. 1891, p. 322) provides: "The auditor must draw warrants on the county treasurer in favor of all persons entitled thereto, in payment of all claims and demands chargeable against the county, which have been legally examined, allowed and ordered paid by the board of supervisors; provided, however, that the auditor must not draw a warrant on the county treasurer in favor of any person until said auditor shall have received from the clerk of the board of supervisors the certified list mentioned in subdivision 4, section 20, of this act." The "certified list" herein referred to, and which the clerk is required to deliver to the auditor, is a list "of all claims allowed and orders made for the payment of money, giving the name of the claimant or payee named in the claim or order, the amount and date of each claim or order, and the date of the allowance thereof." In the present case the clerk delivered to the auditor a list in which was given the name of the plaintiff and the amount allowed, in the following form:

Name of Claimant.	What for.	Amt. of Claim.	Amt. Allowed. \$60.
Sehorn, W. A.			

Under the heading "What for" there had been written "Jailer," and under the heading "Amount of Claim" there had been written "\$60." But before the list was delivered to the auditor these items had been erased, by drawing lines through the words.

It is contended on behalf of the auditor that he was not required to draw his warrant, for the reason that the list delivered to him by the clerk does not specify the liability for which the claim was allowed by the board of supervisors. The statute does not, however, require the clerk, in the list which he delivers to the auditor, to specify the liability for which the claim was allowed. The auditor is required by section 113 to draw his warrant in favor of every person whose claim "has been legally examined, allowed and ordered paid by the board of supervisors." If he has received from the clerk a properly certified list of the claims allowed, he must, upon demand, draw his warrant in favor of the claimant whose name is found therein. The provision in section 41 of the act, requiring the claim to be itemized, "giving names, dates and particular services rendered," before it can be allowed, is directed to the board of supervisors alone, and there is no provision in the county government act

giving to the auditor a revisory control over their action. *McFarland v. McCowen*, 98 Cal. 329, 33 Pac. 113. The provisions of section 45 and section 114 do not justify the auditor in withholding the warrant merely because the clerk shall not have certified the items of the claim, or the liability for which it was allowed. These sections are as follows:

"Sec. 45. Warrants drawn by order of the supervisors on the county treasury for the current expenses during each year must specify the liability for which they are drawn, and when they accrued, and must be paid in the order of presentation to the treasurer."

"Sec. 114. All warrants must distinctly specify the liability for which they are drawn, and when it accrued."

The statute does not prescribe the mode in which the auditor shall ascertain the facts which will enable him to comply with the provisions of these sections relating to the form of the warrant; and, in the absence of any provision therefor, it is his duty to take such steps, or obtain such information, as will enable him to properly comply with the sections. In the present case he testified that after he had received the certified list, and before the plaintiff demanded his warrant,—being in doubt, by reason of the erasures in the list,—he ascertained by inquiry from the county clerk that the plaintiff's claim, as it appears on that list, had been allowed and ordered paid by the board of supervisors. Upon receiving this information, his duty to draw the warrant was clear. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

#### Ex parte NICHOLS. (Cr. 81.)

(Supreme Court of California. Jan. 2, 1896.)

##### REFORMATORY SCHOOL—CONSTITUTIONAL LAW.

1. Act March 11, 1889 (St. 1889, pp. 100-106), entitled "An act to establish a school of industry," and providing for the detention therein of minors guilty of criminal offenses until majority, which may be a longer period than the term of imprisonment in the county jail provided for such offenses, is not unconstitutional as providing unequal punishments for the same offense.

2. The fact that Act March 11, 1889 (St. 1889, pp. 100-106), creating the Preston school as a reformatory for minors guilty of criminal offenses, provides for the transfer thereto from any state prison of minors under 18 years of age on recommendation of the prison directors and the approval of the governor, and gives such minors, when discharged from the school, the "benefits and immunities" of its other inmates, does not make the school a state's prison.

In bank. Ex parte proceedings by William Nichols for discharge on writ of habeas corpus from a reformatory. Writ dismissed.

N. S. Wirt, for petitioner. Atty. Gen. Fitzgerald, for respondent.

**McFARLAND, J.** The petitioner, William Nichols, asks, on a writ of habeas corpus, to be discharged from the custody of Carl Bank, superintendent of the Preston School of Industry, situated in Amador county. He was convicted in a justice's court of petit larceny, and, being under the age of 18 years, the justice adjudged that he was a fit subject for commitment to said school, suspended judgment, and committed him to said school until he should be 21 years old, unless sooner legally discharged. The commitment was approved by the superior judge of the county, as provided by section 16 of an act entitled "An act to establish a school of industry," approved March 11, 1889, under which act the proceedings here complained of were had. St. 1889, pp. 100-106. Petitioner assails the constitutionality of said statute mainly upon the grounds that it is unequal in its operation, because under it an adult can be punished for petit larceny by imprisonment in the county jail for only six months, while a minor may, for the same offense, be sent to said school for a much longer period; that a justice's court has no jurisdiction, in such a case, to impose imprisonment for more than six months; that the statute is a special law regulating jurisdiction of a justice's court, etc. These and similar objections to the statute are answered against petitioner's contention by the case of *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251. That case involved the validity of the act by which the Whittier Reform School was established (St. 1889, p. 111), and its provisions, so far as these questions are concerned, are similar to those of the statute here under review. In answer to similar objections there made, this court, in bank, through Patterson, J., said: "There can be no question as to the power of the legislature to provide for the detention and education of juvenile offenders, as it has done in this act; and the provisions of the act are not obnoxious to the criticism that it prescribes unjust or unequal penalties. It is true, the term of detention at the reform school may be made greater by the judgment of the court than the term of the imprisonment in the county jail or in the state prison for the same offense would be; but it cannot be said that the punishment inflicted is greater than could be put upon an adult for the same offense. The object of the act is not punishment, but reformation, discipline, and education. Pen. Code, § 12. While detained for a longer period, perhaps, than he would be if sent to state prison or the county jail, the conditions surrounding the child are vastly different. He is given the opportunity and instruction to learn a trade, and qualify himself for the duties of citizenship, so that at the end of his term he will go out prepared to take care of himself and those dependent upon him, without the odium which attaches to an ex-convict. There is no doubt of the power of the state to make and enforce provisions for the compulsory education of all children within the

state; and it is equally clear that the state may arrest the downward tendency of those who have offended against its laws, and manifested a disposition to follow a criminal career, by placing them in an institution where they will receive the care, education, and discipline necessary to prepare them for honorable citizenship." It is contended that under a certain provision concerning the Preston school which is not contained in the act creating the Whittier school, sending the petitioner to the latter school was in fact sending him to a state prison, and thus making a felon of him, which the justice's court had no jurisdiction to do. But this contention cannot be maintained. The provision in question is that any boy under 18 years old who is serving a sentence in any state prison, and who shall be deemed a fit subject for training in said school, may, upon the recommendation of the board of prison directors, and the approval of the governor, be transferred to said school; and that said boy, "when honorably discharged from said school, as hereinbefore provided, shall be entitled to such benefits and immunities as are provided for the other inmates of the institution." Taking a boy out of the state prison and putting him in the school, with the "benefits and immunities" of its other inmates, is certainly not turning the reform school into a state prison. It is, in fact, a commutation by the governor; and the boys thus sent to the school, if honorably discharged, are "released from all penalties and disabilities resulting from the offenses or crimes for which they are committed." The petitioner is remanded, and the writ dismissed.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.; TEMPLE, J.; HENSHAW, J.

**VISALIA & T. R. CO. v. HYDE.** (Sac. 52.) (Supreme Court of California. Dec. 31, 1895.)

**CORPORATE STOCK—ASSESSMENTS—TRANSFER—LIABILITY OF TRANSFEROR—ACTION ON ASSESSMENT—DEFENSES.**

1. After a transfer of corporate stock has been duly made on the books of the company, the transferee becomes liable on assessments.

2. An assignment of corporate stock after the levy of an assessment on the same will not relieve the assignor from liability on the assessment, where no formal transfer was made on the books of the company.

3. Where a corporation is authorized to levy assessments to meet its outstanding obligations, a stockholder cannot defend an action on an assessment on the ground that the obligation was created before he became a stockholder.

4. It is no defense to an action against a stockholder by a corporation authorized to levy assessments to meet outstanding obligations, and whose directors were given discretion to require assessments or to resort to the corporate property in payment of such obligations, that the corporation had sufficient property to meet the obligations forming the basis of the assessment.

Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by Visalia & Tulare Railroad Company against R. B. Hyde on an assessment of corporate stock. Judgment for plaintiff, and defendant appeals. Affirmed.

Lamberson & Middlecoff, for appellant. Hannah & Miller, for respondent.

HARRISON, J. The plaintiff is a corporation under the laws of this state, for the purpose of constructing and operating a railroad between the city of Visalia and the town of Tulare, and was incorporated November 1, 1887, with a capital stock of \$100,000, divided into 1,000 shares of \$100 each, all of which was subscribed for, and upon each share of which stock there had been paid into the corporation the sum of \$50. On March 28, 1894, the directors of the corporation levied an assessment of \$10 upon each share of the capital stock, and, in the order levying the assessment, fixed a day on which the stock would be delinquent, and also a day for the sale of the delinquent stock. After the day specified for declaring the stock delinquent, and before the sale, the board of directors, by an order in that behalf, elected to waive and abandon further proceedings for the collection of the assessment by a sale of the stock, and to proceed by action to recover the amount that should be delinquent. November 29, 1890, the defendant became the owner of 100 shares of the capital stock, which had been originally subscribed for by Thomas Creighton, and on that day a certificate for said 100 shares of stock was issued to and received by him, and he was then registered on the books of the plaintiff as the owner thereof, and has since remained registered as such stockholder. The present action is brought to recover from him the amount of the assessment, by virtue of the provisions of section 349 of the Civil Code. The answer to the complaint does not question the regularity of the steps taken in levying the assessment, or in the election of the plaintiff to proceed by action to collect the same, or that the plaintiff was indebted in an amount greater than the amount of the assessment, but sets up as special defenses that, at the time the plaintiff incurred the liability for which he alleges the assessment was levied, he was not a stockholder; that, prior to the commencement of the action, he had sold, indorsed, and delivered the shares of stock to another person; and that, at the time of levying the assessment, the plaintiff had sufficient property with which to meet all of its obligations, without levying an assessment therefor. The plaintiff had judgment, and the defendant has appealed.

1. By purchasing the stock from Creighton, and causing a transfer thereof to himself to be entered upon the books of the plaintiff, the defendant was substituted for Creighton as a stockholder of the corpora-

tion, and thereafter held the shares on the same conditions and subject to the same obligations as did Creighton prior to the transfer. Mor. Corp. § 159; Cook, Stock & S. § 256; Hall v. Insurance Co., 5 Gill. 484; Railroad Co. v. Boorman, 12 Conn. 530; Upton v. Hansbrough, 3 Biss. 417, Fed. Cas. No. 16,801; Mining Co. v. Bagley, 14 Mich. 501. In the case last cited, the court say: "The very essence of a corporation consists in its corporate succession, which in stock companies is kept up by the substitution of one owner for another in the proprietorship of shares. If the original stockholders stand under different relations to the company from their assigns, the corporation itself loses some of its attributes by the substitution, or else becomes introduced into more complicated relations. It seems to be an unavoidable conclusion that every liability which attaches to a stockholder, as such, is inseparable from the ownership of the stock." And in Railroad Co. v. Boorman, supra, it is said: "The reasons for subjecting the original subscribers to personal liability apply with equal force to those who become stockholders by purchase. The relation of stockholder and company exists. A privity between them is created." The defendant did not divest himself of this liability by an assignment of the certificate to another subsequent to the levy of the assessment, especially as his assignee did not procure a transfer to himself upon the books of the corporation. For the purpose of ascertaining those who are liable to it for the amount of the assessment, the corporation can look only to the list of stockholders as their names are registered upon its books.

2. The liability of the defendant to the creditors of the corporation for his proportion of their claims against the corporation, and his liability to the corporation for the unpaid portion of his subscription, are entirely distinct, and rest upon different principles. The stockholder is liable to a creditor upon only such liabilities as were incurred during the time he has been a stockholder, but he is liable to the corporation for the unpaid portion of his subscription, whenever the corporation may choose to call it in; and while the creditor may enforce his claim against the corporation, and seek its entire satisfaction out of the corporate property, he can recover from the stockholder only his proportionate part of the claim. The corporation is authorized to levy an assessment for the express purpose of providing a fund with which to meet its outstanding obligations, and it is no defense to the assessment that the defendant was not a stockholder at the time the obligation was contracted or the liability incurred. Nor is it any defense that the corporation has sufficient property with which to meet its obligations. The liability of the defendant rests upon his contract of subscription, and the propriety or necessity of requiring him to

pay it for the purpose of meeting the corporate liabilities, rather than to resort to property in the hands of the corporation with which to meet such liabilities, has been placed in the discretion of the board of directors. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

BROWN v. CAMPBELL et al. (No. 15,937.)<sup>1</sup>  
(Supreme Court of California. Dec. 31, 1895.)

COURTS — CONFLICTING JUDGMENTS OF SUPERIOR COURT — PLEADING — RES JUDICATA — ANOTHER ACTION PENDING — PRACTICE — INTERPLEADER.

1. The rule that the judgment of the court first acquiring jurisdiction will prevail over that of another court subsequently acquiring jurisdiction does not apply to judgments rendered by different departments of the superior court of the city and county of San Francisco, as all departments of such court, combined, form but one court.

2. The defense of former adjudication, to be available, must be pleaded.

3. The defense of the pendency of another action, to be available, must be pleaded.

4. Where a judgment is ineffectual to support a plea of res judicata, because the time for appeal therefrom has not expired, one pleading such judgment in bar, instead of pleading the pendency of the action in abatement until the judgment should become final, so that it could be set up by supplemental answer in bar, cannot have the second judgment set aside, or its enforcement perpetually stayed.

5. A stakeholder in a suit by a person claiming the money, after withdrawing his plea of interpleader, and defending against the claim of another person, made a party at his request, cannot complain that the judgment against him in favor of such other person may subject him to double liability.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by A. M. Brown against H. C. Campbell and others. One Priest was made a party on motion of defendants. From an order refusing to set aside a judgment for Priest, or to grant a perpetual stay of execution thereon, plaintiff and the other defendants appeal. Affirmed.

Jas. A. Waymire, H. C. Campbell, and W. T. Baggett (R. Percy Wright, of counsel), for appellants. T. Z. Blakeman, for respondent.

HARRISON, J. The case of Priest v. Brown et al., in which Joseph Brown and A. M. Brown were two of the defendants, was commenced in the superior court for the city and county of San Francisco April 13, 1887, and was tried in department 1 of that court, before the honorable T. K. Wilson, and judgment was rendered by him in favor of the defendants, and was entered November 24, 1888. The action was brought for the purpose of subjecting to sale, under the direction of the court, certain real property alleged to have been fraudulently conveyed by

Joseph Brown to A. M. Brown, and the application of a portion of the proceeds thereof to the payment of a claim of the plaintiff against Joseph Brown. While that action was pending, Henry C. Campbell and Thaddeus B. Kent, two of the appellants herein, who held the legal title to the property, sold the same, and A. M. Brown commenced the present action, in the same court, to recover from them \$2,549.50, the amount of certain surplus moneys in their hands, arising from the sale of said property. This cause was assigned to department 6 of that court. In their answer to the complaint, Campbell and Kent alleged that Priest claimed the money, and asked that he be made a party defendant, and that thereupon they be permitted to pay the money into court, and be discharged of all liability therefor. Priest was thereupon made a party defendant to the action, and filed an answer to the complaint of the plaintiff, and also a cross complaint, in each of which he alleged substantially the same facts as were alleged in the complaint in the action of Priest v. Brown. Thereafter the plaintiff united with the defendants Campbell and Kent in a motion to strike out this answer. This motion was granted May 9, 1889, and the case was afterwards tried before the honorable W. T. Wallace, who rendered judgment in favor of Priest, which was entered February 25, 1892. An appeal to this court was taken from each of these judgments, and the two appeals were heard together, and each of the judgments was affirmed December 30, 1893. Priest v. Brown, 100 Cal. 626, 35 Pac. 323; Brown v. Campbell, 100 Cal. 635, 35 Pac. 433. Upon filing the remittitur in the superior court in the present case, the appellants moved that court for an order setting aside the judgment, or granting a perpetual stay of execution thereon. In support of the motion they presented to the court the records and papers on file in the two actions, and urged as the grounds of the motion that inasmuch as in the case of Priest v. Brown judgment had been rendered in favor of A. M. Brown, the plaintiff herein, upon the same cause of action that is presented in this suit, and had been affirmed by the court, that judgment had become the final determination of the rights of the parties, and was not impaired by the subsequent judgment rendered in this action. The motion was denied, and the present appeal is from that order.

The rule invoked by the appellants, that the judgment of that court which first acquires jurisdiction of the subject-matter of a cause of action and of the parties thereto will prevail over the judgment of another court whose jurisdiction was subsequently acquired, has no application to the present case. That rule rests upon comity and the necessity of avoiding a conflict in the execution of judgments rendered by independent courts, either of distinct or concurrent juris-

<sup>1</sup> Rehearing denied.

diction. But the rule itself, as well as the reason for its exercise, has no existence in a case where the actions are brought in the same court, and the judgments are rendered by the same tribunal. There is but one superior court in the city and county of San Francisco, and all of the actions brought in that court are within the same jurisdiction. *White v. Superior Court* (Cal.; S. F. 118) 42 Pac. 480. The assignment of causes to different departments does not take place until after the court has acquired jurisdiction of the cause, and is made in order to expedite the business of the court, by apportioning them to the several judges for trial and judgment. The jurisdiction over a cause, after it has been assigned by the presiding judge to one of the other judges for trial, remains in the same court, and neither the judge to whom it has been assigned, nor the department over which he presides, has any jurisdiction over the cause distinct from that of the court in which the action is pending. The entire procedure, from the commencement of the action to the execution of the judgment, is in one court; and there is no opportunity for conflict of jurisdiction, either in pronouncing a judgment or in its execution after it has been rendered. When, therefore, a suit is commenced in that court upon a cause of action which is then pending before it in another suit, or which has already been carried into judgment, the procedure to be observed is the same as if the two actions were in a court with but a single judge, before whom all causes therein were to be tried. If the defense of a pending suit, or the estoppel of a former judgment, is not pleaded when such defense is available to the defendant, he cannot, after an adverse judgment, avail himself of this defense, which he neglected to plead when he had an opportunity to do so, any more than he could avail himself of any other defense which he had omitted to plead.

When the present action was commenced, the action of *Priest v. Brown* was pending in the same court, and had not been tried. The main issue in that action was whether *Priest* had the right to subject the lands described in the complaint to the payment of his claim against *Joseph Brown*. After *Priest* had been made a defendant in the present action, at the instance of the appellants *Campbell* and *Kent*, he filed an answer, in which he pleaded the pendency of the former action, and the identity of the issues and parties thereto with those in the present action. There was thus presented to the court for determination the precise question involved in this motion; and if this issue had been tried, and found against the plaintiff, the judgment of the court would have been that the action should abate, and the rights of the parties would have been determined by the judgment in the former action. Instead of taking this course,

the appellants asked the court, and the court at their instance struck this defense from the answer of *Priest*, and the cause was tried upon the same issues as were presented in the former action, without any objection to a re-examination of them by the court. It is too clear for argument that the appellants cannot, after an adverse judgment upon issues of their own selection and framing, interpose a defense to the enforcement of that judgment which they had an opportunity to present for the purpose of defeating the respondent's claim, but which they industriously sought not to have presented to the court for its judgment thereon.

When this cause was here upon the former appeal, the appellants urged the reversal of the judgment because of the prior judgment in the case of *Priest v. Brown*, which they had pleaded as a bar to any further litigation of the issue then determined. In holding that this plea of a former judgment was unavailing, for the reason that the judgment had not become final, the court said: "But while the judgment in *Priest v. Brown* was not, for the reason stated, a bar to the cause of action alleged in the cross complaint, still the pendency of that action would have been a good ground for the continuance of this until the final determination of the former action, or would have been a sufficient basis for an order dismissing the present action upon motion of the plaintiff, notwithstanding the affirmative relief demanded by the defendant *Priest* in his cross complaint, and the refusal of the court to have granted either of such motions, would perhaps have been erroneous; but no such motion was made by the plaintiff, and the trial proceeded without objection, the plaintiff still insisting upon the judgment in *Priest v. Brown* as an estoppel, and as ground for a judgment in his favor." In *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589, it was said: "Where a judgment is ineffectual as evidence in a plea of former adjudication until the time for an appeal therefrom has expired, the true course of a defendant in such a case would be to plead the pendency of the former action in abatement, until the judgment therein became final, when a supplemental answer averring the proper facts in bar of the action would be in order."

The appellants *Campbell* and *Kent* urge that, as they are mere stakeholders, they are liable to suffer by reason of the different judgments in the two causes. If, however, they had retained their position as stakeholders, and had complied with the offer made in their original answer to the complaint of the plaintiff by paying the money into court, they would then have been entitled to a judgment discharging them from further liability therefor; but, after *Priest* had been brought into the action at their instance, they abandoned their position as stakeholders, and defended against his right to receive any of the money. Having thus

assumed a position antagonistic to Priest, they cannot claim any of the consideration due to a stakeholder, but are in the position of any other litigant who has failed to sustain his defense. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

**KEENER v. EAGLE LAKE LAND & IRRIGATION CO. (Sac. 13.)<sup>1</sup>**

(Supreme Court of California. Dec. 31, 1895.)

**SUMMONS—SERVICE ON CORPORATION—AFFIDAVIT—MECHANIC'S LIEN—COMPLAINT.**

1. An affidavit of service of summons reciting that the summons was served "personally" on the managing agent of the "above-named defendant" corporation, instead of on the corporation, sufficiently shows service on the corporation, the agent not being a party defendant.

2. Act March 31, 1891 (St. 1891, p. 195), requires corporations to pay laborers and mechanics wages due weekly or monthly, on such day in each week or month as shall be selected by the corporation; and section 2 gives mechanics and laborers a lien for wages so due and not paid. *Held*, that a complaint in an action to establish a lien under section 2 must show that the wages for which the lien is sought to be enforced were payable weekly or monthly.

Department 1. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by one Keener against the Eagle Lake Land & Irrigation Company on a claim for services, and to have the same declared a lien. From a judgment for plaintiff, defendant appeals. Affirmed in part, and in part reversed.

Goodwin & Goodwin, for appellant. Shinn & Shinn and F. A. Kelley, for respondent.

**HARRISON, J.** The plaintiff, under an employment by the defendant, performed labor upon certain reservoirs, dams, and ditches belonging to the defendant at different times between May 27, 1892, and June 23, 1893, amounting in the aggregate, according to the agreed rate of compensation, to the sum of \$868.75, of which he was paid the sum of \$378.82. He brings this action to recover from the defendant the balance thereof, viz. \$488.93, and to have that sum adjudged to be a lien upon the property of the defendant. Judgment by default was rendered in his favor, and the defendant has appealed.

1. The appellant urges that the judgment is void by reason of there being no proof of service of the summons upon the defendant. The service was made by a private individual, and in his affidavit he states that "he personally served the same upon J. H. Elledge, the managing agent of the above-named defendant, Eagle Lake Land and Irrigation Company, a corporation, on the 13th day of January, 1894, by delivering to said

J. H. Elledge, the said managing agent of said defendant [corporation], personally, in the county of Lassen, state of California, a copy of said summons, attached to a true copy of the complaint, \* \* \* and that he knows the person so served to be the person acting as managing agent for said defendant [corporation] named in said action." It is objected that this affidavit merely shows that the service was made upon Elledge, and does not show that it was made upon the corporation. It would be sacrificing substance to form to hold that this service was not made upon the defendant. It sufficiently appears from the complaint that the defendant is a corporation, and the corporation is the only defendant in the action. The affidavit of service upon one who is named the managing agent of the corporation is *prima facie* proof that he was such officer, and the statute authorizes the service to be made upon him for the corporation. *Rowe v. Water Co.*, 10 Cal. 442; *Golden Gate Min. Co. v. Superior Court*, 65 Cal. 187. If Elledge had been a codefendant with the corporation, and the return of service had shown that only one copy of the summons had been delivered to him, there would be some reason for holding that it was a personal service upon him alone; but, as the corporation is the sole defendant, that reason does not exist.

2. The appellant does not contest the amount for which judgment was given, but contends that the judgment was erroneous in declaring that the plaintiff is entitled to a lien therefor upon its property. The plaintiff relies in support of the judgment upon the act passed March 31, 1891 (St. 1891, p. 195). That act is as follows:

"Section 1. Every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them weekly or monthly, on such day in each week or month as shall be selected by such corporation.

"Sec. 2. A violation of the provisions of section 1 of this act shall entitle each of the said mechanics and laborers to a lien on all the property of said corporation, for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust."

By the terms of the first section of this act, it does not apply to all corporations, but only to those who, while doing business in this state, employ laborers and mechanics by the week or month, whose wages, under the terms of their employment, are payable weekly or monthly. It does not purport to impose upon those corporations any duty or liability towards all the mechanics or laborers whom it may employ, or to create a right in favor of those of its employes whose wages are not earned or payable by the week or by the month. As the remedy sought to be enforced herein exists only by virtue of the statute, it was incumbent upon the plaintiff to bring himself within the terms of the stat-

<sup>1</sup> Rehearing denied.

ute, and to show that the wages earned by him were "due weekly or monthly." His complaint is, however, defective in this respect, and contains no allegation concerning the times at which the wages were payable, or that he was employed at weekly or monthly wages; and, from the allegations in reference thereto, it would seem that there was no agreement upon this point,—the greater part of his labor being computed by the day, and at different rates per day for different periods during the year. The plaintiff did not acquire any right to enforce a lien by reason of the notice of mechanic's lien filed by him. As he was employed by the corporation, if he would rely upon the lien given by the provisions of the Code of Civil Procedure, his notice of lien should have been filed within 30 days after the completion of the work or improvement on which he had expended his labor. As it appears from the notice of lien attached to his complaint that the works were incomplete at the time it was filed, his notice was premature, and failed to confer a right of lien. *Davis v. McDonough* (Cal.) 42 Pac. 450. It is conceded by the plaintiff that this notice of lien was insufficient, within the requirements of the mechanic's lien law, but he contends that his lien exists by virtue of the act of 1891. That act, however, makes no provision for filing a claim of lien, but purports to create the lien upon the violation by the corporation of section 1. As the plaintiff is not entitled to avail himself of the provisions of the act of 1891, that provision of the judgment allowing him counsel fees was unauthorized. The judgment in favor of the plaintiff for the sum of \$488.93 and costs of suit is affirmed. That portion of the judgment awarding counsel fees, and declaring that the plaintiff is entitled to a lien upon the property of the defendant, and directing a sale of such property, is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

#### RIGGS v. EAGLE LAKE LAND & IRRIGATION CO. (Sac. 14.)<sup>1</sup>

(Supreme Court of California. Dec. 31, 1895.)

Department 1. Action by one Riggs against the Eagle Lake Land & Irrigation Company for services rendered, and to establish a lien. From a judgment for plaintiff, defendant appeals. Affirmed in part, and in part reversed.

Goodwin & Goodwin, for appellant. Shinn & Shinn and F. A. Kelley, for respondent.

PER CURIAM. Upon the authority of *Keener v. Irrigation Co.* (Sac. 13; this day decided) 43 Pac. 14, the judgment in favor of the plaintiff for the sum of \$520.25 and costs of suit is affirmed, but that portion of the judgment awarding counsel fees, and declaring that the plaintiff is entitled to a lien upon the property of the defendant, and directing a sale of such property, is reversed.

<sup>1</sup> Rehearing denied.

#### STATE v. WILLIAMS.

(Supreme Court of Washington. Dec. 30, 1895.)

#### INFORMATION — PRELIMINARY HEARING—TIME OF OFFENSE—INDIANS—JURISDICTION OF CRIMINAL OFFENSES.

1. Under 2 Hill's Ann. Code, § 1204, authorizing an information when the party is not already under indictment, and the court is in session and the grand jury is not, where an information was set aside it was proper to permit a new information to be filed without preliminary examination.

2. Under 2 Hill's Ann. Code, § 1239, providing that the precise time at which a crime was committed need not be stated, an information charging a murder "on or about" a certain date is sufficient.

3. An Indian who has severed his tribal relations may be prosecuted in the courts of the state, whether the crime was committed within or without the reservation.

4. An Indian who retains his tribal relations may be prosecuted in the courts of a state for a crime committed at a place without the limits of a reservation.

5. An information filed in the superior court of a county containing within its limits an Indian reservation, against a person described in the information as an Indian, need not aver that such person does not sustain tribal relations, or that the offense was not committed within such reservation.

6. Instructions will not be reviewed where no exceptions were taken thereto.

7. It is not the duty of the court to address its instructions to each one of the jury, as individuals.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Joe Williams was convicted of murder in the second degree, and appeals. Affirmed.

C. C. Bitting and E. C. Million, for appellant. George A. Joiner, for the State.

GORDON, J. An information was filed in the lower court charging the appellant with the crime of murder in the first degree. Thereafter said information was, upon motion of appellant's counsel, set aside because of imperfect verification, and, against the objection of the appellant, the court permitted a new information to be filed. To this latter information appellant demurred, and the demurrer was overruled. Thereafter, the appellant refusing to plead, a plea of not guilty was entered by direction of the court, and upon trial the jury returned a verdict of murder in the second degree. Motions for a new trial and in arrest of judgment having been overruled, he was sentenced to imprisonment in the penitentiary for the term of 15 years, and has appealed to this court from the judgment of conviction.

The first error assigned is that the court wrongfully permitted the filing of the new or amended information. Under this head it is urged that no preliminary examination of the defendant was had before a committing magistrate. Unlike that of California and some of the other states, our constitution does not make a preliminary examination necessary. The information upon which the defendant was tried asserts all of the

facts necessary to give the court jurisdiction under the provisions of 2 Hill's Ann. Code, § 1204, which authorizes public offenses to be "prosecuted in the superior courts by information in the following cases: \* \* \* (4) Whenever a public offense has been committed and the party charged with the offense is not already under indictment therefor, and the court is in session and the grand jury is not in session, or has been discharged."

2. The information upon which the appellant was tried and convicted is as follows: "Joe Williams (an Indian) is accused by Geo. A. Joiner, as prosecuting attorney for Skagit county, state of Washington,—the court being in session and the grand jury of said county not being in session,—of the crime of murder in the first degree, committed as follows: The said Joe Williams (an Indian), in the county of Skagit, in the state of Washington, on or about the 13th day of November, A. D. 1893, did purposely, and of his deliberate and premeditated malice, kill Jimmy Dan (an Indian), by then and there, purposely and of his deliberate, premeditated malice, stabbing and mortally wounding the said Jimmy Dan (an Indian) with a certain knife, to wit, a butcher knife, which he, the said Joe Williams (an Indian), then and there held in his hand." In support of his demurrer, appellant insists that the words "on or about," in the charging part of the information, are indefinite and insufficient. Conceding the allegation insufficient under the common-law requirements, we think the objection is not well taken under the provisions of our Code governing prosecutions by information or indictment. 2 Hill's Ann. Code, §§ 1239,<sup>1</sup> 1244; Rawson v. State, 19 Conn. 292; State v. Thompson (Mont.) 27 Pac. 349; State v. Harp (Kan. Sup.) 3 Pac. 432; People v. Littlefield, 5 Cal. 355. It is further insisted that the demurrer should have been sustained because it appears from the information that the accused is an Indian, and also that the person alleged to have been killed was an Indian; that the Swinomish Indian reservation lies within the county of Skagit; and that the court will take judicial notice of the existence and boundaries of said reservation. We do not think the objection is well taken. "Prima facie, all persons within the state are subject to its criminal laws, and within the jurisdiction of its courts. If any exception exists, it must be shown." State v. Tachanatah, 64 N. C. 614. And in 1 Bish. Cr. Law, § 154, that learned author says: "But, if the members of an Indian tribe scatter themselves among the people of a state, they become amenable to the

state laws." Our investigation of the authorities leads us to conclude: First, that an Indian who has severed his tribal relations may be prosecuted in the courts of this state, without regard to whether the place of the commission of the offense is within or without the limits of a reservation; second, that an Indian who retains his tribal relations may be prosecuted in the courts of this state for offenses committed at a place not within the limits of an Indian reservation; third, that an information filed in the superior court of a county containing within its limits a part or the whole of an Indian reservation, against a person who is described in the information as an Indian, need not, in order to confer jurisdiction, aver either that such person does not sustain tribal relations, or that the offense was not committed within the limits of such reservation. U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109; State v. Campbell, 53 Minn. 354, 55 N. W. 553; People v. Antonio, 27 Cal. 404; People v. Ketchum, 73 Cal. 635, 15 Pac. 353; Hunt v. State, 4 Kan. 51. We may properly add, in this connection, that the evidence upon the trial showed that the homicide occurred at a point in the said county of Skagit distant about 50 miles from the reservation referred to, and, further, that the proof tends strongly to show that both the defendant and the deceased had for years lived among the whites, not on any reservation, and that neither of them maintained tribal relations.

3. Various rulings of the trial court, made in the course of the examination of witnesses upon the trial, are assigned as error. It is sufficient to say that upon examination we find that the rulings were not erroneous.

4. Appellant urges that the court erred in instructing the jury in two particulars pointed out in his brief. The record discloses, however, that no exception was taken to the instructions, and in such case we have uniformly held that we would not examine the instruction so assailed. Further, it appears to our satisfaction that no prejudice could have resulted from the giving of the instructions complained of.

5. The appellant requested, and the court refused to give the jury, the following instruction: "If any one of the jury, after having considered all the evidence, and after having consulted with his fellow jurymen, entertain a reasonable doubt of the guilt of the defendant, the jury cannot in such case find the defendant guilty. Each juror must be satisfied beyond a reasonable doubt of the defendant's guilt, before he can, under his oath, consent to a verdict of guilty." This court passed upon a similar request for instruction in State v. Robinson, 41 Pac. 884; holding that "it was not the duty of the court to address its instructions to each one of the jury, as individuals. It was sufficient if the law was correctly stated, as it applied to the duties of the jury as a collective body." We are satisfied with such holding, and no error

<sup>1</sup> Section 1239, 2 Hill's Ann. Code, provides as follows: "The precise time at which the crime was committed need not be stated in the information; but it may be alleged to have been committed at any time before \* \* \* the filing of the information, and within the time in which an action may be commenced therefor, when the time is a material ingredient in the crime."



was committed by the trial court in refusing to give the instruction asked. The judgment of conviction will be affirmed.

HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, JJ., concur.

### DOTY et al. v. KRUTZ

(Supreme Court of Washington. Dec. 4, 1895.)

APPEAL—JURISDICTIONAL AMOUNT—QUESTION AFFECTING VALIDITY OF STATUTE.

1. In an action for damages for removal out of the state of the property subject to liens aggregating \$147, though the complaint laid the damages at \$250, and demanded judgment for that amount, the amount involved was \$147.

2. The questions whether an action is properly brought under a statute, whether a recovery can be had under a statute, and whether there is any statute governing the action, are not questions affecting the validity of a statute, within the constitutional restriction as to appeals in actions involving an amount less than \$200.

Appeal from superior court, Walla Walla county; William H. Upton, Judge.

Action by E. H. Doty and others against Harry Krutz to recover damages for the removal out of the state of property subject to plaintiffs' liens. From a judgment for plaintiffs, defendant appeals. Dismissed.

The aggregate amount of plaintiffs' liens on the property alleged to have been removed by defendant was \$147, and the ad damnum clause in the complaint alleged the damage to be \$250, for which amount judgment was prayed.

B. L. & J. L. Sharpstein, for appellant. J. W. Brooks, for respondents.

DUNBAR, J. The respondents in this case interpose a motion to dismiss the appeal on the ground that this court has no jurisdiction to try the cause, for the reason that the original amount in controversy does not exceed \$200. This motion, we think, will have to be sustained. It is evident from the complaint that the amount originally in controversy was less than \$200, but appellant insists that the amount alleged in the ad damnum clause in the complaint, and for which judgment was prayed, was the amount involved, so far as the constitutional inhibition on appeals where the amount is less than \$200 is concerned. We do not think the constitution can be so construed. If so, any claim for a judgment which could not possibly be obtained under the pleadings would warrant an appeal, and destroy the object of the constitutional enactment.

It is further insisted in the reply brief that the action involved the validity of a statute. But we think this position is also untenable, and, if this proposition was raised, it was not raised in appellant's original brief, nor on the trial of the action below, as far as we can ascertain by the record. The appellant, it is true, in his original brief claims

that this suit was not properly brought under the statute, and that there was no statutory action in this state for elignment of logs. But this does not raise the question of the validity of the statute. Whether an action is properly brought under a statute, whether a recovery can be had under a statute, or whether there is any statute governing a particular action, are all questions of the construction of statutes, but are not questions which go to the validity of a statute. And this meets the suggestion of the appellant in his reply brief that "we contend that this statute is of no validity so far as farm liens are concerned." We think the case falls squarely within the constitutional restriction in relation to actions where the amount does not exceed the sum of \$200, and the appeal will therefore be dismissed.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

### GRIESEMER v. BOYER et al.

(Supreme Court of Washington. Dec. 4, 1895.)

ALLOWANCE TO WIDOW—WHEN PROPER—RESIDENCE OF WIDOW.

1. Code Proc. § 973, provides that, if the amount set aside to the widow and minor children of a decedent as exempt be insufficient for their support, the court shall make such further reasonable allowance out of the estate as may be necessary for the maintenance of the family according to their circumstances during settlement of the estate. *Held*, that it was no ground for denying an application for such further allowance, the exemption being insufficient, that the widow had abundant means of her own with which to maintain herself.

2. The fact that the widow and children left the state on the death of the husband and father, and continued to reside outside thereof, did not deprive them of the right to the further allowance for their maintenance pending settlement of the estate given by Code Proc. § 973.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Petition by Ella W. Griesemer, widow of Chester F. Griesemer, deceased, against Boyer & Rex and others, creditors of decedent's estate, for an allowance for maintenance of herself and minor children. From a judgment denying the petition, petitioner appeals. Reversed.

Murray & Christian, for appellant. East-  
erday & Easterday and A. R. Hellig, for respondents.

DUNBAR, J. The appellant is the relict of Chester F. Griesemer, who died intestate at Philadelphia, Pa., October 29, 1892, but who was, at the time of his death, and had been since 1889, a resident of the state of Washington. Appellant and five minor children were also residents of Pierce county, Wash. At the time of his death Griesemer owned unimproved real estate and personal property in said county. The only personal property of the estate consisted of household

goods, etc., which were appraised at \$450, and set aside to the family as exempt. There was no homestead, and the proceeds derived from the sale of real estate amounted to but \$24. The only assets of the estate were the said \$24, and the sum of \$10,940 recovered on a policy of insurance on the life of Griesemer, made payable to his estate. During his lifetime Griesemer effected three policies of insurance on his life; two of them, aggregating \$15,000, were by their terms made payable to his wife, the appellant, who is also administratrix of the estate. The policies of insurance in favor of the estate had to be collected by suit, and the money on the same was not obtained until December, 1894, and January, 1895; so that no allowance could have been made out of the estate before that time. This we mention in connection with the proposition urged that there is a distinction between making an allowance for a family and advancing it afterwards as a reimbursement. It appears that a large part of the money recovered by the appellant on the policies which were made for her benefit was improvidently invested for her by the Traders' Bank of Tacoma; that she has since recovered judgment against the said bank for about \$8,000, but the bank is in the hands of a receiver, and it is uncertain how much it will pay; though, with the view we entertain of the law, this circumstance is not material. The estate proved to be insolvent. Several judgments had been recovered against Griesemer prior to his decease, and at the time of the hearing of the petition of the appellant for an allowance under the provisions of section 973 of the Code of Procedure, the court found that, if no allowance were made to the widow and children, there would be \$5,960.21 to disburse to creditors; and the allowance was rejected, for the assigned reason that the appellant had a separate estate left her through the life insurance policies above mentioned, sufficient to support herself and family during the administration of the estate. This is the main proposition in the case, and we think the court erred in refusing to grant the petition of the appellant, and to make an allowance commensurate with the necessities of the case.

Section 973 provides that, in case of the appointment of an executor or administrator upon the death of the husband the court shall, without cost to the widow, minor child or children, set apart, for the use of such widow, minor child or children, all the property of the estate by law exempt from execution; that, "if the amount thus exempt be insufficient for the support of the widow and minor child or children, the court shall make such further reasonable allowance out of the estate as may be necessary for the maintenance of the family according to their circumstances, during the progress of the settlement of the estate." It seems to us that the language of the statute is plain, explicit,

comprehensive, and general; that a fund is here absolutely and without qualification protected, and provision made for its distribution in a particular way, and that, if it be found by the court that the amount "thus exempt" be insufficient for the support of the widow and minor child or children, it has no other duty to perform than to make the further reasonable allowance provided for by the statute; that the question is not whether the amount thus exempt, together with some other amount, which the widow or some one or other of the children might own as a separate estate, is insufficient for their maintenance, but it is whether the amount thus exempt is insufficient. It is an absolute right that the statute gives, unqualified by collateral conditions.

The allowance for the maintenance of the family according to their circumstances during the progress of the settlement of the estate is an allowance out of the estate which is being settled, and not an allowance out of some other estate. Neither does it seem to us that it depends upon the question of necessity, or of the capability of the wife to provide a good living for herself and children outside of the estate. It might eventuate that the wife was an accomplished musician or a noted lecturer, or that she could command a salary which would be amply sufficient to support herself and family; but that certainly, under the direct provisions of our statute, would not deprive her of the right to this support out of the moneys of the estate; and the fact that she has a separate estate of her own, no matter whether it came to her through the medium of a life insurance policy or in any other way, cannot be held to militate against her right to receive the allowance provided for by the statute. The right to the possession of the homestead or the household furniture might as well be taken from the widow and children. The law provides that if, by the return of the inventory of the estate of any intestate who died leaving a widow or minor children, it shall appear that the value of the estate does not exceed \$1,000, the court shall, by decree for that purpose, assign for the use and support of the widow and minor children of the intestate, or for the support of the minor child or children if there be no widow, the whole estate after the payment of the funeral expenses and expenses of administration; and there shall be no further proceedings in the administration unless further estate be discovered. On the same line of reasoning advanced by respondents this statute should also be abrogated if it should be ascertained that a sufficient separate estate existed in the widow to maintain herself and children. These are statutes of distribution, and these allowances are debts against the estate, created by the law, and are preferred, just as other debts are preferred, such as expenses of last sickness, funeral expenses, etc. They are absolute in their nature, and therefore not subject to any collateral conditions. If the homestead

right should be rejected, and the allowance should be rejected on the theory that the wife had a sufficient separate estate, and all the funds of the estate were distributed to the creditors, it might eventuate that the widow, by improvident investments, would lose all her separate estate, and then the object of the statute would be destroyed altogether. The right of the children cannot be affected by any action or any condition of the mother. It was the duty of the father to provide for his family during his lifetime, and to provide for them at all hazards, even as against the rights of creditors; and the law, during the administration of the father's estate, simply steps into his shoes, and insists upon making the same provision for the family. It seems to us that a statute like this, where no conditions or qualifications are mentioned, is not susceptible of construction. But, outside of this conclusion, the authorities are uniform in construing statutes of this kind in favor of the right of the family to the allowance.

This question came before the supreme court of the state of Vermont as early as 1850, in the case of *Sawyer v. Sawyer*, 28 Vt. 245, and it was there held that the statutory provision for the maintenance of the widow of the deceased person during the settlement of his estate had a general application, and that the probate court had a discretion only as to the amount of the allowance, and could not refuse it altogether where the widow had other abundant means of maintenance. That is a well-considered case, and was followed in *Re Lux's Estate* (Cal.) 35 Pac. 341, and is the uniform holding of the courts on statutes containing provisions similar to ours. And the authorities are equally uniform to the effect that the right of the widow and children is paramount to that of creditors, and hence does not depend upon the solvency or insolvency of the estate. This rule is laid down in so many words in section 83, Woerner, Adm'n. To the same effect are *Thomp. Homest. & Ex.* (1st Ed.) § 945; *Buffum v. Sparhawk*, 20 N. H. 81, and *In re Dennis' Estate* (Iowa) 24 N. W. 746. Of course, we are not speaking now of the amount of the allowance which should be made by the court under this application, but simply hold that the right to allowance is not affected by the separate estate of the widow.

Another contention of the respondents is that the widow and children had left the state of Washington since the death of the father, and were, therefore, not entitled to this allowance. The record shows that the appellant had taken her children to the state of Ohio, where she was educating them. We are not satisfied from the whole record that the appellant is not really a resident of this state, and the court failed to find on that proposition at all. If the respondents had desired such a finding, in order to raise that issue, they ought to have requested it of the court. But, even conceding that she was a nonresident, the authorities, so far as we have been able to ascertain, hold that such fact would not deprive the widow

and minor children of the right of allowance. In the case of *Farris v. Battle*, 80 Ga. 187, 7 S. E. 262, where it appeared that the widow had been separated from her husband for several years, that the wife and family had been living in Tennessee and the husband in Georgia for 11 years preceding his death, and the point was raised that by reason of nonresidence they were not entitled to the allowance provided by the statute, which was similar to ours, it was held by the court that such fact would not deprive the widow and children of their distributive share in the estate, viz. the year's support (in that state the statute provided for a year's support instead of support during the administration of the estate), the court saying in that connection: "Creditors are left out, and adult children are left out, until this much of the estate is withdrawn from it. Then they are admitted for participation in the balance. They have no right to anything except by the statute of distributions. To take at all, they must look to the law, and must take according to law. This being so, we consider that the special provision applicable to the widow and minor children gives them this much advantage over other distributees. It makes their part of the estate that much more, and they take it as absolutely and unconditionally, and for as long a time, as distributees take under the general provisions of the statute. It requires nothing to give a right to this benefit, except the relation of wife or minor child. When that relation exists at the time of the death, the person or persons sustaining it are entitled to make their claim under the terms of the statute, and this court has held that their title becomes absolute." The same doctrine is announced in *Succession of Christie*, 20 La. Ann. 883. The question of whether or not the expense incurred in transporting appellant and her children to Ohio, and their maintenance there, was a necessary expense, taking into consideration the circumstances of the family, is a question for the consideration of the court when it comes to pass upon the amount of the allowance. It follows from what we have said that the judgment must be reversed, and the cause remanded, with instructions to the lower court to grant the allowance provided for by the statute.

HOYT, O. J., and ANDERS and GORDON, JJ., concur.

STATE ex rel. COLLINS v. SUPERIOR  
COURT OF SNOHOMISH  
COUNTY et al.

(Supreme Court of Washington. Dec. 5, 1895.)

LOCAL ACTION—SPECIFIC PERFORMANCE—PARTITION—LIEN.

An action for specific performance, and also to have certain conveyances set aside, and for partition of lands, and, if specific performance cannot be decreed, to have the moneys advanced by plaintiff declared a lien, is local, and not transitory. *Dunbar, J., dissenting.*

Mandamus by the state, upon the relation of John Collins, against the superior court of Snohomish county and others. Writ issued.

Struve, Allen, Hughes & McMicken, for petitioner. A. D. Warner, Stratton, Lewis & Gilman, and Donworth & Howe, for respondents.

SCOTT, J. This is a proceeding in mandamus, whereby the relator seeks to compel the respondent to assume jurisdiction of, and proceed with the trial of, a cause commenced by the relator in said superior court of Snohomish county against certain parties defendant, in whose behalf the relator's right to the issuance of the writ is contested. The point to be determined is whether the action is a local or a transitory one. It is conceded that if the action is a local one the writ should issue, and if otherwise it should be denied. The respondent contends that the action is simply one for a specific performance of a contract to convey real estate, and is therefore transitory in character. An examination of the complaint, however, satisfies us that the action is something more than one for a specific performance, for the relator in said action not only seeks to compel the performance of a contract to convey an undivided interest in certain lands to him, that was entered into between the relator and certain of the defendants, but he also seeks to have several conveyances made by said defendants to some of the other defendants set aside, in so far as the same affect his claimed interest in the lands, on the ground that they were made with notice of, and subject to, his rights therein. He also asks for a partition of the lands, and further that, if for any reason the court cannot decree a specific performance of the contract, then that several sums advanced by the relator and his assignors to the contracting defendants aforesaid be declared a lien upon the lands in controversy. This makes something more than an action for a specific performance of a contract to convey lands. The request for a partition of the lands, and, if a specific performance of the contract cannot be decreed, that the relator be adjudged to have a mortgage lien thereon, clearly make the action a local one, under the statutes of this state, and it was properly brought in the superior court of Snohomish county.

The relator has also asked a further consideration by us of the question as to whether an action for a specific performance of a contract to convey real estate is a local or a transitory action; the relator maintaining that such an action is a local one, and must be brought in the county where the lands are situated. Under the circumstances of this case, we do not think it is necessary to enter upon any further examination of that question, as the other features above mentioned of the present action make it unquestionably a local one. Let the writ issue as prayed for.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

DUNBAR, J. Believing the action to be in substance an action to enforce specific performance, I think the writ should be denied. I therefore dissent.

LORENCE v. CITY OF ELLENSBURGH.  
(Supreme Court of Washington. Dec. 30, 1895.)

MUNICIPAL CORPORATIONS—INJURIES FROM DEFECTIVE SIDEWALK—NOTICE OF DEFECTS—CONTRIBUTORY NEGLIGENCE—EXCESSIVE DAMAGES.

1. Where a city has exclusive control over its streets and sidewalks, with power to raise money to keep them in repair, it is bound to keep them in a reasonably safe condition for ordinary travel.

2. In an action against a city for injuries to a child of eight years from a defective sidewalk, where there was evidence that the child had lived near the place of the accident, and had frequently passed over the same sidewalk, and the child testified that she had no knowledge of the defective condition of the walk prior to the injury, the question of contributory negligence was for the jury.

3. Evidence that a sidewalk had been defective for three or four months preceding the injury will charge the city with constructive notice.

4. In an action against a city for injuries to a child from a defective sidewalk, where it was shown that, by reason of the injury, a portion of the femur had to be removed, causing a shortening of the right limb from four to six inches; that plaintiff was confined to her bed for about 18 months, and suffered great pain; and that the suffering was likely to continue,—a verdict for \$8,000 was not excessive.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by Ethel Lorence, by guardian, against the city of Ellensburg, for personal injuries. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

John B. Davidson, for appellant. L. A. Vincent, Austin Mires, and Edward Pruy, for respondent.

GORDON, J. This was an action brought by plaintiff in the superior court for Kittitas county, in this state, to recover damages for a personal injury sustained from a fall on a defective sidewalk. The complaint alleges that the defendant wrongfully and negligently suffered and permitted the sidewalk on a street in said city, known as "Third Street," to become and remain out of repair for several months prior to the date of the injury, which was the 20th of February, 1892. The alleged defect consisted of a V-shaped opening in the walk, of about five inches in width, and about 24 inches in depth. The defendant city answered the complaint by denying generally and specifically all of the allegations contained in it, and upon the trial a verdict was rendered in favor of the plaintiff (respondent here) against the appellant (city)

for the sum of \$8,000; and from the judgment entered upon said verdict, and the order of the court denying appellant's motion for a new trial, this appeal is taken. The record is somewhat exceptional, in this: It is not contended that any error was committed by the trial court in admitting or rejecting testimony at the trial, or in charging or refusing to charge the jury concerning the law of the case, nor was any objection made either below or here as to the sufficiency of the pleadings.

1. The principal contention made in the brief of appellant in this case is that the city is not liable in actions for injuries received by reason of defective streets and sidewalks, and the first 37 pages of said brief are devoted to the discussion of that proposition. After the preparation of the brief, but prior to the hearing of the cause, this court passed upon a like question adversely to such contention, in the case of *Sutton v. City of Snohomish*, 39 Pac. 273, in which we held that "where a city has exclusive control of its streets, with power to raise money to keep them in repair, it is bound to keep them in a reasonably safe condition for ordinary travel."

2. It is next contended that the court below erred in denying appellant's motion for a nonsuit, which motion was urged upon the ground that the evidence in behalf of the plaintiff showed her to have been guilty of contributory negligence. An examination of the record satisfies us that the nonsuit was properly denied. It appears from the evidence that plaintiff, at the time of the injury, was a child of about eight years; that she lived with her parents at a place near where the accident occurred; that during the forenoon of the day of the accident, while in company with an elder sister, on the way to Sabbath school, she ran into the opening in the walk already described, and suffered a severe fall. It appears that she had frequently traveled said sidewalk prior to the injury and subsequent to its becoming out of repair. She testified, however, that she did not know of its defective condition prior to the injury; and we think that, considering her tender years, negligence could not, as a matter of law, be imputed to her, but *prima facie* she would be incapable of exercising that care and caution which the law requires of an adult. Just what care and caution a child must exercise in order to be entitled to recover in this class of cases cannot be determined by any general rule, but must, in connection with the circumstances in each case, depend upon the intelligence, capacity, and judgment which he is shown by the evidence to possess, and his capacity must be left to the determination of the jury under proper instructions, which in this instance we are bound to presume were given. *Westbrook v. Railroad Co.* (Miss.) 6 South. 321; *Westerfield v. Levis* (La.) 9 South. 52; *Schnur v. Traction Co.* (Pa. Sup.) 25 Atl. 656; *Iron Co. v. Brawley*, 83 Ala. 371, 3 South. 555.

3. Counsel insists that there is no proof showing that appellant had notice of the de-

fective condition of the sidewalk. There was evidence tending to show that the walk had remained in the defective condition already described for three or four months preceding the time of the injury. Actual notice was not necessary; constructive notice is sufficient. "If this dangerous hole \* \* \* was in existence for such a length of time that the city authorities, by the exercise of ordinary vigilance, would have discovered it in time to prevent the accident, the city cannot escape liability for want of notice. Under such circumstances the law imparts notice. Failure to discover and remedy a dangerous defect in a public street within a reasonable time is itself negligence." *Sutton v. City of Snohomish*, supra.

4. Lastly, it is claimed that the verdict of the jury is excessive. From our examination of the evidence we feel that we would not be warranted in disturbing the verdict upon this ground. It appears that, in consequence of the injury sustained from the fall, the infant plaintiff was obliged to undergo a surgical operation, in which a portion of the femur was removed, causing a shortening of the right limb from four to six inches; that she was confined to her bed for a period of about 18 months, during which time she suffered great pain; and that, as a necessary result of the injury, she is destined to suffer more or less pain through life. From all the evidence, we are unable to say that the damages were given under the influence of passion or prejudice; and, no error appearing in the record, the judgment is affirmed.

ANDERS, DUNBAR, and SCOTT, JJ., concur.

#### SWARTWOOD et al. v. RED STAR SHINGLE CO. et al.

(Supreme Court of Washington. Dec. 30, 1895.)

##### LOGGER'S LIEN—WHEN ARISES.

No lien on shingles arises under Laws 1893, c. 132, § 2, giving a lien to every person performing work or labor in manufacturing logs into lumber and shingles "while the same remains at the mill where it was manufactured or in the possession or under the control of the manufacturer," where the undisputed findings show that the shingles were not at the mill at the time the lien was filed, but had been sold by the manufacturer, and had passed from his possession to defendants.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by H. N. Swartwood and others against the Red Star Shingle Company and others to foreclose a logger's lien. From a judgment dismissing the complaint as to some of the defendants, and allowing them costs, plaintiffs appeal. Affirmed.

B. B. Fowle and Geo. A. Joiner, for appellants. Million & Houser, for respondents.

DUNBAR, J. This case comes here solely upon an exception to the conclusions of law

found by the court below. No exceptions were taken to the findings of fact; in fact, they do not appear in the record; so that (no questions having been raised as to the sufficiency of the pleadings) the only question is, do the findings of fact sustain the conclusions of law announced by the court? The action is brought jointly by appellants, as plaintiffs, against the Red Star Shingle Company, a corporation, and Fred Wiles, W. A. Pitts, and Robert Fraser, respondents, who, it is alleged in the complaint, claim some interest in the shingles, a lien upon which is sought to be foreclosed. The court found that the work had been done by the plaintiffs as alleged in the complaint; that the amount alleged to be due them was due them from the defendant the Red Star Shingle Company; and that they had duly filed their liens for services rendered on said shingles on the 9th day of July, 1894. It also found that prior to the filing of the liens, viz. on the 5th day of May, 1894, the Red Star Shingle Company had sold to the respondents the shingles upon which the plaintiffs were attempting to foreclose a lien; that on the 9th day of May, 1894, the respondents (defendants in the action below) took possession of said shingles, and removed them from the mill where they were manufactured to the warehouse on the railroad, which was about a quarter of a mile from the shingle mill, which warehouse had been used by the Red Star Shingle Company for storing and shipping their shingles when they could not get cars to load into directly; that on the 5th day of May, 1894, at the time of the sale of these shingles to the respondents, the Red Star Shingle Company executed and delivered to them a bill of sale for the same, which bill of sale was recorded in the office of the auditor of Skagit county on the 8th day of May, 1894; that the plaintiffs did not know that said shingles had been sold to the defendants, not being actually apprised of the giving and recording of said bill of sale, but knew that said shingles had been removed to said warehouse by the defendants Wiles, Pitts, and Fraser, with their teams. And, as a conclusion of law from said facts, the court found that the plaintiffs had no lien or right of lien upon said shingles, and that the defendants Wiles, Pitts, and Fraser were entitled to have plaintiffs' complaint dismissed as to them, and to have judgment for their costs and disbursements, and judgment was entered accordingly.

There is very little that can be said on this proposition. The statute governing this case (section 2, c. 132, Laws Wash. 1893) provides that "every person performing work or labor or assisting in manufacturing saw logs and other timber into lumber and shingles, has a lien upon such lumber while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer. \* \* \* The court having found in this case that the shingles

were not remaining at the mill at the time the lien was filed, that they were not in the possession or under the control of the manufacturer, but that they had been sold to the defendants, who had taken possession of them, and removed them from the mill where they were manufactured, it would seem that the court was powerless, under the law, to arrive at any other conclusion than the one announced, that the plaintiffs had no lien or right of lien upon said shingles. The judgment will be affirmed.

HOYT, C. J., and ANDERS, GORDON, and SCOTT, JJ., concur.

PETERSON v. BINGHAM et al.  
(Supreme Court of Washington. Dec. 4, 1895.)

UNMARRIED MAN—EXEMPTIONS.

The word "householder," as used in Hill's Ann. Code, § 486, relating to exemptions, does not include an unmarried man who has no person dependent upon him for support.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Peter Peterson against C. E. Bingham and others to recover the value of certain property sold by defendants. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Millon & Houser, for appellant. Sinclair & Smith, for respondents.

DUNBAR, J. This action was brought by the appellant against the respondents, Bingham & Holbrook and W. E. Perkinson, as sheriff of Skagit county, for the value of a certain quantity of hay sold by the said sheriff at the instance of respondents Bingham & Holbrook upon a judgment in their favor against appellant; the claim of appellant being that the property so sold was exempt under subdivision 4 of section 486 of the Code of Procedure. The pertinent allegations in the complaint were that, at all times therein mentioned, the plaintiff was, and had been, and then was, an unmarried man; that for more than five years last past, as a bachelor and single man, he had been living in a house of his own, and alone, and with no other person than himself; that he did not contribute to the support of any person, and had no person living with him and depending on him for support. A demurrer was interposed to this complaint, which was sustained by the trial court. The plaintiff electing to stand upon his pleading, judgment was entered for the defendants. So that it will be seen that the only question raised is the question of the construction of said section 486.

It is urged by the appellant that the term "householder," used in said section, is not to be construed in its strict sense and meaning, as synonymous with "head of a family," as is done in a great many of the other statutes,

because section 481 of the same act, in using the word "householder," provides that "any householder being the head of a family is entitled to a homestead," etc. The term "householder" is so well understood and so uniformly defined that it seems to us that more would have been required by the legislature to change its recognized meaning than the mere addition of the words quoted; for, under the established authorities, the householder was the head of a family, and the use of these words was simply the use of surplusage on the part of the legislature. Webster defines a "householder" as "the master or head of a family; one who occupies a house with his family." In 9 Am. & Eng. Enc. Law, p. 783, the term "householder" is defined to be "the head or master of a family; a person who occupies a house, and has charge of and provides for a family therein,"—citing, in support of that definition, *Woodward v. Murray*, 18 Johns. 400; *Bowne v. Witt*, 19 Wend. 475; *Aaron v. State*, 37 Ala. 113; and *Carpenter v. Dame*, 10 Ind. 125. An unmarried man keeping house, with no children or dependents living with him, is not entitled to exemptions. Wap. Homest. p. 80. The primary object of exemption laws is to protect the helpless, and to provide subsistence for those who cannot provide it for themselves. To do this, it becomes necessary to provide an exemption for the head of the family, whether we use the word "family" in its ordinarily accepted meaning of kinship, or as an aggregation of persons where one of the persons is the bread winner for the rest. The very suggestion of a homestead exemption raises this idea, and while we do not decide that there are no exemptions for unmarried men or women, or men and women who have no one dependent upon them for support, yet so far as the word "householder" is concerned, which is the only word we are called upon to construe in this case, as we have before said, we think its meaning is so well established that it cannot be varied, enlarged, or limited by the presumption that the legislature meant to use the word in a particular sense, when, in addition to the word "householder," they used its synonym. The judgment will therefore be affirmed.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

#### NIXON v. POST et al.

(Supreme Court of Washington. Dec. 5, 1895.)

#### DEEDS—EXECUTION—PROOF—ACKNOWLEDGMENT—WIFE'S SEPARATE ESTATE—EVIDENCE.

1. The possession by the grantee of a deed sufficient in form is prima facie evidence of its execution.

2. The testimony of a grantor that she did not execute the deed does not necessarily overcome the presumption of execution arising from the possession of the deed by the grantee, where there is evidence that the grantee had remain-

ed in possession for several years without payment of rent, and without objection on the part of the grantor, who was aware that the deed had been recorded.

3. Where property is conveyed to a wife as her separate property, the husband of the grantee may take the acknowledgment of the grantor.

4. As between grantor and grantee, evidence that the deed was executed on the anniversary of the grantee's wedding; that immediately thereafter the husband of the grantee, by whom the consideration was paid, presented the deed to the grantee as a wedding present,—is sufficient to prove that the land was conveyed to the grantee as her separate property.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by Cora E. Nixon, in her own right and as administratrix of the estate of Thomas L. Nixon, deceased, against Mary D. Post and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

W. S. Relfe, J. S. Whitehouse, and Palmer & Palmer, for appellant. Campbell & Powell and E. E. Rosling, for respondents.

HOYT, C. J. This action was brought by Cora E. Nixon, in her own right and as administratrix of the estate of her husband, Thomas L. Nixon, to set aside and cancel two deeds, and to obtain a decree vesting in her the title to lots 19 and 20, in block 5, of Tacoma, the property described in said deeds. One of these deeds purported to have been made by plaintiff and her husband to the defendant Mary D. Post for the consideration of \$8,000, and was dated February 8, 1889. The other was made by the defendant Mary D. Post to the defendant Philip V. Caesar, as trustee, to secure the payment of certain notes made by said Mary D. Post and her husband. The complaint contains other allegations relied upon to acquire possession of the property and damages for its detention, but this ground of relief received no attention at the hands of the lower court, and needs none here. The deed from Nixon and wife to Mary D. Post was not recorded until March 4, 1890. On April 16, 1891, Thomas L. Nixon, the husband of plaintiff, died, and thereafter she was appointed and qualified as administratrix of his estate. This action was commenced December 12, 1892. The deeds, with an exception which will be hereafter noticed, were sufficient in form, and were duly acknowledged, and when introduced in evidence prima facie placed the title in the defendant Mary D. Post, subject to whatever interest was conveyed by the trust deed to Philip V. Caesar. It is not contended that the deed to Philip V. Caesar was not sufficient for the purposes for which it was made, if by the deed to Mary D. Post from the plaintiff and her husband she acquired title as her separate property. The material inquiry is as to the force and effect of this latter deed. It is attacked by the plaintiff upon three grounds: (1) For the reason that it was never executed and ac-

knowledge by the plaintiff; (2) that there was no consideration therefor; and (3) that, if any title passed by said deed, it did not so pass to the defendant Mary D. Post as her separate estate, but was in her name for the benefit of the community composed of herself and her husband. It will be seen from the above statement that the principal questions to be determined are those of fact, and little or no discussion of legal propositions will be necessary in arriving at a determination. The superior court, after full hearing, found as facts that the deed from the plaintiff and her husband was duly executed and delivered to the defendant Mary D. Post, and vested the title to the property in her as her separate estate. Upon this finding but one conclusion of law could be founded, and that was that the plaintiff was not entitled to any relief. Hence, if this finding is supported by the evidence, the judgment dismissing the action must be affirmed.

The deed having been found in the possession of the defendant Mary D. Post, and being in due form, *prima facie* established the fact of its regular execution and delivery. But this *prima facie* case was met by the testimony of the plaintiff to the effect that she never executed the deed, and, if this testimony is to be taken as true, it was, in our opinion, sufficient to overcome the presumption above stated. But public policy will not allow a presumption of this kind to be overcome without clear and convincing proof, and testimony offered for that purpose must be carefully examined in the light of all the surrounding circumstances, and must be of a nature to convince the court of its reliability, before it can be given such force as will overturn a presumption upon which the stability of titles to real estate so largely depends. It was, therefore, the duty of the trial court, before accepting the testimony of the plaintiff as absolutely true, to investigate it in the light of the other circumstances which appeared from the proofs. From such proofs it appeared that the plaintiff knew of the execution of this deed as early as August, 1890; that her husband knew that it had been placed of record at or before the same date; that at that time, and for months thereafter, the defendant Mary D. Post and her husband resided in the city of Tacoma, where the plaintiff and her husband also resided; that nothing was ever said by the plaintiff or her husband to the defendant Mary D. Post as to the deed which was of record not having been properly executed and delivered to her; that no objection was ever made to said defendant and her husband occupying the property without the payment of any rent; that after the death of the plaintiff's husband she made representations to the husband of the defendant Mary D. Post as to favors which he had received from her husband, and sought to have him do something by way of aiding her pecuniarily; that while seeking such aid, which she did not claim was due to

her excepting as a proper return for favors received, she made no claim tending to show that the title to the lots in question was not properly vested in the defendant Mary D. Post. It further appeared from undisputed testimony that up to the time of the making of the deed in question the defendant Linus E. Post was interested in certain property at or near the city of Ellensburg, with the husband of the plaintiff, and there was testimony tending to show that this interest was the consideration paid by said Post for the property in question. It also appeared that the defendant Mary D. Post and her husband continued in possession of this property for a long time, and that substantial changes and improvements were made in the buildings thereon at their expense; that they paid all taxes thereon; and that the plaintiff frequently referred to it as the "home of the Posts." There was also testimony tending to establish numerous other circumstances which, if true, were inconsistent with the present claim of the plaintiff as to her never having executed the deed in question. There was some attempt on the part of the plaintiff to explain some of these circumstances, but, in our opinion, the attempted explanation was not at all satisfactory. It follows that her testimony must be weighed in their light, and when thus weighed, we are of the opinion that it did not so clearly establish her allegation to the effect that she had never executed the deed as to overcome the presumption flowing from its having been found in the possession of the grantee, appearing to have been regularly executed. The finding by the superior court to the effect that the deed had been duly executed and delivered by the plaintiff and her husband was warranted by the proofs.

Upon the question as to the nature of the title conveyed by such deed must also depend the further question presented by the appellant as to the right of the husband to take an acknowledgment of a deed in which his wife was named as grantee. It is not claimed that he could not properly take such acknowledgment if the property was deeded to the wife under such circumstances that it became her separate estate. Hence the determination of the nature of the title conveyed by the deed will also determine the question as to the regularity of the acknowledgment. The proofs as to the intention of the husband at the time the deed was delivered, as shown by his acts, were that the trade was by him consummated and the execution of the deed procured on the anniversary of the wedding of himself and wife; that he desired to make her a present of the property for a home; that in pursuance of this desire he had the deed made out in her name, and immediately after its execution took it to their home, and delivered it to her with the statement that it was an anniversary gift. That this would have been sufficient to have passed the title conveyed by the deed to the



wife as her separate estate, if all had been done in the presence of the grantors, and at the time of the execution of the deed, is not denied by the appellant; but she founds her claim that the title conveyed became community property upon the fact that the proofs fail to show that anything was said in reference to the character of the title to be conveyed between the grantors and the husband of the grantee at the time the deed was executed. But, in view of the fact that the husband of the plaintiff, the grantor who transacted all of the business, is dead, and of the further fact that the husband of the defendant Mary D. Post has disappeared, such testimony could not be obtained, and the action of the husband in at once delivering the deed to the wife as a gift, taken in connection with the consummation of the trade on the anniversary of their wedding, sufficiently indicated his intention to have the wife take the title as her separate property. Especially is this true when the question is raised as between the grantor and the grantee, and not directly by a creditor who was such at the date of the deed. The superior court properly found that the deed had been duly executed and delivered by the plaintiff and her husband to the defendant Mary D. Post, and that the circumstances surrounding the making and the delivery were such that the title conveyed vested in her as her separate estate. The decree must be affirmed.

SCOTT, ANDERS, DUNBAR, and GORDON, JJ., concur.

#### KNIPE et ux. v. AUSTIN et al.

(Supreme Court of Washington. Dec. 9, 1895.)

#### MORTGAGES—REDEMPTION—ACCOUNTING BY PURCHASER—RENTS AND PROFITS.

Under Code Proc. § 519, providing that the purchaser, from day of sale until redemption, shall be entitled to the possession of the property, and that, in case it is in the hands of a tenant holding under an unexpired lease, he shall be entitled to receive the rents or the value of the use and occupation during such period, a purchaser cannot, on redemption, be made to account for the rents and profits received by him from the time of sale to the redemption. *Hardy v. Herriott* (Wash.) 39 Pac. 958, followed.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Robert Knipe and wife against C. M. Austin and others for an accounting to ascertain the sum to be paid on redemption of land sold under a mortgage. From the judgment rendered, defendants appeal. Reversed.

Carr & Preston, for appellants Bond, Hooker & Woolery. Smith & Cole, for appellants Austin and Cole. Will. H. Thompson, Edward P. Edsen, and John E. Humphries, for respondents.

DUNBAR, J. This case involves the construction of section 519 of the Code of Procedure, and the question involved is whether, upon redemption of real estate sold under execution, the amount of rents and profits received by the purchaser shall be credited to the redemptioner, or whether such rents and profits belong absolutely to the purchaser. It is conceded that this question was squarely decided in opposition to the contention of the respondents, by this court, in the case of *Hardy v. Herriott*, 39 Pac. 958, but we are asked by the respondents, notwithstanding this decision, to again construe this statute, and treat it as an open question; and, in view of the importance of the question involved, we have concluded not to treat the case of *Hardy v. Herriott*, supra, as stare decisis, but to enter upon an original investigation. But after a renewed examination of the authorities and of the statute, enlightened by an earnest and intelligent discussion, we are unable to find any escape from the conclusions reached in *Hardy v. Herriott*. It is conceded by the respondents that the statute governing this case might with propriety be construed as it has before been construed by this court; but it is urged that, inasmuch as the construction which has been placed upon it is a construction which permits hardships to be imposed upon the redemptioner, the statute should, if possible, be construed so as not to do an injustice to a debtor, or give an advantage to a creditor. In other words, that the construction should be that which natural justice requires. Without in any way controverting these rules of construction, we do not think they can be applied to a statute where the language is as plain and explicit as the language of our statute. The language of the statute is that "the purchaser from the day of sale until a re-sale or redemption, and the redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period." It is contended by the respondents that while, under this statute, it cannot be denied that the purchaser is entitled to the possession, or, in case of a tenant, entitled to the rents or the value of the use and occupation thereof, yet that the idea of the legislature must have been that the purchaser was to receive this profit, and, upon the redemption, that it was his duty to remit it to the redemptioner; that the law gave him the right of possession for the purpose of securing his investment and the interest which the law allowed, and for no other purpose; and that it is manifestly unjust that he should be entitled to 12 per cent. interest on his investment, and also to rents and the profits accruing from the land

purchased. We do not think that the legislature indulged in any fine distinctions between the word "receive" and the word "have," as is contended by the respondents; that if they had said, "he shall be entitled to have," they would not have said any more than was said by the expression, "shall be entitled to receive." It is a rule of construction, which must not be lost sight of by courts, that, where the legislature makes use of phrases of a well-known and definite sense, courts, in construing such phrases, must accord to them the same sense. We cannot understand how the benefit flowing from rents and profits could have been any more definitely conferred upon the purchaser than was conferred upon him by the legislature by the use of the expression, "shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof." The statute provides that the purchaser shall be entitled to the possession of the property purchased or redeemed. This evidently was a valuable benefit conferred upon the purchaser, and the measure of that value is indicated in the subsequent provision that in case this possession cannot be obtained, by reason of the possession being in a tenant holding under an unexpired lease, the purchaser shall be entitled to receive from such tenant the rents, or the value of the use and occupation thereof. The legislature was talking about something valuable. That something was the right to the possession of the property, and the value of that right, in the mind of the legislature, was presumably the value of the rent of the land purchased. It may be that cases of hardship will arise under this law; but courts have nothing to do with the policy or impolicy, the justice or injustice, of legislative enactments. The right to redeem at all is a right granted by the statute. Without a statutory enactment, the right would be cut off absolutely. It is a right that is purely *ex gratia*, and the legislature, in conferring this right, could confer it burdened with any conditions which it saw fit to impose. As a question of abstract right, there is no reason why the purchaser should be entitled, upon the redemption, to anything more than the return of his money, with the legal rate of interest; but the legislature has seen fit to give him 12 per cent., or one-third more than the legal rate. It may have been thought by the legislature that men who had money would not care to invest it in purchases of this kind, where there was no assurance that their money was invested for any particular length of time, and that, to stimulate buyers, they allowed them 12 per cent. interest on their investment, instead of 8. And it might have occurred to the legislative mind that a further stimulus was necessary, and to supply that the further value of rents and profits was bestowed upon the purchaser. The legislative mind may or may not have reasoned correctly on this proposition, but, when once

we concede to it the right to enter upon an investigation of this kind, the results of that investigation, expressed in an enactment, cannot be called in question by the courts.

Now, there has been a good deal said as to the announcement in *Hardy v. Herriott* of the doctrine that the title of the judgment debtor became extinguished by the sale of the land, and that all that was left to him was the equitable right to redeem, and that the purchaser at such sale acquired the full legal title, carrying with it possession, and the right to rents and profits. Many cases sustain the doctrine therein announced, but the decision of that technical question was not necessary to the decision of the real question involved in *Hardy v. Herriott*, and it is not necessary to the decision in this case. It is a substantial benefit that is granted by the legislature, viz. the right to the possession, or the right to the value of the possession, under certain circumstances; and the legislature has as much power to bestow that benefit upon the purchaser, with the legal title remaining in the redemptioner, as it would if the legal title passed from the redemptioner to the purchaser at the time of the sale. The discussion of the title proposition is the discussion of a theory, and does not affect the practical fact that the legislature, regardless of the question of title, has conferred this right. So that we do not think it at all necessary to discuss that question here.

It is also insisted by the respondents, in that connection, that the statute further finds that the court may restrain the commission of waste on the property on the part of the purchaser, and that such power could not be entertained by a court if the actual title had passed to the purchaser, and he was the actual owner of the premises. We hardly think this proposition is worthy of extended notice. If the right of redemption which the legislature saw fit to grant to the judgment debtor is to be made effective at all, it could only be made effective by maintaining intact the premises sold; for, if waste or destruction were permitted, it is manifest that no redemption could be effected.

The assertion on the part of the respondents that *Hardy v. Herriott* stands alone, and that the adjudicated cases have all decided the opposite doctrine, is an assertion which cannot be sustained. A re-examination of the cases cited in *Hardy v. Herriott* convinces us that they sustain the doctrine there announced. The case of *Harris v. Reynolds*, 13 Cal. 515, under a statute substantially like ours, is exactly in point, and announces the doctrine as broadly as it was announced by this court in the case above referred to; and after the decisions in the California cases, construing the statute as we have construed it, the legislature of that state amended the statute by adding, "but when any rents or profits have been received by the judgment creditor or purchaser, or

his or their assigns, from the property thus sold, preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid." Our statute contains no such provisions, and after providing, in special terms, that the purchaser shall receive the value of the rents and profits, unless this value is by some other provision of the statute taken from him, it must, so far as the power of the court is concerned, remain with him. After a full investigation of the question, and a review of the authorities, we are satisfied that the doctrine announced in *Hardy v. Herriott* was the correct one, and we therefore affirm it. The judgment of the lower court will therefore be reversed, and the court instructed to proceed in accordance with this opinion.

ANDERS and GORDON, JJ., concur.

CITY OF BALLARD v. KEANE et al.  
(Supreme Court of Washington. Dec. 10, 1895.)

GENERAL EXCEPTION—SUFFICIENCY—CITY OFFICER—CHANGE OF SALARY.

1. Under Laws 1893, pp. 112, 130, a general exception to all the court's findings is insufficient.

2. A city treasurer is included in Const. art. 11, § 8, providing that the salary of any county, city, or town officer shall not be increased or diminished after his election, etc.

Appeal from superior court, King county; R. Osborn, Judge.

Action by the city of Ballard against John Keane and others on a bond. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Thompson, Edsen & Humphries, for appellants. Winsor, Bush & Morris, for respondent.

DUNBAR, J. This is an action brought by the city of Ballard, a municipal corporation of the third class, against the respondent Keane, as treasurer of the city of Ballard, and his bondsmen. The case was tried by the court, and judgment rendered for \$418.42. Upon the conclusion of the trial the court announced its findings of fact and conclusions of law. The only exception taken to either the findings of fact or conclusions of law was as follows: "Come now the defendants, by their attorneys, at the signing hereof, and except to the findings of fact and conclusions of law now signed by the court." Respondent moves to affirm the judgment of the superior court for the reason that there was no specific exception taken to the findings of fact and conclusions of law in the court below by the appellants. The appellants, in their reply brief, make a somewhat lengthy argument in opposition to this motion; but we decided in *Rice v. Stevens*, 9 Wash. 298,

37 Pac. 440, that where an action has been tried by a court without a jury, and findings of fact made by the court, the party aggrieved must except to the findings, under Laws of 1893, pp. 112, 130, in order to raise any questions thereon upon appeal, and, by an unbroken line of decisions since, that a general exception to all the findings, such as was made in this case, is not such an exception as will call to the attention of the court the particular findings excepted to. So much has been said on this subject that we do not feel justified in again entering into a discussion of the merits of this motion, but hold that the exception is not sufficient. All that is left to the appellants is the question whether the judgment is justified under the pleadings, and whether the findings of fact justify the conclusions of law announced. In this case there is no question raised upon the pleadings, and, if the facts stated by the court be true,—and, in the absence of proper exception, we will consider them as true,—the conclusion reached by the court that the plaintiff is entitled to a judgment for the sum of \$418.42 is amply justified.

As to the question of whether the city treasurer was an officer who would fall under the prohibition of the constitution (section 8, art. 11) in reference to the increase or diminution of his salary during his term of office, which is a question of law, we think it is too plain for discussion that the treasurer in this case was such an officer. The judgment will therefore be affirmed.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

BRAELEY v. MARKS et al.  
(Supreme Court of Washington. Dec. 11, 1895.)

APPEAL—TIME OF TAKING.

Under Act March 8, 1893, § 3, requiring appeals to be taken within five days after entry of the order, if made at the time of hearing, and in all other cases within five days after the service of a copy of the order with notice of entry, an appeal must be taken within five days after actual notice of the decision, though the order was not made at hearing, and though no notice was served on appellant.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Jennie Braeley against Henrietta Marks, defendant, and Chauncey Betts and another, sureties. Appeal by the sureties from an order refusing to vacate a judgment against their principal. Dismissed.

H. M. Stephens and Jones, Voorhees & Stephens, for appellants. Griffiths & Nuzum, for respondent.

GORDON, J. The appellants in this cause were sureties upon a redelivery bond given by the defendant in an action brought by the respondent in the superior court of Spo-

kane county for the recovery of specific personal property. In said action, judgment was rendered in favor of the respondent on the 19th day of June, 1894. Thereafter these appellants filed their motion in the lower court to vacate and set aside such judgment, and for leave to defend in the name of the defendant therein (their principal). On the 17th day of December, 1894, the said motion was denied, and this appeal is taken by said sureties from the order so made. The respondents have moved to dismiss the appeal for various reasons,—among others, "that this appeal was not taken within five days after the making of the order intended to be appealed from,"—and we think the motion to dismiss must be granted. Section 3 of the act of March 8, 1893, relating to appeals, provides that an appeal must be taken "from any order from which an appeal is allowed by this act, within five days after the entry of the order if made at the time of the hearing, and in all other cases within five days after the service of a copy of such order, with written notice of the entry thereof, upon the party appealing or his attorney." From the record in this case it cannot be told whether the appellants were in court, by their counsel, or not, at the time that the order was made from which this appeal was taken, as the order itself is silent upon the subject. The order appealed from contains the statement that "the sureties except," and from this it might be fairly presumed that they were so present. Whatever the fact be, it does appear from the record that they had knowledge of the entry of the order as early as February 25, 1895, upon which day they procured from the lower court an order extending the time for settling a statement. The notice of appeal, however, was not given until the 22d of April, 1895. The object of the statute in providing for "the service of a copy of such order" upon the party appealing is to furnish notice of the decision. As heretofore stated, the appellants had actual notice of such adverse decision, and it became their duty to appeal within five days thereafter, if at all. *Irwin v. Waterworks* (Wash.) 40 Pac. 637. The appeal will be dismissed.

HOYT, C. J., and SCOTT, ANDERS, and DUNBAR, JJ., concur.

#### FINDLEY v. HULL, City Treasurer.

(Supreme Court of Washington. Dec. 14, 1895.)

#### MUNICIPAL CORPORATION—POWERS—PUBLIC IMPROVEMENTS.

1. A city authorized only to grade streets at the cost of the land fronting on the street improved cannot contract for the grading of a street, the cost to be paid from the general funds of the city.

2. When a city is only authorized to grade

its streets at the cost of the owners of land abutting thereon, the fact that the provision for payment by the owners cannot be enforced, because a personal debt cannot be imposed on the landowner for such improvement, does not authorize the city to contract for the grading, the cost to be paid from the general fund of the city.

Dunbar, J., dissents.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Proceedings by James Findley against J. S. Hull, as city treasurer of Cheney, a municipal corporation, for a writ of mandamus. There was a judgment for petitioner, and defendant appeals. Reversed.

C. S. Voorhees and Jones, Voorhees & Stephens, for appellant. D. H. Fisk, for respondent.

GORDON, J. This appeal is from an order of the superior court of Spokane county directing the issuance of a peremptory writ of mandamus requiring the appellant, as treasurer of the city of Cheney, to make and publish calls for certain warrants issued by said city, and to pay the same upon presentation. The warrants in question were issued to the respondent in payment for certain street grading, in accordance with a contract between the respondent and the council of said city. They were drawn upon the general fund of the city, and the contention of the appellant is that the city authorities had no power to enter into a contract with respondent providing for the payment of the grading of streets out of the general fund of the city. The city of Cheney was incorporated under a special act of the territorial legislature approved November 23, 1883. Subdivision 6 of section 1, c. 5, of said charter, provides that said city shall have the power and authority "to construct and repair sidewalks and to curb, pave, grade, macadamize and gutter any streets, highways or alleys therein at the cost and expense of the owners of the lots and parcels of land fronting on such streets, highways or alleys." It is appellant's contention that the expense of grading streets in said city must be borne by the owners of the lots and parcels of land fronting thereon, and that there is no express or implied power conferred by said charter for the payment of the costs and expenses of grading out of the general fund. We think this contention must prevail. The authority to grade any street in the city "at the cost and expense of the owners of the lots and parcels of land fronting on such street" is, in the absence of other provisions relating to the subject, a limitation upon the power of the city authorities, and the method provided by subdivision 6 is to the exclusion of all other methods. *Second Nat. Bank of Lansing v. City of Lansing*, 25 Mich. 207; *Zottman v. San Francisco*, 20 Cal. 97; *Johnson v. Common Council*, 16 Ind. 227. In the case first above cited it is held: "Improvements in the city of Lansing, for which special assessments are authorized, are not

chargeable on the city, as ordinary corporation debts; and there is no liability to pay for them, except through assessments made for that specific purpose." An examination of the charter of the city of Cheney discloses that nowhere else therein is any power conferred on the city to grade streets, or to pay for such grading, in any other manner than in that pointed out in subdivision 6, above quoted; and in this respect its charter differs from those under consideration in *Soule v. City of Seattle*, 6 Wash. 315, 33 Pac. 384, 1080, and *Stephens v. City of Spokane* (Wash.) 39 Pac. 266, in which cases this court held that the city was not limited to special assessments, as a means of improving its streets in any way it saw fit. An examination of the charter of the city of Seattle, considered by the court in the case of *Soule v. City of Seattle*, supra, shows that in addition to the power conferred upon the city authorities to grade and improve the streets of said city at the cost of abutting property, as provided by section 8 of the special act of the legislature approved February 4, 1886, section 7 of the same act conferred the power upon that city to make such improvements and to assess, levy, and collect a road poll tax on the male inhabitants of the city, and also a "road tax on all taxable property within the city," in payment therefor. And like provisions were contained in the special act of January 29, 1886, under which the city of Spokane was incorporated. Hence neither of these cases supports the position assumed by respondent in this case.

But it is urged by counsel for respondent that the provisions of subdivision 6 of section 1, c. 5, supra, are inoperative because subdivision 8 of the same section provides that the ordinance of the city shall provide "the mode by which the charge on the respective owners of lots or land shall be determined for the purposes authorized by this act," and that the provisions of said subdivisions 6 and 8 cannot be enforced, inasmuch as it is beyond the power of the authorities to create a personal debt against the owner of the lots or land so benefited, for the expense of the grading and improvement. Assuming (without deciding) this to be a correct view, it does not, in our opinion, furnish a sufficient reason for holding that the authorities of the city could bind it by a contract beyond the express or implied powers conferred upon them by law. It might be suggested that the city may become incorporated under the provisions of the general law for the organization of cities and towns whenever the voters of such city shall so determine.

We express no opinion upon the question of practice relating to the issuance of the alternative writ in this case, but for the foregoing reasons the judgment will be reversed, and the cause remanded for dismissal.

HOYT, C. J., and ANDERS, J., concur.  
DUNBAR, J., dissents.

# HUTCHCRAFT v. LUTWIG et al.

(Supreme Court of Washington. Dec. 16, 1895.)

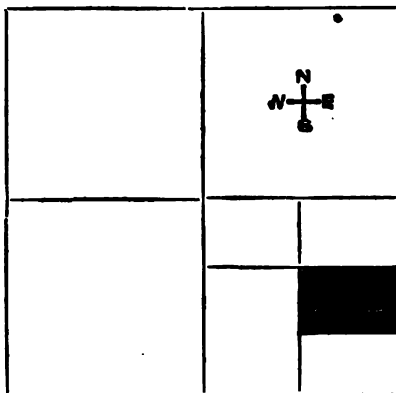
## DEED—DESCRIPTION.

A decision of the trial court that a deed describing the land conveyed as "all that certain quarter of the east half of the southeast quarter of the southeast quarter of section 20 marked pink in the sketch hereunto attached, \* \* \* containing ten acres, more or less," is not void for uncertainty, will not be disturbed.

Appeal from superior court, King county; R. A. Ballinger, Judge.

Action by Samuel W. Hutchcraft against William Lutwig and others, administrators. There was a judgment for plaintiff, and defendants appeal. Affirmed.

The description in the deed from Alexander Gilmore was as follows: "All that certain quarter of the east half of the southeast quarter of the southeast quarter of section 20 marked pink in the sketch hereunto attached, in township, \* \* \* containing ten acres, more or less." The "sketch" is without pink coloring, and is as here represented.



Smith & Littell and Gorham & Gorham, for appellants. W. S. Relfe and Wm. H. Brinker, for respondent.

PER CURIAM. The respondent, claiming as owner in fee, brought this action against appellants to recover possession of certain real premises, situated in King county. Appellants offered no proof on the trial, and make no claim of title, but rely solely upon their possession and the alleged failure of plaintiff to prove title. Appellants admit that one Alexander Gilmore was the owner of the premises in 1869, and it is through him that respondent claims title, by virtue of certain mesne conveyances. The question for determination is whether the description contained in a deed from said Gilmore is sufficient to cover the premises in dispute. The lower court found that it was, and we are entirely satisfied that such finding was right; and, no error appearing, the judgment will be affirmed.

## STATE v. RUTTEN.

(Supreme Court of Washington. Dec. 11, 1895.)

JUROR—COMPETENCY—WITNESS—CREDIBILITY—  
CROSS-EXAMINATION.

1. In a criminal case it is error to overrule a challenge to a juror stating on voir dire examination that he had formed an opinion which it would take evidence to remove, though, in answer to a leading question on cross-examination, he stated that he could give accused an impartial trial; especially where he also stated that he believed something was wrong, and could not go into the jury box with a presumption that accused was innocent. Hoyt, O. J., dissenting.

2. When, in a prosecution for murder, a witness, in testifying as to the beginning of the difficulty between defendant and deceased, uses very loose language, it is error to refuse to permit him on cross-examination to be asked whether he is testifying by guess or by what he knows.

Appeal from superior court, Kitsap county; John C. Denney, Judge.

Servius Rutten was convicted of murder, and appeals. Reversed.

H. E. Shields and John K. Brown, for appellant. J. B. Yakey, Pros. Atty., for the State.

DUNBAR, J. The appellant was convicted of murder in the first degree in the superior court of Kitsap county, and sentenced to be executed, and from such judgment he has appealed to this court.

The first assignment of error by the appellant, viz. that he is entitled to trial by a panel of jurors drawn by the county commissioners for the year 1894, we think was decided adversely to appellant's contention in *State v. Krug* (Wash.) 41 Pac. 126.

The next contention is that the court erred in overruling the appellant's challenge to the jurors Denniston, Greene, and Stark. All these jurors were peremptorily challenged by appellant after the refusal of the court to sustain challenge for cause, but the record shows that the appellant exhausted all his peremptory challenges; and, if the court wrongfully compelled him to exhaust peremptory challenges on jurors who should have been dismissed for cause, his rights were invaded as much as though the jurors had been accepted after his peremptory challenges were exhausted, so that the question must be considered with reference to the qualifications of these jurors. The first juror mentioned, viz. Denniston, in reply to the question, "Have you an opinion as to the guilt or innocence of this man Rutten?" answered, "I think I have," and stated that he had formed such opinion from articles that he had read in the newspapers. He also stated that he could not say that he could be governed entirely by the evidence that was brought forward in the case. This was on direct examination. On his cross-examination he stated that these articles had made an impression upon his

mind as to the guilt or innocence of the defendant, and, if the man who was being tried was the man who did the killing, then he should have an opinion. In this case it was conceded that the man who was being tried was the man who did the killing. A great many of the ordinary questions indulged in upon such occasions were indulged in here, and the court finally asked the witness the following question: "If you were on trial for your life for the crime of murder in the first degree, would you be willing to be tried by twelve men who felt towards you and your case as you do towards this defendant and his case; would you feel safe to be tried by twelve men?"—to which question the juror answered, "I would," whereupon the court denied the challenge. During the examination in chief of Juror Greene the following colloquy occurred: "Q. Have you formed or expressed any opinion as to the guilt or innocence of this defendant? A. I have. Q. Have you such an opinion at the present time? A. Well, it has not been changed, sir. Q. Would it require evidence to remove that opinion? A. It would. Q. From what did you form that opinion? A. From what I heard and read." Witness then, in response to the leading question asking him if he did not think he could sit upon the jury, and give this defendant a fair and impartial trial, answered that he could. Upon the cross-examination the following testimony was given: "Q. You did form an opinion? A. I did. Q. Still have that opinion, have you? A. Certainly. Q. That is, as to the guilt or innocence of the defendant? A. Yes, sir. Q. You say it would take evidence to remove that opinion that you now have? A. It would. Q. Take strong evidence to remove that opinion, would it? A. It would take evidence." Then the question was asked the witness, if he was on trial for his life, if he would be willing to be tried by 12 jurymen who felt towards him as he felt towards the witness, the defendant in this case, and he answered that he would, and the court refused the challenge. The juror Stark stated in answer to questions on direct examination, that he had an impression; that it was an impression it would take evidence to remove; that he had such an impression yet; but finally stated that he could sit in the case, and give defendant a fair and impartial trial, without reference to the opinion that he entertained. On cross-examination he stated that he had read an account of the murder in the papers, and had heard the matter frequently discussed among the people in the neighborhood of the murder, and reiterated that he had an impression in regard to the guilt or innocence of the defendant. When asked to define the difference between an impression and opinion, he answered, "Well, my idea of an impression is to give it all the credit it is worthy of until I know something different. An opinion should be, in my judgment, based upon proof of the facts in the

case." Strictly construed, the juror's idea of an impression was simply a prima facie opinion. After some further cross-examination, the following occurred: "Q. And then it would take evidence to remove that impression, would it not? A. I think so. Q. It would take pretty strong evidence to remove the impression, would it not? A. Well, conclusive." Whereupon the defendant challenged the juror for cause. The redirect examination elicited the usual reply that the opinion that the juror entertained was not such an opinion as would prevent him from sitting on the case and giving the defendant a fair and impartial trial on the law and the evidence, and the stereotyped question was asked him whether, if he was charged as the defendant was, he would be willing to have 12 men try his case who were of the same mind that he was, and he answered that he would be willing to risk his case under the same circumstances. The counsel for the state then asked him, "Would you go into the jury box with a presumption that he was innocent until the state had proven him guilty beyond a reasonable doubt?" The answer was, "No, I am under the impression that there is something wrong." The challenge of this juror was finally overruled by the court. It seems to us that when the juror answered the last question in the manner in which he did the challenge should at once have been sustained, for, notwithstanding the subsequent assertion of the juror that he could try the defendant, and accord to him the presumption of innocence he was entitled to under law, he had already stated in plain terms that he would not go into the jury box with a presumption that the defendant was innocent until the state had proven him guilty, for the reason that he was satisfied that there was something wrong. In this case three jurors admitted that they had formed opinions, that that opinion existed with them at the time of their examination, and that it would take evidence to remove such opinion; and the final announcement by the juror, under leading questions by the court and by the attorney for the state, which plainly indicated to the jurors what answer was expected of them, will not outweigh the deliberate statement they made of their own free will, uninfluenced by leading questions, that they had opinions in regard to the guilt or innocence of the accused which it would take evidence to remove, and especially when it was announced as by the juror Stark that he believed there was something wrong, and that he could not go into the jury box and accord to the defendant the presumption that he was innocent until he was proven guilty. While the statute gives to the court the right to determine the question of the impartiality of the juror, yet, this being a constitutional right, this court will review the discretion of the lower court in passing upon this question; and from the whole of the examination of these jurors, and especially Juror Stark, we

are satisfied that the right of the defendant to be tried by an impartial jury was invaded; that the case falls within the rule announced in *State v. Murphy*, 9 Wash. 204, 37 Pac. 420, and *State v. Wilcox* (Wash.) 39 Pac. 368, where the reason of the rule was fully discussed; and that for that reason the judgment must be reversed.

There is another matter in which it seems to us the court erred, and that is in refusing to permit the defendant's counsel to ask the witness Albertson on cross-examination the question: "Are you testifying by guess or testifying of what you know?" It was suggested on the argument of the case that this was a badgering question, not intended to elicit the truth, but simply to annoy and embarrass the witness. The record does not satisfy us that such was the case, but, on the other hand, the record shows that the witness had a very careless manner of testifying, and frequently used the words "I guess" when he was rehearsing statements of fact. This character of testimony had been unobjectioned to by defendant's counsel, and no attempt had been made to badger the witness, or to call upon him for an explanation, until the following occurred: "Q. Now, what was the first words that you heard spoken when you arrived within hearing distance? A. Billy told him to come up. That was the first I heard. Q. Use the exact language. A. That was, he says, 'Come up here.' Q. Billy says, 'Come up here?' A. Yes. Q. Billy? To whom? A. To Mr. Rutten. Q. How do you know? A. Well, somebody inside of the cabin. I don't know exactly. Q. Do you know whether it was Mr. Rutten, or who it was? Do you know? A. That was the gentleman he was referring to, I guess. Q. How do you know it was? A. I don't know exactly. Q. Well, are you testifying by guess or testifying of what you know? A. (No answer.) The Court: Answer the question. (Question read.) A. Well, I— The Court: Well, proceed with another question. Mr. Shields (attorney for defense): It is a very simple question, your honor. The Court: Yes, sir; but it is very immaterial, too. (Exception.) We do not think that the question was immaterial. This case was very close to the border line between manslaughter and murder, or at least murder in the second degree and murder in the first degree; and every circumstance connected with the quarrel between these two men which was being related by this witness was very material. No objection was made to the interrogatory by the state's attorney, and we think the court should have permitted the question to have been asked. The defense had a right on cross-examination to ask any question which would tend to test the accuracy or veracity of the witness, and cross-examination is as important to test the accuracy of testimony as its truthfulness or credibility, and prejudice will be presumed when this right is denied. The value of

cross-examination as a test of information would be lost in the case of either a dishonest or an unreliable or a careless witness if such questions were not allowed. In fact, the main purpose of cross-examination is to determine the correctness of the statements made in chief, and certainly it was important for the jury to understand whether this witness was testifying concerning actual facts, or whether he was giving his deductions from facts which were not made known to the jury. Even in a civil action we think the question asked by the defendant's counsel would have been proper and pertinent; and where a man is being tried for his life, certainly the right to determine through the medium of cross-examination the exact knowledge of the witness, or the accuracy of his statements, should not be denied him.

There are many other assignments of error, but we think they are not substantial or meritorious. The instructions which were asked for by the defendant had been substantially given by the court in its original charge to the jury, and we have held in numerous cases that a court will not be compelled to instruct in any particular form of words where the substance of the instruction asked for has already been given. In view of the facts, however, that there will in all probability be a new trial of this case, and that the same instructions are liable to be given by the court, we think it best to speak in an advisory way of certain instructions which were given by the court, and which were not excepted to by the appellant. Our statute defines murder in the first degree as follows: "Every person who shall purposely, and of deliberate and premeditated malice, \* \* \* kill another, shall be deemed guilty of murder in the first degree. \* \* \*" Pen. Code, § 1. And murder in the second degree is defined as follows: "Every person who shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree. \* \* \*" Id. § 3. The court properly instructed the jury, after reciting the statute, that the main distinction between murder in the first degree and murder in the second degree was the presence or absence of premeditation or deliberation. In the sixteenth count of the charge the court said: "Premeditated malice is where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given. There need not be any appreciable space of time between the formation of intention to kill and killing. They may be as instantaneous as successive thoughts. It is only necessary that the act of killing be preceded by the concurrence of will, deliberation, and premeditation on the part of the slayer." And in count 21 the court again said: "In deliberating, there

need be no appreciable space of time between the intention to kill and the act of killing. That may be as instantaneous as the successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberated and premeditated, on the part of the slayer; and, if such is the case, the killing is murder in the first degree, no matter how rapidly the acts of the mind may succeed each other, or how quickly they may be followed by the act of killing." It seems to us that the language used wipes out the distinction made in the statute between murder in the first and second degree. While no great amount of time necessarily intervenes between the intention to kill and the act of killing, yet, under our statute, there must be time enough to deliberate, and no deliberation can be instantaneous. In fact, the idea of deliberation is the distinguishing idea between murder in the first and second degree, and the instructions of the court which we have quoted give exactly that which would be necessary to define murder in the second degree, because the intention to kill must be in the mind of the slayer, and he must do it purposely and maliciously. Consequently the act of killing must be preceded by the purpose to kill, and it must be a malicious purpose, and that purpose may be formed instantaneously, or, as expressed by the learned court below, "as instantaneous as the successive thoughts of the mind"; and under the old definition of murder, viz. the unlawful killing of any subject whatsoever through malice aforethought, that would be a proper instruction in regard to murder. But our statute has changed the law in this respect, and has introduced the element of deliberation, and deliberation means to weigh in the mind, to consider the reasons for and against, and consider maturely, to reflect upon; and while it may be difficult to determine just how short a time it will require for the mind to deliberate, yet, if any effect is to be given to the statute which makes a difference between murder in the first and second degree, the language used by the learned court is too broad. This charge not having been excepted to, the case, of course, will not be reversed for that reason; but on account of the other errors which we have mentioned the cause will be reversed, and remanded, with instructions to grant the appellant a new trial.

ANDERS and SCOTT, JJ., concur.

GORDON, J. I concur in the result, for the sole reason that in my opinion the constitutional right of the defendant to be tried "by an impartial jury" was violated.

HOYT, C. J. For reasons briefly stated in the case of *State v. Wilcox* (Wash.) 39 Pac. 368, I dissent.



SCHLOTFELDT et al. v. BULL et al.  
(Supreme Court of Washington. Dec. 17,  
1895.)

APPEALABLE ORDER.

An order denying a motion for judgment by default on the ground that defendant had one day more in which to plead is not appealable.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by J. J. Schlotfeldt and another, partners as Schlotfeldt Bros., against Walter A. Bull and others. From orders denying applications for judgment by default, plaintiffs appeal. Dismissed.

Prunyn & Ready, for appellants. H. J. Snively, for respondents.

GORDON, J. After the commencement of this action in the lower court, counsel for the appellants (plaintiffs therein) filed the following paper, duly signed by them: "The defendants in the above-entitled action, and each of them, are hereby given until Monday, the 15th day of January, 1894, inclusive, within which time to appear in the above-entitled cause; and no default will be taken against them, or either of them, for their failure to appear before said date." It appears that on that day, viz. January 15th, the respondents Walter A. and Rebecca N. Bull filed a demurrer to the complaint; that on the same day, but prior to the filing of such demurrer, the appellants filed a motion for a default, which was denied by the court; and the cause coming on for a hearing before the court upon said demurrer, the respondents failing to appear either in person or by counsel, their demurrer was overruled. Thereupon appellants demanded judgment, which was denied by the court, said ruling being based upon subdivision b of rule 3 of the general rules of the superior court, which reads as follows: "When a demurrer or motion has been determined, the party to whom the decision is adverse shall have one day within which to plead, unless the time is extended by special rule or order." On the opening of court on the following day, the appellants again moved for a default for want of an answer, which application was refused by the court, for the reason that the time allowed respondents by said rule, and as fixed by the court, had not expired. Thereupon appellants gave notice of appeal to this court from the various orders so made.

Respondents have moved the court for a dismissal of said appeal, for the reason, among others, that "none of the orders described in the notice of appeal are appealable orders"; and we are of opinion that the motion to dismiss should prevail. The last ruling complained of simply postponed the right of appellants to proceed to judgment as for default until the day following the

day upon which said motion was made. No final judgment has been entered in this case, nor do we think that any of the orders complained of are appealable. The cause has not been disposed of below upon the merits. "Where the order does completely put an end to the particular issue, and fully settle the controversy as to all the parties affected by it, then it may be considered as a final judgment; otherwise, it cannot be treated as anything more than a nonappealable interlocutory order." Elliott, App. Proc. § 99. This court will not "permit a cause to be brought before it by piecemeal for review, unless clearly authorized so to do by legislative enactment." Windt v. Banniza, 2 Wash. St. 147, 26 Pac. 189. In granting this motion to dismiss, we take occasion to say that an examination of the record satisfies us that none of the several orders of the lower court which are complained of were erroneous. Dismissed.

HOYT, O. J., and SCOTT, ANDERS, and DUNBAR, JJ., concur.

MASON COUNTY et al. v. SIMPSON.  
(Supreme Court of Washington. Dec. 18,  
1895.)

ROAD POLL TAX — RESIDENCE OF TAXPAYERS —  
REMEDY FOR NONPAYMENT.

1. As Laws 1893, p. 151, § 6, requires the payment of a road poll tax to the supervisor of the district in which the person liable therefor resides, a complaint to enforce the payment of said tax should allege that the persons primarily liable reside within the district.

2. As Laws 1893, p. 151, § 7, relating to the collection of the road poll tax from the employer of the persons primarily liable therefor, provides for the seizure and sale of said employer's property for nonpayment of the tax, an action by the county and road supervisor on an agreement by said employer to pay the tax is not the proper remedy for the collection thereof.

Appeal from superior court, Mason county; Mason Irwin, Judge.

Action by the county of Mason and another against S. G. Simpson, doing business as S. G. Simpson & Co., to collect the road poll taxes alleged to be due by defendant's employes. A demurrer to the complaint was sustained, and plaintiffs appeal. Affirmed.

O. W. Hartman, for appellants. H. S. Tremper, for respondent.

GORDON, J. The lower court having sustained a demurrer to the complaint in this action, and the appellant electing to stand upon said complaint and refusing to amend, judgment of dismissal was given, and the cause is here upon appeal. The complaint is too lengthy to permit of being copied into this opinion, but in his brief the learned prosecuting attorney of the county has set forth the substance of what he claims is shown by the complaint, and we adopt that

statement, which is as follows: "(1) That plaintiff Mason county is a municipal corporation. That during the year 1894 J. W. Pratt was the road supervisor of road district No. 12, said county. (2) That defendant S. G. Simpson during said time was doing business in said road district under the business name and style of S. G. Simpson & Co. (3) That during the months of May and June said year (1894) said defendant had in his employ a large number, to wit, 127 men, all of whom were and each of whom was an inhabitant of the state of Washington, over the age of 21 years and under the age of 50 years, residing outside of the limits of an incorporated town or city, not exempt from road poll tax, and liable to and subject to the payment of such road poll tax of four dollars for said year 1894; setting forth their names. (4) That the plaintiff Pratt, as such road supervisor, duly listed and assessed each of said persons for the payment of said road poll tax, and duly gave each of them, said employes, notice when and where he should appear and perform labor on the public roads of said road district in payment of said poll tax; and that they each neglected, failed, and refused to perform any labor or to pay. That they would not pay the said road tax in labor or money. Whereupon said supervisor duly demanded of the defendant, their employer, the amount of road poll tax so due and payable from each of his said employes, and in consideration of the premises it was agreed by and between said road supervisor and defendant, S. G. Simpson, that the attested road poll tax receipts should be made out by said road supervisor for each of said employes in the sum of four dollars each, and that the said receipts should be left with defendant, Simpson, for said employes, and for each of them; and that defendant, Simpson, would deduct the amount thereof from wages due said persons, and pay it over to the road supervisor on or before December, 1894. That said road supervisor fully complied with said agreement on his part, and received the defendant's receipt for said poll tax receipts, 127 in number, a copy of which is set out in the complaint. (5) That defendant, Simpson, has neglected, refused, after demand by the road supervisor, to pay over to him, said has refused to pay to Mason county, any part of said road poll tax, still retains the same. That said J. W. Pratt, supervisor, has been unable to settle with and account with said Mason county for said road poll tax receipts or for the sum of \$508, or any part thereof. That the whole thereof is due and owing from the defendant and unpaid. Demand for \$508 and costs." The demurrer was taken upon several grounds, but it appears that it was sustained by the lower court upon the ground that it does not state facts sufficient to constitute a cause of action. Sections 6 and 7 of the act

approved March 9, 1893 (Laws 1893, p. 151), are as follows:

"Sec. 6. Every male inhabitant of this state over twenty-one years and under fifty years of age, residing outside of the limits of an incorporated city or town, unless by law exempt, shall annually pay a road poll tax of four dollars which shall be assessed and collected by the road supervisor of the district in which any person liable therefor resides, and which must be collected by the road supervisor on or before the first day of December of the year for which such road poll tax is charged. Such road poll tax must be paid on demand to the road supervisor as hereinafter provided.

"Sec. 7. The road supervisor shall annually, in the month of March, make a list of all the persons in his district liable for road poll tax for that year, and shall demand from each person on such list the amount due from such person as such road poll tax. If any person liable for the road poll tax herein required to be assessed and collected, refuses to pay the same when demanded by the road supervisor, and such person is in the employ of any person, firm, corporation or company in such district, the road supervisor shall demand the payment of the road poll tax due from such person, from the person, firm, corporation or company having such person in their employ, and from thenceforth the employer of such person shall be liable for such road poll tax, and the road supervisor shall enforce payment of the same as hereinafter provided. If any person, firm, corporation or company refuses or neglects to pay the road poll tax due from such person, firm, corporation or company, or for which they may become liable under the provisions of this act, the road supervisor is hereby authorized and empowered, and required, to collect the said tax by seizure and sale of any personal property belonging to such person, firm, corporation or company that may be found in the county in and for which such road supervisor is elected and in which such tax is due. When any property is seized by the road supervisor under the provisions of this act, it may be sold by the road supervisor, after having first given two days' notice to the owner of such property and by posting or causing notice of the time and place of sale of such property to be posted in three conspicuous places in the district in which the said road poll tax is due, for at least two days prior to such sale. \* \* \*

It seems clear that the respondent cannot be held liable in the present action unless it appears that the persons assessed were liable to said road district No. 12 for the payment of poll tax for the year 1894, and we think the complaint should have stated that said persons so assessed were residents of said district. This nowhere appears in the complaint, and it certainly does not follow that they are to be considered resi-

dents of said district from the mere fact that they worked therein. The poll tax which the statute exacts is payable only to the supervisor of the district in which a party resides. It does not appear from the complaint that the supervisor of district No. 12 is such person in this case. The liability is created by the statute, and is not to be extended beyond the terms of the statute. For this reason we think that the demurrer was properly sustained.

But we think that a like conclusion is reached in another view of the complaint. It is clear that the supervisor is not pursuing the remedy pointed out by the act in question for the enforcement of the liability of a firm or company having persons in its employ liable to the payment of poll taxes; but the complaint is constructed upon the theory that the respondent has become liable for the payment of the sum demanded by reason of an agreement entered into with the supervisor. It is, we think, sufficient answer to say that, the law having specifically pointed out the method of procedure, it was not in the power of the supervisor to disregard such method. The law under which he was acting admits of the existence of no such power. The county or district would not be bound thereby. If it is to be considered as the personal agreement of the supervisor, then the county of Mason is not a proper party. It does not follow, as counsel for appellants assumes, that the county of Mason cannot settle with the supervisor. Under section 10 of said act the supervisor of a district becomes chargeable with each poll-tax receipt delivered to him by the auditor at the time of its delivery, and the same section entitles the supervisor to credit for each of said road poll-tax receipts returned to the auditor at the time of the final settlement of said supervisor. We are not, in the present proceeding, called upon to determine to what extent (if at all) the supervisor has by his act become liable to his county, but we are clearly of the opinion that the demurrer was properly sustained, and the judgment will be affirmed.

HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, JJ., concur.

**WEST COAST GROCERY CO. v. STINSON,**  
Sheriff, et al.

(Supreme Court of Washington. Dec. 18, 1895.)

**FRAUDULENT CONVEYANCES—WHAT CONSTITUTES—PARTNERSHIP—POWERS OF PARTNERS—PLEADING.**

1. In an action by a creditor of a mortgagor to set aside a mortgage as fraudulent, the complaint must show that plaintiff was a creditor at the time of the execution of the mortgage.

2. The mere fact that a creditor seeks to obtain a preference to the exclusion of other creditors does not render the preference fraudulent.

3. One partner has power to execute a chattel mortgage in the firm name to secure a partnership debt.

4. A complaint by a creditor to impeach a mortgage given by the debtor to secure another creditor must allege the facts rendering the mortgage fraudulent. A general averment that it was "made to defraud creditors, and is void," is insufficient.

5. Under 1 Hill's Ann. Code, § 1656, providing that the right of a mortgagee to foreclose may be contested by any person interested in doing so, and the proceedings may be transferred to the superior court, to entitle a person to such transfer he must show that a defense exists, in whole or in part, and that he has an interest in the subject-matter which entitles him to resist the foreclosure.

Hoyt, C. J., dissenting.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by the West Coast Grocery Company, a corporation, against W. M. Stinson and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Edward Pruyn, for appellant. Wager & Graves and Ralph Kauffman, for respondents.

GORDON, J. On the 24th day of June, 1895, the firm of Grennan & Becker, respondents, executed and delivered to the respondent Shoudy a chattel mortgage upon a certain stock of groceries owned by said mortgagors, and upon certain store fixtures and other personal property specifically described in said mortgage, which was given to secure the payment of five certain promissory notes executed by T. W. Grennan and F. W. Becker, the individual members of such firm, and by Josephine Becker as surety. Said notes were executed December 20, 1894, and were given to said Shoudy, and became due and payable, the 1st of May, August, and November, 1895, and the 1st of February and August, 1896, respectively. Said chattel mortgage contained a provision whereby, in case of default in the payment of any sum falling due, the whole sum secured should become immediately due; also, that if, at any time, the mortgagee should deem himself insecure, he might take possession and proceed to foreclose, etc. It was sufficient in form, and was properly recorded in the auditor's office of Kittitas county on the 24th day of June, 1895. It appears that said notes were further secured by a mortgage upon certain real estate owned, not by said firm, but by the said F. W. Becker and the surety, Josephine Becker, which last-mentioned mortgage was executed at or about the time of the making of said notes. It further appears that soon after the execution of said chattel mortgage the respondent Shoudy caused the respondent Stinson, as sheriff of said county, to take possession of said mortgaged property for the purpose of foreclosing the same by notice and sale in conformity with the statute. Subsequent thereto, but prior to sale, the appellant brought this action in the superior court of said county to enjoin said foreclosure proceedings, and for the purpose of having the same transferred to the superior court.

In accordance with section 1656, 1 Hill's Ann. Code.<sup>1</sup> The lower court sustained respondents' demurrer to the complaint, and appellant electing to stand by his pleading, and refusing to amend, judgment of dismissal was rendered, and the case is brought here upon appeal therefrom.

The complaint is very voluminous, and, in addition to what has been already stated, it alleges, in substance, the recovery by appellant of a judgment in said superior court against the firm of Grennan & Becker on the 1st day of July, 1895; that an execution was issued and delivered to the respondent sheriff, and that a levy was made upon the property covered by said chattel mortgage then in process of foreclosure (which levy would, by virtue of section 1659, 1 Hill's Ann. Code, be subject to the lien of the mortgage). It sets out the chattel mortgage in full; also, the notices of sale. Paragraph 7 is as follows: "That plaintiff is desirous of contesting, and wishes to contest, the right of the mortgagee to foreclose said mortgage, under the provisions of section 1656, 1 Hill's Ann. Code Wash.; and he here and now requests this court to order the foreclosure proceedings of said mortgage transferred to the superior court, and that this plaintiff may be allowed to contest the right to foreclose said mortgage, as well as the amount due thereon." Continuing, the complaint alleges that respondent Shoudy, with the intention of cheating and defrauding the appellant, and with intent to have a mortgage made to defraud creditors, prevailed upon F. W. Becker, one of the members of said firm of Grennan & Becker, to execute the said chattel mortgage in the name of said firm; "that said mortgage was given to secure promissory notes which theretofore had been amply secured, and were at the time amply secured, \* \* \* and there was nothing due on said promissory notes so secured, at that time, except a few dollars, which Dexter Shoudy well knew he could obtain at any time, and the said F. W. Becker, who executed said mortgage, was an ignorant person, and a person whose mind was weak and easily influenced, and he could easily be persuaded to do almost any act by the said Dexter Shoudy; \* \* \* that said mortgage was executed, and its execution was obtained by the said Dexter Shoudy, in bad faith, and by fraud, imposition, and undue influence. \* \* \*" The complaint also alleges that, in addition to said chattel mortgage, the respondent Shoudy also secured an assignment from said firm of Grennan & Becker of all of the book accounts and debts due said firm of Grennan & Becker, of the aggregate value of \$2,000; that the mortgagors are insolvent; and that their creditors will be

remediless unless said mortgage is declared fraudulent and void. These, in substance, are the material allegations of the complaint. While there is much circumlocution of words, we think there is no direct statement of facts in the complaint entitling appellant to the relief which it seeks. It does not appear from the complaint that the plaintiff was a creditor of the mortgagors at the time of the execution of the mortgage in question. This, of itself, constitutes a sufficient reason for affirming the judgment appealed from. True, appellant alleges that it secured a judgment on July 1, 1895, but the mortgage was executed on June 24, 1895; and as to the character of the indebtedness, or when it arose, or in what form of proceeding its judgment was obtained, the complaint is conspicuously silent. But, if we were to assume the fact to be (which is nowhere alleged) that the plaintiff was a creditor of the firm of Grennan & Becker at the time of the execution of the mortgage, it does not follow from the facts pleaded that the mortgage is fraudulent as to creditors of the mortgagors. The indebtedness which the mortgage was given to secure is not assailed, nor is it contended that it was not a bona fide indebtedness. Neither is it contended that the mortgagors intended, by giving the mortgage, to hinder, delay, or defraud their creditors. As to the respondent Shoudy, it was his legal right to obtain security for his debt; and the law does not limit the amount of security which a creditor, under such circumstances, may take. "A creditor has a right to seek and obtain from his debtor a preference for the payment of his debt to the exclusion of the other creditors, and that without the imputation of fraud upon either party." *Mabbett v. White*, 12 N. Y. 442.

We think it was competent for one of the members of the firm to execute the chattel mortgage. "One partner possesses the right to execute a chattel mortgage in the firm name for the purpose of securing or paying a partnership debt." *Robards v. Waterman* (Mich.) 55 N. W. 662. See, also, to the same effect, *Hanchett v. Gardner* (Ill. Sup.) 28 N. E. 788; *Nelson v. Wheelock*, 46 Ill. 25; *Gates v. Bennett*, 33 Ark. 475; *Patch v. Wheatland*, 8 Allen, 102; *Jones, Mortg.* (4th Ed.) § 46. And, if the other member of the partnership firm did not know of its execution, that fact would not render the mortgage invalid. *Harvey v. Ford* (Mich.) 47 N. W. 242; *Robards v. Waterman*, supra; *Hanchett v. Gardner*, supra; *Mabbett v. White*, 12 N. Y. 442; *Farwell v. Cook*, 42 Ill. App. 291. The complaint shows that the indebtedness for which the notes were given was the indebtedness of the firm; also, that the property covered by the mortgage was the property of the firm; and it is immaterial that the notes were signed by the individual members, and not by the firm.

Nothing that is alleged in the complaint constitutes a defense, in whole or in part, to said mortgage, and hence we think that no case was presented justifying a removal of the

<sup>1</sup> 1 Hill's Ann. Code, § 1656, provides that "the right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any person interested in so doing, and the proceedings may be transferred to the superior court, for which purpose an injunction may issue if necessary."

foreclosure proceedings to the superior court. We think the general rule is well established that, where a mortgage is fair upon its face, it cannot be impeached for fraud, unless the facts relied on to constitute fraud are pleaded. A mere general averment that it "was made to defraud creditors and is void" is insufficient. *Brereton v. Bennett*, 15 Colo. 254, 25 Pac. 310; *Gleason v. Wilson* (Kan. Sup.) 29 Pac. 698.

This complaint is clearly insufficient, in that it alleges no specific facts from which fraud is inferable; and, indulging every latitude of presumption consistent with the rules of good pleading, the facts stated are wholly insufficient to entitle appellant to the relief which it is seeking. We cannot agree with the contention of the learned counsel for appellant that "when a person interested appeals to the court, averring that he desires to contest the right to foreclose, or the amount due, and asks that the proceedings be transferred to the superior court, the court applied to should order such proceedings transferred." We think that, to entitle a party to such transfer, he must show that a defense exists, either in whole or in part, and that he has such an interest in the subject-matter as entitles him to resist the foreclosure or to assail the mortgage. We conclude that the demurrer was properly sustained, and the judgment is affirmed.

ANDERS, DUNBAR, and SCOTT, JJ., concur. HOYT, C. J., dissents.

#### HAUGH v. CITY OF TACOMA.

(Supreme Court of Washington. Dec. 18, 1895.)

##### APPEAL—BRIEFS—STATEMENT OF FACTS.

1. A brief which fails to show whether the case was disposed of on the pleadings or on the evidence, or to state how the errors relied on for reversal arose, will be stricken out for non-compliance with Laws 1893, p. 127, § 15, requiring the brief to "clearly point out" errors.

2. The court will not consider the statement of facts, in aid of a defective brief.

On rehearing. Denied.

For former opinion, see 41 Pac. 173.

James Wickersham, for appellant. M. L. Clifford and R. F. Laffoon, for respondent.

GORDON, J. Counsel for the appellant has filed a petition for the rehearing of this cause, in which, with a zeal which we commend, but with an acerbity of feeling which we deplore, he insists that his brief was in strict compliance with the statute and the rules of this court, and that it ought not to have been stricken. We have given his petition careful consideration, but our opinion remains unchanged. It cannot be told, from a reading of the brief, what course the proceedings took in the lower court,—whether the cause was disposed of upon demurrer, or, if an answer was filed, what was the

nature of the defense interposed by it,—nor can it be told from said brief whether counsel relies for a reversal upon errors committed by the lower court in ruling upon the pleadings, or in receiving or rejecting testimony, or in charging the jury; and as said in *Brown v. Tolles*, 7 Cal. 398, "we cannot \* \* \* be expected to wade through the record to find argument or invent pretexts for reversing the cause." We do not think that authority can be found (and the well-known ability and industry of the learned counsel for appellant justifies our indulging the presumption that none exists, from the fact that none is cited) which would warrant this court in entertaining the case upon appellant's brief.

In his petition counsel says that: "In the statement of facts contained in the brief, we say that 'Haugh paid his assessment on these two lots, amounting to \$102, nearly two years after which he began this suit for damages.' Now, the first error complained of, immediately after that, is that the payment of that assessment was an estoppel to this suit. I do not know what could be clearer than that." We differ with counsel in his assumption that any error is pointed out by this statement. It does not indicate that the lower court had anything to do with it. Whether "the payment of that assessment was an estoppel to this suit" might depend upon whether estoppel was pleaded in this action. If it was (and on that question the brief is entirely silent), and the court below has ruled upon it, such ruling should have been assigned as error, and argument directed to it. Counsel insists that his "points," "taken in connection with the statement of facts, become intelligible." Doubtless, such is the case, but we think they should be made intelligible in the brief.

With a volume of business approximating 500 cases per annum, we cannot be expected to resort to cumbersome records and statements of fact in order to determine what questions, if any, we have jurisdiction to review. Nor do we think that section 15 of the act of 1893 contemplates that we should. That section provides that the brief of the appellant "shall clearly point out each error that the appellant relies on for a reversal"; and, in addition to the statute and the authorities cited in our former opinion, we quote, as bearing upon the subject, the following from the case of *Denton v. Woods*, 86 Tenn. 37, 5 S. W. 489: "The presumption is in favor of the correctness of the rulings and decisions of lower courts, and under the established practice in this court, unless error is affirmatively shown, an affirmance will be had. It is also presumed that every appellant is able, through his solicitor or attorney, to point out the errors upon which he relies for reversal, and not impose upon adversary counsel the labor of toiling through a large transcript like this one, speculating upon the probable grounds

of attack, nor to impose upon the court the work of reading the entire record, and passing upon the case de novo in all its bearings. Some weight must be attached to the holdings of inferior courts; and counsel must be able to point out, as required, their errors, and will not be permitted to dump in, for the consideration of the court, immense transcripts, filled with pertinent and impertinent matter, and demand their investigation upon general negatives of the correctness of decrees or judgments." The petition will be denied.

SCOTT and ANDERS, JJ., concur.

SULLIVAN et al. v. TREEN et al.  
(Supreme Court of Washington. Dec. 21, 1895.)

**MECHANICS' LIENS—NOTICE OF LIEN—SUFFICIENCY—VERIFICATION—AMENDMENT.**

1. A notice of lien for labor and material furnished on three buildings, reciting that the buildings were all situated on the same lot, giving their relative positions on such lot, and stating the amount claimed on account of each, sufficiently shows a claim of lien on the entire lot and the buildings for labor and materials furnished on all the buildings.

2. The failure of the notary before whom a lien claim was sworn to state his place of residence after his signature and official title, as required by 1 Hill's Ann. Code, § 333, may be remedied by amendment, under Laws 1893, p. 34, § 5, permitting amendments where the interests of third persons are not affected.

3. Mortgagees of property on which a lien is claimed, whose relation to the property has not been changed since the filing of the lien claim, cannot object to an amendment of the claim correcting a defective verification, made by virtue of Laws 1893, p. 34, § 5, authorizing amendments where the claims of third persons are not affected, on the ground that their interest would be prejudiced.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by L. H. Sullivan and others against O. J. Treen and others to foreclose mechanics' liens. M. F. Backus, receiver, intervened. Judgment for plaintiffs, and defendants appeal. Affirmed.

The lien notice recited that a lien was claimed on three dwellings situated on one lot, and that one of such dwellings was "upon the rear portion" of the lot, another on the "northwesterly front portion," and the other on the "southwesterly portion," and also set out the specific amount claimed on each.

Duncan G. Inverarity and Stratton, Lewis & Gilman, for appellants. James Klefer, for respondents.

HOYT, C. J. This action was brought to foreclose certain liens for material and labor upon property owned by the defendant O. J. Treen, and upon which the defendants Taylor had a mortgage. The only question presented upon the appeal is as to the sufficiency of the several lien notices. They are

each attacked upon the ground that the description of the property upon which the lien is claimed is insufficient. It appeared from each of the lien notices, as well as from the complaint, that work was performed on three different buildings, all situated on a single lot in the city of Seattle; and it is claimed by appellants that by the notices it was intended to claim separate liens upon each of such houses, and that no sufficient description of the property upon which each of said houses was situated was contained in the notices. If we were to agree with this contention, we should still be of the opinion that the lien notices were sufficient, for the reason that each of the houses was described as being upon a particular lot, and there was no particular portion of said lot which, by anything done by the owner, was set apart as necessary to be used in connection with each of the houses. That fact would therefore have to be determined by the court. It might have been possible to have described exactly the part of the lot upon which each house was situated, but it could not be presumed that other land than that actually covered was not necessary to the convenient enjoyment of each house. But, in our opinion, the notices fairly indicate an intention to claim the lien upon the entire lot and the buildings thereon situated, for all the labor done and materials furnished for all the houses; and, under the liberal provisions of the act of 1893, such description and claim were sufficient. The three lien notices were not exactly alike, but they were substantially so, and what we have said will apply as well to one as to the other.

There was an additional objection raised to the lien of M. F. Backus, receiver, and that was that there was no sufficient proof of its having been verified. The only objection pointed out was the fact that the notary before whom such lien was sworn had omitted to add to his signature and official title his place of residence.<sup>1</sup> Whether or not this omission would, upon the authority of the case of *Gates v. Brown*, 1 Wash. St. 470, 25 Pac. 914, be fatal to the lien notice, it is not necessary for us now to decide. The statute of 1893 authorized an amendment of notices of lien when the interests of third parties would not be affected thereby, and, under this provision, the court allowed this lien notice to be amended by the addition of the place of residence of the notary. That this might be done if it did not affect the rights of third parties is conceded by appellants, but they contend that the appellants Taylor, as mortgagees, are such third parties, and that their rights were directly affected by the amendment. In our opinion, the parties intended to be protected from the force of the statute allowing such amendments were only those who had acquired some interest subsequent to the filing

<sup>1</sup> This is required by 1 Hill's Ann. Code, § 333.

of the lien notice, and had no reference to those whose relations to the property had not been changed since such filing. None of the errors assigned warrant a reversal of the judgment, and it will be affirmed.

SCOTT, DUNBAR, ANDERS, and GORDON, JJ., concur.

**PUGET SOUND MACH. DEPOT v. RIGBY et al.**

(Supreme Court of Washington. Dec. 21, 1895.)

**STATUTE OF FRAUDS—CONTRACT FOR SALE OF MERCHANDISE.**

A contract for the sale of a mining and pumping plant to be manufactured in accordance with special specification, which requires the furnishing of special engines and pumps, connected by shafting specially fitted, the specially manufactured parts of which would be of little value except in connection with the plant, is not within the statute of frauds, though the bulk of the plant was made up of articles purchased as merchandise by the seller from other parties.

Appeal from superior court, King county; R. Osborn, Judge.

Action by the Puget Sound Machinery Depot against John Rigby and another. There was a judgment for defendants, and plaintiff appeals. Reversed.

Donworth & Howe, for appellant. Wm. H. Moore, for respondents.

HOYT, C. J. This action was brought to recover damages alleged to have been occasioned by the refusal of the defendants to accept and pay for a mining and pumping plant, which it was alleged they had employed the plaintiff to make and furnish for them. Upon the close of plaintiff's case, a motion for nonsuit was interposed by the defendants, and granted by the court. The only ground upon which it is claimed by the respondents that this action of the court can be sustained is that the proofs showed that the contract in question was one for the sale of articles of personal property of the value of more than \$50, and that no memorandum in writing of the contract was made and signed by the parties to be charged thereby, or by any person thereunto by them lawfully authorized. The appellant claims that the contract was not for the sale of the several articles of property to be furnished, but was for the manufacture and furnishing of a mining and pumping plant, not within the statute of frauds, and required no memorandum in writing to give it force. As to what contracts are within and what without the statute of frauds has been a question often before the courts, and from the cases no uniform rule can be formulated. It may, however, be fairly deduced from the authorities that a contract for the manufacture and delivery of an article will not be within the statute of frauds as to sales of such property

if the completed article will not be one which would, under the circumstances of the case, be a marketable commodity. If the article, when so completed, is one of special value to the one for whom it was manufactured, and would be of comparatively little value as an article of merchandise to be held for sale, the contract will be construed to be one for manufacture, and not of sale. In the case at bar there was testimony which tended to prove that the plant was to be manufactured by the plaintiff in accordance with plans and specifications furnished by the defendants; that to comply therewith it was necessary not only to furnish separate articles of merchandise like engines and pumps, but to connect them by shafting to be specially cut and fitted, and to provide special friction pulleys and other articles necessary to adapt the several parts of the plant to the purposes for which such parts were to be used in connection with the use of the entire plant; that the engines which were to constitute a part of the plant were of a special kind, and not such as were usually kept on sale; that such engines and the pump, without the connecting shafting and friction pulleys, etc., would have been of no use for the purpose for which the plant was designed; that all of the articles which it was necessary to specially manufacture and fit for the plant would be of little or no value excepting in connection therewith; and that the engines themselves were of such a nature that, excepting for the purposes of the plant for which they were ordered, they would, in this market, have but little commercial value. These facts having been so established by the evidence as to require their submission to the jury, if they were sufficient to sustain the claim of the plaintiff that this contract was one for the manufacture of the plant, and not for its sale, the action of the court in granting the nonsuit was erroneous, and the judgment rendered thereon must be reversed; and, in our opinion, they were.

It is not seriously contended on the part of the respondents but that if, after the placing of this order, the plaintiff had gone on, and itself manufactured each of the articles necessary to constitute the plant in accordance with the plans and specifications, such would have been the nature of the contract; but their contention is that, for the reason that the bulk of the plant was made up of articles which were purchased as merchandise from other parties by the plaintiff, the nature of the contract was changed. But, in our opinion, there is little ground for the distinction thus sought to be drawn. It can make little difference whether the plaintiff itself manufactured the several parts of the plant, and connected them together so as to make up the complete article ordered, or purchased the principal parts, which, as purchased, were not adapted to the use for which they were designed by the defendants; and by the application of skill and labor manufac-

tured the necessary parts to connect them so that as a whole the plant would comply with the plans and specifications for its manufacture. It seems to us that there was testimony which would have authorized the jury, under proper instructions, to find that the contract was for the manufacture and delivery of a plant which was to be the product of the skill and labor of the plaintiff; and, if this was so, and the jury found in accordance with such testimony, damages for the violation of the contract could be recovered, though it was not evidenced by a memorandum in writing. That such a contract would not be within the statute can be fairly deduced from what was held by this court in the cases of *Fox v. Utter*, 6 Wash. 299, 33 Pac. 354, and *Iron Co. v. Worthington*, 2 Wash. T. 472, 7 Pac. 882, 886; for while it is true that the exact question presented by this record was not involved in either of those cases, yet the general doctrine was announced in each of them that a contract for the manufacture and delivery of articles of personal property of the value of more than \$50 was not within the statute of frauds. The question as to whether or not the contract was one of sale or for the manufacture and delivery of the plant should have been submitted to the jury under proper instructions. The judgment will be reversed, and the cause remanded, with instructions to deny the motion for a nonsuit.

SCOTT, DUNBAR, ANDERS, and GORDON, JJ., concur.

STATE ex rel. THAYER, City Treasurer, v. MISH, County Treasurer.

(Supreme Court of Washington. Dec. 24, 1895.)

PENALTY ON CITY TAXES—OWNERSHIP—MANDAMUS TO COUNTY TREASURER.

1. The penalty and interest collected upon taxes levied for the benefit of a city belong to the city, and not to the county.

2. Mandamus will not lie, at the suit of a city, to compel the county treasurer to pay over the interest and penalty on city taxes collected and paid out by his predecessor in office.

3. Mandamus will not lie to compel a county treasurer to certify as to the moneys collected by his predecessor as penalty and interest on delinquent city taxes.

Appeal from superior court, Snohomish county; John O. Denney, Judge.

Petition for mandamus by the state of Washington, upon the relation of Stephen E. Thayer, city treasurer of the city of Everett, against W. W. Mish, county treasurer of Snohomish county. From an order granting the writ, both parties appeal. Writ denied.

Alex. Akerman, for relator. A. W. Hawks and J. W. Heffner, for respondent.

HOYT, C. J. The relator, as treasurer of the city of Everett, sought by this proceeding to obtain a writ of mandate to compel the

respondent, as treasurer of the county in which such city is situated, to render a certified return of all moneys collected as penalty and interest upon the taxes levied by the city for the year 1893, and to pay over the amount found to have been so collected. An alternative writ was issued, from which it appeared that certain sums of money had been collected by the county treasurer as penalty and interest on delinquent taxes of the city of Everett, levied for the year 1893, and that such moneys had not been accounted for, or paid over to the relator. By his answer the respondent admitted that the books of his office showed that certain sums of money had been collected by his predecessor as penalty and interest upon said delinquent taxes, but averred that the same had been by such predecessor credited to the general fund of the county, and paid out on warrants regularly drawn upon such fund. It was further admitted by said answer that said respondent had collected the sum of \$22.90 as penalty and interest upon said delinquent taxes. The relator moved the court that a peremptory writ issue, notwithstanding the answer of the defendant. The court ordered that a writ issue, commanding said respondent to pay over to relator the sum of \$22.90, but refused to compel him to account for or pay over moneys collected by his predecessor in office. Both parties appealed, and on the part of the relator it is contended that the writ should have commanded the county treasurer to pay over the money collected by his predecessor, as well as that collected by him, or that, at least, it should have required him to make a certified return as to the amount of moneys so collected, as prayed for in the application for the writ. The respondent, as appellant here, contends that the relator was not entitled to any relief at all, and that that part of the order which commanded him to pay over the sum of \$22.90 should be reversed and set aside. The ground upon which he claims that this part of the order should be reversed is that the interest and penalty collected upon said taxes should be paid into the county treasury for the use and benefit of the general fund.

In the case of *School Dist. v. Hedges* (decided Nov. 14, 1895) 42 Pac. 522, we were called upon to decide, as between the school district and the county treasurer, the proper disposition of the penalty and interest collected upon taxes levied for the benefit of the school district; and, upon full consideration, we held that the penalty, when collected, belonged to the same fund as the tax upon which it was assessed. The principle involved in that case was the same as the one which we are called upon now to decide, and, under it, it must be held that the penalty and interest collected upon taxes levied for the benefit of the city belonged to it, as much as the taxes so levied. This substantially disposes of the claim to reversal of



that part of the order from which an appeal was prosecuted by the respondent in the court below.

The contention of the relator, above stated, presents two questions, the important one being as to whether or not a writ of mandate will issue to compel a county treasurer to pay over money which has never come into his possession. The argument of relator is to the effect that the relief is sought against the respondent as an officer, and not as an individual; that the office is a continuing one, and the rights of those having business therewith are not affected by any change in its incumbents. As to some rights, this position is undoubtedly correct, but mandamus is an extraordinary remedy, and will only issue to compel an act which it is clearly the duty of the officer to perform; and it cannot be said that it is the duty of the present incumbent of the office of county treasurer to pay over money not in his hands, and which had been paid out without any fault on his part. If the money had been wrongfully disposed of by him, there would be some foundation for the contention that he should not be allowed to plead his own unlawful act as a reason for refusing to do his duty; but even in that case the courts have held that the remedy of one who had, by such unlawful acts, been deprived of money to which he was entitled, was not by mandamus. In *Bates v. Porter* (Cal.) 15 Pac. 732, this exact question was before the court, and it was there held that the fact that the money to which the relator was entitled had been unlawfully paid out by the respondent furnished no foundation for relief by mandamus, if it appeared that the money was not, at the time of the application for the writ, in the hands of the respondent. The case of *Redding v. Bell*, 4 Cal. 333, though not so clearly in point as the one just cited, sustains the same principle, and no authorities to the contrary have been called to our attention. So that it is probable that, even if the respondent had unlawfully paid out the money, the remedy of the relator would not have been by mandamus. If the city of Everett had any remedy against the county for moneys which were paid out by the predecessor of the respondent, it was by an action against the county to recover the sum so paid out.

We think the court was also right in refusing to compel a certified return of the moneys collected as penalty and interest. This relief could have been rightfully refused for the reason that it was joined with a claim for other relief to which the relator was not entitled, but, aside from that technical reason, the relator could not, upon facts which showed that his principal grievance could only be righted by an action against the county, procure by mandamus relief which, at most, would be only incidental to such principal relief.

The superior court came to the proper conclusion, and though it is possible it might

have been justified in refusing the relator any relief, for the reason that he was not entitled to all, a reversal of that part of the order which granted such relief has not been sought upon that ground; and this being so, and the relator having been shown to have been entitled to that part of the order, if he had asked for no more, it will not be disturbed. The order of the superior court will be in all things affirmed; neither party to recover costs.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

### JACKSON v. McAULEY et al.

(Supreme Court of Washington. Dec. 24, 1895.)

APPEAL—REVIEW—PLEADING—DEMURRER—HARMLESS ERROR—COVENANT FOR QUIET ENJOYMENT—BREACH.

1. Findings of fact by the court cannot be reviewed on appeal unless exceptions were taken thereto.

2. A complaint is not demurrable on the ground of the pendency of another action unless such fact appears on the face of the complaint.

3. Error in overruling a demurrer for misjoinder of parties defendant is not ground for reversal, where the cause was subsequently dismissed as to the defendant alleged to have been improperly joined.

4. A covenant for quiet enjoyment is broken by the eviction of the grantee by reason of the foreclosure of a mortgage executed by the grantor prior to the conveyance.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Frances Jackson against Angus McAuley and others. From a judgment for plaintiff, defendants M. A. Schwab and another appeal. Affirmed.

Charles F. Fishback and James B. Dowd, for appellants. Wm. Martin, for respondent.

HOYT, O. J. This was an action for damages for breach of a covenant of warranty contained in a deed made by the appellants M. A. Schwab and Franziska Schwab to Angus McAuley, conveying certain real estate, which was afterwards, by said McAuley, by warranty deed, conveyed to the plaintiff. After a demurrer to the complaint had been interposed and overruled, an answer was put in by the appellants, which was replied to by the plaintiff. Upon the issues thus made the cause went to trial before the court without a jury, and findings of fact and conclusions of law were made and filed; and thereupon judgment in favor of the plaintiff was rendered, from which this appeal is prosecuted.

From the record it is not made to appear that there were any exceptions to the findings of fact; and the result, under the rule established by numerous decisions of this court, is that such findings must be taken to be true, and, if they are sufficient to support the judg-

ment rendered, it will not be reversed by reason of the fact that the evidence is not sufficient to support the findings. It is not contended in the appellants' brief but that the judgment in the case at bar is sustained by the findings; hence, none of the exceptions taken during the trial can be of any avail.

The only alleged error which, under the state of the record, we can investigate, is that founded upon the action of the court in overruling the demurrer to the complaint. This demurrer was upon three grounds: (1) That there was another action pending between the same parties, and as to the same subject-matter; (2) misjoinder of parties defendant; (3) that the complaint did not state facts sufficient to constitute a cause of action. There was nothing upon the face of the complaint which in any way indicated that there was another action pending, as to the same subject-matter, between the same or any other parties; and, since a demurrer can only reach defects which appear upon the face of the complaint, this ground of demurrer was without any foundation. If there was a misjoinder of parties defendant, that fact furnishes no ground for the reversal of the judgment, for the reason that the cause was dismissed as to the defendant which it was claimed had been improperly joined with the appellants. The reason for claiming that the complaint did not state a cause of action, as we gather it from appellants' brief, was that the covenant contained in the deed was one only for quiet enjoyment, and that the breach shown in the complaint was the existence of an incumbrance upon the property. The facts alleged in the complaint were that the appellants, before making the deed in which the covenant was contained, executed a mortgage to one William S. Ladd; that said mortgage had been foreclosed in an action to which the appellants were parties, and the property sold in pursuance of a decree rendered in said action, and the purchaser at such sale put in possession of the property by the sheriff. That the ouster alleged was sufficient to have constituted a breach of the covenant is conceded by appellants, but they claim that it did not constitute a breach of the covenant of warranty, for the reason that it did not appear that such ouster was by superior title. But we think that such fact did appear. When the deed was made which contained the covenant, the mortgage was in existence as an outstanding claim upon the land, and the deed was subject to the mortgage; and, if it was, the rights under the mortgage must have been superior to those under the deed. The argument of appellants to the effect that there would never be any need of a covenant against incumbrances, if the one for quiet enjoyment was to be construed as this one was by the trial court, cannot be sustained. If one is content to take a deed with a covenant for quiet enjoyment only, he can have no relief until his possession is disturbed by one claiming under a su-

perior title. He could have no relief whatever by reason of the fact that there was a mortgage upon the property at the time the deed was made, until the rights under the mortgage had been so asserted as to interfere with his possession; whereas, if the deed had contained a covenant against incumbrances, a right of action would have accrued upon the delivery of the deed, if at the time there was an outstanding mortgage upon the property. It is true that at the time the deed was executed the mortgage was only a lien upon the property, but the rights of the holder were to have that lien enforced against the property in the hands of the grantee of the mortgagor, and by means of it to have the title conveyed taken away. The right to evict the plaintiff had its source in the mortgage, and therefore the rights under it must have been superior to the title conveyed to the plaintiff. The judgment must be affirmed.

ANDERS, SCOTT, and GORDON, JJ., concur.

DUNBAR, J. I concur in the result.

COCHRANE v. VAN DE VANTER et al.<sup>1</sup>  
(Supreme Court of Washington. Dec. 27, 1895.)

TRIAL COURT—JURISDICTION OVER JUDGMENT AFFIRMED ON APPEAL.

After a judgment has been affirmed on appeal, the trial court has no jurisdiction of a suit to enjoin the enforcement of said judgment.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by William Cochrane against A. D. Van de Venter and another to enjoin the enforcement of a judgment recovered against plaintiff. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Stratton, Lewis & Gilman and E. S. Lyons, for appellant. Williamson & Franklin, for respondents.

DUNBAR, J. On the 22d day of November, 1890, the respondent Gunderson obtained a judgment against the appellant Cochrane for the sum of \$500 and costs, with interest thereon from the said 22d day of November, at the rate of 10 per cent. per annum, from which judgment the said Cochrane appealed to this court. Said appeal was dismissed, and said judgment affirmed, with costs of said appeal to the appellant. It may be in order to state that there were two attempts by the appellant to sustain this appeal, both of which were denied by this court. After a petition for rehearing had been denied, and the remittitur returned from this court to the superior court, affirming the judgment of the superior court, the appellant commenced an

<sup>1</sup> Rehearing denied.

action in the equity department of the superior court of King county to restrain the respondents from carrying into effect the judgment of this court until the cause could be retried. To this complaint or petition the respondents demurred, for the reason that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court, upon which the appellant filed a bond to stay proceedings; and this is a motion to dismiss the appeal, on the ground that this court has no jurisdiction of an appeal from the orders from which the appeal was taken, or an appeal from either of said orders. Respondents move the court to affirm said orders, and further move for damages to be paid by the appellant to the respondents, on the ground that such appeal was and is manifestly unauthorized by law, and that it was taken merely for delay.

We do not think it is necessary to pass upon the first contention of the respondents in their motion, viz. that the order appealed from is not an appealable order, for we think the second contention is fully sustained, viz. that the lower court had no jurisdiction of the subject-matter of the action, and, not having jurisdiction of the subject-matter of the action, such jurisdiction could not be conferred by consent, even if the consent of the respondents could be gathered from the record. The latter proposition is so universally accepted as the law that the citation of authorities is not called for.

As to the first proposition,—the want of authority in the superior court to in any way interfere with the judgment of this court,—it was decided by this court in the case of *State v. Superior Court of Spokane Co.*, 7 Wash. 234, 34 Pac. 930, that the judgment of the supreme court upon an appeal from an equity cause which, by our statute, is required to be tried *de novo* in the appellate court, cannot be modified by the superior court after the cause has been remanded. It was said by the court in that case: "It is certainly questionable, and we very much doubt, whether the superior court has authority to entertain any such petition in a law action, even when an appeal has been taken to this court and a judgment rendered finally disposing of the case." That case was decided on the theory that an equity cause brings to this court the entire case for a trial *de novo* upon questions of law and fact. The same reasons for holding that the judgment of the supreme court in that case should not be inquired into, qualified, or set aside by the lower court attach in this case. If the petition of the appellant should be successful, the result would be a retrial of the original cause, and that was the identical question which was passed upon by this court on the motion for the affirmance of the judgment. We held in *Davis v. Fields*, 9 Wash. 78, 37 Pac. 281, that an independent action

or proceeding would not lie for the purpose of setting aside a judgment rendered in a former suit between the same parties, when the action was based upon the error of the court in setting aside a verdict in such suit where no appeal was prosecuted in said former action. This is a stronger case, for an appeal was attempted here, and it was twice decided by this court that the appellant had not availed himself of the law which allowed him an appeal under certain conditions, and the judgment of the lower court was affirmed, becoming, in effect, the judgment of this court; and it seems that it ought not to be necessary to fortify with argument an announcement of the proposition that a judgment of the supreme court of a state could be set at naught by any action of an inferior tribunal. If such practice were tolerated, nothing would be gained by an appeal to this court. The losing party could commence his action again in the superior court, and, if the decision was against him, appeal to this court, and, in case of failure here, commence another action, and so on *ad infinitum*, and the judgment of a court would represent the paradox of a benefit without value. The court below, then, having no jurisdiction, jurisdiction cannot be conferred upon this court to try the cause any further than to affirm the judgment under the statute. The motion will therefore be sustained, and the judgment will be affirmed, with costs to the respondents.

HOYT, C. J., and ANDERS, GORDON,  
and SCOTT, JJ., concur.

#### STATE ex rel. GUNDERSON v. SUPERIOR COURT OF KING COUNTY et al.

(Supreme Court of Washington. Dec. 11, 1895.)

##### PROHIBITION—PRIVATE PERSON.

1. After the court has sustained a demurrer to a complaint in a suit to restrain the enforcement of a judgment, a writ of prohibition will not issue to prevent the court from interfering with said judgment.

2. Prohibition will not lie to prevent a private person from acting.

Application for writ of prohibition by the state, upon the relation of Gust Gunderson, against the superior court of King county and another. Writ denied.

Williamson & Franklin, for petitioner.  
James Hamilton Lewis, for respondents.

GORDON, J. This is an original application for a writ of prohibition, directed to the superior court for the county of King, and to the judges thereof, and also to William Cochrane, prohibiting and restraining the said court and its judges and the said Cochrane from proceeding with, or permitting any proceedings interfering with, certain judgments

recovered by the relator herein against the said Cochrane. From the affidavit in support of the application it appears that the relator recovered a money judgment against the said Cochrane in the superior court of said county, from which judgment said Cochrane appealed to this court, and said appeal was thereafter dismissed. Subsequently said Cochrane brought an action in said superior court for the purpose of restraining and enjoining the enforcement of said judgment. From an adverse decision in the court below, he brought the case to this court upon appeal, which appeal was also dismissed, and the judgment of the lower court affirmed. Thereafter said Cochrane instituted another proceeding in the superior court of said King county, for the purpose of restraining the relator from enforcing his said judgment, and the sheriff of said county from levying any execution, and perpetually enjoining them from interfering with the property of the plaintiff, etc. To the complaint in this last-named action the relator interposed a demurrer, which the lower court sustained, and from said order and judgment thereupon it also appears that the said Cochrane has given notice of appeal to this court.

We deem it unwise to enter upon a discussion of the merits of the various proceedings upon the part of the said Cochrane, for the purpose of defeating the judgment at law recovered against him, as they are not involved in the present proceeding. Regardless thereof, we are satisfied that the present application cannot be sustained. Prohibition, being an extraordinary remedial process, issues only in cases of extreme necessity, and should never be granted until the aggrieved party has applied in vain to the inferior tribunal for relief; and "it does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal; \* \* \* nor should it be granted except in a clear case of want of jurisdiction in the court whose action it is sought to prohibit." High, Extr. Rem. (2d Ed.) § 765. It differs from an injunction against proceedings at law in this: that an injunction in such case is directed only against the parties litigant, and does not interfere with the court; "while a prohibition is directed to the court itself, commanding it to cease from the exercise of a jurisdiction to which it has no legal claim." Id. § 763. And prohibition does not lie to set aside judicial acts already done. Hull v. Superior Court, 83 Cal. 179. As already noticed, the superior court of King county has sustained the relator's demurrer to the proceeding instituted by Cochrane in that court. The court has already acted, and its action was invoked by the relator tendering a demurrer to the complaint in this action. It seems plain that the court has assumed no jurisdiction not conferred by law. As to the respondent Cochrane, it is equally clear

that prohibition will not lie to prevent a private person from acting. Its office is to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction. It is a remedy for the encroachment of jurisdiction. *Camron v. Kenfield*, 57 Cal 550. We think that the relator has mistaken his remedy, and the writ will be denied.

HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, JJ., concur.

#### STATE v. MURPHY.

(Supreme Court of Washington. Dec. 14, 1895.)

HOMICIDE—PLEA OF FORMER ACQUITTAL—HARMLESS ERROR—NEW TRIAL—REQUESTED INSTRUCTIONS.

1. A conviction of murder in the second degree on an indictment for murder in the first degree is an acquittal of murder in the first degree. Dunbar, J., dissenting.

2. Where a reversal of a conviction of murder in the second degree on an indictment for murder in the first degree is had, and defendant is again indicted for murder in the first degree, error in sustaining a demurrer to plea of acquittal of murder in the first degree on the former trial is harmless, where, on the second trial, he was again convicted of murder in the second degree.

3. A new trial in a criminal case cannot be granted on an affidavit on information and belief of misconduct of the jury.

4. Where instructions in a criminal case, considered together, correctly and sufficiently stated the law, refusal of requested instructions is not ground for reversal.

Appeal from superior court, King county; T. J. Humes, Judge.

James Murphy was convicted of murder in the second degree, and appeals. Affirmed.

S. H. Piles and J. T. Ronald, for appellant. A. W. Hastie, for the State.

HOYT, C. J. Defendant was charged with the crime of murder in the first degree. A trial was had, which resulted in a verdict of guilty of murder in the second degree. From the judgment rendered upon such verdict, appeal was taken to this court, where the judgment was reversed, and the cause remanded. 37 Pac. 420. When the cause was again called for trial, defendant interposed a plea of former acquittal of murder in the first degree, and asked to be put on trial for murder in the second degree. The state answered the plea, and, upon demurrer of appellant, the superior court held that the plea of former acquittal was not sustained, and allowed the defendant to be again put on trial for murder in the first degree. Upon such trial, defendant was again convicted of murder in the second degree, and, from the sentence imposed, has prosecuted this appeal.

His first contention is that the action of the court in overruling his plea of former acquittal of the crime of murder in the first degree was erroneous, and entitles him to a

reversal of the judgment and sentence. The question raised by this contention has been often before the courts, and the decisions upon it have not been entirely uniform. By far the greater number have held in accordance with the contention of the appellant, and, although some courts of high repute have held to the contrary, it must be conceded that, if the question is to be decided upon authority, the contention of appellant must be sustained. In principle, the decision must depend upon the nature of an information for murder in the first degree, and a verdict rendered thereon in its relation to the lower grades of felonious homicide. That a verdict of guilty of murder in the second degree or manslaughter may be properly rendered against a defendant charged with murder in the first degree is universally conceded. If this is so, it must be for the reason that an information charging murder in the first degree also charges murder in the second degree and manslaughter, since it is familiar law that a person cannot be convicted of a crime without first having been charged therewith by indictment or information. It is the duty of the court to see that the verdict of the jury covers the subject-matter of the charge by finding the defendant either guilty or not guilty; and, since in every charge of murder in the first degree is included a charge of murder in the second degree and manslaughter, it is the duty of the court to see that a verdict of either guilty or not guilty is returned as to each of these charges. The practice of requiring a verdict which in form finds as to only one of such charges is so universal that it must be held to have been founded upon correct principles. It follows that the rendition of such single verdict is, in fact, the rendition of a verdict as to every grade of the offense included in the information; that, upon the charge of murder in the first degree, the rendition of such single verdict must, at least, include a verdict of guilty or not guilty as to murder in the first degree, murder in the second degree, and manslaughter. This can only be so upon the theory that a verdict of guilty as to any grade of the crime included in the information is a verdict of not guilty as to the higher grades, and of guilty not only of the grade mentioned in the verdict, but of every lower grade. The logical result of this course of reasoning, which seems necessary to sustain the practice as to receiving verdicts where the information charges a crime with lower grades, is that, for the purposes of such verdict, the defendant is upon trial upon a separate information for each of such grades. If this be so, reason will require that, in determining the result of any verdict, it should be in the light of the fact of such separate charges. A defendant upon trial for the crime of murder in the first degree could not be again put upon trial for that offense after a general verdict of not guilty; and, since the effect as to that grade

of the crime of a verdict of guilty of a lower grade is the same as a verdict of not guilty, a verdict of guilty of the lower grade should protect from further prosecution for the higher grade.

The respondent seems to rest its contention upon the claim that the verdict is entire, and relates to all grades of the crime, and, when vacated, has no longer force as to any grade. But the practice of allowing such verdicts is better sustained upon the theory that the verdicts as to all of the grades are several; and, if they are, there seems to be no ground upon which the contention of the appellant can be successfully met. The question has been so often discussed in all its bearings that it is not necessary for us to say more than that the cases which have held as contended by the appellant are so fully sustained upon reason that, even if the authorities were equally divided, we should be inclined to sustain such contention; and, in view of the fact that such an overwhelming weight of authority is upon that side, our duty is clear. This question has been heretofore substantially determined by this court. The directions as to the disposition to be made in the superior court of the cases of *State v. Freidrich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, and 31 Pac. 332, and *State v. Robinson* (decided July 17, 1895) 41 Pac. 51, could only have been properly given upon the theory that a verdict of guilty of murder in the second degree was also, in legal effect, a separate verdict of not guilty of murder in the first degree and of guilty of manslaughter.

Was the defendant injured by this ruling? Respondent contends that he was not, for the reason that he was not convicted of a higher crime than that for which he was rightfully put upon trial, and with this contention we feel compelled to agree. The argument against it is founded almost entirely upon presumed misconduct on the part of the jury. Such argument is to the effect that some of the jurors might have been convinced that the defendant was guilty of murder in the first degree, and others that he was guilty of manslaughter only, and the result might have been the verdict of guilty of murder in the second degree brought about by compromise. There might be force in this argument were it not for the fact that it is the duty of each juror to come to a conclusion for himself, and it will not be presumed that, for any reason of convenience or policy, a juror consented to any other verdict than that of which he believed the defendant guilty. The defendant could have been rightfully put upon trial for murder in the second degree, and, under the circumstances disclosed by this record, the course of the trial would have been the same that it was upon the charge of murder in the first degree; and, since it must be presumed that the evidence warranted the verdict, the same evidence would have warranted a like verdict if he

had been put upon trial charged only with the crime of murder in the second degree. The error of the court in overruling the plea of former acquittal as to the charge of murder in the first degree, for these reasons, did not affect any substantial right of the defendant.

The next error is founded upon the action of the court in denying defendant's motion for a new trial. This motion was founded principally upon allegations in an affidavit made by the defendant as to the misconduct of the jury. But such affidavit did not furnish any such evidence of misconduct as to authorize the court to act upon it. The affiant did not claim any knowledge upon the subject, but only that he had been informed and believed as to the facts charged. The presumptions surrounding the verdict of a jury are necessary, and can only be overcome by the competent testimony of some one having knowledge upon the subject.

The other errors assigned grow out of the action of the court in instructing the jury, and in refusing to give certain instructions asked for by the defendant. We do not deem it necessary to discuss each separate criticism made by the appellant upon the instructions. It is enough for us to say, as to the instructions given, that we have carefully examined them; and while it is true that certain isolated parts may have contained statements which, if taken alone, would have tended to the prejudice of the rights of the defendant, these parts, taken in connection with the other instructions given, correctly state the law of the case, and all of the law which it was necessary for the jury to have that they might arrive at a correct conclusion. This being so, the fact that the court refused to instruct as requested by the defendant would not entitle him to a reversal of the judgment. The rights of the defendant seem to have been carefully protected by able counsel, and by correct action on the part of the court, and the judgment and sentence will be affirmed.

ANDERS, SCOTT, and GORDON, JJ., concur.

DUNBAR, J. I do not believe that the refined distinctions discovered and indorsed by the majority exist in fact, or are founded in reason, and hence they ought not to have any place in the practical operations of the law. To my mind the common-sense idea is that, when a defendant convicted of murder or any other crime seeks and obtains a new trial, it is a new trial which is accorded him, and not a trial for some other crime, and that he should be compelled to enter into the new trial subject to the same penalties that confronted him on the first trial. The whole object in granting him a new trial is to insure him a trial freed from the errors which prejudiced him in the first. But, as the majority has found against the appellant on another proposition, I concur in the result.

# MORFORD v. FRYE et al.

(Supreme Court of Washington. Dec. 18, 1895.)

## APPEAL—REVIEW—EVIDENCE—BUYING HAY IN STACKS—MEASUREMENT.

1. In the sale of hay in stacks the measurements of all the stacks were taken, but only one stack was baled, it being agreed that the tonnage of the others should be calculated from the one baled as a basis. After the hay was delivered, the seller gave the buyer a statement of the number of tons calculated in a certain way. The buyer responded that he had calculated the tonnage in the same way, and found that the seller had made a mistake. *Held* that, in an action for a balance alleged to be due on the price, a finding, based merely on the buyer's testimony, that it was not agreed that the contents of the stacks should be calculated in the manner used in the seller's calculation, would be set aside as against the evidence, it also appearing that the buyer had paid more than the proper price if the tonnage was to have been calculated in the manner testified to by him. Gordon, J., dissenting.

2. Where hay in stacks is sold under an agreement that all of the stacks should be measured in a certain way, and the actual weight of one stack should be taken, it will be presumed that the object of such measurements and of the weighing of one stack was to establish the rule that, as the measurement of the stack to be weighed was to the actual weight thereof, so the entire measurements of the stacks were to the entire weight thereof.

Appeal from superior court, King county; R. Osborn, Judge.

Action by S. O. Morford against C. H. Frye and others. From the judgment, plaintiff appeals. Reversed.

Frank H. Rudkin, for appellant. Mitchell Gilliam, for respondents.

HOYT, C. J. This action was brought to recover a balance alleged to be due for the purchase price of certain stacks of hay sold and delivered by the plaintiff to the defendants, and for a balance alleged to be due for feeding said hay to the stock of the defendants. There was no dispute as to the fact of the sale and delivery of a certain number of stacks of hay, nor of the fact of its having been fed to the stock of the defendants by the plaintiff; and the amount of money paid by the defendants to the plaintiff was agreed upon. The difference between the parties arose from their respective claims as to the number of tons of hay contained in the stacks sold. Upon this question it was stipulated that, at the time the hay was purchased, the entire 24 stacks were measured by the plaintiff and the defendants, and the following dimensions thereof taken: (1) The length of each stack; (2) the distance over the top of each stack from base to base; and (3) the width of each stack; and the dimensions of each of the stacks so measured were also stipulated. It was further stipulated that, at the time of such sale and delivery, it was agreed between the plaintiff and the defendants that one certain stack should be baled and weighed as a basis for ascertaining the whole number of tons of hay in the 24

stacks. It was further admitted that the stack designated as the one to be baled was baled and weighed, and found to contain 25½ tons. The plaintiff claimed that, as a part of the agreement by which these measurements were taken and the one stack baled and weighed, it was understood that the cubical contents of each stack should be determined by multiplying the length by the width, and that product by one-third of the distance over from base to base, and introduced testimony tending to show that such was the fact. The defendants claimed that there was no agreement as to the method to be taken to determine from the measurements the cubical contents of each stack, and introduced testimony tending to prove such claim. Some time after the hay was delivered, the plaintiff presented a claim to the defendants, in which the amount of hay in the several stacks, as compared with that in the stack weighed, was figured in accordance with the rule which it was claimed by him had been agreed upon between the parties. Upon receiving such claim and statement, the defendant who, for himself and the other defendants, had transacted all of the business connected with the purchase of the hay, wrote the plaintiff three letters, of which the following are copies:

"You certainly made a mistake in your figures on the hay. The number of cubic feet in the stack we baled are 15,598 feet, instead of 13,324 feet, the figures you gave me. That will cut quite a figure in the number of tons. I figured that same as you did, dividing the over by three, and multiplying that by the base and length. Please look over your figures, and try again."

"You certainly must have made a mistake in your figures. Figuring on a basis that that stack weighed out, I make it 482¼ tons, at 4.75,=\$2,290.70. I paid you on Nov. 12th \$1,504.60, on Dec. 10th \$500.00, leaving a balance due you, \$286.10, for which you find inclosed a check payable to your order. I counted the figures on that board carefully, and made them 50,090  $\frac{1}{2}$ , but I figured the stack at 50,250  $\frac{1}{2}$ . Mr. Spilan says there was about 100  $\frac{1}{2}$  left in his baler. Think you will find these figures correct. If I made a mistake, I will rectify it."

"Inclosed find cheque of \$307.81, balance due you for feeding cattle and wire. I have gone over my figures carefully, and they are correct. I figured the hay as per contract."

It is contended by the plaintiff that these letters furnished absolute proof of the correctness of his contention as to the manner in which the cubical contents of the several stacks of hay were to be determined, and that their force was such as to estop the defendants, in the absence of any allegation of mistake or fraud, from claiming the right to estimate such contents by any other rule. There is force in this contention, and, if it were necessary to the decision of the case, we should probably sustain it. But it is not

necessary to determine as to the exact legal effect of these letters. It is enough for us to say that they furnished such confirmation of the testimony of the plaintiff, and were so contradictory of that offered on the part of the defendants, that the findings of fact by the trial court, in accordance with the claim of the defendants, were so clearly against the evidence that, notwithstanding the force which must here be given to the findings of fact of the trial court, they cannot be allowed to stand. There was no fact shown by the testimony of the defendants which offered any adequate excuse for having written these letters, if the facts in reference to the manner in which the hay was to be estimated were as contended for by them; while their having been written is consistent with all of the facts in the case upon the theory as to measurement testified to by the plaintiff. Not only was the testimony of the defendants contradicted by these letters, but it was further contradicted by the fact that they paid the plaintiff fully for the hay upon an estimate made by them upon the basis contended for by the plaintiff, and, from all that appears, would have paid him all he claimed if they had not made a mistake in figuring the cubical contents of the stack agreed upon as a basis. That they did not then contend for the rule for finding such contents upon which they now rely is made further to appear by the fact that they paid the plaintiff quite an amount more than the hay would have come to estimated upon that basis.

Under all the circumstances, we think the findings of the superior court upon the proofs as to the method to be adopted in estimating the cubical contents of the stacks should have been in accordance with the claim of plaintiff; and as there is no dispute as to the fact that, when so estimated and reduced to tons by comparison with the measurements of the stack weighed, the amount of hay sold and delivered was as stated in the complaint of plaintiff, the findings of the court should have conformed to the claim stated in the complaint.

But it is not necessary for the determination of this case to decide this disputed question of fact, for the reason that if, as claimed by the defendants, there was no agreement as to how the cubical contents of each stack should be determined from the measurements taken by the parties, it would follow, as a matter of law, from the fact of the measurements of each stack having been taken, and the agreement made that one stack should be baled and weighed as a basis for ascertaining the amount of hay in all the stacks, that, as the measurements of the stack to be weighed were to the tons found in such stack by weighing, so would the total similar measurements of all the stacks be to the total number of tons contained therein. The result from the solution of this proportion will be found to correspond with the

claim of the plaintiff. When it was agreed that all of the stacks should be measured in a certain way, and that the actual weight of one of the stacks should be determined as a basis for determining the weight of all, the law, in the absence of any other agreement, would presume that the relation of the weight to the measurements taken of the stack to be weighed was the same as the measurements to the weight of the other stacks. In the absence of some agreement as to the method by which the cubical contents of each stack should be determined by the measurements taken, the law would presume that the object of such measurements and the weighing of one of the stacks as a basis for estimating the weight of all would be for the purpose of enabling a compound proportion to be stated as above set forth.

It follows that as a matter of law, even if the testimony of defendants be taken as true, their contention as to the amount of hay contained in the stacks cannot be sustained. It is therefore unnecessary for us to determine the question of fact raised by the contradictory proofs on the part of the plaintiff and defendants. But in view of the fact that, in our opinion, the trial court failed to give the force which it should to the admissions in writing on the part of the defendants, we have thought it necessary to say that, upon all of the proofs, the findings of fact could not be sustained. The judgment will be reversed, and the cause remanded, with instructions to enter a judgment for the amounts claimed by the plaintiff.

DUNBAR, SCOTT, and ANDERS, JJ., concur.

GORDON, J. I am not convinced that the findings were without competent evidence to support them; hence I respectfully dissent.

#### LEAKE v. HAYES et al.

(Supreme Court of Washington. Dec. 11, 1895.)

#### PARTITION—RIGHT TO RECOVER TAXES PAID—IMPROVEMENTS BY TENANTS IN COMMON—APPEAL.

1. Where, in partition, it appears that the improvements placed on the lands by a tenant in common are equal to its rental value while he was in possession, he is entitled to recover such portion of the taxes on the land paid by him while in possession as inured to the other tenants in common.

2. Appellee cannot, by offering to permit a judgment to be modified in respect to a certain error after an appeal has been perfected, deprive appellant of his right to demand a reversal for such error.

3. Where one tenant in common, in good faith, under the belief that he is the owner, makes valuable improvements on the common estate, he is entitled, in partition, to be allowed their present value.

4. Where one tenant in common enters on the common estate, which yields no profit, and so improves it as to make it productive, he is entitled to all the profits produced by means of such improvements, without being charged with

the increase in value occasioned by such improvements.

5. A husband, making improvements on land in which his wife is a part owner, under the belief that the land belongs to her, cannot recover the value of the improvements in an action by the other tenant in common for partition.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Florence Washburn Leake against Ella Washburn Hayes and others. From the judgment, defendants Charles Hansen and wife appeal. Reversed.

C. C. Bitting, for appellants. Frank Quinby and Million & Houser, for respondent.

ANDERS, J. This was an action for partition of certain real estate situated in Skagit county, and which, it is conceded, was formerly the community property of Charles Washburn and Mahala Washburn, his wife, the latter being the defendant Mahala Washburn Hansen, and the wife of Charles Hansen. In July, 1880, Charles Washburn died, leaving, him surviving, his widow, Mahala Washburn, and five minor children, of whom the plaintiff and respondent is one. Another child was born some two months after the death of the father. Subsequently two of the minor children died. The remaining four are all parties to this proceeding, three of them being defendants. Prior to his death, Charles Washburn made a will, by which he devised the whole of his property, real and personal, to his wife, Mahala Washburn, now Hansen. This will was duly admitted to probate, and the said devisee was appointed executrix by the probate court. Thereafter a decree was entered declaring the said Mahala Washburn to be the owner of all the real estate in question, by virtue of the provisions of the will of her said deceased husband. She remained in possession of the premises, with her children, after the death of her husband, and has ever since occupied the same, always believing, as she claims, prior to the judgment of the court herein, that she was the sole owner thereof. In the year 1882 she married the defendant Charles Hansen, who, with her, has occupied the premises ever since said marriage. It is claimed by the defendants Hansen that, at the time of the death of Charles Washburn, and up to the time of the marriage of said defendants, but a small portion of the land in controversy was capable of cultivation, and that the whole tract was of comparatively little value; but that since that time it has been, by the labor and means of the defendant Charles Hansen, rendered fit for cultivation and profitable use, and its value greatly enhanced. Plaintiff, in her complaint, alleged facts showing a tenancy in common between her and the other children of the deceased and her mother, the defendant Mahala Hansen. She also alleged that the defendants Mahala Hansen and Charles Hansen have for the last seven years had exclusive control and use of



the premises described in the complaint, and have collected the rents and profits, the reasonable value of which is \$1,000; and she prayed for a partition, and that said defendants be required to account for the said rents and profits. The defendants Charles Hansen and Mahala Hansen answered, alleging, among other things, the making of the will by Charles Washburn, the probate thereof, and the decree of the probate court, and averring that by virtue of said will and decree the defendant Mahala Hansen became the sole owner of the land sought to be partitioned, and that the plaintiff and the other children of said deceased had no interest therein or title thereto. A reply was filed, denying all the material allegations of the answer. Upon the issue thus formed the question of title was tried by the court. At the trial the court adjudged the will void as to the children of the testator, for the reason that it neither made mention of nor provided for them, as required by law, and that the probate proceedings were likewise invalid. By consent of all parties, the defendants Hansen then filed an amended answer, setting out the death of Charles Washburn, the circumstances in which his family were left at the time of his death, the unfitness of the land to furnish subsistence for the family, the fact of the execution of the purported will of the deceased, the inability of the widow to employ or pay lawyers to advise her concerning said will, and her ignorance of the law concerning the same, the probate of the will, and the belief by the defendants that said Mahala Hansen was the sole owner of the property by reason of the will and the decree of the probate court, an account of the receipts from the land, together with the expenditures for the support of the family, and the character and cost of the improvements, and asking for specific relief on account of such improvements. A reply was filed to this amended answer, alleging, affirmatively, that the claim for improvements prior to the year 1891 was barred by the statute of limitations. The cause was then set for trial upon the question of rents, profits, and improvements, and when it came on for hearing the plaintiff objected to any claim for improvements on the ground that, "the defendants having held possession and claimed title to the property, they are not entitled to any improvements made, except in so far as they may offset the rents and profits," which objection was sustained, and the offer of the defendants to show the character and the value of their improvements rejected, counsel for plaintiff having admitted in open court that the value of the improvements equaled the value of the rents and profits. The defendants thereupon asked leave to withdraw the answer on which the ruling of the court was based, and to file an amended answer because of "mistake of former counsel," and "in aid of substantial justice between the parties," which request was denied by the

court, and exception taken. It seems that the trial court disallowed all claims for taxes paid by the defendants on the land, and rendered judgment establishing the interests of the various parties, and for a partition according to such interests, excluding all claims for improvements and other relief asked for by the defendants, and appointing a referee to make partition and report his doings to the court, as provided by law. In determining the interests of the several parties in the land in dispute, the court found and adjudged that the defendant Charles Hansen had no individual interest therein, claim thereto, or lien thereon, by reason of labor performed or improvements made thereon by him. The defendants Hansen have appealed, and here allege and insist that the trial court erred in denying their request to withdraw their original answer, and in ruling that, because they had held the premises adversely, they were not entitled to compensation for improvements in excess of the rents and profits, and in refusing to permit them to show the character and value of the improvements in accordance with the allegations of the amended answer.

As to the point that the court erred in refusing to allow appellants to withdraw their original answer, it is sufficient to observe that, in our opinion, the action of the court was right. In any event, it was the primary duty of the court to determine the respective rights and interests of all the parties to the action, and this would necessarily have been done if the answer had been such as appellants desired to file in lieu of the original one, for the reason that a partition must of necessity be made according to the interests of the respective owners of the land sought to be divided. The statute requires each defendant in proceedings for partition to set forth in his answer the nature and extent of his interest in the property (Code Proc. § 582), and this the appellants did in their original answer, according to their understanding and belief at the time. But, even if it were conceded that the court erred in this ruling, appellants were not in the slightest degree injured thereby, for their real interests could not have been changed by their answer, and their amended answer put in issue all other questions deemed material by them. We think, however, that appellants, or at least Mrs. Hansen, was entitled to recover such portion of the taxes paid by appellants as inured to the benefit of the other owners of the property. This seems to be conceded by the respondent, in view of the ruling of this court in *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130; but she claims that the judgment should not be reversed on that account, because she offered to allow it to be modified in accordance with that decision, although the offer was not made until after the judgment had been entered and the appeal duly taken. But we think the appellants were under no obligation, either legal or equitable, to submit to the proposed modi-

fication at that time. They had a perfect right to stand upon the record as made, without thereby losing any of their rights in this court.

We also think that the court should not have awarded a partition of the premises without first having ascertained the value of appellants' improvements thereon. While it is a well-settled general rule of law that one tenant in common cannot, at his own suit, recover for improvements placed upon the common estate without the request or consent of his cotenant, yet a court of equity will not, "if it can avoid so inequitable a result, enable a cotenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the cotenant who has enhanced the value of a parcel of the premises the fruits of his expenditures and industry, by allotting to him the parcel so enhanced in value, or so much thereof as represents his share of the whole tract. 'It is the duty of equity to cause said improvements to be assigned to their respective owners, whose labor and money have been thus inseparably fixed on the land, so far as can be done consistently with an equitable partition.'" *Freem. Coten.* (2d Ed.) § 509. This principle is but an exemplification of the ancient and well-known maxim that "he who asks equity must do equity." Now, if it be true, as appellants allege, that at the time of the death of Charles Washburn the land was almost wholly in a wild state, and therefore unproductive, and that they have not only put valuable and permanent improvements upon it, but have cleared it for cultivation, and made it capable of yielding valuable profits, and have done all this in good faith, under the belief that Mrs. Hansen was the absolute owner, it seems to us that it would not only be extremely unjust and inequitable to allow them nothing for their expenditures and labor, but contrary to reason and the great weight of the authorities. The doctrine of the courts on this subject is well expressed by Mr. Pomeroy in the following language: "Where two or more persons are joint purchasers or owners of real or other property, and one of them, acting in good faith and for the joint benefit, makes repairs or improvements upon the property which are permanent, and add a permanent value to the entire estate, equity may not only give him a claim for contribution against the other joint owners, with respect to their proportionate shares of the amount thus expended, but may also create a lien as security for such demand upon the undivided shares of the other proprietors. Such an equitable lien has not always been confined to cases in which a contract to reimburse could be implied at law. The right to a contribution or reimbursement from the owner, and the equitable lien on the property benefited as a security therefor, have been extended to other cases,

where a party innocently and in good faith, though under a mistake as to the true condition of the title, makes improvements or repairs or other expenditures which permanently increase the value of the property, so that the real owner, when he seeks the aid of equity to establish his right to the property itself, or to enforce some equitable claim upon it, having been substantially benefited, is required, upon principles of justice and equity, to repay the amount expended." 3 *Pom. Eq. Jur.* §§ 1240, 1241. See, also, 1 *Pom. Eq. Jur.* § 398; 3 *Pom. Eq. Jur.* § 1389; *Carver v. Coffman*, 109 Ind. 547, 10 N. E. 587; *Annely v. De Saussure*, 17 S. C. 389; *Scaife v. Thomson*, 15 S. C. 337; *Hall v. Piddock*, 21 N. J. Eq. 311; *Carter's Ex'r v. Carter*, 5 Munf. 108; *Worthington v. Hiss*, 70 Md. 172, 18 Atl. 534, 17 Atl. 1026; *Green v. Putnam*, 1 Barb. 500; 1 *Story, Eq. Jur.* (13th Ed.) §§ 554, 555.

The respondent can lose nothing by the application of this just principle. The improvements have cost her nothing, and if the appellants are allowed their present value, in case partition cannot be made without prejudice to the interests of the several owners, or are awarded the particular portion of the premises which are thereby enhanced in value, she will receive all she would have received if appellants had permitted the land to remain unimproved, and that is all she can justly claim. Of course, if it should be found to be a fact that the whole tract has been cleared and fitted for cultivation, the respondent (and each of the other heirs of the deceased) would, in the event of a division, necessarily receive a portion of the land so improved, for under no circumstances could she be deprived of her just proportion. The court below found that appellant Mrs. Hansen was the owner of  $\frac{2}{12}$  of the land, and, being a tenant in common with the respondent, she and her husband have at all times been rightfully in possession of the entire premises; and if the land was made productive solely by their industry and enterprise, they are entitled to all the profits which have resulted from their efforts, especially if they have not excluded their cotenants from a like possession. In *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. 138, the court declared the law to be that where one tenant in common enters upon the common estate, which yields no profit, and so improves it as to make it productive, he is entitled to all the profits produced by means of such improvements, and without making any allowance against him for the increase in value occasioned by his improvements. And this is substantially the doctrine maintained by a decided preponderance of the authorities. See *Freem. Coten.* § 253; *Worthington v. Hiss*, supra; *Killmer v. Wuchner*, 79 Iowa, 722, 45 N. W. 299; *Ford v. Knapp*, 102 N. Y. 135, 6 N. E. 283. Moreover, if appellants are liable at all for use and occupation, or rents and profits,

their liability did not arise until after demand was made therefor by the respondent. *Johnson v. Pelot*, 24 S. O. 255; *Scaife v. Thomson*, *supra*; *Woodward v. Clarke*, 4 Strob. Eq. 167.

But the respondent contends that if appellants are entitled to anything at all for improvements, the amount thereof should be limited to the value of the rents and profits, as provided by Code Proc. § 584, in actions for possession of real property; and such seems to be the rule in Alabama. *Sanders v. Robertson*, 57 Ala. 435. We are not disposed, however, to adopt that rule in this instance. This is not an action of ejectment; nor does the respondent in her complaint ask to be let into possession of any part of the land in controversy, or even allege that she ever asked or demanded possession thereof. For aught that appears in the record, she has silently stood by for years, without once claiming title or possession, and with full knowledge that her mother and stepfather were patiently and laboriously toiling to make this land, which they claim was of no rental value whatever, fit for comfortable habitation, and capable of yielding remunerative profits. But, be that as it may, she now not only asks the court to determine and set apart her portion of the land, but is unwilling to allow appellants the value of their own improvements, or to refund the taxes paid for her benefit. This is unjust, and cannot be sanctioned by a court of equity. As against the respondent, appellant Charles Hansen is entitled to no specific relief. He knew, when he performed labor and erected improvements upon the land, that he had no interest or title in or to the premises so improved. He therefore stands, so far as respondent is concerned, in the position of a party who has voluntarily and knowingly improved another's property without request, and can claim nothing by way of direct compensation. But it does not follow that the improvements resulting from his labor and expenditures should be entirely disregarded in this proceeding. He believed that he was bettering the property of his wife, and what he did was done with her consent and for her benefit as well as his own. His wife's belief was the same, and we perceive no substantial reason why she should not receive the benefit of all that was done on her account, to the same extent as if she had, by her own hands, improved the common estate.

Our conclusion, therefore, is that if an equitable partition can be made, that portion of the premises upon which buildings and other improvements, if any, have been erected, should be allotted to appellant Mrs. Hansen; and if a division cannot be so made, then the land should be sold, and the value of the improvements awarded her out of the proceeds. In either event, she will be entitled to recover the amount of taxes paid

on that part of the property belonging to her cotenants. The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

HOYT, C. J., and DUNBAR, GORDON, and SCOTT, JJ., concur.

#### STATE ex rel. MEGLER v. FORREST.

Commissioner of Public Lands.

(Supreme Court of Washington. Dec. 21, 1895.)

#### TIDE LANDS—SALES—APPLICATION FOR PURCHASE—SUFFICIENCY—CONSTRUCTION.

1. Laws 1895, c. 178, regulating sales of tide lands, by section 68, requires an applicant to file with his application for purchase a plat of a survey, with field notes thereof, which shall show two existing connections with the United States surveys of the land. *Held* that, in mandamus to compel the commissioner to accept an application for purchase, an allegation that the applicant presented the commissioner a duly-certified plat of such a survey, with the field notes thereof, is sufficient, without alleging that such survey showed two existing connections with United States surveys of the land.

2. Laws 1895, c. 178, regulating sales of tide lands, by section 68, requires a plat of a survey of the lands applied for, with the field notes thereof, to be filed with the application for purchase. *Held*, that an application with the plat, but without the field notes, is insufficient.

3. Where a statute authorizes a public officer, on the existence of a certain fact, to do a prescribed act, his finding as to the facts is not subject to review.

4. Act March 26, 1890, provides for sales of a certain class of tide lands by public sale. Act March 26, 1895, provides for sales of the same class of lands on application, and by section 106 repeals the former act, saving all "rights which have been acquired" under it, and by section 108 saves generally all vested rights. February 21, 1895, under the old act, the commissioners advertised for bids for such tide lands, to be received till March 30, 1895, and in response thereto, both before and after the date the new act took effect, received sealed bids from duly-qualified bidders, and, after such date, accepted them. *Held*, that the bidders' rights to purchase were, as "rights acquired," saved by section 106, and were superior to such a right acquired under the new act after the bids had been accepted.

5. Act March 26, 1890, § 1, provides for the appraisal of "the tide and shore lands" in the state, and disposal thereof by the land commissioner; section 4 divides the tide lands into three classes, and, after prescribing what shall be included in classes 1 and 2, provides that the third class shall embrace all other tide lands; sections 11 and 12 give abutting upland owners and improvers a prior right of purchase of such lands; and section 13 provides that, on their failure to exercise that right within the time limited, the lands shall be open for public sale as in the act provided. *Held*, that tide lands, when there are no abutting upland owners or improvers, are subject to sale.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Application, on relation of J. G. Megler, against W. T. Forrest, commissioner of public lands, for a writ of mandamus to compel defendant to accept relator's application for

the purchase of tide lands. From a judgment denying the writ, plaintiff appeals. Affirmed.

T. N. Allen, for appellant. James A. Haight, for respondent.

DUNBAR, J. This action involves the construction of the tide-land acts of 1890 and 1895, respectively. On the 30th day of March, 1895, the relator, J. G. Megler, made application to W. T. Forrest, commissioner of public lands of the state of Washington, at his office, in Olympia, to purchase a certain tract of land, situated in Wahkiakum county, known as "Miller's Sands." On the 6th of April, 1895, Commissioner Forrest notified the relator that his application for the purchase of such land had been rejected, for the reason that the map which the relator had furnished did not comply with the provisions of the law in relation thereto, and his certificate of deposit of \$365.29 was returned to him. On the 20th of April, following, the relator again made an application to the commissioner for the purchase of the aforesaid lands, and on the 23d the second application was rejected by the commissioner, and the relator was notified of such rejection, and that it was for the alleged reason of the insufficiency of the map; the commissioner insisting that the map did not furnish the necessary information as to the portions of the land described that had not been sold. On the 27th day of April, 1895, the relator made affidavit in support of the motion for a writ of mandamus, embracing substantially the facts recited above. To this affidavit the respondent filed a demurrer, which was overruled by the court, and an alternative writ was issued, to which respondent filed another demurrer, which demurrer was also overruled, whereupon respondent answered. To this answer appellant demurred, which demurrer was overruled. A reply was filed, and the cause went to trial. After hearing of testimony, judgment was rendered denying the peremptory writ, and dismissing the case at appellant's cost.

It is urged by the respondent that the demurrer to the affidavit was well taken, for the reason that it nowhere appeared from said affidavit that the survey was connected with, and that the plat showed two or more connections with, the United States surveys of the land. We think this objection is more technical than meritorious, and that, when the affidavit stated that the relator had presented to the commissioner a duly-certified plat of survey of said lands and the field notes of said survey, the requirements of the law were substantially met, so far as the pleadings were concerned,—sufficient, at least, to put the respondent upon his denial of the fact as to whether or not the survey and field notes did show the connections required by the law to be shown. It is evident, however, that the first application of the relator did not comply with the plain provisions of

the law, for it nowhere appears that the field notes had accompanied the plat of survey.

Many questions are discussed in this case, which, under our view of the main features of the case, it is not necessary to notice. The answer avers that the plat of survey presented to the respondent at the time the relator made his application on the 26th day of April, 1895, was in fact incorrect and indefinite, and found to be so by the respondent, and for that reason was rejected by him. This being a question of fact, to be determined by the commissioner, it is not within the province of a court to review it. In *State v. Forrest*, 8 Wash. 610, 36 Pac. 686, 1120, it was said: "The law has intrusted the commissioner with the duty and power of determining the facts in each application presented to him, and directed him, upon proof of those facts, to proceed in a certain way. With the determination of the facts the courts will not interfere, but, should he make an erroneous application of the law to the facts, it will then be time enough for judicial interference."

The answer also shows that "a portion of the land embraced in plaintiff's plat was sold by order of the state board of land commissioners on the 4th day of April, 1895, to John Lamont, F. Kennedy, and Thomas Craine, and the relator refused to accept the land included in his application not already sold by the state, but insisted on the acceptance of his application as a whole; that, pursuant to applications duly made, the commissioner gave notice on the 21st day of February, 1895, that he would on March 30, 1895, receive sealed bids, according to law, for the lands heretofore alleged to have been sold, and cause the same to be published as provided by law; that sealed bids, in due form, and accompanied by a certificate of deposit or certified check on some bank in this state equal to one-tenth of the amount of the bid, were duly received by the commissioner within said time, and that within five days after said 30th day of March, 1895, said bids were duly opened by defendant, as commissioner of public lands, in the presence of the state board of land commissioners, and thereupon said board, being satisfied that there was no fraud or collusion by or among the bidders, approved the bids that were considered the highest and best, and caused said confirmation or approval to be certified to the defendant, as commissioner of public lands; and that such proceedings were duly had that contracts of sale were duly made and executed therefor on the 24th day of April, 1895." It appears that a new law, providing for the sale of tide lands, was approved on the 26th day of March, 1895, and, under an emergency clause, went into effect immediately. It will be noticed that the commissioners, acting under the provisions of the old law, advertised for bids prior to the passage of the new law, viz. February 21, 1895, giving notice that the

sealed bids would be received until March 30, 1895, and at the time the relator had made his application, which we hold to be a good application on its face,—viz. the application made April 20th,—and in some instances prior to March 28th, the date of the passage of the new act, bids had been furnished by applicants under the provisions of the old law, and, before relator's application, such bids had been approved by the board of land commissioners. It is contended by the appellant (1) that the law of 1895 repealed and abrogated all the provisions of the law of 1890, and that the applicants, Lamont, Kennedy, and Craine, having applied under the law of 1890, had no standing before the commissioners, or that all the rights they had obtained up to that time were swept away and destroyed by the provisions of the new act; and (2) that there was no provision at all in the law of 1890 for the sale of the character of lands described in relator's application.

We are satisfied that neither of these contentions can be reasonably sustained. The language of the repealing act of the law of 1895 is as follows (after mentioning the acts repealed): "are hereby repealed \* \* \* except as provided in this act, saving, however, and preserving all rights which have been acquired," etc. We think the right that had been acquired by these purchasers who had made their applications under the provisions of the old law, and under the direction of the commissioners; who had been to the expense of preparing maps and field notes, and furnishing the same, with the deposit that was required by the law,—was one of the rights which the new law intended to preserve. The contention that it was only vested rights that the law intended to preserve is not plausible, for the reason that vested rights could not be disturbed, in any event, and for the further reason that the legislature, in an abundance of caution, had expressed themselves upon that subject in section 103 of the same act, where they provided that "this act shall not be construed to affect any vested right in any of the public lands as herein defined of any person, firm or corporation, acquired under existing laws, or any preference right to purchase, but that the same are hereby confirmed, subject only to such rules and regulations for the government of said rights as may be hereafter defined by the board of state land commissioners." So that absolute vested rights and preference rights of purchase, such as are enjoyed by upland owners and improvers, could not have been contemplated in section 106,—the repealing section,—which provided for the saving and preserving of all rights which had been acquired under the previous laws; and, to give any force and effect whatever to this language, we must presume that it was the protection of rights different from those expressly protected in section 103 that was intended.

The second contention,—that there was no provision made under the law of 1890 for the sale of these tide lands,—we think, is equally without foundation. It seems to be the idea of the appellant that because section 13 provides that in case the persons mentioned in sections 11 and 12—viz. the abutting upland owners and improvers—do not, within the time limited, exercise the right to purchase there given, then said lands shall be open to the public for sale as therein provided, this excludes the idea of a provision for the sale of lands where there are no upland owners. We think that would be a strained construction of the law. The first section of the act provides that "the tide and shore lands in the state of Washington shall be appraised, and the same shall be disposed of by the commissioner of public lands." This language is comprehensive, and would seem to reach, not only two different characters of land, but all the tide and shore lands in the state. Section 4 provides that the tide lands of the state of Washington are divided into three classes; that the first class shall embrace all tide lands situated within, or in front of, the corporate limits of any city, or within two miles thereof, upon either side; that the second class shall embrace all tide lands situated at a greater distance than two miles from either side of an incorporated city or town, and upon which are located valuable improvements; and the language of the statute is, "the third class shall embrace all other tide lands." If the lands in question are tide lands (and it is undisputed that they are), then they are, without question, embraced in the provisions of section 4 of the act of 1890, and provision is made for their sale. It follows that, these lands having been legally applied for by legal purchasers prior to the application of the relator, the writ of mandate asked for was properly denied. The judgment will therefore be affirmed.

HOYT, O. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

MARTIN v. UNION MUT. LIFE INS. CO.  
(Supreme Court of Washington. Dec. 21, 1895.)

LIFE POLICY — DEATH — EVIDENCE — OBJECTIONS  
WAIVED—HARMLESS ERROR—DISCRETION OF COURT.

1. Where plaintiff, knowing what the evidence of an absent witness would be, suggests his absence for the first time in a motion to open the case to admit such evidence, made after motion for nonsuit, his motion to open is properly denied.

2. In an action on a life policy, evidence that the insured, a man of industrious habits, and with happy home relations, left home on a short hunting trip, stating that he intended to hire a boat for the purpose, and has not been seen for two years; that a boat was found shortly afterwards, with certain articles in it, but no evidence to connect either with the

insured; that his wife and daughter believe him to be dead,—is insufficient to establish his death.

3. An instruction based on facts not in evidence is reversible error, unless it appears that on the evidence no other verdict than the one returned could have been found.

4. In an action on a life policy, evidence of the disappearance of bodies in a certain body of water is inadmissible to show the death of the insured, where it is not shown that he fell into such body of water.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Johanna C. Martin against the Union Mutual Life Insurance Company on a life policy. From a judgment for defendant, plaintiff appeals. Affirmed.

Palmer, Palmer & Thomas, for appellant. Richard Saxe Jones, for respondent.

HOYT, C. J. This action was brought to recover the amount stipulated in a certain insurance policy issued by the defendant upon the life of the husband of the plaintiff. The payment of the claim was resisted upon two grounds: (1) That the husband of the plaintiff was not dead; and (2) that no proofs of his death had been furnished the company, as required by the terms of the policy. The trial resulted in a verdict for the defendant, and from the judgment rendered thereon this appeal has been prosecuted.

After plaintiff had introduced her evidence and rested, the defendant interposed a motion for a nonsuit, after which the plaintiff moved the court to open the case, so that she might, the next morning, have the testimony of her son made a part of her affirmative evidence. The court denied the motion, and upon its action in so doing is founded appellant's first allegation of error. Applications of this kind are addressed to the sound discretion of the trial court, and its decision will not be interfered with in this court, unless the circumstances clearly show an abuse of such discretion. If the application in this case had been made before plaintiff rested, and a showing made as to the reason why the son was not there, and that he would in all probability be there on the morning of the next day, it would probably have been the duty of the court to have continued the trial, so as to give the plaintiff an opportunity to put him upon the stand. But when the plaintiff, having full knowledge as to the nature of the testimony which it was expected to elicit from the absent witness, rested her case without any suggestion to the court as to the absence of such witness and the efforts which she had made to procure his attendance, and asked for relief only after the sufficiency of her testimony in chief to make out a prima facie case had been challenged by the motion for a nonsuit interposed by the defendant, the case is brought within the rule which allows the trial court discretion in determining when the regular course of trial shall be departed from, and its ruling upon such question will not be disturbed here.

The second allegation of error grows out of the refusal of the court to allow the witness Ronquest to testify as to facts connected with the disappearance of bodies in the waters of the Sound in front of Stellacoom. Whether or not this testimony would have been competent if evidence had been introduced tending to show that the husband of the plaintiff had probably fallen into the Sound in that vicinity we are not called upon to decide, for the reason that, as will be seen by what we shall say upon another point, there was no evidence tending to show such fact.

The third error is founded upon the action of the court in denying appellant's motion for a new trial. This motion, excepting so far as it raised questions of law which we have or shall discuss in this opinion, was addressed to the sound discretion of the court, and no reason is shown why we should control such discretion.

For reasons which will hereafter appear, we do not deem it necessary to decide as to the correctness of all the instructions to which exceptions were taken. We feel it our duty, however, to say that when the court, in its instructions, stated to the jury that: "Of course, you can see that if a man were shown to have disappeared from his home, that he had gone aboard of a ship, and it were afterwards proved that the ship had gone down in one of those disasters that occur at sea, such as the newspapers have recently given an account of; if it was shown that a man left home, and was aboard of a ship of that kind, and that it was followed up by the proof that the ship went down, and that he did not appear with any of the survivors who were saved from the ship,—then, after sufficient time, you may find it enough, under such circumstances, to reach a conclusion that he died at that time,"—it committed error, for the reason that there was nothing in the evidence which warranted a reference to facts of the kind stated; for, while it is true that the court stated that such facts were not at all parallel to the facts in this case, yet, if what was said had any force with the jury, it had a tendency to belittle the facts proven by the plaintiff. If the facts stated were in no manner parallel to the case upon trial, no reference should have been made to them in the instructions; and the fact that they were referred to under such circumstances as might have tended to mislead the jury would make the giving of such instruction such an error as will entitle the plaintiff to a reversal of the judgment, unless, from the undisputed testimony, it is evident that no other verdict than the one returned could have rightfully been rendered. It follows that, for the error in giving this instruction, the judgment must be reversed, unless the contention of the defendant to the effect that, if all the facts as to which there was any legal testimony are taken to be true, enough was not made to

appear to sustain a finding by the jury that the husband of the plaintiff was dead.

This leads us to an investigation of the facts as to which there was such evidence. We have carefully examined all the proofs offered upon the part of the plaintiff, and find that upon the question of the death of her husband there was evidence tending to prove the following facts, and those only: That plaintiff and her husband were living together in the city of Tacoma on the 30th day of October, 1893; that their married life had been a happy one, unbroken by any important quarrels or differences; that they were in fair financial condition; that they had money in the bank and in the house, amounting in all to some \$500; that the husband was an industrious man; that he had lately completed one job of work, and had made arrangements to go to work upon another in the near future; that, in accordance with a custom of his so to do, in times of leisure, he, on the evening of the 29th day of October, announced his intention to go to the Nisqually river to hunt, and stated that for that purpose he would hire a boat; that he announced his intention to be gone two or three days, but told his wife not to worry if he did not return quite so soon; that, in pursuance of such announced intention, he left the house next morning, between 6 and 7 o'clock, equipped for a hunting trip; that he had since that date never returned to his home, or been seen by his wife or daughter; that both his wife and daughter believed him to be dead; that thereafter certain articles shown to have been a part of those taken by him when he left home were brought to the house, and delivered to the wife. There were, it is true, various other statements made by the witnesses introduced on the part of the plaintiff, but it clearly appeared from the evidence that statements which went to prove facts other than those which we have recited were purely hearsay. The only testimony not clearly hearsay having any tendency to prove any other fact was that of Miss Ronquest. She testified as to the fact of a boat having been found near Stellacoom in which were certain articles of personal property; that the boat was afterwards called for by a man by the name of Foss, who claimed to be its owner; but, in the absence of any testimony tending to connect said boat or the articles in it with the husband of the plaintiff, this evidence had no tendency to prove his death. Were the facts above recited sufficient to *prima facie* establish the fact of the death of the husband of the plaintiff? When analyzed and stripped of the detail in which they were put in evidence, they amounted to only this: That a person in good standing and repute in the community, and friendly with his family, had left home, and for a period of two years not returned, and from such fact alone it could not be presumed that he was dead. If, in addition to these facts, it had been

shown that he had hired a boat, and left in the direction of Stellacoom, and soon thereafter the same boat, with certain articles belonging to him, had been found in that vicinity, it might, when taken in connection with the other facts, have warranted the jury in finding that he was dead. But no competent evidence tending to prove these facts was introduced, and, without this, the facts proven were not sufficient to warrant the jury in so finding. Especially is this true in view of the fact that, if a boat had been procured in accordance with the intention announced, it would have been easy to have introduced proof to show it; and, if some of the property taken away by him had been found in the same boat near Stellacoom, that fact could also have been easily shown. It follows that the error in instructing the jury was without prejudice to the rights of the plaintiff, for the reason that the defendant was entitled to a directed verdict in its favor. The judgment will be affirmed.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

#### ALLEN v. OLYMPIA LIGHT & POWER CO.

(Supreme Court of Washington. Dec. 28, 1895.)

#### RECEIVERS—CORPORATIONS—PLEADING—INCONSISTENT DEFENSES.

1. The appointment of a receiver for a corporation does not work a dissolution of the corporation, so as to prevent it being sued.

2. A corporation cannot defend an action on a note executed in consideration of a loan made the corporation, on the ground of want of power on the part of the officers of the corporation to execute the note.

3. Defenses which are inconsistent to the extent of being untrue are not sufficient to put plaintiff upon proof.

4. In an action against the maker of a note, allegations in the answer showing the nonliability of the sureties, should be stricken out as immaterial.

Appeal from superior court, Thurston county; T. M. Reed, Judge.

Action by T. N. Allen, trustee, against the Olympia Light & Power Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

John P. Judson and John C. Kleber, for appellant. T. N. Allen, for respondent.

DUNBAR, J. The complaint in this case alleges that on the 1st day of June, 1893, the defendant, the Olympia Light & Power Company, for value received, executed and delivered to A. H. Chambers, George D. Shannon, E. T. Young, R. Frost, and A. Farquhar its promissory note, whereby it promised to pay to the order of said payees the sum of \$8,000, with interest, etc., and sets out the note executed; alleges that on the same day, for value received, Chambers and others indorsed and delivered to plaintiff

said promissory note aforesaid, said indorsement being: "Pay to the order of T. N. Allen, trustee. Presentment, protest, and notice waived,"—signed by the payees; alleges that the plaintiff was the owner and holder of the note, and that no part thereof has been paid, except the sum of \$1,300. The defendant's amended answer alleges that the Olympia Light & Power Company is in the hands of a receiver; admits that the promissory note set out in the plaintiff's complaint was signed as it appears in the complaint to have been signed, but denies that there was any consideration for said note; denies each and every allegation contained in the third paragraph of the complaint, said paragraph being the one which alleges that Chambers and others indorsed and delivered to the plaintiff said promissory note. For further defense the answer alleges that at the time of the execution of said note the plaintiff was the attorney for defendant corporation; alleges that on said day the defendant borrowed directly from the plaintiff the sum of \$8,000, and that when said loan was made by defendant from the plaintiff it was understood and agreed that as security for said loan the defendant company should give to plaintiff its note, which note should be signed by A. H. Chambers, George D. Shannon, E. T. Young, R. Frost, and A. Farquhar as sureties. That none of these sureties had any interest in said loan or the money loaned by the plaintiff to defendant, and that for defendant's accommodation, and at plaintiff's request, the said parties agreed to sign the said note as sureties. The defense then alleges some controversy between the plaintiff and defendant in regard to the note, which is not material, but alleges that at the time of the execution of the note the president and secretary had no authority to sign said note, which fact was known to plaintiff; denies generally the authority of the president and secretary to execute the note. The defense states affirmatively that upon representations made by the plaintiff the note was executed by the president and secretary of the defendant company, they both protesting that it was wrong, and plaintiff assuring them that it was right. This is a brief synopsis of what is set forth in the answer. To this answer a demurrer was interposed, which was sustained by the court, and judgment was rendered for the amount prayed for.

It is contended by the appellant: First, that the demurrer should not have been sustained, because the answer alleged want of consideration, which was a good defense to the action; secondly, because there was want of authority shown in the officers who executed the note; third, because the defense showed that the property of the defendant was in the hands of a receiver; and the second is repeated substantially in the fourth contention.

Commencing with the last contention, it

is only necessary to say that the appointment of a receiver does not work a dissolution of the corporation. This action was not for the purpose of ousting the receiver of the possession, but was one for the purpose of litigating the question of ultimate right to the property, and the answer that the company was in the hands of a receiver was, therefore, not material.

The second contention, viz. the want of authority in the officers to make the note in suit, will not serve the defendant, when it appears, as it does from the pleadings in this case, that it had the benefit of the money which it received by reason of the execution of the note. This court has often decided that corporations cannot escape their honest obligations by pleading want of authority to execute a contract where, as a result of the contract, the corporation had received the benefit of the money obtained. See *Dexter, Horton & Co. v. Long*, 2 Wash. St. 435, 27 Pac. 271; *Tootle v. Bank*, 6 Wash. 181, 33 Pac. 345. See, also, 2 *Morse, Banks* (3d Ed.) § 743; *Bradley v. Ballard*, 55 Ill. 413; *Green's Brice, Ultra Vires* (2d Ed.) p. 729, note a; *Railway Co. v. McCarthy*, 96 U. S. 258.

The first contention, viz. that the want of consideration pleaded in the answer should defeat the demurrer, notwithstanding the fact that the consideration was admitted in the affirmative defenses, which raises the question of inconsistent defenses, has been considered at length by this court in the case of *Bank v. Jones* (lately decided) 43 Pac. 331. In fact the two cases were investigated together, and it was there announced that defenses which were inconsistent to the extent of being untrue would not be sufficient to put the plaintiff upon proof. All that was said in the case above cited applies to this case, so that it will not be necessary here to enter again into the discussion of that question.

That portion of the answer in relation to how Chambers and others came to transfer the note, and the rights of Chambers and others, has no place in this case. This action is not brought to determine the liability of Chambers and others, the payees on this note, but is brought directly against the appellant, the Olympia Light & Power Company; and, if the demurrer had not been sustained, such portion should have been stricken from the answer as matter absolutely irrelevant.

There seems to be no defense whatever to this action, so far as the complaint and answer show. The plaintiff loaned the money to defendant. The defendant executed the note, and received the money mentioned therein. It has appropriated it to its own use, and no reason appears why it should not pay it. The judgment will be affirmed.

HOYT, C. J., and SCOTT and ANDERS, JJ., concur.



## ALLEN v. CHAMBERS et al.

(Supreme Court of Washington. Dec. 28, 1895.)

## SURETYSHIP — PAROL EVIDENCE — ACCOMMODATION INDORSERS — CONSIDERATION.

1. Code Proc. § 758, providing that when any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may cause the question of suretyship to be tried, does not apply to an action on a note against the indorsers only.

2. Persons whose names appear upon a note as indorsers cannot show by parol that they were sureties, in the absence of fraud.

3. It is no defense, to an action against the indorsers on a note, that no consideration passed to them from the maker.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Action by T. N. Allen, trustee, against A. H. Chambers and others on a note. From the judgment rendered, plaintiff appeals. Reversed.

T. N. Allen, for appellant. John P. Judson, for respondents.

DUNBAR, J. The complaint in this action alleges that the Olympia Light & Power Company, a corporation, on the 1st day of June, 1893, for value received, executed and delivered to the defendants herein and to Alexander Farquhar its promissory note, whereby it promised to pay to the order of said payee, at the First National Bank of Olympia, Wash., the sum of \$8,000 in gold coin, etc. The note is set out in the complaint, and is in the following words: "\$8,000.00. Olympia, Washington, June 1, 1893. One year after date, for value received, we promise to pay to the order of A. H. Chambers, George D. Shannon, E. T. Young, Robert Frost, and Alexander Farquhar, at the First National Bank of Olympia, Washington, eight thousand dollars, in gold coin of the U. S., with interest thereon from date until paid at the rate of ten per cent. per annum. Interest payable at the end of every three months. Olympia Light and Power Company, per George D. Shannon, President. A. H. Chambers, Secretary." Upon the same day the defendants indorsed and delivered to the plaintiff said promissory note, which indorsement was in the following words, viz.: "Pay to the order of T. N. Allen, trustee. Presentment, protest, and notice waived. A. H. Chambers. George D. Shannon." E. T. Young. R. Frost. A. Farquhar. The complaint alleges that the plaintiff is the holder and owner of said note, that the same is past due, and that no part thereof has been paid, except the interest thereon until June 1, 1894. To this complaint, Chambers, Young, Shannon, and Frost answer, denying that there was any consideration from the Olympia Light & Power Company to the defendants or Alexander Farquhar for the note set out in the complaint, and denying that the plaintiff loaned the sum of \$8,000, or any

other sum, to the defendant on the 1st day of June, 1893, or at any other time. They allege that on the 1st day of June, 1893, the Olympia Light & Power Company borrowed from the plaintiff the sum of \$8,000, and that to secure payment of said sum on the part of the Olympia Light & Power Company, plaintiff caused to be prepared the promissory note set out in his complaint, and that the same was executed by the Olympia Light & Power Company, at his request and under his directions, in the manner and form set out in the first paragraph of the complaint; that the defendants did not borrow the money from the plaintiff, nor any part thereof, but that the money was loaned to the Olympia Light & Power Company, and that the defendants indorsed said note as sureties only; that they received no part of said money; that the same was all paid to the Olympia Light & Power Company; that at the request of the plaintiff they indorsed said note as sureties for the Olympia Light & Power Company. Wherefore they pray that the question as to whether they were sureties for the Olympia Light & Power Company may be tried and determined upon a hearing thereof. Defendant Farquhar interposed an answer containing substantially the same averments. The plaintiff moved the court to strike these answers from the files on the ground that they were sham, frivolous, and immaterial, which motion was overruled by the court. Plaintiff then demurred to the answers on the ground that they did not state facts sufficient to constitute a cause of defense, which demurrers were also overruled by the court. Plaintiff then replied, denying the affirmative matter of the answers, and set up the insolvency of the Olympia Light & Power Company and the fact that it was in the hands of a receiver. Judgment was rendered in favor of the plaintiff in the sum of \$3,222.22, and the sum of \$41.45 costs, and the judgment further commanded that no execution should issue thereon until the question of suretyship had been determined. By order of the court, the issue in relation to suretyship was tried by jury on April 30, 1895. On that question the verdict of the jury was, "We, the jury in the above-entitled cause, find for the defendants," and, as special findings, they found that the plaintiff did not request the defendants to sign the indorsement as sureties, but that defendants did sign said indorsement as sureties. Judgment was rendered that the defendants signed the note as sureties for the Olympia Light & Power Company, and not as principal makers or indorsers, and that they were sureties only, and it was ordered that no execution should issue against the defendants, or either of them, until execution be first levied upon the property of the Olympia Light & Power Company, and its property first exhausted before execution should issue against defendants or their property. It was further ordered that defendants should recover of

and from the plaintiff their costs, taxed at \$21. To this judgment the plaintiff excepted, and has brought his case here on appeal.

The respondents based their right to have the question of suretyship determined in this case upon the provisions of the statute. Section 756 of the Code of Procedure provides that "any person bound as surety upon any contract in writing for the payment of money or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute an action upon the contract." Section 757 provides: "If the creditor or obligee shall not proceed within a reasonable time to bring his action upon such contract, and prosecute the same to judgment and execution, the surety shall be discharged from all liability thereon." Section 758 provides that, "when any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may, upon a written complaint to the court, cause the question of securityship to be tried and determined upon the issues made by the parties at the trial of the cause, or at any time before or after the trial, or at a subsequent term, but such proceedings shall not affect the proceedings of the plaintiff." Section 759 provides that, "if the finding upon such issue be in favor of the surety, the court shall make an order directing the sheriff to levy the execution upon and first exhaust the property of the principal. \* \* \*" It is difficult to see how this statute applies to this case, for it nowhere appears that this notice was given to the plaintiff. Even admitting that these defendants are sureties on the note, section 758 cannot be made to apply, because this does not purport to be an action against two or more defendants upon a contract, any one or more of the defendants being surety for the others, so that the right of these parties to show their suretyship depends upon the law irrespective of statute. First, it was unquestionably the right of the plaintiff to bring this action against the principal and the indorsers, or against the indorsers without the principal, and the indorsers cannot require the holder to proceed against the maker. *Wade v. Creighton* (Ore.) 36 Pac. 289; *Davis v. Patrick*, 57 Fed. 909; *Rand. Com. Paper*, § 761, and cases cited. The plaintiff, then, having a right to bring this action against the indorsers as he did, and the obligation on its face showing conclusively that the defendants were indorsers and not sureties, the only remaining question is,—even conceding, for the sake of the argument, that the defendants would be in any better position if it were determined that they were sureties,—were they entitled by parol testimony to show that they were sureties and not indorsers? This question was squarely decided by this court in the case of *Bryan v. Duff*, 12 Wash. —, 40 Pac. 936, where it

was held that parol testimony was not admissible to vary the terms of the contract, or for the purpose of showing any agreement on the part of the payee or indorsee tending to affect the contract, and that there was no distinction between a written contract, where the terms of the contract were set out in the instrument, and an implied contract created by the law which governs the responsibilities of guarantors and indorsers, and the court in that opinion said: "In our opinion, the liability of the drawer of a bill of exchange or the indorser of a note has become so well established under the rules of the law merchant and is so well understood, that the person who assumes such liability must be held to have understood the effect thereof, and by his signature to have bound himself in the same manner as he would have done had the conditions been, at the time of such signature, fully written out and signed by him." The court in that case discussed the authorities, hence it is not necessary to rediscuss them here; and it quoted the language of the supreme court of Indiana in the case of *Campbell v. Robbins*, 29 Ind. 271, where it was held that "the legal effect of an assignment in blank of a promissory note cannot be varied by evidence of a parol contemporaneous agreement that the note should be taken without recourse on the assignor," and the following from 2 *Para. Notes & B.* p. 501: "If the defendant endeavors to prove an oral bargain between himself and the plaintiff, which differs in its terms from the written note, it will then be remembered that it is a firmly-settled principle that parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, to add to, or subtract from, the absolute terms of the written contract." The appellant in this case admits the general rule in relation to the varying of a written instrument by parol testimony, but insists that it comes within the exception. We see nothing, however, which brings this case within the recognized exceptions to the rule. There are no allegations of fraud; in fact, outside of the allegations of the answer, the jury found specially that the plaintiff did not request the defendants to sign as sureties, and the language of the indorsement is so absolute and sweeping that it is not susceptible of construction.

The allegation of the defense that there was no consideration moving from the Olympia Light & Power Company to the defendants is one which does not interest the plaintiff. Whatever influence it might have between the indorser and the maker of the note, it is a matter of no concern to the plaintiff. These answers are plainly demurrable, and as, according to the findings of the jury, no fraud had been committed in obtaining these indorsements, and that being all the defense that could be made to the

payment of this note, the case will be reversed, so far as the action of the court is concerned in finding that the defendants were sureties, and in imposing restriction upon the judgment, that execution should not issue until the property of the Olympia Light & Power Company had been exhausted. The case will be remanded to the lower court with instructions to grant the motion made by the appellant to vacate and set aside the verdict of the jury and the judgment of the court that the defendants were not indorsers, and that they were sureties only, and the further judgment that until the execution shall be levied upon the property of the Olympia Light & Power Company, and its property first exhausted, no execution shall issue against the property of the respondents; and the record will be so corrected that the plaintiff shall have an unrestricted judgment against the defendants, as prayed for in his complaint.

HOYT, C. J., and ANDERS, J., concur.

GORDON, J., did not sit.

#### FIRST NAT. BANK OF HAILEY v. VAN NESS et al.

(Supreme Court of Idaho. Dec. 16, 1895.)

##### REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.

Evidence in this case examined, and held not to support certain findings in the special verdict.

(Syllabus by the Court.)

Appeal from district court, Alturas county; O. O. Stockslager, Judge.

Garnishment by the First National Bank of Hailey against J. H. Van Ness and George H. McLeod. Judgment for defendants, and plaintiff appeals. Reversed.

R. F. Buller and Texas Angel, for appellant. P. M. Bruner, for respondents.

HUSTON, J. Appellant, having recovered judgment against one J. W. Hodgman and others upon a note for \$5,000, garnished defendants, as debtors of, or holding property and effects belonging to, said Hodgman. In its complaint, appellant alleges that at the date of its service the defendant McLeod was indebted to said Hodgman in the sum of \$800, balance due upon two promissory notes, for \$400 each, dated September 29, 1890, executed by defendant McLeod to one David Earhart; that the said notes were really the property of defendant Hodgman, and were made in the name of Earhart to defraud the creditors of said Hodgman, and that they were afterwards, in pursuance of the same design to hinder, delay, and defraud creditors of said Hodgman, and particularly plaintiff, transferred, fraudulently and without consideration, to defendant Van Ness; that defendant McLeod admitted the indebtedness, but said that Van Ness claimed the notes,

and defendant Van Ness answered, denying that he was indebted to said Hodgman, or had any of his property under his control; that afterwards, on the 5th of June, 1893, judgment was rendered in favor of appellant, and against said Hodgman and others, in said cause, for \$10,075 and costs, upon which execution was duly issued, and said McLeod, and Van Ness again summoned as garnishees. Defendant McLeod filed no answer. Defendant Van Ness answered, denying knowledge of the alleged indebtedness of Hodgman, and denying the alleged indebtedness of himself to Hodgman, and alleging that prior to the 29th day of May, 1891, two notes, for \$400 each, dated September 29, 1890, executed by defendant McLeod to David Earhart, were sold, assigned, and transferred to him for a valuable consideration, and that they were his sole and individual property at the time of the service of the garnishment, viz. June 5, 1891. Issue was joined upon the answer of defendant Van Ness, and a trial had before the court with a jury. The following special findings were returned by the jury: "Q. 1. Was J. W. Hodgman the real owner of the notes that were placed in the hands of J. H. Van Ness? A. 1. Yes. Q. 2. Did J. W. Hodgman have the notes made payable to David Earhart, and transferred to J. H. Van Ness, for the purpose of placing and keeping them out of the hands of his creditors? A. 2. Yes. Q. 3. If J. W. Hodgman so placed the notes to keep them out of the reach of his creditors, did J. H. Van Ness participate in such intent and purpose? A. 3. No. Q. 4. Did J. H. Van Ness purchase the notes mentioned in plaintiff's complaint, for a full and valuable consideration, on the 30th day of May, 1891, in the ordinary course of business, for himself, and in good faith? A. 4. Yes. Q. 5. Was the transfer of the notes from J. W. Hodgman to J. H. Van Ness made with intent to hinder, delay, and defraud the creditors of said Hodgman? A. 5. Yes. Q. 6. Did J. H. Van Ness know this? A. 6. No." The answers Nos. 1, 2, and 5 are given by the entire jury. The answers Nos. 3, 4, and 6 are by a majority of the jury. Motion for judgment upon the findings of the jury was made by appellant, and denied by the court, and judgment was entered in favor of defendant Van Ness for costs, from which judgment, and the order overruling motion for new trial, this appeal is taken.

It is contended by appellant that the motion for judgment by appellant upon the special verdict should have been granted by the court, for the reason that the third, fourth, and sixth findings are unsupported by the evidence. The evidence is conclusive upon the following facts: That Hodgman was the real partner of McLeod, under the firm name of Earhart & McLeod; that, when Earhart pretended to sell his interest in said firm, such interest really belonged to Hodgman, and the name of Earhart was used simply as a guise or cover for Hodgman against his

creditors; that the notes given by McLeod in payment of the pretended interest of Earhart, although made payable to Earhart, were really the property of Hodgman, and were by Hodgman placed in the hands of Van Ness, and by Van Ness placed in the appellant bank; that, when said notes were so placed in said bank by Van Ness, they were the property of Hodgman. Van Ness testified that he supposed the notes belonged to Hodgman. He had been an intimate friend of Hodgman for years, and apparently well advised as to his business affairs. The notes (three in number, for \$400 each) were on the day of their execution delivered by Hodgman to Van Ness, and by the latter deposited in the bank, and as fast as payments were made on them the money was remitted by Van Ness to Hodgman. That Van Ness knew that Hodgman was the owner of the notes is too clearly shown by the evidence to admit of doubt. It is apparent from all the evidence that Van Ness never had any interest in the notes, up to May 30, 1891, the time of the alleged sale to him of the two unpaid notes for the sum of \$625 by Hodgman, for Earhart. Van Ness testifies: "I think it was on the 30th day of May, 1891. Hodgman asked me, a time or two, if I would not take those notes. On this morning he came down there, and he asked if I would not take those notes,—buy his notes,—and let him have the money." Surely, Van Ness could have had but little doubt at this time as to the ownership of the notes. He knew the notes belonged to Hodgman, and he also knew that the use of Earhart's name in the transaction was a mere pretense. It does not appear that Earhart was present at any of the conversations in regard to the sale of the notes, or that he was ever consulted or alluded to. McLeod testifies: "He [Van Ness] spoke to me different times about the notes, to see what I could pay on them. He [Van Ness] asked me if I would have any objections to taking Hodgman in the way he was before, and I told him I didn't want any partner, if I could get along without one. He [Van Ness] says, 'Well, you know—of course you know—that is Wes' [Hodgman's] money.' I said I never knew positively, although I always supposed so. That conversation took place probably in February or March, 1891." And yet, when Hodgman gives Van Ness a receipt for the \$625, claimed to be in payment for the notes, the receipt is signed, "J. W. Hodgman, for D. Earhart." That Van Ness could have had the intimate acquaintance with Hodgman, and with his business and business transactions, the record shows him to have had; that he should have acted as his agent in the collection and remittance of money paid upon notes purporting to be the property of Earhart, but which Van Ness knew were the property of Hodgman,—and still be ignorant of the fact that Hodgman was resorting to these shifts and subterfuges to avoid his creditors, passes belief.

We have examined the record with most scrutinizing care, and we are forced to the conclusion that the special findings 3, 4, and 6 are not supported by the evidence; that the defendant Van Ness was fully cognizant of the object and purpose of Hodgman to hinder, delay, and defraud his creditors; that Hodgman was, at the time of the garnishment served on the defendant Van Ness, the owner of the said notes. The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment for the plaintiff in accordance with the prayer of its complaint.

MORGAN, C. J., and SULLIVAN, J., concur.

#### STATE v. ELLINGTON.

(Supreme Court of Idaho. Dec. 16, 1895.)

##### MURDER—INDICTMENT—EVIDENCE—STATEMENTS OF DEFENDANT.

1. Where, as in Idaho, the statute defines what shall constitute murder, an indictment which sets forth the crime in the language of the statute is sufficient.

2. The finding of the degree of murder being, by statute, required to be found by the trial jury, it is not essential that the definitions of the various degrees should be stated in the indictment. *People v. O'Callaghan*, 9 Pac. 414, 2 Idaho, 143, overruled.

3. Voluntary statements made by a defendant at the time of and while under arrest, it not appearing that the same were made or induced by any promise or hope of benefit to accrue to him therefrom, are proper to be proved on his trial.

4. Evidence in this case examined, and held to sustain verdict.

(Syllabus by the Court.)

Appeal from district court, Ada county; J. H. Richards, Judge.

James A. Ellington was convicted of murder in the first degree, and appeals. Affirmed.

Frank Martin and J. R. Wester, for appellant. Atty. Gen. Parsons, for the State.

HUSTON, J. The defendant was convicted of murder in the first degree, under the following indictment: "James A. Ellington is accused by the grand jury of said county of Ada, state of Idaho, upon their oaths, by this indictment, found this 28th day of December, A. D. 1894, of the crime of murder, committed as follows: The said James A. Ellington, on the 20th day of December A. D. 1894, at the said county of Ada and state of Idaho, did unlawfully, wilfully, feloniously, and of his deliberately premeditated malice aforethought make an assault on one Charles Briggs, and a certain pistol, commonly called a 'revolver,' which then and there was loaded with gunpowder and one leaden bullet, and by him, the said James A. Ellington, had and held in his hands, he, the said James A. Ellington, did then and there unlawfully, wilfully, feloniously, and of his deliberately premeditated malice aforethought, shoot off and dis-

charge at and upon the said Charles Briggs, thereby, and by thus striking the said Charles Briggs with the said leaden bullet, inflicting on and in the body of said Charles Briggs one mortal wound, of which said mortal wound the said Charles Briggs thence continuously languished, until the 25th day of December, 1894, on which said 25th day of December, 1894, at said county, he, the said Charles Briggs, died. And so the said James A. Ellington did, in manner and form aforesaid, unlawfully, willfully, feloniously, and of his deliberately premeditated malice aforethought, shoot, kill, and murder the said Charles Briggs, contrary to the form, force, and effect of the statutes in such cases made and provided, and against the peace and dignity of the state of Idaho."

It is claimed by counsel for appellant that this indictment is fatally defective, in that it does not allege specifically that "the killing was done unlawfully, willfully, and with deliberation, premeditation, and with malice aforethought." While, perhaps, it might be conceded that a hypercritical analysis of this indictment, under the strict rules of etymology, would develop some deviation from such rules, we are clearly of the opinion that under the provisions of section 7687, Rev. St. Idaho, which is as follows: "No indictment is insufficient, nor can the trial judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of a substantial right of the defendant upon its merits,"—the objections urged by counsel for the defendant cannot obtain. Counsel for defendant have urged their objections with exceptional zeal and ability, but we are mindful that our legislature has repeatedly remanded us that in the administration of the criminal law justice is not to be defeated through technicalities. Section 8236, Rev. St., is as follows: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein renders it invalid, unless it has actually prejudiced the defendant or tended to his prejudice in respect to a substantial right." And, again, sections 7685 and 7686 are as follows:

"Sec. 7685. Words used in a statute to define a public offense need not be strictly pursued in the indictment; but other words conveying the same meaning may be used.

"Sec. 7686. The indictment is sufficient if it can be understood therefrom: (1) That it is entitled in a court having authority to receive it, though the name of the court be not stated; (2) that it was found by a grand jury of the county in which the court was held; (3) that the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury unknown; (4) that the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the

local jurisdiction of the county, is triable therein; (5) that the offense was committed at some time prior to the time of finding the indictment; (6) that the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended; (7) that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

It is contended by appellant's counsel that the indictment does not state with sufficient certainty that deceased died from the effects of the wound inflicted by defendant. It seems to us that even a cursory examination of the indictment refutes this contention. We are not, as we have before said, called upon to go into a critical analysis of the language used; it is sufficient if it states in ordinary, plain, and concise language the commission of the offense. "The object of pleading, in its application to criminal cases, is a statement of a crime imputed to the prisoner with such a particularity of circumstances only as will enable him to understand the charge, and prepare for his defense, and as will authorize the court to give the appropriate judgment upon conviction." 1 Archb. Cr. Prac. & Pl. 884. This would appear to have been the view entertained by our legislature in the enactment of the statutes above given. The supreme court of Idaho territory, in *People v. Ah Choy*, 1 Idaho, 317, says: "The definition given of 'murder' in the statute is 'the unlawful killing of a human being with malice aforethought, either expressed or implied.' This definition includes both degrees of murder, and it is sufficient if the indictment charges the offense in the language of the statute defining it." This conclusion is supported by many decisions from the supreme court of California, from which state our statutes were taken. The degrees of murder are defined by our statute; and by section 7925, Rev. St. Idaho, it is provided: "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." How are the jury to find the degree? From the descriptive allegations in the indictment, or from the evidence on the trial? It seems to me the answer is unavoidable, as it is conclusive, that the degree of the crime is solely for the trial jury, and it is not requisite or essential that the words defining the degrees of murder should be set forth in the indictment to constitute a good indictment for murder in the first degree under our statutes. We cannot recognize the decision of the territorial supreme court of Idaho in the case of *People v. O'Callaghan*, 2 Idaho, 143, 9 Pac. 414, as a correct application of the law as given in our statutes. It must be admitted, we think, that a disposi-

tion on the part of some of our courts to give a strained latitude to technicalities in behalf of persons accused of crime has not only tended to make our courts, in the administration of the criminal law, an arena for the exhibition of professional acuteness and agility, but make us obnoxious to the charge of Lord Hale (2 P. C. 193): "More offenders escape by the overeasy ear given to exceptions in indictments than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offenses escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and to the dishonor of God."

Error is claimed in the admission of certain testimony as to statements of deceased made to persons at or about the time of the shooting. The witnesses differ somewhat in regard to time, but it is only a matter of seconds. The facts as shown by the evidence are about as follows: There appears to have been a difficulty or dispute between deceased and defendant in regard to money matters, defendant claiming that deceased owed him some \$30, which was disputed or denied by deceased. On the day of the homicide, these parties met on Thirteenth street, in Boise City. Some words were passed in regard to the alleged indebtedness, as testified by one or two of the witnesses, and then a shot was fired. After the first shot was fired, the parties came together, or "clinched"; and then two more shots were fired, and the defendant was seen to pull himself from deceased, or push deceased away from him, and fly. He had not gone more than 100 or 200 feet when one of the witnesses reached deceased. Witness asked deceased if he was hurt. "He said he was shot. I said: 'Who done the shooting?' He says: 'His name is Jim Ellington, a tramp who came up with me from California. He shot me, and has taken my watch.'" At this time defendant was running away, and was from 150 to 200 feet from the place where deceased was. Several witnesses reached that point at about the same time. The watch of deceased was gone, and the chain was hanging from his pocket. Several other witnesses arrived at about the same time, and testified to substantially the same facts. They differ as to time from half a minute to five minutes. The defendant's counsel object that the admission of the statements of the deceased made to said witnesses was error, the same not being a part of the *res gestæ*. What is or is not of the *res gestæ* is a matter that must be decided upon the facts of each case. There are no limits of time within which the *res gestæ* can be arbitrarily confined. Where it is apparent that the statements of deceased were made at a time, in a manner, and under circumstances which preclude any presumption that they were the result of consideration or design, their admission is prop-

er. Every statement made by the deceased, and admitted in evidence, was in substance corroborated by the subsequent statements of defendant at the time and after his arrest. The killing was not denied, it was admitted, by defendant. The whole theory of the defense was self-defense. When asked by the officer who arrested him, "What did you shoot Briggs for?" defendant answered, "Well I was going to shoot the s— of a b— down to my size, so I could handle him." The watch of deceased was found on defendant at the time of his arrest. No weapons of any kind were found upon deceased, nor is there any evidence of his having had a weapon at the time of the shooting. One witness (Mrs. Bower) says: "I saw a weapon of some kind in the hand of the taller man [deceased]. I seen a weapon in the short man's hand, I think it was. I didn't see any in the other man's hand." This is all the evidence aside from that of defendant supporting the contention that deceased was armed. The witnesses who examined deceased immediately after the shooting testify that they found no weapons of any kind upon him. Dr. Collister, the physician who examined deceased, testifies: "The ball entered the back at the eleventh rib, fracturing the rib, passing upward, fracturing the seventh rib. The ball entered about three inches from the spine, to the left of the spine." The defendant, in his testimony, it is true, gives a different statement of the affair; but the jury seem to have given more credence to the physical facts and the declarations of defendant at the time of his arrest than the testimony of defendant on the trial. It is quite apparent the defendant viewed the matter very differently at the time of his arrest, and while his victim was still living, from what he did when testifying under the shadow of the gallows.

It is objected that the prosecution were allowed to recall certain witnesses to testify in regard to matters which it is claimed were not strictly rebuttal. This is a matter entirely within the discretion of the trial court, and is so made by statute. It would most certainly be a denial of justice to refuse to allow witnesses to be recalled on the part of a defendant on trial for a capital offense merely because the matters in regard to which they are to testify are not strictly rebuttal, although material, and the same rule should apply to the state.

It is objected by appellant that there was error in the admission of testimony as to declarations made by defendant at the time of his arrest. The grounds for this objection are various. In their brief, counsel for appellant claim that the general rule is "that confessions made by one while under arrest, who is unwarned or uncautioned, and which admissions do not lead to the discovery of some fact or circumstance connecting or tending to connect defendant with the crime, are illegal testimony, and will necessitate a

reversal." The application of this rule to the case under consideration is not glaringly apparent. Appellant's counsel cite in support of this contention three authorities, viz.: *Musgrave v. State* (Tex. App.) 11 S. W. 927; *Davis v. State* (Tex. Cr. App.) 23 S. W. 687; *Jackson v. State* (Tex. App.) 16 S. W. 247. These are all cases from the court of appeals of Texas. The case of *Musgrave v. State* was an indictment for larceny. The point relied upon by appellant herein is thus stated in the syllabus of said case: "Defendant was approached by persons who, without his knowledge, were looking for a stolen mare. They asked defendant where the mare was which 'you and M. had,' and defendant informed them. The mare was found at the place as a result of defendant's statement. Held, that defendant's statement was not admissible against him as a confession of theft, as the statement in no way conduced to establish his guilt." The zeal and enthusiasm of counsel may be able to discover wherein this case supports the contention in the case at bar, but we confess it is beyond our ken. In the case of *Jackson v. State* (Tex. App.) 16 S. W. 247, the defendant was held for murder in the killing of his child, some three months old. The defendant, while under arrest, made a statement or confession to the constable having him in charge, after the constable had told him "it would be better for him to tell the truth." The court says: "The voluntary statement was made in strict compliance with the statutory provisions (Code Cr. Proc. Tex. arts. 261, 262), and was legitimate evidence as such statement." In the case of *Davis v. State* (Tex. Cr. App.) 23 S. W. 687, the syllabus of the case, which is borne out by the text of the decision, is as follows: "The statements, made by one while in jail on the charge of burglary, that a certain article with which the building was broken into, and a certain article taken therefrom, would be found in a certain place under a building, is, in connection with evidence that they were so found, admissible against him, under Code Cr. Proc. Tex. art. 750, making the confession of one in confinement admissible, where, in connection therewith, he made statements of facts that are found to be true, which conduces to establish his guilt." Aside from the fact that all of these decisions were predicated upon a statute peculiar to the state where they were made, we are unable to see how they can be claimed to support the position of appellant herein. The whole theory of appellant seems to be based upon an assumption of facts entirely unsupported by the evidence as shown by the record. The proposition of counsel that the deceased was the aggressor in the conflict which resulted in his death has no other support than the testimony of the defendant on the trial, and is not only in conflict with the voluntary statements of defendant at the time of his arrest, but is completely overthrown by the evidence of numerous

witnesses, as well as by the indisputable physical facts proven on the trial.

Several objections are presented to the instructions given and refused by the trial court. We have examined them all with the care and scrutiny which the importance and solemnity of the case demand, and we are convinced that the record shows no error prejudicial to any rights of the defendant.

Counsel for the defendant have presented his case with most commendable zeal and persistency, and defendant's rights under the law have been fully and ably protected, but we are unable to find anything in the record that will justify us in disturbing the verdict and judgment of the district court.

The judgment of the district court is affirmed, and the cause remanded for further proceedings.

MORGAN, C. J., and SULLIVAN, J., concur.

On Petition for a Rehearing.

HUSTON, J. The petition for a rehearing in this case has been carefully examined. It presents no new questions, but is a mere reiteration of the case made on the hearing. To go over the same ground covered in the decision of the court would avail nothing. We appreciate the zeal of counsel in a case of this kind, but we can only declare the law as we understand it. Petition denied.

MORGAN, C. J., and SULLIVAN, J., concur.

#### STATE v. MASON.

(Supreme Court of Idaho. Dec. 18, 1895.)

CRIMINAL LAW—ADMISSIBILITY OF CONFESSION.

A confession, so called, which the record shows was extorted from the defendant by threats and menaces, and which does not connect the defendant with the alleged crime, should not be permitted in evidence.

(Syllabus by the Court.)

Appeal from district court, Fremont county; D. W. Standrod, Judge.

Charles Mason was convicted of arson, and appeals. Reversed.

Quarles & Averitt and Evans & Rogers, for appellant. Geo. M. Parsons, Atty. Gen., for the State.

HUSTON, J. The defendant was indicted, jointly with one J. W. Hammon, for the crime of arson, in the burning of certain buildings, and other property, belonging to said Hammon. On arraignment, separate trials were given the defendants. Hammon was tried and acquitted. On the trial of Mason, the following writing, which the evidence clearly shows was extorted from him by one McCarty, a detective in the employ of the Continental Insurance Company (which institution had a policy of insurance on the property burned), was offered in evidence,

and received by the court, in words and figures as follows, to wit: "Interrogatories by Thomas McCarty, in the presence of Sheriff J. B. Cutshaw, and Deputy Sheriff W. W. Green: Q. What is your name and age? A. Charles Mason; age, 21 years. Q. Where do you reside? A. Hooper, Utah. Q. How long have you been living with J. M. Hammon? A. About six years. Q. How long were you living with him prior to the fire, November 25, 1893? A. About three months. Q. Do you know, of your own knowledge, how the fire originated which destroyed the Hammon buildings and contents? A. Yes, sir. Q. Go on and state to the gentlemen all you know about it, if you wish. A. About three weeks before the fire, J. M. Hammon came to me and told me about firing it. Q. Tell what he said, and how he said it. A. We were right at home, then, when he said, 'If I could keep a secret, we would make some money.' I asked how we could make money, and he said he could make money by firing the building, and asked me if I would set it on fire. This I refused to do. He said, 'I will fire it myself.' We talked about it several times after that. The day of the fire he told me he would set the fire that night. About 6 o'clock the evening of the fire, Daunt Hammon and myself went over to the house of H. Hammon, stayed there until about 9 o'clock, and returned to Daunt Hammon's house, and about half past 10 Daunt Hammon took a coal-oil can, poured the oil on the floor in the kitchen, near the stove, and set a match to it. He then took a coal-oil can, and then went to the barn, in which we had driven the horses that evening. He was gone for a few minutes. He said, when he went out, he was going to set the barn on fire. When he came back he said, 'Go to pulling the things out of the house,' which I did. At the time he set fire to the house I was standing near the sitting room, near the door. Levy Hammon and his wife were standing outside the house at this time. I do not know whether they were informed that the place was going to be set on fire or not. I drove the horses in the barn at his request, about sundown that evening. He wanted me to put some of my horses in with his, and burn them. He said it would not look suspicious if some of mine burned with his. I refused to do it, as I hated to have some of mine burned up. He took the stallion up to Mr. Daws' about a week before the fire. He told me he did not want him burned up, and that was the reason he took him up. I am sorry I did not inform the officers of the proposition he made me, before the fire; and I make this statement of my own free will, and voluntarily, without hope of reward, and as far as I can to undo the wrong that I have done; and the above facts are absolutely truth. So help me God. [Signed] Charles Mason. Subscribed and sworn to before me this December 15, 1893. F. S. Branwell, Clerk, by W. E. Patrie, Deputy. [Seal.]"

That the so-called confession was prepared in advance by the armed emissary of the insurance company is evidenced by the following testimony of Walter Patrie, a witness for the prosecution: "I am slightly acquainted with Charles Mason. I believe I was present in the sheriff's office at the time he is said to have made a statement to Thomas McCarty. I was requested by Mr. Green to come down to the jail and write out an affidavit that Mason was going to make. I didn't understand at the time it was a confession. I took the machine down as Mr. Green requested, and wrote down the questions and answers to the questions as they were given to me. Mr. McCarty gave the questions, and Mr. McCarty and Mason gave the answers. Mason gave the answers first. Q. I ask you if the statement had not been written out, and if the questions were not read from the statement by McCarty, and the answers made by him, and if Mason was not then asked if the answers were not correct? A. To the best of my recollection that is correct." This is the only evidence in the record which pretends in the slightest degree to connect the defendant with the arson, and it is palpable, from the record, that the defendant is an under-witted boy, and that this so-called confession was extorted from him by an armed bully, sometimes denominated a "detective," in the employ of the insurance company. We have searched the record in vain to find anything therein directly or indirectly, or by inference, connecting this defendant with the alleged crime. The manuscript is voluminous, containing a great deal of evidence in regard to the apparent cause of the fire; and counsel, in their zeal, seem to overlook the fact that all this evidence has no pertinency in connecting this defendant with the alleged crime. It is, of course, to the interest of the insurance company that this defendant, or some other, should be convicted, and in that behalf a strenuous effort has been made; but we do not believe that even the interests of an insurance company would warrant us in affirming the conviction of a half-witted boy upon such a showing as is made by this record. The judgment of the district court is reversed, and the defendant ordered discharged.

MORGAN, C. J., and SULLIVAN, J., concur.

#### ROBINSON v. NELSON et al.

(Supreme Court of Idaho. Dec. 21, 1895.)

PARTNERSHIP ACCOUNTING—REFERENCE—REMANDING REPORT—JURISDICTION.

1. Where a referee is appointed under subdivision 1, § 4414, Rev. St., and ordered to examine all evidence theretofore taken and reported in the cause, and report all issues, both of law and fact, and report a judgment therein, subject to the approval of the court, and the referee makes his report, and fails to find upon all issues of fact, the court may remand the



cause to the referee, to bring in amended findings of fact covering all issues made by the pleadings, without any further consent of the parties.

2. When a referee fails to comply with the order of the court making the reference, the court has authority and jurisdiction to require a strict compliance with such order.

(Syllabus by the Court.)

Appeal from district court, Ada county; J. H. Richards, Judge.

Action by Henry Robinson against A. Nelson and others for a partnership accounting. Judgment for plaintiff. Defendants appeal. Affirmed.

George H. Stewart and W. E. Borah, for appellants. T. D. Cahalan and D. D. Williams, for respondent.

SULLIVAN, J. This is an action for an accounting between partners. On the 27th day of April, 1891, by agreement of counsel, this case was referred to J. H. Wickersham to take and report the testimony; and on March 8, 1892, by agreement of parties, entered on the minutes of the court, Frank T. Wyman, Esq., was appointed referee to examine the evidence theretofore taken by J. H. Wickersham, state an account, report findings of fact and conclusions of law, and report a judgment therein, subject to the approval of the court. Thereafter, on the 30th day of April, 1892, the referee presented his report therein, and the court, by order of that date, directed the same to be filed. On the 4th day of May, 1892, the attorneys for the defendants filed their notice of motion to set aside said report, specifying 27 grounds therefor. On December 23, 1892, the court set the hearing of said motion for December 24, 1892. On the 24th day of December, 1892, the attorneys for the plaintiff made a motion to re-refer said report to the said referee, with instructions to make full and complete findings of fact upon all of the issues raised by the pleadings, from the evidence already before the referee, which motion was taken under advisement by the court on December 29, 1892. On April 19, 1893, said motion was granted. The record is silent as to the action of the court on appellants' motion to set aside the report of the referee, which was set for hearing on the 24th of December, 1892. But it is conceded that the court did not hear or decide said motion. Under said order of re-reference, the referee returned his amended report into court. It was filed April 10, 1894, and judgment thereon was duly entered on February 1, 1895. A motion for a new trial was made on February 4, 1895, and on the 6th day of April, 1895, denied. This appeal is from the order denying a new trial.

Appellants assign numerous errors, alleged to have been made, and demand a reversal of the judgment. The main contention of appellants is that the court erred in re-referring said case to the referee Frank T. Wyman, Esq., with instructions to make a full and

complete finding of facts upon all of the issues made by the pleadings, from the evidence already before the referee. The referee was appointed under the provisions of subdivision 1, § 4414, Rev. St. Idaho, which provides that a reference may be ordered, on the agreement of the attorneys, "to try any or all issues in an action or proceeding whether of fact or of law and to report a finding and judgment thereon." It appears from the record that the first report made by the referee failed to find on all of the issues made by the pleadings, and a re-reference was made for the purpose of obtaining findings of fact upon all issues. The reference was made without appellants' consent. The judgment recommended by the amended report made no change in the judgment recommended by the first report. Each report recommended a judgment in favor of plaintiff for the sum of \$3,311.94 and costs. Appellants contend that, when the first report of the referee was filed, it became the decision of the court, and that the referee was functus officio as soon as said report was filed, and had no power to act in the matter thereafter; that the court had no jurisdiction to re-refer said report without their consent. If the referee had performed all of the duties imposed by the order appointing him, upon filing his report his duties were at an end. He was functus officio. But, if he had failed to perform any of the duties thus imposed, his duties were not at an end. He was an officer of the court, acting under special instructions from the court,—instructions given under and by virtue of the agreement of the attorneys of the respective parties, and as provided by said statute. Until he performed all of the duties imposed by the order appointing him, he was not functus officio, but was still subject to the direction of the court; and it had jurisdiction to compel him or require him to perform all of the duties thus imposed, without any further consent of appellants. It is conceded by appellants that the referee failed to find on numerous issues made by the pleadings, as, in their motion to set aside said report, they specify 27 facts in issue on which the referee failed to find. A referee cannot discharge himself by failing or refusing to perform the duties imposed on him by order of the court. Nor can a party, after agreeing to a reference, withdraw his consent therefrom, after it has been acted on by the court, without its consent. If the referee fails to comply with the order of reference, it is the duty of the court to enforce compliance therewith. The consent of the parties is not necessary to confer jurisdiction on the court to compel the referee to obey the order under which he acts. The case of *Arn v. Coleman*, 11 Kan. 460, is cited by appellants in support of this contention. Mr. Justice Brewer, speaking for the court in that case, says: "The referee is born of an order. Without it he is not, and when he has

performed the duty imposed by that order he is functus officio." Note the language there used, to wit "when he [the referee] has performed the duty imposed by that order," etc. However, the point under consideration was not involved in that case. The court says: "How far the court may, after the report is filed, and before any order is made setting aside, send it back for consideration and amendment, is not involved in this case, and we express no opinion thereon." *Smith v. Warner*, 14 Mich. 158, cited by appellants, does not decide the point under consideration. In that case the court says: "Neither is it necessary, in the present case, to consider how far the court may go, in requiring a referee to make a fuller statement of facts when he has not embodied in his report a full recital." After a careful consideration of appellants' motion to set aside the first report of the referee, I do not think the court would have erred had it denied the motion, and referred the report for a fuller finding of facts. The action of the court resulted in bringing about that state of facts, and no prejudicial error was committed.

The appellants contend that the referee's finding of facts is not sustained by the evidence, and the first point urged thereunder is that the referee found that defendants had in their possession all of the partnership assets, amounting to \$5,194, which sum, the referee states, includes \$4,099 recovered on sale of cattle to Catlin, and \$225 received for cattle sold to Sparks & Tinnin, and fails to find of what items the balance of said \$5,194 is composed. While that is true, the evidence clearly shows that there were other partnership assets. And the report of the referee shows that defendants had the proceeds of the sale of 180 head of partnership cattle, or that they had purchased plaintiff's interest therein at the agreed price of \$2,100, which sum they retained. I think the finding of fact complained of is sufficient, and sustained by the evidence.

The eighteenth finding of fact is specified as error. It finds that plaintiff had received on account of said partnership \$344.13, and no more. It is contended that plaintiff admits in his complaint that he had received \$500 on account of said partnership, and that he also testified that he had received \$500, and should have been charged with that sum. Plaintiff admits in his complaint that he had received, on account of said copartnership, not more than \$500. He also testifies that he received \$500 from defendants, and, as I understand his testimony, it is to the effect that this \$500 was sent him to pay for supplies, hired help, etc., in connection with the partnership business, and not to be retained by him. Regardless of the indefinite admission made in the complaint, the referee was justified, under the evidence, in finding that he had received but \$344.13 on account of the partnership, as a part of his interest therein.

After a careful consideration of the various errors assigned, I find no prejudicial error in the record. While it is true the evidence, at least in part, is quite unsatisfactory and conflicting, I think there is sufficient to sustain the report of the referee. The judgment of the court below is sustained, with costs in favor of respondent.

MORGAN, O. J., and HUSTON, J., concur.

#### STATE v. NESBIT.

(Supreme Court of Idaho. Dec. 19, 1895.)

GRAND LARCENY—SUFFICIENCY OF EVIDENCE—VERDICT.

1. When there is absolutely no evidence to sustain the verdict, or where the evidence so preponderates against the verdict as to justify the presumption that it was rendered under the influence of passion or prejudice, the verdict should be set aside.

2. When the circumstances on which a verdict is based can be as reasonably explained upon some other reasonable hypothesis than that of defendant's guilt, or as perfectly consistent with defendant's innocence, then a new trial should be granted.

(Syllabus by the Court.)

Appeal from district court, Boise county; E. Nugent, Judge.

Watson M. Nesbit, Jr., was convicted of grand larceny, and appeals. Reversed.

Wyman & Wyman, for appellant. George M. Parsons, Atty. Gen., Hawley & Puckett, and L. E. Workman, for the State.

SULLIVAN, J. The defendant Watson M. Nesbit, Jr., was on the 9th day of August, 1894, jointly indicted with his father, Watson M. Nesbit, Sr., for the crime of grand larceny. The indictment charged that on October 5, 1893, the defendants did feloniously steal, etc., twelve \$20 gold pieces, three \$10 gold pieces, four \$5 gold pieces, one \$100 bank note, denominated "national currency," all United States money, and one gold English sovereign, dated 1828,—all the property of William Frame. The defendants were arraigned, pleaded not guilty, and by the verdict of the jury Nesbit, Sr., was acquitted, and Nesbit, Jr., was convicted, with a recommendation of mercy to the court. The defendant Nesbit, Jr., was sentenced to two years' imprisonment in the state penitentiary. Defendant's motion for a new trial was overruled. This appeal is from the order denying a new trial and the judgment.

The facts, as they appear from the record, are substantially as follows: Watson M. Nesbit, Sr., on or about the 8th day of September, 1893, arrived at Placerville, Idaho, from Utah, and remained there over night with Thomas Mootry, Jr., and the next day went with him to Quartzburg, when said Mootry placed him in charge, as superintendent, of the mines there being operated by the Gold Hill Mining Company, the owners of which were Thomas Mootry,

Jr., and David and W. A. Coughanour. Watson M. Nesbit, Jr., arrived in Quartzburg from Utah on the 14th day of September, 1893, and went to work for said company, under his father, as superintendent. He had charge of the cyanide plant, did assaying, etc. And it further appears that shortly after said Nesbit, Sr., was appointed superintendent of said company, several other men arrived from Utah, and went to work for said company; that the complaining witness, William Frame, had been foreman of said company for a long time prior to the said appointment of Nesbit, Sr., and was removed therefrom without his (Frame's) request or resignation. The company owned a Tilton & McFarland safe, which was situated in what is called the "old office" of the company, a new office having been built adjoining the old one, and the old one turned into an assay office. Said William Frame had, while foreman of said company, charge of said office and safe, and on the appointment of Nesbit, Sr., as superintendent, he delivered the keys of and possession of said office and safe to said Nesbit, Sr. Some time thereafter the witness Frame got the key to the safe from Nesbit, Sr., and opened the safe, and put therein the watches and rings referred to. Nesbit, Sr., placed his son (this defendant) in charge of said assay office, and gave him the key to the safe. On the night of the 5th of October, 1893, the safe was robbed of a gold bar of the value of about \$500, and some amalgam, belonging to the Gold Hill Company; and it is claimed that said Frame had in said safe, at the time of the robbery or theft, money of the kinds and denominations above set forth, also two watches, three finger rings, and two specimens of gold quartz, all of which, it is claimed, were taken by the robbers. The indictment, however, only charges these defendants with the theft of the money above described. It is shown that the morning of the 6th of October, 1893, Nesbit, Jr., went to the office about 7 o'clock, went in, and shortly after came out of the office, and went directly to his father, Nesbit, Sr., and reported to him that the office had been "looted"; whereupon they returned to the office, and found Nesbit, Jr.'s trunk broken open; its contents strewn about the room. A bent file was found lying on the floor, and some injury done to another trunk, which the burglars failed to open. Also the safe was open, and the bar of gold and amalgam gone, and the money and property claimed by said Frame to have been therein was also missing. There were also some pieces of tin and paper found on the floor. Strips of the tin were fashioned somewhat after the key to said safe. On December 8, 1893, the defendants, while on their way from Quartzburg to Utah, were arrested at Idaho City, and searched by the sheriff of Boise county and his deputy. On Nesbit, Sr., among the other things, was found a \$100

United States silver certificate or note; and on Nesbit, Jr., was found \$290 in gold coin of the United States and an English gold coin known as a "sovereign." Said gold coins were found in a buckskin purse, suspended by a string around the neck of Nesbit, Jr., and drawn up close under his left armpit, next to the flesh. At the same time were arrested six other persons who were on their way to Utah with the Nesbits, and who had been at work for said mining company under the superintendency of Nesbit, Sr. All of the parties so arrested were released except Nesbit, Jr. Thereafter Nesbit, Sr., and Nesbit, Jr., were indicted, tried for said larceny, and, as above stated, Nesbit, Sr., was acquitted, and Nesbit, Jr., convicted, and is now serving out the sentence imposed, in the state's prison.

The above state of facts we think sufficient for the purposes of this decision. Several errors were assigned, and a reversal of the judgment demanded. The principal error relied on is that the verdict is contrary to law and the evidence.

As to the contention that the verdict is contrary to the evidence: The rule is well established that if the evidence is conflicting, and there is any evidence to sustain the verdict, it will not be disturbed. *U. S. v. Camp*, 2 Idaho, 215, 10 Pac. 226; *People v. Ah Hop*, 1 Idaho, 698; *State v. Jorgenson* (Idaho) 32 Pac. 1129; *State v. O'Brien* (Idaho) 29 Pac. 33. In *People v. Vance*, 21 Cal. 400, the court says: "In order to justify the appellate court in setting aside a verdict, on the ground that it is opposed to the evidence, the evidence must be so overwhelming against the verdict as to justify the presumption that it was rendered under the influence of passion or prejudice." When tested by these rules, is the verdict sustained by the evidence? There is no evidence whatever tending to identify the \$100 silver certificate or note, or the gold coin of the United States,—the former found on the person of Nesbit, Sr., and the latter on the person of Nesbit, Jr.,—as the property alleged to have been stolen, and belonging to William Frame. The case seems to have turned on the evidence as to the identification of said English sovereign, which sovereign is before this court as an exhibit.

The said Frame, as a witness for the state, testified that he had been in the employ of the said company for some 20 years as miner and foreman, and had charge of said office, safe, etc., and had slept in said office for years prior to his discharge by Nesbit, Sr.; that he quit work on the last of September, 1893, some five days before the alleged robbery or theft; that on the first Tuesday after October 1, 1893, he went from Quartzburg to Horseshoe Bend, remained there one day, and returned home the day following, or, as we understand it, the day preceding the night of the robbery. He testified as follows: "When I left, I had some gold coin, a \$100 bill, two watches, and three rings in the safe. Can't

say how much coin there was. I never thought I had less than \$300 in money in the safe. I did think it was about \$400. It might have been \$500. There were \$20, \$10, and \$5 gold pieces. I don't remember how many of each kind, but there were more \$20 than any, and more \$5 pieces than \$10. This was all gold coin of the United States, and the \$100 bill was United States money of some kind; don't recollect what kind. I also had an English sovereign, which I took for \$5, but did not count it in to make the even hundreds. Can't say how long I had it; think about three years. The night I got it, some other boys who were there asked me if it wasn't a King George sovereign. I didn't know, and so looked at the date, and read it that time 1826. I looked at it again, and could not tell the date, and thought perhaps I had made a mistake. I read it that time 1836. I always thought my eyesight good until I examined that sovereign here in the court room, and I found I could not tell the figures on it." And, further, on cross-examination, he testified as follows: "All that I know about the \$100 bill that I had is that it was a \$100 bill. I am pretty well satisfied that it was not a gold note. I don't know that it was not a silver bill. I testified before the probate court at the preliminary examination of one of the defendants on this charge, and, in response to a question by the prosecution, testified: 'I can't say. It looks like it. It is for the same amount, but I can't say whether it is the same one I lost or not.' I am not certain about it at all." Referring to the English sovereign, and to the time he loaned Splain some money for the company, he testified: "The time I saw the sovereign last was probably three or four days before Nesbit commenced to work there. I gave Splain the money about a week or two before Nesbit, Sr., came there. We knew he was coming at the time. I did not notice the sovereign at that time. I didn't miss it anyway. I do not know how many \$20, \$10, and \$5 gold pieces there were there then. It is an English sovereign of 1826. It has a man's head on it, represented as a curly-headed man. It is worn more on the face side than on the other. I carried it in my pocket for a long time. It appears to be a little sprung. It always felt to me like it was. The first time I saw it, thought the date was 1826; the next time, 1836; and the next time, 1886. I didn't pay much attention to it. The top looks like an '8' or a '3.' I recognized this coin because it felt like the one I had. I think I could identify that sovereign by feeling of it once. I can yet, I guess. This coin seems sprung, has a hump on it, and feels different than an American coin. Mine felt the same way. This gold coin here [referring to United States coin] is all alike, like greenbacks, but it looks the same as the money I saw thrown on top of the documents spoken of in the safe. It looked just the same as my money did. I didn't

pay much attention to the gold in the sheriff's office. I saw the sovereign when they emptied it out on the table amongst the money, and thought that it was all mine. I found the same wear and the same peculiar mark about the sovereign as the one I had, and did not notice any of the balance of the money. I did not know how much money I had in the safe; so I went at once to Mr. Splain, and asked him. He said he did not know; that Nesbit, Sr., did. I did not ask Nesbit, because he asked me how much there was, or whether I had any money there." The last statement of witness indicates that he had not informed Nesbit, Sr., that he had any money in the safe, and Nesbit, Sr., and this defendant both testify that they did not know that he had any money there.

Recurring now to the identification of the money stolen, the foregoing is all of the evidence touching the identification of the money which the defendant was convicted for stealing. The evidence utterly fails in the identification of the \$100 bill as the one lost by witness Frame. Frame testified that "I can't say. It looks like it. It is for the same amount, but I can't say whether it is the same one or not. I am not certain about it at all." And, as to the identification of United States gold coin, he testified: "This gold coin [referring to that taken from Nesbit, Jr., by the sheriff] here is all alike, like greenbacks, but it all looks the same as the money I saw thrown on top of the documents spoken of in the safe. It looked just the same as my money did." This is no identification whatever of said gold coin as being that lost by the complaining witness. It is not claimed that any of the United States gold coins had any distinguishing marks on them, but it is shown that they have not. The witness testified, they are all alike; that they looked like his money; not that they were his. A very weak attempt was made to point out distinguishing marks on the English sovereign, and to identify it as the one claimed to have been lost by the complaining witness. The quotation from the testimony above set forth shows how utterly the prosecution failed in that attempt. The witness Frame at first attempts to identify it by testifying that "It had a man's head on it, represented as a curly-headed man," and "It is worn more on the face side than on the other," and "It appears to be a little sprung," and "It always felt to me like it was." As to the man's head on one side, that is no mark of identification, for all sovereigns of that date and issue had the same; and it is not distinguishably worn on one side more than the other, and it is not sprung, but in the usual shape of such coins. The witness testified: "I recognized this coin because it felt like the one I had. I think I could identify that sovereign by feeling of it once. This coin seems sprung. It has a hump on it, and feels different than an American coin. Mine felt the same way." Here he seeks to identify it by feeling, and

signally falls. The coin has no hump on it, but it does feel different from an American coin, and the witness swears to that, but is careful not to testify that it feels different from other sovereigns of the same date and coinage, or that it contains a single distinguishing mark. Having utterly failed to identify the coin by any peculiar distinguishing marks, he undertook to identify it by the date it bore. He testified: "The first time I saw it I thought the date was 1826; the next time, 1836; the next time, 1886;" and finally admits as follows: "I didn't pay much attention to it." The said sovereign is before us. It is not perceptibly worn more on one side than on the other; it is not sprung; neither has it a hump on it different from sovereigns of that date and coinage; and it is of the date of 1826, while the testimony shows that the last time Frame read the date on his coin, prior to losing, he read it 1886. It is rather surprising that witness Frame should have so completely failed to describe the sovereign after having seen it taken from the defendant, and no doubt having carefully examined it, with a view of identifying it on the trial of this case. His eyesight and delicacy of touch or feeling must be very defective.

The possession of the gold coin is the only circumstance shown by the evidence tending to connect the defendant with the larceny charged, and the prosecution failed to identify said coin as that alleged to have been stolen. If the prosecution had identified said coins as the ones stolen, or had proved that defendant had no money prior to the theft, either would have been a strong circumstance of defendant's guilt, and would have placed upon him the necessity of showing that he came into the possession of said coins innocently. But, as there was a complete failure to identify the coins as those alleged to have been stolen, the jury should have returned a verdict of not guilty. The defendant must have been convicted on suspicion, as there was no legal evidence establishing his guilt, regardless of the utter want of evidence on behalf of the prosecution attempting to identify the coin.

The defendant testified in his own behalf that he brought said gold coin from Utah, and also from whence he got it; that he had carried money several times as he was carrying that when arrested by the sheriff; that he was on his way to Utah, and carried it thus for safety; that he had a small collection of old coins; and that he had had said sovereign for more than three years,—and is corroborated as to these facts by his father, sister, two brothers, his betrothed, and by two other witnesses not related to him. In regard to the \$100 bill, Nesbit, Sr., testified as to circumstance and date of his drawing \$1,900 out of the Deseret National Bank at Salt Lake City, Utah, and that the \$100 bill was a part of that money, and is corroborated as to those facts by one witness.

Conceding that there is circumstantial evidence against the defendant tending to establish his guilt, those circumstances can be and are as reasonably explained on other hypotheses than that of defendant's guilt, or as perfectly consistent with defendant's innocence, and for that reason a new trial should have been granted. But, in our view of the case, there is no evidence to sustain the verdict; and as the record shows that Frame is the only witness who could identify the money alleged to have been stolen, and his testimony is full and complete of all he knew in that regard, it would only result in an acquittal of defendant if a new trial should be ordered, and also in a great expense to the county, without any beneficial result. A new trial will not be ordered for those reasons. It is not necessary for us to pass upon the other errors assigned.

The judgment of the district court is reversed, and it is ordered that the defendant be discharged, and that the exhibit consisting of United States gold coin and said English sovereign be delivered by the clerk of this court to the defendant or his attorneys, and that order for release of defendant and remittitur issue at once.

MORGAN, C. J., and HUSTON, J., concur.

#### BUSH v. ARTESIAN HOT & COLD WATER CO.

(Supreme Court of Idaho. Dec. 31, 1895.)

WATER COMPANIES — INSUFFICIENT SUPPLY — LIABILITY.

Under a contract between a city and a water company, by which the latter agrees to supply the city with water sufficient for fire purposes, an individual citizen, whose property has been destroyed by fire through the alleged neglect of the water company in complying with the terms of such contract, has no right of action against the company.

(Syllabus by the Court.)

Appeal from district court, Ada county; J. H. Richards, Judge.

Action by James H. Bush against the Artesian Hot & Cold Water Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Hawley & Puckett, for appellant. Johnson & Johnson, for respondent.

HUSTON, J. On the 1st day of August, 1893, the defendant corporation was under contract with Boise City, by the terms whereof, as the same is set forth in the complaint herein, said defendant agreed for a certain stipulated consideration to "maintain and keep in order forty hydrants, so placed in position as aforesaid, and such other hydrants as should be required by said Boise City, and to supply water at all points where such hydrants were located, sufficient for fire purposes in the vicinity thereof," etc.; that on said 1st day of August, 1893, the plaintiff

was the owner and in possession of certain real property and buildings therein situated in said Boise City; that said buildings were destroyed by fire on said 1st day of August, whereby plaintiff suffered damage in the sum of \$12,100; that such loss was the result of and in consequence of the failure of defendant to keep a sufficient supply of water in the hydrants and water pipes adjacent to said property. To the complaint, defendant filed the following demurrer: "Now comes the said defendant, by Messrs. Johnson & Johnson, its attorneys herein, and demurs to plaintiff's complaint in the above-entitled action filed, on the ground that it appears on the face thereof: (1) That said complaint does not state facts sufficient to constitute a cause of action. (2) That said complaint is ambiguous, unintelligible, and uncertain: First. In that, while it attempts to hold said defendant liable for the destruction of plaintiff's property through the alleged failure of defendant to furnish sufficient water supply. It does not allege or set forth any contract between defendant and said plaintiff to furnish such water supply, or any water supply whatever, for fire purposes; nor does it allege that plaintiff and defendant ever in any manner contracted for such a water supply, or that any consideration was ever paid or promised to be paid by plaintiff to defendant therefor. Second. In that it does not allege that plaintiff was a party to the said contract between said defendant and Boise City for supplying water for extinguishing fires, nor show any privity of contract between said plaintiff and said Boise City in relation to said contract on which to base this action. Third. In that it does not show that any duty or obligation existed on the part of said defendant to said plaintiff to furnish him a supply of water for protection from fire." The district court sustained the demurrer, and plaintiff declined to amend. Judgment was rendered for defendant for costs, from which judgment this appeal is taken.

The questions, or rather the question, for there is really but one question to be considered, raised by this appeal, has been frequently before the courts of this country, and the decisions have been uniformly against the contention of appellant. In fact appellant cites but one case, and we have been unable to find another,—that of *Paducah Lumber Co. v. Paducah Water Supply Co.* (Ky.) 12 S. W. 554,—which supports his contention. We have examined that case with much care, and, while it may be conceded that the rule of decision therein announced would cover the case at bar, it may not be amiss to call attention to the difference in the contracts upon which the two actions were brought. In the Kentucky case the defendant "agreed [as set forth in the opinion] to erect upon a platform 50 feet high a standpipe, 22 feet in diameter, and 175 feet high, with which was to be connected the conduct-

ing pipes and hydrants mentioned; and also two pumping engines, each having a capacity to force into the standpipe 2,000,000 gallons of water every 24 hours; and to keep a head of water sufficient to throw from any eight of the hydrants simultaneously, and for five consecutive hours at any one period of time, streams through 50 feet of hose 100 feet high; \* \* \* that appellee also agreed to have in the standpipe and conducting pipes at all times a supply of water sufficient to afford a head or pressure requisite for all domestic, manufacturing, and for protection purposes for all the inhabitants and property of the city," etc.,—a very different contract from that set forth in the record in this case; and, in addition to this, the water company, in the Kentucky case, the plaintiff, had a special private contract with the defendant for a water supply. What influence these facts may have had upon the decision in that case is, of course, matter of conjecture; but it could hardly, upon the facts, be accepted as an authority in the case under consideration here. All of the cases, or nearly all, in which this question has been raised, have held that the want of privity in the contract debars the individual citizen from suing in cases of contract between a water company and the municipal corporation. *Mott v. Manufacturing Co.* (Kan. Sup.) 28 Pac. 989. In *Howsmon v. Water Co.* (Mo. Sup.) 24 S. W. 784, although the contract contained a clause to the effect that, "should said company, from lack of water supply, or from other cause, except providential or unavoidable accident, fail to furnish a reasonable supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such failure or neglect," the court held that this gave no right of action to the individual citizen against the water company. To the same effect is the case of *Anderson v. Fitzgerald*, 21 Fed. 294. In *Davis v. Waterworks Co.*, 6 N. W. 123,—an Iowa case, a similar case to that under consideration,—the court say: "The petition does not allege or show any privity of contract between plaintiff and defendant. The plaintiff is a stranger, and the mere fact that she may find benefits therefrom by the protection of her property in common with all other persons whose property is similarly situated does not make her a party to the contract, or create a privity between her and the defendant." See, also, *Becker v. Waterworks* (Iowa) 44 N. W. 694; *Clark v. City of Des Moines*, 19 Iowa, 212; *McPherson v. Foster*, 43 Iowa, 57; *Jones, Neg. Mun. Corp.* § 31; *Beck v. Water Co.* (Pa. Sup.) 11 Atl. 300; *House v. Waterworks Co.* (Tex. Civ. App.) 22 S. W. 277; *Fitch v. Water Co.* (Ind. Sup.) 37 N. E. 982; *Ferris v. Water Co.*, 16 Nev. 44; *Nickerson v. Hydraulic Co.*, 46 Conn. 24; and numerous other authorities to same effect.

There is nothing in the contract in this case which intimates that any breach of the contract between the city of Boise and the

defendant was to inure to the benefit of any citizen who might consider himself aggrieved. What rights or remedies exist as between the parties to the contract we are not called upon to decide. One of the rules—a primary rule—in the construction of contracts by courts is to ascertain as near as possible the actual intention of the parties at the time they entered into the contract. It will hardly be contended, we apprehend, that either the city or the water company ever intended or ever contemplated the assuming by the latter of such a liability as the contention of the plaintiff would impose upon them. To undertake to review the multitude of cases cited by respondent would be a profitless task. It seems to us they are conclusive of the question herein, to wit, as to the liability of the defendant to the plaintiff under the contract set forth in the complaint. The order and judgment of the district court is affirmed, with costs.

MORGAN, C. J., and SULLIVAN, J., concur.

#### ADA COUNTY v. GESS.

(Supreme Court of Idaho. Dec. 31, 1895.)

COUNTIES—RECOVERY OF MONEY PAID OFFICER.

1. Appeal from the action of the board of county commissioners in the rejection or allowance of claims against the county is not the only remedy. Suit may be brought either by or against the county.

2. Money paid an officer of the county by the county commissioners in violation of the provisions of the constitution may be recovered back in a suit at law.

(Syllabus by the Court.)

Appeal from district court, Ada county; J. H. Richards, Judge.

Action by Ada county against Thomas B. Gess. Judgment for plaintiff. Defendant appeals. Affirmed.

The defendant was elected assessor of Ada county, Idaho, on November 10, 1890, was regularly qualified, filed his official bond, entered upon the duties of his office, and acted as such assessor and collector during the years 1891 and 1892, and until the second Monday in January, 1893. During the year 1891 the defendant, as assessor and ex officio tax collector of said Ada county, filed accounts against Ada county for the sum of \$6,510.24 for services as such officer during the year 1891. Said accounts were allowed by the board of county commissioners of said county, and defendant received from the auditor of said county warrants to the amount of the above-named sum. Defendant still retains the sum of \$6,510.24. During the year 1892 the defendant, as such assessor and ex officio tax collector of said county, filed with the board of county commissioners of said county, for services rendered as such officer, bills and accounts amounting to the sum of \$7,055.12, which said bills were allowed by the board, and

warrants therefor issued to said assessor, which warrants were paid by the county treasurer. Demand was made upon the defendant by the plaintiff for the sum of \$4,055.12 of said money so received and retained in the year 1892. Demand was also made upon said assessor for the sum of \$3,510.24 of the amount received by him in the year 1891. Defendant refuses to pay over to said county any part of the money so demanded, and the county now claims that the defendant is indebted to it in the sum of \$3,465.36, also for the sum of \$1,059.17, interest on said sum last above mentioned from the time of the commencement of this action. This suit was commenced on the 23d day of November, 1893. Cause was tried before the court, a jury having been waived by the parties, resulting in a judgment in favor of the county for the sum of \$9,525.33, with interest thereon at the rate of 10 per cent. per annum from the date of the judgment until paid, together with plaintiff's costs and disbursements incurred in the action, amounting to the sum of \$13.85. Judgment was rendered against the defendant March 1, A. D. 1895. From this judgment the defendant appeals to this court.

Brown & Cahalan and W. E. Borah, for appellant. Geo. M. Parsons, Atty. Gen., and Hawley & Puckett, for respondent.

MORGAN, C. J. (after stating the facts). The appellant contends that, the bills having been presented and paid by the board of county commissioners, and no appeal taken, the payment was voluntary, and cannot be recovered back. The appellant also contends that an appeal from the action of the board was the only remedy, and cites *Picotte v. Watt*, 2 Idaho, 1154, 31 Pac. 805. In that case application was made for an injunction to restrain the payment of certain warrants ordered issued by the board of county commissioners. The court holds that there was a complete and adequate remedy at law, and in such case equity cannot be invoked. The same is held by this court in *Morgan v. Board*, 39 Pac. 1118; *Rogers v. Hayes* (Idaho) 32 Pac. 239; *Clark v. Dayton*, 6 Neb. 192. The last-named case was also a suit in equity. The court did not hold that appeal from the action of the board of county commissioners was the only remedy, as such a decision would be in the face of the statute (section 1780, Rev. St. Idaho), which provides that a claimant dissatisfied with the rejection of his demand may sue the county therefor at any time within six months. In *Meller v. Board* (Idaho) 35 Pac. 712, the court simply holds that all orders of the board of county commissioners are appealable under section 1776, and does not hold that the county may not sue to recover money illegally paid. *Davis v. Commissioners* (Mont.) 1 Pac. 750, also cited, does not sustain the contention of appellant. The decision of the court in *Brown v. Otee Co.*, 6 Neb. 121;

was rendered under a different statute from the one in this state, as there the statute provides, as the court say, that appeal from the action of the board on accounts is the only remedy, while our statute (section 1780) provides the county may be sued when a claim is rejected. Appeal may also be taken, but appeal, under our statute, is not the only remedy, and it cannot be said, as in case of *Martin v. Supervisors*, 29 N. Y. 645, that the action of the board is final and conclusive, as other remedies are expressly provided; and the district court is not a court of appellate jurisdiction only, but has original jurisdiction also in such cases. Under our statute, therefore, there are other remedies provided.

As the county is a municipal corporation, it may sue and be sued, and we know of no limitation as to time, except that provided in the general limitation laws of the state. We are told, however, that money paid through a mistake of law is a voluntary payment, and cannot be recovered back; and we are cited to the case of *Badeau v. U. S.*, 130 U. S. 439, 9 Sup. Ct. 579, as sustaining that doctrine, but it does not do so. Chief Justice Fuller, in that case, did not place his decision on the ground that money paid by one officer of the government to another officer is a voluntary payment that cannot be recovered back, but upon the ground that the claimant although retired, was still an officer of the army de facto, if not de jure, and for that reason he was entitled to the money received, and it could not be recovered back, and ex aequo et bono should not be returned. Some of the authorities cited, however, seem to sustain the contention of the appellant, and some authorities go so far as to hold that payments of the money of the public by its authorized agent to an officer on account of a mistake of law cannot be recovered back. The doctrine is so repugnant to every principle of justice and common honesty that the latter cases do not, by their reasoning, commend themselves to this court. We cannot consent to carry the doctrine beyond settlements between private individuals. Therefore we must hold that payments made by the county commissioners to public officers, which are positively and absolutely forbidden by the statutes of the state and by the constitution thereof, may be recovered back. Both are public officers, and it is the duty of both to see to it that the county is not damaged through their malfeasance, negligence, or mistake. The statute positively forbids the county commissioners to issue any warrant except it is directly authorized by law (section 1775). Again, section 7 of article 18 of the constitution provides as follows, to wit: "The officers provided by section 6 of this article shall receive annually, as compensation for their services as follows: \* \* \* The county assessor who is ex officio tax collector, not more than three thousand dollars and not less than five hundred dollars." The

case of *Guheen v. Curtis*, 2 Idaho, 1151, 31 Pac. 805, is directly in point in this case. In that case this court said: "The maximum compensation to be paid annually to the assessor and tax collector is, however, limited by the provisions of section 7, art. 18, of the constitution, to the sum of three thousand dollars, and he can in no event receive a larger sum." Here is a plain and positive prohibition by the constitution, which cannot be avoided nor violated. To hold otherwise would open the door to unlimited payments of sums forbidden by the constitution as salaries or fees of public officers by the county commissioners with or without collusion, and these payments retained under the specious pretext that they were voluntary payments under a mistake of law. We do not impute any fraud or misconduct to the assessor in this case. He seems to comply with the provisions of the constitution and laws of the state, except in retaining the money of the county above the amount allowed him by the plain and positive provisions of the constitution above quoted. The judgment of the court must be affirmed, and it is so ordered. Costs awarded to respondent.

SULLIVAN and HUSTON, JJ., concur.

HODGINS v. HARRIS et ux. (WHITE, Intervener).

(Supreme Court of Idaho. Nov. 30, 1895.)

APPEALABLE JUDGMENT.

An order for a judgment is not such a final judgment as an appeal can be taken from, under the provisions of the statutes of Idaho. (Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by one Hodgins, administrator, against Harris and wife, and White, intervener, to foreclose a mortgage. From an interlocutory order, plaintiff appeals. Dismissed.

Forney, Smith & Moore, for appellant. S. S. Denning, for Harris and wife. E. O. Neill and J. C. Elder, for intervener White.

HUSTON, J. This is an action to foreclose a mortgage. At the end of the conclusions of law found by the district court, the following words appear: "It is ordered that, after deducting the payment to the sheriff, that the balance of the proceeds of sale be paid into court, and distributed, by and through the clerk, in the foregoing order, and that judgment and decree be entered herein in accordance with the foregoing findings. Done in open court this 8th day of December, 1894. [Signed] W. G. Piper, Judge." This is not a judgment, as has been repeatedly decided by this court, following uniform decisions of the supreme court of California



upon identical statutes. *Durant v. Comegys*, 2 Idaho, 809, 26 Pac. 755; *Gray v. Cederholm*, 2 Idaho, 42, 3 Pac. 12; *Meysan v. Chabrie* (Cal.) 7 Pac. 634; *Stebbins v. Savage* (Mont.) 5 Pac. 278; *Gray v. Palmer*, 28 Cal. 416; *McNevin v. McNevin*, 11 Pac. Coast Law J. 92; *Thomas v. Anderson*, 55 Cal. 43; *Schroder v. Schmidt*, 71 Cal. 399, 12 Pac. 302; and many others. Appeal dismissed, with costs.

MORGAN, C. J., and SULLIVAN, J., concur.

#### PRITCHARD v. BUTLER.

(Supreme Court of Idaho. Dec. 11, 1895.)

##### CHATTEL MORTGAGE—WHAT CONSTITUTES.

A deed or bill of sale of either real or personal property, accompanied by a contemporaneous agreement for reconveyance of the same upon payment of consideration, which shows that the conveyance was made to secure indebtedness, is in effect a mortgage.

(Syllabus by the Court.)

Appeal from district court, Kootenai county; Alex Mayhew, Judge.

Action by Joseph L. Pritchard against Benjamin Butler. Judgment for plaintiff. Defendant appeals. Affirmed.

On August 9, 1893, respondent, Pritchard, was indebted to Butler, appellant, in the sum of \$285. To secure this respondent gave appellant a bill of sale of a certain store building and some personal property, and delivered possession thereof to him. A contemporaneous verbal agreement was made between respondent and appellant, that if respondent would pay appellant said sum of money, appellant would reconvey said property to respondent, and deliver the same to him. There was also an agreement, by and between Butler and one Ignatz Well, a short time after the making of the agreement between Butler and Pritchard, that if Well should pay Butler the amount due him from Pritchard, he (Butler) would convey said property to Well to secure a debt from plaintiff to Well. Well never paid said amount to defendant, and therefore nothing came of the latter agreement. The court submitted questions to the jury, on which a special verdict was rendered, which is as follows: The jury find: That at the time the bill of sale of the property was given by plaintiff to Butler, it was agreed by them that on payment of \$285 to Butler he (Butler) was to convey the property back to Pritchard. That after the delivery of the bill of sale, it was agreed upon between plaintiff and defendant that on the payment of the said \$285 by Well, Butler was to convey the property to him (Well) as security for this payment and other moneys due Well from plaintiff; but Well himself testifies that he never paid anything to Butler thereon. The jury further find that Pritch-

ard paid said sum of \$285 to Butler before the commencement of this suit. These findings were adopted by the court as the facts in the case, and a judgment and decree entered thereon in which said bill of sale, executed on the 9th day of August, 1893, by plaintiff to defendant, is declared to be a chattel mortgage. Said defendant Butler is ordered to execute a reconveyance of the said property remaining in his hands to said plaintiff, Pritchard; and the court gives judgment for \$50, rent for use of property, and for \$103.70, costs of suit. From this judgment, and from the order overruling defendant's motion for new trial, defendant appeals.

R. E. McFarland, for appellant. Chas. L. Heltman, for respondent.

MORGAN, C. J. (after stating the facts). All the assignments of error made by appellant which are deemed material are considered and determined as follows, viz.: The complaint sets forth the cause of action which, the facts show, existed at the commencement of the suit in ordinary and concise language, and, as we think, is entirely sufficient. The contract between Well and Butler was never complied with by Well, as appears by his own testimony, and was therefore of no effect, and left the contract between plaintiff and defendant in full force; and any evidence relating to the Well contract, and the remarks of the court thereon, as to who should keep the said agreement, were entirely immaterial, and can have no effect. It was entirely proper for the court to submit the questions proposed to the jury, and to adopt their findings when returned, if he believed them to be correct. It was properly an equity case, and the court could adopt or reject the findings of the jury thereon, at his discretion. A deed or bill of sale of real or personal property, made by a debtor to his creditor, accompanied by a contemporaneous agreement between the parties for a reconveyance of the property upon payment of the debt, constitutes a mortgage. See *Kelley v. Leachman*, 2 Idaho, 1112, 29 Pac. 849; *Jones, Mortg.* § 20; *Smith v. Smith*, 80 Cal. 325, 21 Pac. 4, and 22 Pac. 186, 549; *Taylor v. McLain*, 64 Cal. 514, 2 Pac. 399; and a number of authorities cited in *Kelley v. Leachman*, supra. The evidence of the making of this contemporaneous agreement to reconvey the property upon payment is conclusive, as testified to by both plaintiff and defendant. The evidence as to the payment of the \$285 by plaintiff to defendant is conflicting, and in such cases this court must receive the verdict of the jury and the findings of the court as conclusive. The judgment of the lower court is affirmed, with costs to respondent.

SULLIVAN and HUSTON, JJ., concur.

**DERNHAM et al v. LIEUALLLEN.**

(Supreme Court of Idaho. Dec. 14, 1895.)

**APPLICATION TO SETTLE BILL OF EXCEPTIONS.**

Where an application is made to this court to settle exceptions under section 4432, Rev. St., and paragraph 1, rule 12, of the rules of this court (32 Pac. vii.), and the applicant prays to have such exceptions as are set out in his Exhibit No. 7, and fails to submit such exhibit, the court has nothing to act on, and the application will be denied.

(Syllabus by the Court.)

Action by Henry Dernham and others against A. A. Lieuallen. Application by defendant to have his bill of exceptions settled. Denied.

A. A. Lieuallen and James W. Reid, for petitioner. Forney, Smith & Moore, for respondents.

**SULLIVAN, J.** This is a petition for the allowance of a bill of exceptions, claimed to have been brought under the provisions of section 4432, Rev. St., for the allowance of a bill of exceptions on behalf of the defendant. Paragraph 1, rule 12, of the rules of this court (32 Pac. vii.), provides that the petition must be filed with the clerk of this court within 30 days after such refusal, and a copy of the petition served upon the adverse party, and that the facts may be presented by certified copies of the record, stenographer's notes duly verified, or affidavits, and, if necessary, oral testimony. The petition was served and filed in proper time. The petition is submitted without brief or oral argument on behalf of either of the parties. The petitioner prays for the settlement of his bill of exceptions, "as set out in Exhibit No. 7, herewith submitted," and fails to submit said exhibit. There are only six exhibits submitted with the petition, numbered from 1 to 6. The proposed bill of exceptions is neither of the six. We therefore cannot settle the proposed bill of exceptions, for the reason that it is not before us. The application is not allowed, for that reason.

**MORGAN, C. J., and HUSTON, J., concur.**

**GUYNN v. McDANELD.**

(Supreme Court of Idaho. Dec. 30, 1895.)

**SERVICE OF WRIT — PRIVILEGE OF NONRESIDENT.**

M., being a nonresident, in attendance upon a term of the United States circuit court for the district of Idaho as plaintiff in a suit brought by him against G., a resident of Idaho, was not exempt from service of a summons in an action commenced by G. against him in the district court of Idaho.

(Syllabus by the Court.)

Appeal from district court, Bannock county; D. W. Standrod, Judge.

Action by H. G. Gynn against D. H. McDaneld. From a judgment quashing service of summons, plaintiff appeals. Reversed.

**Hawley & Puckett and Reeves & Terrell,** for appellant. E. M. Allison, Jr., and Geo. H. Stewart, for respondent.

**HUSTON, J.** This is an appeal from an order and judgment of the district court for Bannock county quashing service of summons. Defendant is a resident of the state of Illinois, and while attending the United States circuit court at Boise City, in this state, as plaintiff in a suit which he had brought against the plaintiff, was served with summons in this action brought against him by plaintiff. The only question before us is, is a nonresident plaintiff exempt from service of summons in a civil suit while in attendance upon a court within this state as plaintiff? This question has frequently been before the courts of this country, both state and federal; and, while there has been pretty general uniformity in the decisions of the federal courts, those in state courts have been almost distractingly variant.

Rev. St. § 4123, provides under title 4, "Of the Place of Trial of Civil Actions," *inter alia*, as follows: "If none of the defendants reside in the state, or, if residing in this state, the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint, and if the defendant is about to depart from the state such action may be tried in any county where either of the parties reside or service is had." Section 4143 provides that "the summons may be served by the sheriff of the county where the defendant is found," etc. These, we believe, are all the provisions of our statute pertinent to this question. The first case cited in the brief of counsel for respondent is that of *Mitchell v. Circuit Judge*, 53 Mich. 541, 19 N. W. 176. This was the case of a resident of the state, who, while attending court in a county other than that of his residence, was served with process in a civil suit. The decision was based largely upon the fact that the party was a necessary witness, although Judge Cooley, it is true, uses the following language in his decision: "Public policy, the due administration of justice, and protection to parties and witnesses, alike demand it. There would be no question about it if the suit had been commenced by arrest; but the reasons for exemption are applicable, though with somewhat less force, in other cases also." Primarily, we think, the exemption extended only to cases of arrest, and was applicable only to the case of witnesses. An examination of the authorities cited by Judge Cooley in *Mitchell v. Circuit Judge*, *supra*, will show that a large majority of them arose in cases of witnesses. Still, in those courts where the rule contended for by respondent has been recognized, it has very generally been extended to parties as well as to witnesses. In *Wilson v. Donaldson*, 117 Ind. 356, 20 N. E. 250, in the case of a nonresident defendant sued

while returning from attending a suit brought against him by the same plaintiff in the state of Indiana, the court says: "The contention of appellant's counsel is that the fact that the appellee was in Indiana, in attendance upon court as a party to an action which he had brought against him, and for the purpose of testifying as a witness, does not entitle him to avoid the summons served upon him while in this state. Our statute is broad enough to sustain this contention if we take it apart from all the other rules of the law, for it provides that in cases of non-residents an action may be commenced and summons served in any county where they may be found. But a statute is not to be isolated from the great body of the law of which it forms a part. On the contrary, it is to be taken as forming part of one great system, and is to be construed with reference to co-ordinate rules and statutes." We confess that such a rule of construction seems to us something more than novel; it is startling. It is not predicated upon any rule of *pari materia*, but is, it seems to us, in conflict with those elementary principles which recognize the definitive distribution of governmental power in both our state and federal systems. If courts can set aside the positive provisions of a statute upon the specious plea that it is not in accordance with the court's idea of "the eternal fitness of things," as applied to legislation, it is difficult to conceive the limit of judicial power through the medium of construction. Great as is our respect for the court from which this decision emanates, we cannot accept its conclusions in this matter. Neither are we able to concur in the view of Judge Cooley as expressed in *Mitchell v. Circuit Judge*, *supra*, in support of the same rule, that "public policy, the due administration of justice, and protection to parties and witnesses, alike demand it." Let us see. We will suppose that in a given case a creditor, resident of the state of Illinois, sues a debtor, citizen of the state of Idaho, in the courts of Idaho. The debtor, we will suppose, has a meritorious cause of action against the creditor, but it is of a character not permissible under the rules of practice to be litigated in the suit instituted by the creditor, and the debtor is presumably too poor to enter upon the assertion of his rights in a suit which would involve the expense of taking his witnesses from Idaho to Illinois, and supporting them there during what the wealthy creditor might make interminable litigation. Would not this be a palpable denial of justice? The nonresident has sued his debtor in a forum selected by himself wherein to enforce his claimed rights, but he will not submit to have the claims of his debtor adjudicated in the same forum. Why? Because, by compelling him to seek another forum, he thereby subjects him to conditions which simply amount to a defeat of his claims. If the courts of Idaho can, in the

opinion of a litigant, protect his rights in one case, it would seem that they ought to be equally adequate in another. We are tardy in recognizing a rule which seems to us capable of being wrested to the infliction of such palpable injustice, more especially as our statutes admonish us thus: "Revised statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect their objects and promote justice." Rev. St. § 4.

While it may be conceded that perhaps, including the decisions of the federal courts, a majority of decisions are contrary to our view, still we are "sustained and soothed" by the reflection that our position has the support and concurrence of very many of the most highly esteemed courts of the country. Say the supreme court of Rhode Island in discussing the rule under consideration, in *Baldwin v. Emerson*, 15 Atl. 83: "We think it would rarely happen that the attention of a nonresident plaintiff or defendant would be so distracted by the mere service of a summons from the immediate business in hand in prosecuting or defending a pending suit that the interests of justice would suffer in consequence, or that the liability to such service would often deter them from prosecuting or defending their just claims or rights. The reasons assigned for the exemption would apply equally as well to resident as to nonresident suitors, and it has never been deemed necessary to exempt resident suitors from the service of a summons so far as we have been able to find, except in the single state of Pennsylvania. We think these reasons are fanciful, rather than substantial." See, also, *Capwell v. Sipe* (R. I.) 23 Atl. 14; *Bishop v. Vose*, 27 Conn. 1; *Christian v. Williams* (Mo. Sup.) 20 S. W. 96; *Balsley v. Balsley* (Mo. Sup.) 21 S. W. 29; *Mullen v. Sanborn* (Md.) 29 Atl. 522; *Page v. Randall*, 6 Cal. 32.

The order and judgment of the district court are reversed, with costs, and the cause remanded for further proceedings.

MORGAN, C. J., and SULLIVAN, J., concur.

#### PENCE v. LEMP.

(Supreme Court of Idaho. Dec. 13, 1895.)

APPEAL—DISMISSAL—INSUFFICIENCY OF TRANSCRIPT.

Where the transcript fails to show a compliance with the provisions of the statute or the rules of this court in the matter of appeals, the appeal will be dismissed.

(Syllabus by the Court.)

Appeal from district court, Ada county; E. Nugent, Judge.

Action by Joseph C. Pence against John Lemp. Judgment for defendant, and plaintiff appeals. Dismissed.

J. H. Richards, O. E. Jackson, J. R. Wester, and Hawley & Puckett, for appellant. Geo. H. Stewart and W. E. Borah, for respondent.

**HUSTON, J.** This is a motion to dismiss the appeal. The grounds upon which the motion is based are numerous, and, we think, in every instance well taken. In fact, there seems to have been, either through negligence or misapprehension, a complete abnegation, in the taking of this appeal, not only of the rules of this court but of the provisions of the statutes. It appears from the record that there was never any engrossment of the statement, or settlement thereof. There appears in the record the following: "The foregoing statement on motion for a new trial is hereby settled and allowed, and ordered filed. [Signed] E. Nugent, Judge." This appears at the end of some 37 pages of "proposed amendments to the statement of plaintiff on motion for a new trial," which proposed amendments are entirely disconnected from what purports to be the "statement of appellant on motion for a new trial." What was, or was intended to be, settled by the said indorsement by the district judge? God and himself may know; but neither has, either by endowing us with retrospective vision, or enlightening us through the record, given this court any basis for an opinion therein. The notice of appeal was filed and served January 11, 1895. The transcript was filed October 12, 1895. Rule 27 (32 Pac. xi.) requires transcript to be filed within 60 days after appeal is perfected. This time may be extended by any justice of this court upon proper application in proper time. No application for an extension of time was ever made in this case. If there was ever a bona fide intention to take an appeal in this case, it has most signally failed. The motion to dismiss is allowed, with costs.

**MORGAN, C. J., and SULLIVAN, J., concur.**

#### **BAKER v. SCOTT.**

(Supreme Court of Idaho. Dec. 30, 1895.)

**OFFICIAL BALLOTS—CORRECTION OF DEFECTS—ESTOPPEL.**

Where a candidate for a county office neglects to have an alleged defect in the official ballot corrected as provided by section 59 of the election laws of this state, he cannot, after the election is had, and he finds himself defeated, raise the objection that the name of the successful candidate was improperly placed upon the official ballot.

(Syllabus by the Court.)

Appeal from district court, Bannock county; D. W. Standrod, Judge.

Action by John S. Baker against John Scott to try title to office. Judgment for defendant. Plaintiff appeals. Affirmed.

S. C. Winters, D. C. Lockwood, Stewart & Deltrich, Edgar Wilson, and Geo. M. Parsons, Atty. Gen., for appellant. Eden & Warner and W. C. Love, for respondent.

**HUSTON, J.** This is an action brought by the plaintiff against the defendant to try the right to the office of clerk of the district court and ex officio auditor and recorder for the county of Bannock. At the regular biennial election held in this state on November 6, 1894, the plaintiff was the nominee of the Republican party of Bannock county, and his name was placed upon the official ballot as such. The defendant was the nominee of the Democratic party for said office, and was also nominated by the People's party and by the Taxpayers' party for the same office, and his name appeared upon the official ballot of said county as the candidate of each of said parties for said office. At the said election the plaintiff received, according to the official canvass of the votes cast at said election for said office, 545 votes, and the defendant received 818 votes. It is claimed by plaintiff that the votes cast for the defendant as the candidate of the People's party, being, as found by the district court, 275 votes, and those cast for defendant by the Taxpayers' party, being, as found by the district court, 46 votes, should not have been included or counted in the official canvass, for the reason that said defendant's name as a candidate for said office was placed upon said official ballot as the candidate of said People's party and said Taxpayers' party irregularly, and in contravention of the provisions of the election law of this state. It appears: That on the 15th day of September, 1894, the People's party of Bannock county held a convention for the purpose of placing in nomination candidates for the various county offices to be voted for at said election. That said convention left the nomination for clerk of the district court of said county vacant, and that said convention, while in session, duly assembled for the purpose herein mentioned, passed this resolution: "Resolved, that a special committee of three be elected who are authorized to fill all vacancies on the ticket." That said resolution was adopted by said convention, and Frank Walton, Frank H. Murphy, and W. F. Fisher were elected as such committee. That said committee organized by the election of W. F. Fisher as chairman and Frank H. Murphy as secretary. Subsequently, and within the time prescribed by the statute, such nomination was duly certified by the chairman and secretary of said committee to the auditor of said county of Bannock, together with the other nominees of said party for county offices of said county. It is contended by the plaintiff that said resolution of the People's party convention gave no power or authority to said committee to certify the name of the defendant to the auditor of said county, or authorize said auditor to place the name of defendant upon

the official ballot of said county as the candidate of the People's party for said office. It is contended by counsel for appellant that under the provisions of section 34 of the election law of 1891 such committee has no power to fill any vacancy that is not made or caused by the death or declination of a candidate previously nominated by the convention. Perhaps a strict technical construction of section 34 might support this contention under certain circumstances, but when we consider this law in the light expressed by an authority cited by appellant, viz.: "The main purpose of the law evidently is to enable voters to express their real wishes by their ballots, freed entirely from the influences which might tend to corrupt or intimidate them, and also to provide for printing and distributing at public expense ballots which will afford *all political parties, and considerable groups of electors, a fair opportunity to vote for the candidates of their choice*" (the italics are ours),—we may well doubt whether the construction contended for by appellant's counsel should be entertained. Vacancies may occur in the nominations of political parties from various causes, entirely consistent with honesty of purpose on the part of the convention, and a just and commendable desire on their part to subserve the best interests of the people. Take, for instance, the case cited by counsel for the appellant in their last brief, to wit, that of the Prohibition party's last state convention in this state. Now, we all know what is the primary and underlying principle of that party, and in declining to place upon their ticket any candidates for the offices of judge of the supreme court and attorney general they undoubtedly considered that they were acting for the best interests of their party and of the people, presumably in view of the fact that the candidates for those offices on the Republican ticket were such known and palpable exponents of the fundamental principles of the Prohibition party that any nominations by them would not only be invidious, but an act of supererogation. Counsel for appellant, in their brief, seem to intimate that their contention is supported by the English decisions upon similar statutes. In this counsel are in error, we think, in their application of the rule of the English statute to this case. It is provided by 35 & 36 Vict. (1872), amended in 1875 by 38 & 39 Vict. p. 283, c. 40, § 1, that the returning officer shall decide on the validity of every objection made to a nomination paper, and his decision, if disallowing the objection, shall be final, but, if allowing the same, shall be subject to reversal on petition questioning the election or return. It will be seen that in England the erroneous placing of a name upon the ballot, though not corrected before election, is not permitted to work the disfranchisement of the voter.

Much zeal is manifested and much space occupied in the brief of counsel in picturing

the fearful results attendant upon any but the strictest construction of the statutes under consideration, and yet we are constrained to think that the agonizing fear of counsel in that behalf is a little overstrained. We have always been under the impression that, however divergent the fact might sometimes be, our government is predicated upon the theory that the American people were capable of self-government, and our election law seems to comprehend intelligence and education in the voter, sufficient to enable him to read the names on the ballot, for he is required to designate the candidate for whom he desires to vote by placing a cross opposite the name of such candidate, and this he must do without assistance extraneous of the ballot itself. Under the old system of voting, the apprehension of counsel was that some voter might be deceived by the placing of the name of a candidate upon more than one place upon the ballot; but it does seem to me that the danger of such deception is reduced to the minimum under a system which requires the voter to read upon the ballot the name of every candidate he would vote for, and distinguish the same by a certain prescribed mark. Of course, there always has been, and there always will be, until integrity becomes a more prominent factor in party politics than it ever has been in this country, found means whereby voters may and will be deceived. All legislation upon this subject ought to be directed to the protection of the voter, not only from intimidation and corruption, but from deceit; but such means, when provided, ought not to be so construed as to work the disfranchisement of the honest and innocent voter. Says the supreme court of Missouri in the case of *Bowers v. Smith*, 20 S. W. 101: "So that the language of section 4772 (Rev. St. Mo. 1889) forbidding other ballots than those printed by the respective clerks of the county courts according to the provisions of this article to be cast or counted, obviously carries no such meaning as to nullify ballots printed by county clerks as directed by the law, and cast by voters in conformity thereto, but incorrectly made up beforehand by the secretary of state or the county clerk by erroneously admitting some candidate's name to a place on the ballot. The suffrage is regarded with jealous solicitude by a free people, and should be so viewed by those intrusted with the mighty power of guarding and vindicating their sovereign rights. Such a construction of a law as would permit the disfranchisement of large bodies of voters because of an error of a single official should never be adopted where the language in question is fairly susceptible of any other." With this view we are in full accord, while it must be conceded that some of the earlier decisions, notably in the case of *Price v. Lush* (Mont.) 24 Pac. 749, hold to a strict construction of these statutes; but that rule no longer obtains. We have not been cited

to, nor have we found, any case since *Price v. Lush* (and that case has since been overruled by the court that rendered the decision). In *Stackpole v. Hallahan* (Mont.) 40 Pac. 80, which supports the contention herein, counsel for appellant cite with a degree of confidence the case of *Lucas v. Ringsrud* (S. D.) 53 N. W. 428. An examination of this case shows that the proceedings therein were prior to the issuing of the official ballot, and, of course, before the election. The decision in that case did not involve the question of the disfranchisement of a large number of electors on account of the failure of some official to comply with all the duties of the statute in the preparation and printing of the official ballot. The action in *Lucas v. Ringsrud* was mandamus to require the secretary of state to prepare the official ballot in compliance with what were claimed to be the provisions of the statute. Section 59 of our law concerning elections and electors provides that: "Whenever it shall appear that an error or omission has occurred in the publication of the names or descriptions of the candidates nominated for office, or in printing of the tickets, the probate court of the county may upon application of any elector, by order require the county auditor or municipal clerk to correct such error, or show cause why such error should not be corrected." This or a similar provision obtains in all of the statutes predicated upon what is known as the "Australian Ballot Law," and it has, we believe, been uniformly held under such statutes that, where a party neglects to avail himself of this provision, he cannot, after awaiting the result of the election, and finding himself defeated at the polls, seek to defeat the expressed will of the voters upon the technical error of an officer, which he might have had corrected had he invoked the provisions of the statute at the proper time. *Bowers v. Smith* (Mo. Sup.) 20 S. W. 103, and cases therein cited. The equity and righteousness of this rule must, we think, be apparent to any mind not warped by the zeal of partisanship. The plaintiff had abundant opportunity, under the law, to have any of the alleged errors in the ballot corrected before the election, and, having neglected to avail himself thereof, he cannot now be heard to urge such objections when their recognition would avail not only to defeat the express will of the voters, but to disfranchise hundreds of legal voters. It may well be doubted whether, had the result of the election been different, we would have heard such a zealous, eloquent, and voluminous appeal for a strict construction of the statutes as is presented on behalf of the plaintiff.

The somewhat vindictive attack of counsel upon the assemblage of citizens who met at McCammon, and who are denominated in the brief as the "Taxpayers' Party," while it might pass muster in a political stump speech, can hardly be accepted by any court

as argument. It is true, there were not a great many people present, but the statute, although in my opinion it contains much that had better been left out, does not assume to prescribe any number of people requisite to constitute "a convention or primary meeting" under the statute. The language of the statute is as follows: "A convention or primary meeting within the meaning of this act, is an organized assemblage of electors or delegates representing a political party or principle." Election Law 1891, § 25. But the learned counsel for the appellant tell us that the convention of the Taxpayers' party of Bannock county did not represent any political party or principle, and therefore the votes cast for defendant by that party should not be counted. Perhaps the learned counsel, or some one of them, can tell us what political principle except "to get there" is ever involved in a county convention for the nomination of candidates for county offices. The desire for office may have existed in the minds and hearts of the citizens assembled at McCammon, and its intensity or honesty is not to be gauged by the chances of their hopes ending in fruition. Numbers do not control in this matter. "Brute force is many, mind only one." It was a convention or primary meeting under the statute, and the nominees were entitled to a place upon the official ballot.

The question presented by the record is one of much importance to the people of this state, and we have endeavored to give it the consideration due to its importance, and we are constrained, under what we conceive to be a correct interpretation of the law, and a proper recognition of its aim and the purposes and objects sought to be attained by its enactment, to affirm the judgment of the district court, and we are confident that in so doing we are in accord with nearly, if not quite, all the more recent authorities. The judgment of the district court is affirmed, with costs.

**SULLIVAN, J.** I concur in the conclusion reached in the opinion of Mr. Justice HUSTON on the ground that if the nomination of Scott by the committee, and placing his name on the Populist ticket, was contrary to law, the appellant should have made application to have the same corrected before the election.

**MORGAN, C. J.** I concur in the affirmance of the judgment of the court below.

#### FRANK v. SNOW et al.

(Supreme Court of Wyoming. Jan. 15, 1896.)

##### PARTIES TO NOTE—NOTICE OF SURETYSHIP.

The fact that a husband negotiated the loan for which he and his wife executed their note and mortgage as principals, and that he received the money, is not notice to third persons that the wife signed as surety.

On petition for rehearing. Denied.  
For former report, see 42 Pac. 484.

CONAWAY, J. It is urged on behalf of defendants in error that evidence that Edgar P. Snow negotiated the loan for which he and Elizabeth Snow executed their note and mortgage as principals, and that he received the money, is sufficient to support a finding by the trial court that plaintiff in error had notice that Elizabeth Snow really executed the note and mortgage as surety for Edgar P. Snow. Such is not our opinion. Such facts are consistent with suretyship or non-suretyship, and furnish no intimation as to which is the fact, or that the written instruments are different from what they purport to be. The order made on the former hearing will not be changed.

GROESBECK, C. J., concurs.

#### SYNDICATE IMP. CO. v. BRADLEY.

(Supreme Court of Wyoming. Jan. 8, 1896.)

REVIEW ON APPEAL.—BILL OF EXCEPTIONS.—ASSIGNMENT OF ERRORS.—ABANDONMENT.—PRESUMPTIONS.

1. The action of the trial court in sustaining an attachment cannot be reviewed in the absence of a bill of exceptions containing the evidence produced on the hearing of the motion to dissolve.

2. An assignment of error is abandoned by failure of appellant's counsel to refer to it in his brief.

3. Error cannot be assigned upon a ruling to which no exception was taken.

4. To support an assignment that the court erred in refusing a jury trial, the record must show that a request therefor was made at the time the docket was called, that the request was refused, and that an exception was taken.

5. Where a special appearance made by a party's attorney is in writing, it must, in order to be considered on appeal, be incorporated in a bill of exceptions, instead of being certified to by the clerk.

6. An objection, raised for the first time on appeal, that defendant was not notified of the time of trial, will not avail, where a general appearance of defendant, by answer and upon motions, appears from the record, and nothing therein negatives the fact that due notice was given.

7. In the absence of anything in the record to the contrary it will be presumed that a cause properly triable at the term in which it was heard was duly entered on the trial docket by the clerk: such being his duty under Rev. St. § 2519, 2522, as amended by Sess. Laws 1896, c. 39.

Error to district court, Natrona county; J. H. Hayford, Judge.

Action by Chester B. Bradley against the Syndicate Improvement Company, a corporation. From a judgment for plaintiff, defendant brings error. Affirmed.

R. W. Breckons, for plaintiff in error.  
Lacey & Van Devanter, for defendant in error.

GROESBECK, C. J. The plaintiff in error seeks a reversal of the judgment of the trial court in favor of the defendant in error. It assigns six grounds of error: (1) That the trial court erred in overruling a motion made by the plaintiff in error to dissolve the attachment; (2) that the court erred in overruling the motion of the plaintiff in error for a change of judge; (3) that the court erred in refusing the demand of plaintiff in error for a jury trial; (4) that the cause was called for trial and tried without notice to the plaintiff in error; (5) that judgment was rendered for the plaintiff below, when it should have been rendered for the defendant; and (6) that the judgment was rendered on a trial without notice to the defendant.

1. The action of the trial court in sustaining the attachment cannot be reviewed. There is no bill of exceptions containing the evidence produced upon the hearing of the motion to dissolve. The affidavits, motions, and other papers in the attachment proceedings are attempted to be brought into the record by copies thereof certified to by the clerk of the court; but, as such matters are not part of the record proper, they can only be made a part of the record by a bill of exceptions. It does not appear that the affidavits contain all of the evidence adduced at the hearing of the motion to dissolve the attachment, and it must appear that all of the evidence is before us that was before the court or judge hearing such motion. An exception was taken to the ruling of the court sustaining the attachment, but no time was asked or allowed within which to prepare and present to the court or its judge in vacation a bill of exceptions, and no bill is in the record. There is no proper record before us, and all the alleged errors are waived by the failure to preserve the exceptions by asking and obtaining time for the preparation and presentation of the bill. *C. D. Smith Drug Co. v. Casper Drug Co.* (Wyo.) 40 Pac. 979. Counsel for plaintiff in error abandons this assignment of error by making no reference to it in his brief, and it would not have been considered if he had not waived it.

2. The motion and affidavit for a change of judge were filed during the progress of the trial, after a witness had testified, and too late to be considered. The motion was overruled by the court, and no exception was taken to the ruling. The error, if any, was therefore waived. The motion and affidavit for change of judge are not incorporated in a bill of exceptions, where they properly belong.

3. A demand for a jury trial was made after a witness for the plaintiff had testified. No such demand was made when the docket was formally called at the first day of the term, as the statute requires; the record stating that upon such call of the docket the attorney for the defendant waived a

jury trial by not then demanding the same and depositing the jury fee, as provided by statute. No exception was taken to the ruling of the court denying the motion for a jury trial. The party asking a jury trial must cause the record to show a due request therefor, a refusal by the court, and an exception; for, in the absence of countervailing facts, it must be assumed that the court did not usurp the functions of the jury. Elliott, App. Proc. § 612. It is evident that this assignment of error is unavailing. Further, the matter was not properly raised on a motion for a new trial, as required by the rules and repeated decisions of this court.

4. It is insisted that the cause was called for trial, tried, and judgment was rendered on a trial without notice to the defendant. The record does not bear out this contention. It does show that there was a general appearance of the defendant below by answer and upon motions, and that a special appearance, as it is designated, was made by the attorney for the defendant. This "special appearance" was in writing, and should have been incorporated in a bill of exceptions, instead of being certified to by the clerk. But considering it, as we have no right to do, it attempts to show that the trial court was without jurisdiction because a change of judge had been previously granted by the court, an assertion not borne out by the record. It does not even suggest that the cause was on trial without notice to the defendant, and nowhere in the record does it appear that complaint was made that the defendant had not been notified of the time of trial. The record affirmatively shows the presence of the defendant by counsel during a portion of the trial, when the demand for a jury trial was made, and a motion for a change of judge was offered, and when the so-called "special appearance" was entered; and the record does not negative the fact that the defendant was present by attorney at other times during the trial. The journal entries of the court, it is true, do not show that the cause was ever set down for hearing; but it may have been that the clerk of the court, on the first day of the term, made up the trial docket, and set down the cause for trial on the day on which and at the time when it was tried. The cause was triable at the term when it was heard and determined, as the issues had been made up long before the beginning of the term, and under the statute it was the duty of the clerk to enter the cause on the trial docket, and set down the cause for trial. Sections 2519, 2522, Rev. St. Wyo., as amended by chapter 39, Sess. Laws 1896. The presumption is that the clerk performed this duty imposed upon him by statute, and that the parties and their attorneys had due notice from this trial docket that the cause would be tried at the time fixed therein by the clerk, as the trial docket is a public record provid-

ed by law, of the contents of which attorneys and litigants are bound to take notice. Moreover, in the absence of anything appearing to the contrary, the presumption is that the cause was regularly tried and properly disposed of during the term and at the appointed time, of which all parties thereto had notice. But no objection was raised at any time, while the cause was pending or during the progress of the trial or after it, before the trial court, although there was an appearance by answer, and also, during a portion of the trial, at least, by the attorney for the defendant. The objection to the judgment because it was rendered and the trial had without notice to the defendant is raised for the first time in this court. Affirmative error must appear in the proceedings of a court of superior general jurisdiction, and cannot be imputed, as every presumption is in favor of the regularity of its proceedings, which import absolute verity. For aught that appears in the record before us, the defendant, through its attorney, had full knowledge and notice of the setting of the cause for trial, and of the time of trial, and there is nothing to show that the attorney for the defendant was not present during the whole trial. The rendering of judgment before the action stood for trial according to the provisions of law and the rules of the court shall be deemed a clerical error. Rev. St. § 3147. It must be so regarded unless it appears from the record, either by the journal of the court or by bill of exceptions, made a part of the record, that the party complaining had no notice or knowledge of the time of trial. But the presumption is from the record, from the absence of anything to the contrary, and from the silence of the defendant when it should have spoken, that the cause was heard and determined upon due notice to the defendant. Counsel for the defendant in error insist that the record presents no matter for the consideration of the court, and that there is no reasonable ground for this proceeding in error. They ask for a reasonable counsel fee, and that additional interest at the rate of 5 per centum per annum during the time of the stay of the execution be adjudged by this court in the judgment of affirmance, pursuant to the provisions of section 3130 of the Revised Statutes. There is no question that the proceedings in error in this cause were without foundation, but we have grave doubts as to the meaning of the statute invoked, particularly as this is the first application of the kind made to this court, and it is made without argument, or the citation of any authorities. The statute should be carefully considered, and we do not feel inclined to do this without full argument and consideration. The matter will be set down for argument at an early day. The judgment of the district court for Natrona county is affirmed, and the order of affirmance will not be considered final, but



will be subject to amendment if it is considered that counsel fees and additional interest should be allowed.

CONAWAY and POTTER, JJ., concur.

**PROSSER v. MONTANA CENT. RY. CO.**  
(Supreme Court of Montana. Dec. 21, 1895.)

**INJURY TO BRAKEMAN—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—CUSTOM—BURDEN OF PROOF—OBJECTION TO QUESTION—INSTRUCTIONS.**

1. Where, for the purpose of using a road engine as a switch engine, a flat car is put in front of it, it is a sufficient showing of negligence, to go to the jury, that the brake staff on the end of the car, used in connection with the brake beam by brakemen in mounting the car, is bent, so that it turns in the hands of a brakeman mounting the car, and causes him to lose his hold.

2. The question of the contributory negligence of a brakeman, who, after throwing a switch, attempts to mount the flat car in front of an approaching road engine, used in connection with the car as a switch engine, by means of the brake beam and brake staff, and who, by reason of the brake staff being bent loses his hold and falls under the trucks, is for the jury, it appearing that the car was put in front of the engine for the purpose of enabling brakemen and switchmen thus to mount it.

3. Testimony of railroad employee, given from their knowledge and observation, that a flat car in front of a road engine used as a switch engine was so placed for the purpose of allowing the brakemen and switchmen to mount or the brake beam of the car by grasping the brake staff, is a statement of fact, and not an expression of opinion.

4. An objection to a hypothetical question, as not correctly stating the facts in the case should point out wherein it is defective.

5. Where an act of a brakeman in mounting a car was not per se negligent, it is competent to show that, under the same circumstances, experienced brakemen perform the same act as he did.

6. The modification of an instruction requested by defendant in an action by a brakeman for injury received while attempting to mount a flat car in front of an engine, by means of the brake beam and brake staff, while the engine was approaching him, that "an established usage or custom among men engaged in the same employment cannot justify or excuse an act negligent in itself," by adding, "unless known and acquiesced in by the defendant," while not as full as it should be, is not error, where such act of plaintiff was not negligence per se, and there was evidence that the arrangement of the car in front of the engine was for the purpose of enabling brakemen and switchmen thus to mount.

7. There is no error in refusing a requested instruction that the jury might render a general verdict or a special verdict, where the party requesting it does not ask the court to submit any special findings.

8. Unless plaintiff's own case raises a presumption of his contributory negligence, the burden of proving such negligence is on defendant.

Appeal from district court, Cascade county; Charles H. Benton, Judge.

Action by James H. Prosser against the Montana Central Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

A. J. Shores, for appellant. Largent & Huntoon, for respondent.

DE WITT, J. This action was brought by plaintiff to recover damages for injuries received by him when in the employ of defendant as a brakeman and switchman. The plaintiff was engaged in switching cars at or near the station of Nelhart, on the defendant's railway. The engine used on this occasion was a road engine. The distinction between a road engine and a switch engine is this: The road engine has a pilot in front. A yard or switch engine has a footboard, both front and rear, upon which the brakemen and switchmen step and stand while switching cars. The engine in this case had been used on the work ordinarily performed by a yard or switch engine. It had no footboards in front or rear, and therefore no convenient or safe place for the switchmen to mount and ride while engaged in their duties. Furthermore, in making up trains and switching cars, it was inconvenient to use a road engine, for the reason that the cars would have to be attached to the engine by a pilot bar, which is too heavy for convenient use. To convert the road engine to the use of a switch engine, two flat cars were placed in front of the engine. The second flat car from the engine was so placed that the braking apparatus was at the end furthest from the engine. It was equipped with a double connected brake and brake staff. The purpose of placing these flat cars as they were was to enable brakemen or switchmen to mount the brake beam, and hold by the staff, in moving about the yard while switching cars. The engine and these cars were moving down the track, and crossed a switch. Having crossed the switch, it was the duty of the plaintiff to throw the switch to let the train in on another track. As the last car passed over the switch, the engineer reversed his engine. The plaintiff threw the switch, and stepped into the middle of the track. The car approached him at the rate of two or three miles an hour. He stepped carefully upon the brake beam, and took hold of the brake staff carefully with both hands. The staff was loose in its socket, and was bent at an angle of about 30 degrees from the perpendicular. It bent away from the plaintiff, as he stood. He testified that for this reason it appeared straight to him, and he could not tell that it was bent, and that he did not see whether the brake wheel was tipped from a horizontal. Having carefully and firmly grasped the staff, it turned in his hands, swung around towards him, and caused him to lose his hold and fall under the trucks. The jury awarded him \$2,500, which is not claimed by defendant to be excessive, if there is any liability. It appears further that, although the engine had already started when plaintiff threw the switch, he signaled the engineer to come on. He said that,

at the rate the train was approaching, he could have gotten off the track if he had seen the defective condition of the brake staff at a distance of 6 or 10 feet. He did not see the defective condition, for the reason above mentioned. He had a right to signal the engineer to stop, if there was occasion to stop in the performance of the business in which the train was engaged. There were no means provided for mounting the car on the side. It was also impossible or dangerous to mount from the side, owing to the roadbed being washed out and depressed. He was obliged to get upon the train and ride in order to be at a point about 340 feet distant, where there was another car to be coupled. He could not have walked to that point, while the train was moving to it, and be there in time to make the coupling. These facts appeared by the testimony of plaintiff and two other witnesses. These two flat cars were equipped with air brakes, and while plaintiff was employed at this place he did not see the hand brakes used for braking the cars. These facts being shown, the defendant moved for nonsuit, upon the ground that no negligence had been shown on the part of the defendant, and that plaintiff appeared to be guilty of contributory negligence.

As to proof of negligence or contributory negligence sufficient to go to the jury, the writer of this opinion said in *Wall v. Railway Co.*, 12 Mont. 61, 29 Pac. 721, as follows: "I am fully aware that negligence of the defendant or contributory negligence of the plaintiff is a matter for the jury, unless the evidence is such as to leave the matter clear and undisputed to persons of fair and sound minds. It is needless to cite authorities. Their name is legion. They are collected in the citations above made. I find their tenor to be that, if the question of negligence or contributory negligence is a fairly-disputed question of fact, it must be resolved by the jury, but that if the evidence is perfectly clear the matter is for the court; and by 'perfectly clear,' the authorities say, is meant, not perfectly clear in the view of the particular court or persons composing the court which is reviewing the matter, but rather in the judgment of reasonable men of sound minds. That is, if different conclusions might be drawn by different men, of fair, sound minds, then the matter must go to the jury; but if only one conclusion can be reached by men of fair, sound minds, the determination is for the court. This seems to be a settled doctrine, and with it I fully concur. But is it not, practically, somewhat illusive? For the court must determine what would be the judgment of men of fair, sound minds, and to arrive at that determination the court must use its own sense and knowledge and judgment. And as long as courts are composed of finite men, with minds not all cast in the same mold, we cannot but expect some diversity of views in the appli-

cation of the doctrine to particular facts. This may account for the confusion in the reported cases, and the fact that decisions may be produced sustaining either side of a contention of this nature which is at all close." In the case before us we are perfectly satisfied that there was a sufficient showing of negligence on the part of the defendant to go to the jury. It was not perfectly clear that there was no negligence by defendant. The brake beam and brake staff, being used for the purpose of mounting the car by the brakemen and switchmen, we do not hesitate to say that, to allow the apparatus to remain in the condition it was, was a showing of negligence sufficient to go to the jury.

The next question upon the decision of the court in denying the nonsuit is, was it perfectly clear that plaintiff was guilty of contributory negligence, so that that question should have been taken from the jury, and the court should have granted a nonsuit? We do not think that this was, by any means, perfectly clear. The plaintiff mounted the car with the utmost care. He mounted it just as it was intended he should. The cars were so arranged for this purpose. This was the only means by which he could mount and ride on the car in order to arrive at the car to be coupled in time to make the coupling when the train reached there. The facts in this case differ from those in *Cunningham v. Railroad Co.*, 17 Fed. 882, in which case Mr. Justice Miller used such strong language in granting a new trial, and in which case the learned justice said that this was not only a case of clear negligence on the part of the deceased, but a case of stupid negligence on his part. We are scarcely prepared to fully indorse the remarks in that case, even upon the facts which there existed. But the distinction between the facts in that case and this is that here, so far as the plaintiff could reasonably be expected to see, the apparatus of the car was in a proper condition for him to make a safe mount. In the *Cunningham* Case the deceased undertook to mount the footboard of a switch engine from which the hand railing had been torn away the night before. The case is not fully stated in the report, but, as far as it appears, it seems that the deceased could, by looking at the rear of the tank, have very readily perceived that the hand rail was missing. In this case, plaintiff could not see that the brake staff was bent, because it was bent directly away from him, and, so far as he could see, it might readily appear to be straight. And, seeing an apparently straight brake staff, it does not appear that he should also have looked at the brake wheel, to observe that it was tipped, for the brake wheel might easily have been tipped from causes other than the bending of the staff. Taking the facts all together, we are not at all satisfied that contributory negligence was so clearly shown that the court should have

removed that subject from the consideration of the jury, and ordered a nonsuit. We are therefore of opinion that in this respect there was no error committed by the court.

The treatment thus far brings us logically to the next assignment of error made by the appellant. We have discussed the question of nonsuit upon the ground, partly, that it was in evidence that the arrangement of the locomotive and cars shown was for the purpose of allowing the brakemen and switchmen to mount upon the brake beam by grasping the brake staff. There was an objection, however, to the introduction of evidence showing that this arrangement of the cars was made for this purpose. The plaintiff and two other competent witnesses testified that the cars were so arranged in order that employes might mount when moving, in the manner attempted by the plaintiff. The objection to this testimony was that it was an opinion of the witnesses that this arrangement was made for such purposes. The court admitted the testimony over the objection. We think this was not error. The witnesses did not give this testimony as an opinion. They, being employed in the business, and being cognizant and observant of the conduct of the business, stated, from this knowledge and observation, that as a fact the cars were arranged as described for the purposes mentioned. We think that their testimony was the statement of a fact which came under their observation. If they were mistaken, or if their testimony was not true, it could have been taken for simply what it was worth, and rebutted by testimony on behalf of defendant. But this testimony was not denied by the defendant.

The next question raised by appellant is its exception to the allowance of certain testimony. It may be stated as he puts it in his own brief, as follows: "Q. Mr. Ennis, the testimony in this case shows that there were two flat cars, with double connected brakes, with brake staff and brake beam on the further end of the second car from the engine, and this was a road engine; that this engine and the cars had passed out of the side track where the switch had been thrown by the plaintiff, and the engine and cars were going on up to another track, about 340 feet, to make a head-end coupling with other flat cars, and that it was necessary for the plaintiff to be at the cars to make the coupling; that the engine and cars were approaching the plaintiff at the rate of about three miles an hour; that there were no hand holds, stirrups, or jaw straps, or other means of mounting the approaching cars from the sides; that these flat cars had double connected brake on the end nearest the plaintiff; were attached to the engine for the purpose, among others, of allowing the brakeman to step upon the brake beam, and take hold of the brake staff and mount the car. It appears, also, from the evidence,

that on the west side from the track upon which the plaintiff stood the embankment was low, and depressed from two to three feet below the track, the ties stuck out over the embankment, large rocks and bowlders were lying along the track, and that the east side of the track from where the plaintiff stood, the ground was low and depressed, and another track, known as the 'Main Track,' came into this side track where the plaintiff stood, and on which this train was running. The evidence further shows that the plaintiff had no right to stop the train for the sole purpose of mounting the car, and that the engineer should obey the plaintiff's signals. You may state, from your experience as a brakeman, what is the usual and customary way of mounting flat cars by brakemen experienced in the business, under those circumstances? (Defendant objects to the question upon the ground that the question assumes a state and condition of affairs not existing at the time the plaintiff received his injuries. Does not truly state the evidence, in matters material to be considered, if the question is to be answered at all. That it misdescribes the conditions of the car the plaintiff attempted to mount, and fails to state its condition in important particulars disclosed by the evidence. The question assumes that there was a necessity for mounting the car while in motion. The question is further objected to upon the ground that the evidence is not relevant or material; upon the further ground that it is incompetent as proof of the usage or custom among brakemen and men employed as the plaintiff was employed, and cannot excuse the plaintiff's conduct as disclosed by his own evidence, such conduct being negligent as a matter of law.)" We will examine the objections to the question as they were made. An examination of the record satisfies us that it is not the fact that the question did not truly state the evidence on matters material to be considered. The question gave a very fair statement of the facts. Furthermore, the objection itself is open to criticism, in that it did not state wherein the question was defective, or wherein it did not state the facts in the case as a basis for the hypothetical question. Appellant's counsel elaborately argues the question that testimony as to how persons other than the plaintiff performed acts similar to that performed by the plaintiff is incompetent, and that proof that other persons did negligent acts under the same circumstances is not evidence to excuse the doing of a negligent act by the plaintiff. But the competency of evidence to show acts of carelessness by other persons is not the question here involved. From what we have said as to denying the motion for a nonsuit, it is apparent that the conduct of the plaintiff was not per se negligence. He carefully mounted the car in the way provided for him to mount in order to perform his duties. The question was not

as to what other persons did in a careless manner. The question hypothetically stated the facts, and then asked the witness to state, from his experience as a brakeman, what was the usual and customary way of mounting flat cars, under these circumstances, by brakemen experienced in the business. Therefore the question involved what an experienced person would do, not what other persons generally did, or what careless persons did. We think that the word "experienced" is used here much in the sense of "prudent"; and the question, in effect, was put to a person experienced in the business, as to what experienced or prudent persons did under the circumstances. The matter of the competency of the question comes to this: Is it competent to prove what experienced or prudent persons do under the existing circumstances? We will concede that it is not competent, in endeavoring to excuse a negligent act, to show that there is a usage or custom by others to perform said negligent act. 27 Am. & Eng. Enc. Law, §89 et seq. But, when it does not appear that the act is positively negligent, we are of opinion that it is competent to show the usage or custom of competent and prudent persons in performing the act. In the case at bar it did not appear that the act of plaintiff was negligence per se. He carefully performed his duties with the means supplied him for their performance, and we think it was competent to show, under those circumstances, that persons experienced in the performance of the same act, under the same circumstances, performed it as did the plaintiff.

It is said in *Miller v. Railway Co.*, 57 N. W. 418, 89 Iowa, 567: "The plaintiff introduced a witness who testified that it was usual and customary for brakemen, in going over the tender, to step on the lid of the manhole. We do not understand counsel to object to this line of evidence. It was surely proper for plaintiff to show that he was in the line of his duty when he received the injury, and that he pursued the course usually adopted by men in that employment under similar circumstances. *Jeffrey v. Railroad Co.*, 56 Iowa, 546, 9 N. W. 884; *Whitsett v. Railway Co.*, 67 Iowa, 150, 25 N. W. 104. The objection of the defendant is that the witness was allowed to state what he would do under the same circumstances, and what was considered a safe course to pursue. We need not set out the questions and answers to which objection is made. When the whole testimony of the witness is considered, the objections do not appear to be well taken. The questions and answers show that the witness did not give his own opinion of the proper course to pursue." As in the Iowa case, so in the case at bar, the witness did not give an opinion as to what he would do, but as to what experienced persons do. In *Larson v. Ring*, 43 Minn. 88, 44 N. W. 1078, there was a question as to negligence of contract-

ors in stretching a guy from the top of a derrick across the street. The supreme court said: "The court erred in permitting defendant to show at what height or distance above the public ways it was usual for contractors to stretch or suspend guys and ropes." The court, in speaking further of usages and customs, said: "It would depend largely, perhaps, on whether there had been adopted and used a way or means of fastening which time, usage, and long experience had demonstrated to be reasonably safe." It was upon this idea that the district court acted in admitting the testimony complained of. He did not admit testimony as to other persons doing careless acts, but, on the contrary, testimony as to what experience had demonstrated to be reasonably safe.

We find the following in *Lawson on Usages and Customs* (page 318): "Judge Story, in stating the degrees of negligence, and the measure of diligence in different relations, says: 'Indeed, what is common or ordinary diligence is more a matter of fact than of law. And in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers as well as the institutions peculiar to the age; so that, although it may not be possible to lay down any very exact rule applicable to all times and all circumstances, yet that may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live.' " Further in the same volume, we find the following: "In *Vaughan v. Menlove*, *Vaughan, J.*, said, speaking of the evidence of negligence: 'The conduct of a prudent man has always been the criterion for the jury in such cases, but it is by no means confined to them.' " See, also, by the same author, section 171, p. 324. See, also, 27 Am. & Eng. Enc. Law, p. 902, with a large collection of cases.

We are satisfied that, under the circumstances of the case at bar, it was not error to admit this testimony.

The next error assigned by appellant is the modification of an instruction which it offered. The instruction offered was as follows: "An established usage or custom among men engaged in the same employment cannot justify or excuse an act negligent in itself." There does not seem to be an objection to this instruction as a matter of law, but, as noted in the treatment of the motion for a nonsuit, it did not appear clearly that the act of the plaintiff was negligent in itself. The court refused to give this instruction as it stood, and modified it by the following: "Unless known and acquiesced in by the defendant." This modification was not as full probably as it should be; but we are of opinion that error cannot be predicated upon it under the facts of this case, and in consideration of the fact that there was evidence in the case to the effect that, in the arrange-

ment of the cars, the brake beam and brake staff were for the purpose of mounting as the plaintiff mounted.

The next question presented by appellant is that the verdict is against the law, for the reason that the jury disregarded the instructions of the court, and declined to apply them to the evidence. This is a proposition of law with which we fully concur,—a proposition which is fully discussed in the case of *Murray v. Heinze* (decided this term) 42 Pac. 1057. But the question here is, was the verdict against the instructions? The first instruction contrary to which the appellant claims the verdict was rendered is as follows: "If, in the discharge of a dangerous duty, an employé of a railroad company voluntarily places himself in a dangerous position unnecessarily, when there is another place that is safer that he could have chosen, and he has time to exercise his judgment, and an injury results to him by reason of his position, he cannot recover for such injury." But it is to be observed that this instruction lays before the jury the conditions of an employé voluntarily placing himself in a dangerous position unnecessarily, when there is another place safer that he could have chosen, etc. But, as appears in the treatment of this case heretofore in this opinion, the evidence is not conclusive that the plaintiff voluntarily and unnecessarily put himself in a dangerous position when he might have chosen a safer one. That was an open and disputed fact in the case, and there was evidence, as before shown, sufficient to go to the jury upon this question; and the jury, in finding a verdict for the plaintiff, did not, by necessity, find against this instruction. The same reason applies to the other instructions contrary to which the appellant claims the verdict was rendered.

Appellant complains of the refusal of the court to give the following instruction: "In this case the jury may, in its discretion, render a general verdict or a special one. A general verdict is one by which you pronounce generally upon all the issues in favor of the plaintiff or in favor of the defendant. A special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them, and those conclusions of fact shall be so presented as that nothing shall remain to the court but to draw from them conclusions of law." In connection with this, the appellant complains that the court submitted to the jury two forms of verdicts only,—one a general verdict for the plaintiff, assessing the amount of the damages, and leaving the amount blank to be inserted by the jury. It is said in *American Co. v. Bradford*, 27 Cal. 365, and *Swift v. Mulkey*, 14 Or. 65, 12 Pac. 76, that it is discretionary with the court whether or not it submit special findings to the jury. But in the case at bar no findings were requested by the appellant. He did not ask that the court submit special findings upon

any branch of the case. Not having made this request, he cannot complain of the action of the court. It certainly would have thrown the jury into inextricable confusion to instruct them, as appellant requested, that they might find special findings or special verdict, when not the slightest intimation was given to them upon what questions of fact they should find.

Appellant complains that the court refused to instruct the jury that there was no evidence tending to show that the defendant had failed to use proper care to keep its track and roadbed in proper condition; nor that there was any evidence that would justify the jury in finding that the defendant had failed to use reasonable care in keeping the ground on both sides of the track in proper condition for use by the employés. But, if this instruction had been given, it would have taken that question of fact wholly from the jury. We are of opinion that there was some evidence at least upon this question, and the treatment of this branch of the case seems to us to have been fully covered by other instructions which the court gave.

As to the exception to the refusal of the court to give instructions Nos. 7 and 12, requested by the appellant, without reciting them, we are satisfied to say that the questions there raised were covered by other instructions given by the court.

Appellant again complains of the refusal of the court to give the instruction requested by it, No. 15, as follows: "The undisputed evidence is that the plaintiff had the power to stop the engine and cars by a signal, and that it was the duty of the engineer to obey his signals." Following this was defendant's request 22, refused, as follows: "I charge you that the plaintiff had a right to stop these cars for the sole purpose of mounting them. If, in the proper discharge of his duties, it was reasonably necessary that he should mount the car on the brake beam, and if the act of mounting a flat car or the brake beam thereof, while moving at the rate of about three miles an hour, would ordinarily be attended by any considerable danger." It is true that the plaintiff had the power to stop the engine by signal for the purpose of mounting them, but his right to stop the train was only in the course of his business as brakeman, and it was all through the case a question whether his mounting the car while in motion was per se contributory negligence. We have determined that that was a question for the jury. If the court had given the instructions as charged, it would have taken that question away from the jury, and practically instructed the jury that it was contributory negligence per se to mount the cars as he did.

The appellant complains of the refusal of the court to instruct the jury as requested in Nos. 20 and 21, which are as follows: "It appears from the evidence that the plaintiff's injuries resulted from his own voluntary act

in mounting the car as it was in motion. This being the case, it devolves upon the plaintiff to satisfy you by a fair preponderance of the evidence that he was not guilty of negligence contributing to his injury." "Under the circumstances of the case, the burden of proving that he was free from negligence contributing to his injury rests upon the plaintiff, and he must establish his freedom from such negligence by a preponderance of evidence." Counsel on both sides of this case have extensively argued the question of the burden of proof of contributory negligence. It is as unnecessary to review the law upon that topic in this opinion as it was to discuss it in the briefs, as it has long been settled in this state. *Higley v. Gilmer*, 3 Mont. 97; *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21; *Wall v. Railway Co.*, 12 Mont., at page 56, 29 Pac. 721; *Nelson v. City of Helena*, 16 Mont. —, 39 Pac. 905. Contributory negligence is a matter of defense, and plaintiff need not allege or prove its absence. The corollary to this rule is that, whenever the plaintiff's own case raises a presumption of contributory negligence, the burden of proving its absence is immediately upon him, and it devolves upon the plaintiff to clear himself of suspicion of contributory negligence which he himself has created. See cases last cited. The instructions refused were based upon the ground that the plaintiff had shown himself guilty of contributory negligence. As heretofore demonstrated, this was not the fact. The instructions were therefore inapplicable and properly refused. It did not appear by the testimony on the part of the plaintiff that there was a presumption of his contributory negligence.

Having reviewed the points raised upon this appeal, we are of opinion that the judgment and the order denying a new trial should be affirmed, which is accordingly done. Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

#### McCAMAN v. STAGG.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 9, 1896.)

##### RIPARIAN OWNERS—RIGHT TO ACCRETIONS.

Where two irregular pieces of ground lie upon the north side of the Kansas river, at a point where the course of the river is southeast, and are separated from each other by a half quarter-section line, running north and south, the accretions formed by the recession of the river to the south belong to the respective tracts of land lying immediately north thereof, and the division line between the two tracts continues to be the half quarter-section line extended.

(Syllabus by the Court.)

Error from district court, Riley county; R. B. Spilman, Judge.

Action by James Stagg against R. T. McCaman to recover land. There was a judg-

ment for plaintiff, and defendant brings error. Affirmed.

John E. Hessin, for plaintiff in error. Sam Kimble, for defendant in error.

CLARK, J. This action was brought in the district court of Riley county by James Stagg to recover from R. T. McCaman a small tract of land, embracing about  $8\frac{1}{4}$  acres, lying south of a line running east and west, equidistant from the northern and southern boundaries of section 26, township 10, range 7 east, in said Riley county, and between the Kansas river, on the southwest, and the half quarter-section line running north and south through the southwest quarter of said section. The plaintiff claims title through successive conveyances from the original patentee, to whom the land was conveyed by the government on August 16, 1890. The original plat of this section shows that at the time the survey was made the Kansas river ran through said section in a southeasterly direction, entering it on the west at a point 26.40 chains south of the northwest corner of the section. The official plat of the original survey shows that a portion of the section is designated as "Lot 1," and contains 34.70 acres, and that it is bounded on the north by the northwest quarter of the northwest quarter of the section, on the east by a line running north and south through the center of that quarter section, and extending to the Kansas river on the southwest quarter of the section, on the south and southwest by the Kansas river, and on the west by section 27. It is admitted by the plaintiff in error that the plaintiff below established a clear title to lot 1. Since the original survey was made and the patent issued, the course of the river has very materially changed, so that the land lying south of the northwest quarter of the section, and between the Kansas river on the south and southwest, and the half quarter-section line running north and south on the east, embraces about  $8\frac{1}{4}$  acres, while under the original survey the land thus bounded embraced only about  $1\frac{1}{4}$  acres, and was platted as a part of lot 1. The defendant established a perfect chain of title in himself from the government to lot 2 in said section 26, which contained, as shown by the original survey and official plat thereof, 22.80 acres, the half quarter-section line running north and south through the southwest quarter of the section being the boundary line between lots 1 and 2. The defendant claims that, as the course of the river has changed so that its left bank is now south and west of its former location (at the time the original survey and official plat were made), the new land formed by reliction, both on the south and southwest of lot 2, became a part of lot 2. The plaintiff does not controvert this claim as to the accretions on the south of lot 2 (which increases the number of acres in that lot from 22.80 to

more than 40), but contends that the new land thus formed, which lies west of the half quarter-section line, and adjoining the original southern boundary of lot 1, became a part of lot 1; making the number of acres in that lot 34.98, an increase of only .28 of an acre over that shown by the original survey. The trial court sustained the plaintiff in this claim, and in this we see no error. It is said in *New Orleans v. U. S.*, 10 Pet. 662, that: "The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations shall still hold the same boundary, including the accumulated soil. No other rule can be applied, on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and, as he is also without remedy for his loss in this way, he cannot be held accountable for his gain." The quantity of land embraced in that part of lot 1 which lies north of the half-section line was by the changes in the course of the river, diminished about seven acres. As the southern boundary of lot 1, as shown by the official plat of the original survey, was the Kansas river, that boundary remains unchanged. In like manner, the boundary line between lots 1 and 2 is an extension of the half quarter-section line running north and south to the river, and the owners of these lots are entitled to the accretions on the left bank of the river which lie south of the line which originally formed their southern boundaries, respectively.

The defendant also contends that no part of the southwest quarter of the section was ever properly included in lot 1, that the statutes regulating the survey of public lands forbade such a division of territory, and that if the statute were complied with the half-section line running east and west should be extended through to the river, and the triangular tract of land, embracing about  $1\frac{1}{4}$  acres, which lies south of such line, and which is shown by the plat to be a part of lot 1, should have been platted as a part of lot 2. We are unable to discover any error in the survey, and the presumption is that the rules prescribed by law for the subdivision of the section were followed, both in making the survey and the official plat thereof. Section 2397 of the Revised Statutes of the United States provides that, "in every case of the division of a quarter section, the line for the division thereof shall run north and south." This rule was complied with by the surveyor in the division of the southwest quarter of the section, and lot 2 lies wholly east of that line. That section further provides that, "in every case of a division of a half quarter section, the line for the division thereof shall run east and west." This rule was also followed whenever a subdivision of a half quarter section was made. The divisions of the several quarter sections were made by lines

running north and south, and in the division of the half quarter sections the lines were run east and west, as prescribed by the statute.

We think the court properly held that the plaintiff was not precluded from maintaining this action by the bar of the statute of limitations, and, as no errors appear in the record, the judgment of the court will be affirmed. All the judges concurring.

#### HAGLER v. TAYLOR et al.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 9, 1896.)

##### APPEAL—REVIEW—CONFLICTING EVIDENCE.

A general verdict by a jury upon conflicting evidence must be treated as a finding of every fact necessary to be established to sustain the verdict; and, being approved by the trial court, such finding will not be disturbed by an appellate court.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by J. H. Taylor and another against Isaac Hagler for a broker's commission. From a judgment for plaintiffs, defendant brings error. Affirmed.

R. A. Lovitt, for plaintiff in error. Joseph Moore, for defendants in error.

CLARK, J. This is an action brought in the district court of Saline county by J. H. Taylor and Robert See to recover from the plaintiff in error a commission claimed to be due them as agents for the sale of certain real estate belonging to the plaintiff in error. The plaintiffs recovered a judgment as prayed for, and the defendant has brought the case to this court, seeking a reversal of the judgment, upon the following assignments of error: The overruling of the demurrer to the evidence; the admission and rejection of certain evidence offered at the trial; the giving of certain instructions to the jury; and the overruling of defendant's motion for a new trial. The real contention between the parties to this action was and is as to whether or not Taylor and See procured a purchaser for the land who was willing, ready, and able to purchase on the terms authorized by Hagler, the landowner. We have carefully examined the record, and find that conflicting evidence was submitted to the jury upon the question at issue. The evidence submitted by the plaintiffs below was sufficient, if uncontradicted, to support a general finding in their favor; hence the demurrer to the evidence was properly overruled. The jury returned a general verdict in favor of the plaintiffs, which was approved by the trial court. This verdict must be treated as a finding in favor of the plaintiffs of every essential fact necessary to be established to entitle them to a recovery. This court cannot weigh conflicting evidence,

or set aside the verdict of a jury solely on the ground that, in its opinion, the preponderance of the evidence was in favor of the defeated party. The jury are to determine the facts, and, except in the entire absence of competent evidence to support the verdict, their findings are conclusive upon this court. *Elerick v. Braden*, 38 Kan. 83, 15 Pac. 887; *Morris v. Trumbo*, 1 Kan. App. 150, 41 Pac. 974. We have been unable to discover from an examination of the record any errors committed by the court in its rulings on the admission or rejection of evidence offered, or in its instructions to the jury, prejudicial to the rights of the plaintiff in error. It follows, therefore, that the judgment must be affirmed. All the judges concurring.

### HASELTINE v. GILLELAND et al.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 9, 1896.)

CASE MADE—SETTLING AND SIGNING—WAIVER—EXTRINSIC EVIDENCE—DECREE OF FORECLOSURE—CONCLUSIVENESS—VALIDITY OF MORTGAGE.

1. When a record fails to show on its face that a case for the appellate court was regularly settled and signed, with opportunity to the opposite party to suggest amendments and to be heard, extrinsic evidence is admissible to show a waiver of amendments and consent to the settling and signing of the case made at the time and in the manner it was done.

2. The judgment of a court decreeing the foreclosure of a real-estate mortgage, and adjudging the debt secured thereby to be a lien upon the mortgaged premises, is conclusive, until set aside, upon the parties as to all matters actually determined, or which might, under the pleadings, have been determined in the case; and the validity of such mortgage cannot be questioned, for the first time, by a motion to set aside a sale of the mortgaged premises made pursuant to an order of sale issued on the judgment.

(Syllabus by the Court.)

Error from district court, Dickinson county; M. B. Nicholson, Judge.

Action by George Haseltine against William O. Gilleland and others to foreclose a mortgage. There was a decree for plaintiff, under which a sale was made, and defendants moved to set aside the sale. From a judgment for movants, plaintiff brings error. Reversed.

John H. Mahan, for plaintiff in error.  
Stambaugh & Hurd, for defendants in error.

**GARVER, J.** The defendants in error have moved to dismiss this case, and object to its consideration, on the ground that the record attached to the petition in error as a case made was erroneously settled and signed, and should not be held to be a legal case made. The decision of the court complained of was made October 9, 1891. The plaintiff in error was given 90 days in which to make and serve a case for the supreme court. The case made was served on counsel for the defendants in error on December 4, 1891, and settled and signed January 4, 1892. On the

hearing of the motion to dismiss, counsel for the plaintiff in error filed his affidavit, showing that after the case made was served upon the counsel for the defendants in error, and after it had been examined by them, it was returned to counsel for plaintiff in error, with the statement that it was correct, that they had no suggestion of amendment to make, and that they were satisfied with it as served; and that, relying upon such statement, the case was settled and signed before the time had expired for suggestions of amendment. No suggestions of amendment were at any time made, nor is there now any objection to the correctness of the case made. This showing on behalf of the plaintiff in error is not disputed, and should be deemed a waiver of any irregularity in the time of settling the case. Matters touching the jurisdiction of the trial judge may be shown by extrinsic evidence, the record itself failing to show necessary jurisdictional facts. *Jones v. Kellogg*, 51 Kan. 263, 33 Pac. 997; *Roser v. Bank* (Kan. Sup.) 42 Pac. 341.

The questions in this case arose in an action commenced March 31, 1887, in the district court of Dickinson county, by Haseltine against Gilleland and others, on a note and mortgage executed in his favor by the Gillelands. Personal service of summons was made on the defendants in that county, and a judgment by default rendered June 1, 1887, for the recovery, on the note, of the sum of \$1,512.50, and for the foreclosure of the mortgage and sale of the mortgaged premises after six months. On March 30, 1891, an order of sale was issued on said judgment, the premises sold to the plaintiff for \$500, and return thereof made, in due form, to the court. At the May, 1891, term of the court, the Gillelands appeared, and filed their motion to set aside the sale, for the reason "that the property sold is now, and has been since long before the rendition of the judgment in said cause, the homestead of said defendants, and that, at the time of the rendition of said judgment, the title to said premises was in the United States government, and that, long after the rendition of said judgment, said defendants made final proof under the homestead law of the United States, and obtained title thereto." In support of this motion, evidence was introduced over the objection of the plaintiff, the motion sustained, and the sale set aside. The objection to this motion and to the evidence offered in its support, we think, was well taken. The merits of the motion involved the validity of the mortgage. That was an issue presented by the petition filed in the case, and was confessed in plaintiff's favor by defendants' default. The judgment declaring the validity of the mortgage, and adjudging the debt secured thereby to be a lien upon the premises, had been in force and undisputed for nearly four years. The defendants had ample opportunity to defend



in the action by pleading therein the several matters set up in this motion; and the plaintiff had a right to have such questions determined in the regular course of legal procedure, and by a formal trial in court. The ruling of the court permitted the defendants to avoid a trial when the issue was regularly and properly presented, and to dispose of the entire question affecting the right of the plaintiff to his lien, upon the summary hearing of a motion. The law certainly does not contemplate any such procedure. It does not matter that the issue was not made, nor the question raised, in the case proper. It could have been made and determined therein. The defendants were challenged to it by the petition, and their default had the same legal effect as an actual appearance and trial. Parties are concluded, not only by what has been actually litigated and determined in a case, but also by what, under the pleadings, might have been litigated and determined. *Hentig v. Redden*, 46 Kan. 231, 26 Pac. 701; *Chicago, K. & W. R. Co. v. Commissioners of Anderson Co.*, 47 Kan. 706, 29 Pac. 96; *Sanford v. College*, 50 Kan. 342, 31 Pac. 1089. This rule should apply in any subsequent proceedings had in the same case, as well as in subsequent actions. The judgment of the court once rendered, is conclusive of the rights of the parties, respecting matters involved therein, until it is set aside. *Elder v. Bank*, 12 Kan. 242; *Watson v. Voorhees*, 14 Kan. 328.

It is suggested that the record fails to show that this court has jurisdiction to review this case. We are of opinion that it sufficiently appears that the amount involved exceeds \$100, and does not exceed \$2,000, and this brings the case within the jurisdiction of this court.

As the motion to set the sale aside was made upon only the one ground, it should have been overruled, and the sale confirmed, if otherwise regular and not subject to objection. The order of the court is reversed, and the case remanded for further proceedings in accordance with this opinion. All the judges concurring.

#### HALLOWELL v. SMITH.

(Court of Appeals of Kansas, Northern Department, O. D. Jan. 9, 1896.)

##### PLEADING AND PROOF—VARIANCE.

Where the plaintiff alleges fraud and deceit as the ground for a recovery of damages, it is error for the court to render judgment upon a finding of only a mutual mistake of facts. (Syllabus by the Court.)

Error from district court, Republic county; F. W. Sturges, Judge.

Action by N. M. Smith against E. A. Hollowell and another to recover damages for deceit. From a judgment against defendant Hollowell, and an order denying a new trial, said defendant brings error. Reversed.

In March, 1887, the plaintiff in error wrote to N. M. Smith, the defendant in error, who then owned a stallion called "Duke of Glenn Lake," and proposed to trade him land for the horse as follows: "Belleville, Kans., March 19, 1887. Dr. N. M. Smith, Washington—Dear Sir: In answer to your letter of late date would say, a party here has 160 acres of wild land he will trade for 'Duke.' No imp., 13 miles from Belleville and 3 & 1/2 miles from the B. & M. Railroad station. No incumbrance. I think he would give you the land for the horse. It is not hilly or stony. The nor. east quarter 29-4-2. Would refer you to Geo. S. Simmonds, president of the First Nat'l Bank, H. O. Studley, county clerk, or B. R. Logan; all of Belleville. I think if anything is done, must be done soon. Let me hear from you again. I am not particular about any int. in the horse, but would like to see him here, as I have a No. of mares to breed. Yours, truly, E. A. Hollowell." Smith sent his agent, P. S. Erb, to Belleville, to look at the land, and, if it suited Erb, he was to make the trade. Hollowell went to Munger, a liveryman, and hired him to take Erb to the land, giving them the numbers correctly, and also saying to them that it was east of John Berkman's farm. They went and examined the quarter adjoining Berkman's on the east, which was the northeast of 30, instead of the northeast of 29, both tracts being unimproved land. On Erb's return to Belleville, some talk was had with reference to Hollowell giving boot, which he refused to do. The trade was made. Hollowell accepted the horse, and gave a deed for the land. Almost two years afterwards Smith brought this suit against Hollowell and Munger, alleging that they had fraudulently and purposely shown his agent the wrong tract of land, and had deeded him a tract of land that was utterly worthless; that Hollowell had made certain false, and fraudulent representations to him and to his agent, and that he and Munger conspired together, and it was understood between them, that he should show his agent the wrong piece of land; and that these acts, arts, and devices on the part of the defendants towards the plaintiff were resorted to for the purpose of cheating, wronging, and defrauding this plaintiff out of his said stallion or value of the same; that by reason of said fraud, conspiracy, and collusion the plaintiff had been damaged in the sum of \$2,000; that said fraud was not discovered until some time in the summer or fall of 1887; that after the commencement of this action, and before trial, the plaintiff sold the land which he received in the trade. Trial had before court and jury. General verdict against both of the defendants for \$200. Special findings requested by both plaintiff and defendant and returned by jury. Motion for judgment in favor of Hollowell and Munger on findings sustained as to Munger, overruled as to Hollowell. Judgment ren-

dered against Hollowell for \$200. Motion for new trial filed and overruled, and from this judgment he appeals, and brings case here for review.

W. T. Dillon, for plaintiff in error. Noble & Hogan and J. W. Rector, for defendant in error.

GILKERSON, P. J. The errors complained of on the part of the plaintiff in error are in giving certain instructions and the overruling of the motion for a new trial. The sole ground for recovery laid in the petition was the fraud and deceit of the defendant in making the trade. Nothing of an equitable nature is claimed. The case was tried on the theory of fraud, yet the instructions of the court attempted to and did change the nature of the case, and authorized the jury to give the plaintiff relief upon the ground of mutual mistake and negligence; and the jury must have rendered their verdict upon the theory of mutual mistake and negligence, for they found that the examination of the land was without fraud or procurement on the part of any one, but was a mutual mistake, and specifically find that the defendant Munger did not intentionally, for the purpose of deceiving Erb, show him the wrong tract of land, and that there was no collusion or agreement between the defendants by which it was agreed and understood that Munger should show Erb the wrong tract of land, and that Hollowell did not know, prior to the final consummation of the trade in question, that Erb had examined the wrong tract of land. As we have said, the charge of the court and findings of the jury are all based upon the theory that the plaintiff could recover after there had been a mutual mistake, or if Hollowell was guilty of negligence. As far as false or fraudulent representations being made are concerned, there is a total failure of proof, as the records show that the only representation made by Hollowell was, as mentioned in his letter, "that the land was neither hilly nor stony." Smith never offered to rescind the contract after he discovered what he terms the fraud, which was in the summer of 1887; nor offered to return the property which was in his possession and under his control at the time this suit was commenced, but waited until after Hollowell had disposed of the horse before bringing his suit for damages. Counsel say that he could not rescind and return the property at the time the suit was brought, as Hollowell did not have the horse in his possession or under his control. This is true, but there was ample time for him to have done so between the date of the discovery of the fraud and the sale of the horse; "and where grounds for rescission of a contract exist, a party desiring to avail himself of them must act with reasonable promptness in returning the property." This Smith did not do, and very potent reasons are dis-

coverable by an examination of the record why he did not want the property returned to him. Of course, it is his right to make an election, but when he has made it he must be bound by it. Under the circumstances we think this action must be governed by the rules of law which govern actions for fraud and deceit in effecting sales. Hence if there was no fraud or deceit, no moral turpitude or obliquity, on the part of Hollowell in effecting the sale, the plaintiff cannot recover. We know of no exception to this rule, and we know of no decision that has ever expressed a different doctrine. *Chandler v. Lopus*, 1 Smith, Lead. Cas. 238, and cases cited in *Hare & W.* notes; *Da Lee v. Blackburn*, 11 Kan. 190. We know the courts of equity, in granting equitable relief, go much further. "Equitable relief may often be granted for purely innocent mistakes, but relief can never be granted in such cases as this where the relief asked is of a purely legal character." *Da Lee v. Blackburn*, supra. Now, if all the other necessary facts were shown, then, if Hollowell committed any fraud in making such statements as he did make, he certainly was liable for the fraud; and if he made the statements knowing and believing them to be false, for the purpose of effecting the sale, and did thereby effect the sale, he certainly did commit fraud. Or even if he made the statements as though he knew or believed them to be true, while in fact he had no knowledge or belief on the subject, he was equally guilty of committing fraud; and there are many other ways in which fraud could have been committed, and in which Hollowell could have made himself liable. But, if he committed no fraud, he is certainly not liable in this action. Section 133 of the Civil Code provides: "No variance between the allegations of a pleading and the proof is deemed material unless it have actually misled the other party to his prejudice in maintaining his action or defense upon the merits." Section 134: "When the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence and may order an immediate amendment without costs." Section 135: "When, however, the allegations of the claim or defense to which the proof is directed is unproven, not in some particular or particulars only, but in its general scope and meaning, it is not deemed a case of variance within the last two sections, but a failure of proof." The Civil Code here describes three grades of disagreement between the proof at the trial and the allegations in the pleading to which such proofs are directed: (1) An immaterial variance, and in such case the courts will order an immediate amendment. (2) An immaterial variance, where the proof has some relation to and connects with the allegations, yet the difference is so substantial that the adverse party is misled; then, upon a proper showing, the court will permit an

amendment. (3) Complete failure of proof,—that is, where the proofs did not materially fail to conform with the allegations in some particular or particulars, but in its entire scope and meaning. In other words, where the proofs establish something wholly different from the allegations of the pleadings, in such a case no amendment can be permitted, but the action should be dismissed. As we have said, the sole ground for recovery laid in the petition was the fraud and deceit of Hallowell in making the trade. In other words, the allegation in the petition in its general scope and meaning is that the defendant Hallowell was guilty of actual fraud and conspiracy against the plaintiff, whereby he was injured, while the proof directed to that allegation and the special findings of the jury are that he was not guilty of fraud or conspiracy, but at most was negligent, and that the injury, if any happened, was caused by his negligence, or the mutual negligence and mistake of the parties to the transaction. This is not an immaterial variance under sections 133 and 134, but a total failure of proof under section 135, of the Civil Code. The judgment in this case is reversed, and cause remanded, with instructions to render judgment therein for Hallowell upon the special findings. All the judges concurring.

#### MYERS v. TYSON.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 9, 1896.)

#### PARTNERSHIP—INSOLVENCY—PAYMENT OF INDIVIDUAL DEBTS.

1. As a general rule, the simple contract creditors of a partnership have no lien upon the partnership property until it is acquired by process of law; and a bona fide transfer of the partnership property, while it remains within the control and possession of the firm, made upon sufficient consideration, and with the consent of all the partners, places it beyond the reach of the partnership creditors. *Woodman- sie v. Holcomb*, 7 Pac. 608, 34 Kan. 35.

2. While the partnership remains in existence and in a solvent condition, it may, upon a bona fide consideration, all the partners assenting, transfer and appropriate the firm property in payment of the individual debt of its members; and mere insolvency, where no actual fraud intervenes, will not deprive the partners of their legal control over the property, and of the right to dispose of the same as they may choose; and where the separate creditor purchases from the firm in good faith, and the individual indebtedness is a fair price for the property purchased, such purchase cannot of itself be held fraudulent as against the general creditors of the firm.

3. A general jury finding, based upon disputed facts and conflicting testimony, and being approved by the district court, will not be disturbed. *Morris v. Trumbo*, 41 Pac. 974, 1 Kan. App. 150.

(Syllabus by the Court.)

Error from district court, Riley county; R. B. Spillman, Judge.

Replevin by Peter Tyson against J. M. Myers. From a judgment for plaintiff, and an

order denying a new trial, defendant brings error. Affirmed.

John E. Hessin, for plaintiff in error. Sam Kimble, for defendant in error.

GILKESON, P. J. This action was brought in the district court of Riley county by Peter Tyson to recover of J. M. Myers various items of personal property, consisting of a stock of agricultural implements, horses, wagons, buggies, and harness. Myers was at the time of the commencement of the action sheriff of Riley county, Kan., and had levied upon the property in controversy by virtue of a writ of attachment issued out of said district court in favor of the St. Joseph Plow Company against the firm of Leach & Tyson, a copartnership, consisting of Thomas Leach and F. B. Tyson. Prior to the issuance of the writ, Leach & Tyson had been engaged in business in Randolph in the sale of agricultural implements. The members of said firm, Thomas Leach and F. B. Tyson, were, respectively, the son-in-law and son of Peter Tyson, plaintiff in the court below. The plaintiff claimed to have purchased the articles of personal property from Leach & Tyson before the levy was made, and was therefore the owner and entitled to the immediate possession thereof. The defendant, acting under the instructions of the St. Joseph Plow Company, upon this suit being brought, gave bond and retained the property, claiming that the sale and transfer by Leach & Tyson to the plaintiff was a fraud on the rights of the defendant and other creditors, and was therefore void. The case was tried to the jury; general verdict rendered for Peter Tyson, plaintiff below; motion for new trial filed and overruled. No special findings were asked for by either party, or returned by the jury.

Myers brings case here for review, alleging error in the giving of certain instructions to the jury, and in overruling the motion for new trial. The record discloses that for some time prior to the sale to Peter Tyson, which occurred about the 15th of October, 1890, the firm had been in business in Randolph, and the management thereof had been principally with the partner Leach, Tyson having been engaged in other pursuits; that, as a firm and individually, they had borrowed money from Peter Tyson, and their indebtedness to him up to the time of the sale had not been paid; that at about the time this sale was made, or shortly before, the firm being satisfied that they could not meet all their obligations, concluded to make a preferred creditor of Peter Tyson, and made a proposition to him to buy their stock of implements, offering to sell the same to him for the sum of \$500, which was by him accepted. Whether all the property sought to be recovered in this action was included in the sale or not we are unable to tell from the record, as all of the testimony upon that proposition

is not preserved, as it is shown that a bill of sale was given, together with an inventory, neither one of which is incorporated in the record, as is also the case with reference to a certain receipt passed between the parties to the transaction, which was offered in evidence, but no record thereof made. The value of the property claimed, as shown by the petition, is \$963.89, and there is testimony tending to show that some of this property was purchased prior to the date of the sale, so that the testimony shows that the property sold by the firm to Peter Tyson was worth \$829.89. The amount agreed upon for the sale of this property was \$500, and was paid by surrendering to the firm their note for \$300, and the giving to them a note for \$200, due one day after date. This note of \$200 was paid by the cancellation of certain indebtedness of the individual members of the firm, viz.: Frank B. Tyson's indebtedness, \$100; Leach's indebtedness, \$200,—making the consideration about \$600, instead of \$500. The indebtedness of the firm to other parties was about \$1,500. At the time the sheriff levied upon and took these goods into his possession, they were in the possession of Peter Tyson, and the key to the house or store in which they were situated was in his possession. Peter Tyson knew that the firm owed some debts, but there is no evidence to show that he knew the amount, or to whom they were owed, and any information that he had on this subject was merely general.

The plaintiff in error complains of the giving of a certain instruction by the court, viz. No. 8, which reads: "I further instruct you that if you believe from the evidence that the plaintiff came into the possession of the property in controversy by a sale or sales, made in good faith and for a sufficient consideration, in payment of an honest debt or debts owed to him by F. B. Tyson and Thomas Leach jointly or individually, or both, without any knowledge of fraudulent intent on their part (if, in fact, such intent existed), was in possession of said property either in person or by agent, before the defendant levied upon the same by virtue of a writ of attachment under which he claims the right of possession thereto, then you should return a verdict for the plaintiff,"—and insists that the rule is: "Partnership creditors have a priority over the separate creditors of individual partners in the payment out of the partnership property, and have a quasi lien upon the property to enforce such payment." We cannot concur with counsel upon this proposition. "While the firm is in existence, its property may be sold by either partner, and will be followed by no claim, in law or equity, by the creditors of the firm if sold to the purchaser in good faith. The law does not provide that partnership debts may be first enforced against the joint property of the firm in preference to the individual debts of the partner, on the ground of any equity held by the creditors. But this relief is granted

to the creditors on account of the equity of the partners. Each one of them has the right to demand that the firm property shall be devoted to the payment of the firm's debts, and shall be first exhausted before the individual estates are taken." *City of Maquoketa v. Willey*, 35 Iowa, 323; *King v. Sutton*, 42 Kan. 600, 22 Pac. 695. In *Woodmansie v. Holcomb*, 34 Kan. 35, 7 Pac. 603, Mr. Justice Johnson, in delivering the opinion of the court, says: "While it is true, as a general rule, that as between partners, and also as between firm and individual creditors, the partnership debts have priority over individual debts as against partnership property, yet the simple contract creditors of a partnership have no lien upon its property until it is acquired by process of law. They have what has been termed a 'quasi lien,' but this arises and is derived solely through the equitable lien of the partners. Each partner has the right to have the firm assets applied in the discharge of the firm liabilities, and to the payment of whatever may be due him when the firm indebtedness is discharged and the partnership closed up. This equitable claim of the partners may in many cases, with the consent of the partners, be made available to the creditors; but as no such claim or equity exists in the creditors, independent of the partners, a bona fide transfer of the partnership property, made with the consent of all the partners, places it beyond the reach of the firm creditors,"—and, in support of this, cites *Story, Partn. § 258*. While the partnership remains in existence and is solvent, we think it has the right, with the consent of all its members upon a bona fide consideration, to sell and transfer the firm property in payment of the individual debt of one of the firm. No such circumstances about the transaction can be held to be a fraud upon the firm creditors. The decisions of the courts have gone further than this, and, although not unanimous, the weight of authority seems to be that mere insolvency, where no actual fraud intervenes, will not deprive the partnership of their legal control over the property, and their right to dispose of the property as they may choose; and where the separate creditor purchases from the firm in good faith, and individual indebtedness is a fair price for the property purchased, such purchase cannot of itself be held fraudulent as against the general creditors of the firm. *Sigler v. Bank*, 8 Ohio St. 511; *Schmidlapp v. Currie*, 55 Miss. 597; *Case v. Beauregard*, 99 U. S. 119; *Bank v. Sprague*, 20 N. J. Eq. 13; *Wilcox v. Kellogg*, 11 Ohio, 394; *Gwin v. Selby*, 5 Ohio St. 96; *Allen v. Center Valley Co.*, 21 Conn. 130; *Rice v. Barnard*, 20 Vt. 479; *Haben v. Harshaw*, 49 Wis. 379, 5 N. W. 872; *White v. Parish*, 20 Tex. 688; *Schaeffer v. Fithian*, 17 Ind. 463; *McDonald v. Beach*, 2 Blackf. 55; *Ex parte Ruffin*, 6 Ves. 119; *Whitton v. Smith*, 1 Freeman Ch. (Miss.) 231; *Freeman v. Stewart*, 41 Miss. 138; *Potts v. Blackwell*, 4 Jones, Eq. 58.

We do not think that the court erred in giving this instruction. We have carefully examined the record and evidence submitted at the trial of this case, and, even were it admitted that there was any fraudulent intent upon the part of Leach & Tyson as against their creditors, Peter Tyson did not participate therein, or have the slightest knowledge thereof; and in cases of this kind, where the sale made is alleged to be fraudulent, there must be participation in the fraud on the part of the grantee, or, at least, knowledge of the intended fraud of the grantor must be shown, or the sale will be upheld. This is the doctrine laid down by the supreme court of this state, and we cannot say that any prejudicial error was committed at the trial. There was evidence submitted tending to prove every material fact found by the jury that authorizes the verdict that was returned; and the question having been passed upon by the jury, and its findings approved by the trial court, this court cannot disturb the judgment. "We must hold, in accordance with the established principles and repeated decisions, that the general finding and judgment include every material fact necessary to sustain such judgment; and that, in legal contemplation, there is a finding by the jury that the sale of the property in question was made in good faith, upon a sufficient consideration; and that Peter Tyson was a bona fide purchaser thereof, and entitled to its possession." *Well v. Eckard*, 37 Kan. 700, 15 Pac. 922; *Morris v. Trumbo*, 1 Kan. App. 156, 41 Pac. 974. The judgment in this case will be affirmed. All the judges concurring.

#### GILSON et al. v. HAYS.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 9, 1896.)

##### LITIGATION OF FALSE ISSUES—QUESTIONS NOT RAISED BELOW.

Where the court, the litigants, and counsel all proceed in the trial of an action upon an erroneous theory as to the issues that are actually joined by the pleadings, and the matters in dispute are fairly litigated in such action, and it is clearly evident that the defeated party was not prejudiced thereby, the objection that there was a variance between the issues joined by the pleadings and the questions actually litigated cannot be considered when presented for the first time in this court.

(Syllabus by the Court.)

Error from district court, Osborne county; Cyrus Heren, Judge.

Action by William Spencer, for whom, on his death, was substituted John J. Hays as administrator, against Ashley Gilson and another. From a judgment for plaintiff, defendants bring error. Affirmed.

E. F. Robinson, for plaintiffs in error. J. C. Pitta, for defendant in error.

CLARK, J. On August 19, 1890, William Spencer brought this action in the district

court of Osborne county against Ashley Gilson and Roselsa Gilson. The plaintiff was about 79 years of age, and in feeble health, and the defendants were his son-in-law and daughter, respectively. The petition was very inartistically drawn; in fact, it is difficult to ascertain from a critical examination of it the nature of the cause of action upon which the plaintiff based his right to recover; and yet when the pleadings are construed as a whole, together with the evidence that was submitted by the parties to the action, the instructions of the court, and the verdict of the jury, together with the other proceedings had upon the trial, it is evident that the questions fairly litigated were as to whether or not the defendants had been legally released from the obligation assumed by them under a certain contract entered into on or about the 6th day of September, 1888, by the terms of which the plaintiff agreed to convey to the defendant Ashley Gilson the homestead upon which Mr. Spencer was then residing, being a quarter section of improved farming land in Osborne county, upon which there was a mortgage of \$1,000, the defendants undertaking and agreeing to supply the plaintiff with all necessary food, clothing, shelter, and warmth, together with other necessities for his comfort and sustenance in defendants' family, for and during the term of his natural life, the defendant Ashley Gilson assuming and agreeing to pay the \$1,000 mortgage; and, if this question should be determined adversely to the defendants, then the amount which plaintiff was entitled to recover as damages for a breach of the contract. The trial proceeded upon the theory that these were the issues joined, and therefore a similar construction of the pleadings will be adopted by this court. The jury returned a verdict in favor of the plaintiff, assessing his damages at \$761, and a judgment was rendered against the defendants in accordance therewith. To reverse this judgment, the defendants have brought the case to this court. Since the petition in error was filed, the death of the plaintiff below has been suggested, and the administrator of his estate has been duly substituted as defendant in error.

There is no contention as to the terms of the contract entered into between the parties, but the plaintiffs in error pleaded in bar of plaintiff's right to recover that, for a valuable consideration, they were on November 6, 1888, duly released from their obligation to support the plaintiff. They admit the execution and delivery of the deed in pursuance of the original contract, and that they moved into the dwelling house on the Spencer homestead, and took actual possession of the farm, under the deed, and also looked after and cared for Mr. Spencer's personal property, which consisted of live stock, farming implements, and household furniture, and which was on the place at that

time. They claim that, soon thereafter, Mr. Spencer transferred to Ashley Gilson all of the said personal property (the same then being in the virtual possession of the plaintiffs in error), and that the sole inducement for such transfer was that Mr. Spencer was at that time indebted to various parties for certain farming implements, as well as for the expenses incurred incident to the recent sickness, death, and burial of his wife; his creditors would be likely to take his property from him, unless he otherwise disposed of it; and that, in order to avoid the payment of this indebtedness, he gave this property to Mr. Gilson. This claim was, however, refuted by the plaintiff below, who testified that after the contract had been consummated upon his part by the execution and delivery of the deed, and the defendants had gone into possession of the farm, Mr. Gilson said to him: "You might just as well let me have the rest of the property. You are old, and it is a bother to you,"—to which he replied: "After I am dead and buried, all will be yours." He also testified that that was the substance of the conversation, and that he did not give the personal property to Mr. Gilson. Soon afterwards a controversy arose between the plaintiff and Mrs. Gilson, growing out of a desire on the part of the former to transfer a bed claimed by him to the residence of a neighbor, with whom he was stopping temporarily; and Mrs. Gilson refused to allow him to remove the bed from the premises, and the plaintiff claimed that as a result of that altercation, and without sufficient provocation therefor, he was driven from the home of the defendants, and compelled to seek refuge and support elsewhere. He also claimed that the circumstances attending the execution of the release pleaded in bar by the defendants were such that he was not bound thereby; that because of his infirmity, both of mind and body, and his incapacity, by reason thereof, to manage his affairs, of which fact the defendants had full knowledge, and with the intent to wrong him and to secure a discharge from their obligation to support him, they refused him possession of certain personal property claimed by him, except upon the condition that he sign said release. This, however, is denied by the defendants, who claim to have dealt fairly and honorably with the plaintiff in the premises, and that they purchased such release upon sufficient consideration therefor. The evidence in support of the claims of the respective parties is very unsatisfactory and conflicting, save as to the terms of the original contract entered into by them, and yet we do not feel warranted in saying that the general verdict of the jury in favor of the plaintiff was not supported by the evidence, or that there is an irreconcilable conflict between the general verdict and the special findings of fact. As the instructions asked by the plaintiffs in error, which were refused by the court, were

substantially covered by the general instructions, which stated the law applicable to the case, the questions of fact having been determined by the jury in favor of the plaintiff below, the verdict having been approved by the trial court, and no prejudicial error appearing in the record, it follows that the judgment must be affirmed. All the judges concurring.

#### POMEROY v. SCHWENDENER et al.

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 9, 1896.)

#### RECORD ON APPEAL—WANT OF JURISDICTION—DISMISSAL.

When the record filed for the review of a judgment of the district court does not affirmatively show that the value of the property in controversy, exclusive of costs, exceeds \$100, and the case does not belong to one of the excepted classes of appealable cases, it must be dismissed for want of jurisdiction.

(Syllabus by the Court.)

Error to district court, Graham county; Charles W. Smith, Judge.

Action by James P. Pomeroy against Henry Schwendener and others to reverse an order dissolving a temporary injunction. Plaintiff brings error. Dismissed.

Z. C. Tritt and H. M. Baldwin, for plaintiff in error. H. J. Harwi, for defendants in error.

GARVER, J. The plaintiff in error, Pomeroy, commenced this action in the district court of Graham county to enjoin the removal of a frame stable from certain lots in Hill City which he had purchased at a sheriff's sale made pursuant to a judgment of foreclosure of a mortgage held thereon by him. The premises were bid in by him for \$75. A temporary injunction was granted by the probate judge, which, on motion of the defendants, was dissolved by the district court. To reverse this order these proceedings in error were instituted. The subject of controversy is a certain frame stable situated on the mortgaged lots. The evidence does not show its value, but the petition for the injunction alleges that the plaintiff purchased the lots and building at the sheriff's sale for \$75, and that the lots, exclusive of the stable, are not worth to exceed \$10. A proceeding in error cannot be taken to this court or to the supreme court in any civil action "unless the amount or value in controversy, exclusive of costs, shall exceed \$100," except in certain specified classes of cases, to which this case does not belong. Accepting the allegations of the petition in this case as the only evidence of the amount or value in controversy, it is clear that the case was not appealable. But, without this, the result would be the same, for the record must in all cases affirmatively show jurisdiction. *Loomis v. Bass*, 48 Kan. 28, 28 Pac. 1012; *Packard v. Packard* (Kan. Sup.) 42

Pac. 335. If we look to the merits of the case, we find little conflict in the evidence as to the ownership of the stable in controversy. The preponderance of the evidence goes to show that the stable was not on the land at the time the mortgage was executed; that it never belonged to the owner of the lots, but was moved thereon, with his consent, by other persons. The building was not placed upon a permanent foundation, and could be easily removed without injury to it or the lots. We think the decision of the court is amply supported in the evidence. For the reasons first given the case will be dismissed. All the judges concurring.

#### BOARD OF COUNTY COM'RS OF RAWLINS COUNTY v. BEALS.

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 9, 1896.)

##### APPEAL FROM JUSTICE—FILING AFFIDAVIT.

Both the written statement and the affidavit, required by the statute for an appeal by a municipality from the judgment of a justice of the peace, must be filed within 10 days after the rendition of the judgment; and if the statement only is filed within the 10 days, the affidavit not being filed until the lapse of 15 days, it is not error for the district court to dismiss the appeal.

(Syllabus by the Court.)

Error from district court, Rawlins county; G. Webb Bertram, Judge.

Action by the board of county commissioners of Rawlins county against Jesse W. Beals. Judgment for defendant. Plaintiff brings error. Affirmed.

Robert S. Hendricks, for plaintiff in error.  
J. C. Call, for defendant in error.

GARVER, J. This was an action commenced before a justice of the peace by the board of county commissioners of Rawlins county against Jesse W. Beals, in which judgment was rendered by the justice for the defendant, and an appeal therefrom to the district court was attempted to be taken by the plaintiff. On motion of the defendant, the appeal was dismissed. This ruling of the court is the only question presented for our consideration. No appeal bond was given, and, in lieu thereof, the plaintiff attempted a compliance with the statute which provides: "When any municipality desires to appeal, no bond shall be required, and it shall be sufficient to perfect any such appeal if the appellant shall, within ten days after the rendition of the judgment, cause to be filed with the justice of the peace a statement in writing that appellant does appeal from such judgment to the district court of the county, and file an affidavit setting forth the appeal is not taken for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment." Gen. St. 1889, § 4973. A

written statement that the plaintiff appealed to the district court was filed 8 days, and the affidavit required by the statute was filed 15 days, after the rendition of the judgment. The requirements of the statute, as to the conditions upon which an appeal may be taken from a justice's court to the district court, must be complied with within the time given by the statute, or the right to an appeal is lost. When other conditions are imposed in lieu of the giving of a bond, a compliance with such statutory requirements is essential. Both the written statement and the affidavit must be filed. Neither one, of itself, is sufficient to secure an appeal. The statute expressly provides that these necessary steps for an appeal must be taken within 10 days after the rendition of the judgment. As that was not done in this case, the appeal was properly dismissed. *Struber v. Rehifs*, 36 Kan. 202, 12 Pac. 830; *McCarthy v. Holden*, 54 Kan. 313, 38 Pac. 261. The judgment of the district court will be affirmed. All the judges concurring.

#### KNEELAND v. RENNER.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 9, 1896.)

##### SALE—VESTING OF TITLE—DELIVERY—SUFFICIENCY OF EVIDENCE.

In a contract of sale of personal property, the intent of the parties controls, and if they intended a present vesting of title, the title may in fact pass at once to the purchaser, although the actual delivery thereof is to be made subsequently, and whenever a dispute arises as to the true character of an agreement, the question of intent is rather one of fact than of law; and the finding of the trial court, when sustained by the evidence upon this question, will not be disturbed upon review.

(Syllabus by the Court.)

Error from district court, Jewell county; Cyrus Heren, Judge.

Replevin by Noah A. Renner against L. D. Kneeland. From a judgment for plaintiff, defendant brings error. Affirmed.

This was an action in replevin, brought by Noah A. Renner, as plaintiff below, against L. D. Kneeland, defendant below, as constable of Burr Oak township, in Jewell county, Kan., to recover the possession of two colts, upon which the defendant below, as such constable, had levied upon as the property of one John Laird. As a statement of facts in the case we can do no better than to take the findings of the court below, viz.: That on February 8, 1890, Noah A. Renner and John Laird entered into a contract and agreement whereby the said John Laird sold to said Noah A. Renner the property in controversy, being a span of colts, one of which was two years old and the other three. That it was at the time agreed between the said Renner and Laird that Renner should pay Laird the sum of \$128 in cash, or execute his note for that amount, due and payable on the 1st of

March, 1890. That the said Laird should keep for the said Renner the property until the 1st of March, 1890, as Renner had not room for them at his place of residence, and that the property then and there became the property of said Renner. That a note was to be executed, or the cash paid, on the 10th of February, 1890, at Burr Oak, Kan., the contract of sale having been made at the residence of Laird in the country, and on Saturday afternoon. That Renner did, on Monday, the 10th of February, execute and deliver to Laird his note for the sum agreed upon. That the note was executed about 4 o'clock in the afternoon of said day, and was immediately placed in the Bank of Burr Oak by Laird as collateral security to secure the indebtedness owed by him to said bank, which was not quite as large as the amount of the note. That, at the time the bank received the note as collateral, it agreed with Laird to credit the amount of the note on his indebtedness to them, and pay him the difference, provided the Renner note was all right, and would be paid without any trouble or question; and they did so pay Laird the difference. That on or about the 15th of February, 1890, Renner went to the bank and paid the note so given, by executing to said bank another note. Thereupon the bank assigned to him the obligations of Laird to the bank without recourse, and Renner afterwards delivered to Laird the indebtedness so taken from the bank by him, without any further or other consideration between him and Laird. That on February 10, 1890, there was issued by a justice of the peace of said county, in an action pending before him, in which Ira F. Hudson was plaintiff and the said John Laird defendant, a writ of attachment, and delivered to the plaintiff in error, as constable, under and by virtue of which he took into his possession the property in question. That on the 21st day of February, 1890, Renner brought this action. Kneeland gave a redelivery bond and held possession of the property, and on the 25th day of February, 1890, proceeded to, and did, sell the same to the plaintiff in the attachment, Ira F. Hudson. That said Laird was a married man, the head of a family, and had no other team but the one in question. That one of the colts had been broken to work, and had been worked prior to the levying of the writ of attachment, and the other had been broken to work about the time of levying, and that ever since they have been used together as a team. That the value of the property in question at the time this action was commenced was the sum of \$150. That the plaintiff has never had the actual possession of the property in controversy. Case tried to the court. Special findings of fact, as above set forth, made, together with conclusions of law. Judgment rendered in favor of defendant in error, Renner, from which judgment Kneeland complains, and brings case here for review.

T. S. Kirkpatrick and I. F. Hodson, for plaintiff in error. Turner & Hotchkiss, for defendant in error.

GILKESON, P. J. (after stating the facts). There is but one question in this case which requires our attention, the answering of which determines all other issues in the case, viz.: Did the title and ownership of the property in question pass to Renner at the time the contract was made, February 8, 1890? And this we must answer in the affirmative. The rule is, in sales of personal property, the property passes at once on the sale, if such is the intention of the parties, though the seller is afterwards to make a delivery of the goods sold. This intent may be expressly declared, or it may be implied from the circumstances surrounding the making of the contract. This, we think, has always been the rule. Nothing was required at common law to give validity to the sale of personal property, except the mutual consent of the parties to the contract; and as soon as it was shown by competent evidence that it was agreed by mutual consent that the one should transfer the absolute property in the thing sold to the other for a money price, the contract was considered complete and binding on both parties. *Hatch v. Oil Co.*, 100 U. S. 124. Mr. Justice Brewer, in delivering the opinion of the court in *Bailey v. Long*, 24 Kan. 91, says: "So long as T. W. B. [the vendor] had the title and the right to control the property, it might be taken for his debts, notwithstanding any agreement he might have made to sell it. It is unquestionably true that the intent of the parties controls, and if they intend a present vesting, it did in fact pass at once to L. [the vendee], and that though the actual delivery was to be made subsequently under the arrangement of the vendor." As Benjamin, in his work on Sales (section 309), says: "Both of these contracts [the contract of sale and the contract to sell] being equally legal and valid, it is obvious that whenever a dispute arises as to the true character of an agreement, the question is one rather of fact than of law." The agreement is just what the parties intend to make it, if that intention is clearly and unequivocally manifested, *cadit quæstio*. And this rule is again laid down in *Howell v. Pugh*, 27 Kan. 702. The intention of the parties, therefore, governing, and upon a dispute as to what the intention was, it being a question of fact, we merely look to the findings, which clearly show that it was the understanding and intent of the parties that the title did and should pass at once, viz. on the 8th of February, 1890. Is this finding sustained by the evidence? We think it is. Where an action has been tried by the court without the intervention of a jury, and the court makes special findings, the findings of the court are as conclusive in an appellate court as the verdict of a jury, and when each finding of fact is sustained by some evidence, this court will not



order the finding set aside, or grant a new trial, although the evidence is of the most unsatisfactory character, and although thereon this court, if sitting as a nisi prius court, might reach different conclusions of fact. *Gibbs v. Gibbs*, 18 Kan. 419. And this has been the rule uniformly recognized from the existence of the supreme court down to the present time. *Backus v. Clark*, 1 Kan. 303. And see the first reported case of this court, *Westerman v. Evans* (Kan. App.) 41 Pac. 675, in which the same rule was reiterated. As we have said, this finding is sustained by the evidence. In fact, all the findings of the court in this action are sustained; not only by some, or even a preponderance, but by all, the testimony. The judgment in this case will be affirmed. All the judges concurring.

#### UNION PAC. RY. CO. v. McCOLLUM.

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 9, 1896.)

**FIRE NEGLIGENTLY SET—LIABILITY OF RAILROAD COMPANY—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.**

1. One who negligently sets out a prairie fire, which causes the destruction of the property of another, is liable for the injury sustained, when it is such as reasonably should have been foreseen as the natural and probable consequence of the negligent act.

2. A fire negligently set from a passing railroad train, after running a short distance, was, as supposed, subdued and extinguished by section men, except in some burning hay stacks, from which further damage was not apprehended. The next day a moderately strong wind, but which was neither unusual nor extraordinary, carried the fire from the stacks into the prairie grass 80 or 90 feet therefrom, and thence upon the plaintiff's premises, 3 or 4 miles distant. *Held*, that such wind is not such an independent intervening agency as can be said to be the proximate cause of the plaintiff's damage, so as to relieve the railway company from liability for negligently permitting the fire to escape from its engine.

3. It cannot be held, as a matter of law, that one living on a prairie farm, four miles from a railroad, with intervening public highways and cultivated farms, is guilty of contributory negligence in not surrounding his premises with fire guards, such as are commonly regarded as sufficient to protect them from prairie fires.

(Syllabus by the Court.)

Error from district court, Trego county; Stephen J. Osborne, Judge.

Action by Eli McCollum against the Union Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

On the 14th day of July, 1892, Eli McCollum commenced this action in the district court of Trego county against the Union Pacific Railway Company to recover the sum of \$765.85 and attorney's fees for damages alleged to have been sustained from a fire caused by the negligence of the railway company in the operation of one of its trains on the 27th day of March, 1892. The fire was set out between 2 and 3 o'clock in the afternoon of March 27th, and burned north

through the prairie grass about three-quarters of a mile, and into two stacks of hay. At this point the fire was subdued and extinguished, with the exception of the burning stacks, which were left, with the supposition that no further damage was to be apprehended. The next forenoon, about 11 o'clock, the wind carried the fire from the stacks across a burned space of about 80 or 90 feet, into the dry prairie grass, and in a short time, having traversed the intervening distance of three or four miles, it reached McCollum's farm, and did the damage complained of. The jury returned a general verdict for the plaintiff for \$587.32 and \$50 attorney's fees. They also made the following special finding of facts: "(1) Did not the fire start near the railroad track of defendant, and on the north side thereof, about two miles east of Ogallah, on the afternoon of March 27, 1892? Answer. Yes. (2) Did not such fire destroy Mr. Ridgway's stacks, and burn beyond them? A. Yes. (3) To what distance north of Mr. Ridgway's stacks did the fire burn? A. From 84 to 90 feet on the first day's fire. (4) Did not defendant's section men, assisted by Mr. Ridgway and other farmers of the neighborhood, put out such fire after it had burned such distance beyond the haystacks? A. They did not. (5) How wide was the space burned around these haystacks at the narrowest place? A. From 84 to 90 feet on the first day's fire. (6) Did not the parties engaged in extinguishing said fire consider it had been entirely put out, except what may have been left in the stacks when they left it in the evening? A. They did." "(8) Was not the ground surrounding the haystacks burned off clean, and was not a space on the north side of the stacks burned clean from the stack to the edge of the grass? A. Yes. (9) Were not the stacks about three-fourths of a mile north of the track? A. Yes." "(11) Was there not very little wind blowing on the evening of March 27, 1892? A. Yes. (12) Did not the wind begin to blow very hard during the forenoon of March 28th? A. Medium strong. (13) Where did the fire which burned plaintiff's property on the 28th of March, 1892, originate? A. On company's right of way, on the 27th of March, 1892. (14) Did the fire which destroyed plaintiff's property come from the stacks above mentioned? A. Yes. (15) If you answer the last question in the affirmative, then state whether or not sparks were carried by the very high wind then prevailing across the burned space from the stacks to the grass on the north of them? A. They were carried by a medium high wind. (16) Was not the plaintiff's property destroyed by the fire started on the 28th of March? A. It was destroyed by the continuation of the fire of the 27th of March, 1892." "(24) What hour of the day did the fire begin burning in the grass on the 28th day of March? A. About 11 o'clock a. m." The motion of the railway company for judgment

on the special findings of facts was overruled, and judgment entered on the verdict in favor of the plaintiff.

A. L. Williams, N. H. Loomis, and R. W. Blair, for plaintiff in error. Lilla Day Monroe and John E. Hessin, for defendant in error.

GARVER, J. (after stating the facts). No question is raised in this court as to the negligent setting out of the fire by the railway company on March 27th. The principal contention of plaintiff in error is that the fire set out by the train on that day was not the proximate cause of the injury complained of, but that such injury was directly caused, on the following day, by the intervening agency of a high wind. This contention is thus stated in the brief of plaintiff in error: "If the Sunday fire was started by an engine, and had burned continuously until it reached plaintiff's property, under the decisions of the supreme court of this state there would be no question about the liability of the company; but, the fire having been extinguished on Sunday evening, and the premises left in what was considered by those in a position to know a safe condition, and in such a condition that, but for the high wind the next day, the property of plaintiff would not have been destroyed, changes the case entirely. It is plain from the evidence, and is settled by the findings, that if it had not been for the wind prevailing Monday morning, sparks would not have escaped from the stacks across the burned space, and started a new fire in the standing grass." We are unable to distinguish this case on principle from *Railway Co. v. Stanford*, 12 Kan. 354; *Railway Co. v. Bales*, 16 Kan. 252; and *Railway Co. v. McBride*, 54 Kan. 172, 37 Pac. 978. In those cases the supreme court fully and clearly discussed similar questions as to proximate and remote causes, and established precedents which inevitably lead us to but one conclusion. True, in neither of the cases referred to was there such an intermission in the progress of the fire as existed in this case; the burning there being, in a sense, continuous. Yet in no such case is there a simultaneous burning. The fire is communicated from one object to another, whatever the size and nature of such objects may be, with some interval of time between the burning of the different objects. In dry prairie grass, and before a brisk wind, a fire may sweep over miles of territory in a very short time; or again, if the conditions are not so favorable, it may linger, and hesitate, and almost die out, moving with dilatory steps, until it makes a final destructive leap. When there is this succession of causes and effects, it is difficult to fix any definite limit which shall mark the dividing line between causes which are proximate and those which are remote, as connected with subsequent events. The distinction cannot be made by any mere reference to

time or distance. In case a building is negligently set on fire, and the flames are thereby communicated to an adjoining one, the burning of the first is the immediate cause of the destruction of the second. Yet, as is well settled, the negligent act by which the fire was communicated to the first must be held to be in law the proximate cause of the final effect,—the burning of the second building. In such case, is it of any importance, in determining legal liability, that the first building was burning an hour, or six or more hours, before the fire was actually communicated to the second? Are the legal consequences which follow from the original wrongful act avoided by the efforts made by the wrongdoer, after the starting of the fire, to prevent its spreading? Is it a legal excuse or justification for the wrongdoer to say that, if the wind had not been blowing in a particular direction, or had not been blowing at all, the damage would not have been done? These and kindred questions must be answered in the negative. The main inquiry in all such cases is: Is the one who is charged with the original wrongful act responsible for the existence of the fire which caused the damage, and was it a result which might have been foreseen, at the time of the commission of the negligent act, as its natural and probable consequence? What the answer to this inquiry should be is largely a question of fact, and the trier of the facts must say what are proximate and what are remote causes in view of the peculiar circumstances of each case. *Railway Co. v. Kellogg*, 94 U. S. 469; *Fent v. Railway Co.*, 59 Ill. 349; *Railway Co. v. Hope*, 80 Pa. St. 373.

Counsel for plaintiff in error lays much stress upon the fact, found by the jury in the seventh special finding of facts, that the section foreman and others who were engaged in putting out the fire thought that it was entirely safe to leave the burning stacks on the evening of the 27th, and reasonably supposed there was no danger of the fire being again communicated to the prairie. The fact is, however, it was not safe, as is shown by what occurred the next day, when the fire was readily carried from the burning stacks to the prairie grass by a wind, which was neither unusual nor extraordinary. Had such wind sprung up immediately after the fire, except that in the stacks, had been extinguished, and had the flames been thereby again kindled in the dry grass, there would be little room for any controversy about intervening causes. By the fire being lodged and detained for a time in the stacks there was a change or break in the succession of events, but was there the intervention of a new and independent cause? Liability does not arise in this case from subsequent negligent watch or care. The negligence consisted in letting the fire escape, in the first place, from the engine. Neither is it a question as to what would

reasonably have been foreseen as the natural and probable consequence of leaving the fire in the burning stacks. That has nothing to do with a liability which exists, if at all, because of the first wrongful act of the company,—negligently setting out the fire. Such liability cannot be affected by subsequent efforts to restrain and control the devastating force thus let loose. It was for the jury to say whether it was reasonable to expect as the natural and probable consequence of setting a fire in the dry grass that it would sweep over the adjoining country with more or less rapidity, consuming what came in its way, and yielding to the influences of the winds which were then usual and common. Though the subduing of the fire, and its stopping in the stacks 16 or 17 hours, were events not foreseen, yet it is not unreasonable to say it could have been foreseen, as the natural and probable consequence of setting the fire, that it would burn over and devastate this very territory. The jury in this case have found that it was only a "medium strong" wind which carried the fire from the stacks into the grass. As courts may take judicial notice of what is within the experience and knowledge of all men, it might probably be said, without calling for evidence of the fact, that "medium strong" winds are among the natural and reasonable occurrences in western Kansas in the month of March. However that may be, the evidence clearly shows that the wind on March 28, 1892, was not unusual nor extraordinary in that locality. One setting out a fire on the prairie is bound to take into consideration any such merely natural occurrences. If the winds did not fan the flames, and sweep them with such destructive, and often uncontrollable, force, prairie fires would not leave so many blackened ruins in their paths. But it cannot be said in such cases that a wind which is neither unusual nor extraordinary is an independent intervening cause of the spread of the flames. It is simply a natural force, which is exerted upon almost every fire, as a contributing cause, to the doing of more or less damage. When two causes combine to produce an injury, both of which are proximate in their character, the one being the result of culpable negligence and the other an occurrence for which neither party is responsible, the negligent party is liable, if the injury would not have been sustained but for such negligence. If there had been the intervention of such an extraordinary force as a whirlwind, as was the case in *Marvin v. Railway Co.*, 79 Wis. 140, 47 N. W. 1123, a different question would be presented. The independent intermediate agency which may become the proximate cause, and thus stand between the injurious results and a prior wrongful act, must also be a force whose intervention or contribution in bringing about the results could not have been foreseen by the exercise of reasonable diligence on the part of

the wrongdoer. This cannot be said as to such a wind as occurred in this instance. Upon principal and authority, we think the negligent setting out of the fire by the railroad company on the 27th must be held to be the proximate cause of the plaintiff's loss. In addition to the cases cited and commented upon by the supreme court in the *Stanford and McBride Cases*, which bear upon this question, we refer to the following: *Poeppers v. Railway Co.*, 87 Mo. 715; *Railway Co. v. Nitsche*, 126 Ind. 229, 26 N. E. 51; *Railway Co. v. Williams*, 131 Ind. 30, 30 N. E. 696; *Railway Co. v. Kellogg*, 94 U. S. 469.

The facts in *Railway Co. v. Williams* and *Railway Co. v. Nitsche* are similar to those in this case. In each of those cases, which were actions for damages sustained by fires negligently set out by the railway company, several days intervened between the time when the fire was set out and the time when the damage was done; the fire in the meantime having been subdued and extinguished, as was supposed, and again breaking out. In the case of *Nitsche* the fire was set out on the right of way of the railway company on July 19th, and was under control and supposed to have been extinguished several times thereafter, the smouldering fire being as often fanned into flames by the wind, until, on August 2d, it again broke out, and burned the property of plaintiff. In both cases the wrongful act of the railway company in permitting the fire first to escape was held to be the proximate cause of the final injury. There, as in this case, had it not been for the wind, the fire probably would not have again broken out after it had been subdued, and on that ground it was contended that the wind was an intervening agency, and the proximate cause of the plaintiff's damage. Considering this claim, it is said in the opinion in *Railway Co. v. Nitsche*: "It is difficult, if not impossible, to find a substantial reason for holding that an ordinary wind is an independent intervening agency; for what occurs in the usual course of nature, and is not abnormal or extraordinary, cannot be regarded as an independent agency. \* \* \* Extraordinary winds may justly be regarded as independent intervening agencies; but not so winds which are usual, and prevail without disturbing the normal conditions of nature. One who is himself without fault has, in justice and common fairness, a right to recover from one who has caused him a loss by a tortious act, although an ordinary natural occurrence entered into the chain of events which culminated in the loss. It is, in truth, impossible to conceive a case wherein loss by fire can happen wholly independent of natural causes. Fire will not burn without air, and yet no one will be bold enough to assert that, because this natural agency enters into every conflagration, therefore the wrongdoer is absolved from responsibility."

It is next contended that the plaintiff was guilty of contributory negligence, and therefore not entitled to recover, even admitting that the negligence of the railway company was the proximate cause of his loss. We think this contention cannot be maintained. It is founded upon the mere fact that the plaintiff had not protected his premises by a sufficient fire guard. The evidence shows that the plaintiff lived about four miles from the railroad, with intervening public highways and cultivated farms. He had provided some protection by fire guards around his farm, but nothing that was adequate. While it is the duty of one to use reasonable efforts to prevent or lessen an injury, even in case it is threatened because of the wrongful act of another, no such duty is imposed to protect one from the effects of the wrongful acts of others which are only possible, but are not probable or imminent. In this case, as in most cases, the existence of contributory negligence on the part of the plaintiff was a fact to be determined by the jury, and such determination is conclusive on this court. The omission to provide adequate fire guards cannot, as a matter of law, be said to have been negligence contributing to the injury. *Railway Co. v. Kincaid*, 29 Kan. 467; *Railway Co. v. Cornell*, 30 Kan. 35, 1 Pac. 312; *Railway Co. v. Tubbs*, 47 Kan. 630, 28 Pac. 612; *Railway Co. v. Eddy* (Kan. App.) 42 Pac. 413.

Complaint is also made of various rulings of the court in the admission and the refusal of evidence, and of the instructions to the jury. We do not deem it necessary to lengthen this opinion by a detailed consideration of those objections. We think the instructions of the court fully and with substantial correctness gave the jury the rules of law applicable to the case. There was no substantial dispute as to any of the material facts, and the result would probably not have been changed had all the rulings of the court upon the admission of evidence been in favor of the plaintiff in error. The judgment is affirmed. All the judges concurring.

#### BURGWALD v. DONELSON.

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 9, 1896.)

##### REPLEVIN—PLEADING—DEMAND—CONTINUANCE.

1. A petition in replevin properly alleges plaintiff's ownership and right of possession, and defendant's wrongful detention, as of the time when the action was commenced.

2. It is not error to overrule an application for a continuance of the trial of an action, on the ground of the absence of material evidence, when such application is made on behalf of one not a party to the action, though he may be interested in the matters involved therein, and in the result of the trial.

3. A demand is not necessary to make the detention of the property of D. wrongful, when levied upon and held as the property of H., by an officer, under legal process issued against H. (Syllabus by the Court.)

Error from district court, Cheyenne county; G. Webb Bertram, Judge.

Action by S. A. Donelson against John Burgwald. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Finley and W. F. Oberlender, for plaintiff in error. W. B. Ingersoll and Thos. F. Egan, for defendant in error.

GARVER, J. In an action of replevin, brought in the district court of Cheyenne county by S. A. Donelson against John Burgwald, the plaintiff obtained a judgment for the possession of certain cattle alleged to have been wrongfully detained from him by the defendant. The defendant, as plaintiff in error, brings the case to this court and assigns as error various rulings of the trial court.

The first complaint arises upon the overruling of a demurrer to the petition. The particular defect claimed to exist in the petition is that it fails to allege that the plaintiff was the owner of the cattle on the day they were taken by the defendant, and also that it failed to set out the fact that, in taking the cattle, the defendant acted under and by virtue of a certain order of attachment duly issued by a proper court. These objections are not well taken. The petition properly alleges ownership and right of possession in the plaintiff, and wrongful detention by the defendant, at the time the action was commenced. It is not necessary that a petition in replevin set out the excuse or justification which the defendant may have. It is sufficient that the detention is alleged to be wrongful. Any legal reason which the defendant may have for withholding possession from the plaintiff is a matter of defense.

The overruling of an application for a continuance of the trial is also assigned as error. It appears from the record that the defendant, Burgwald, at the time he took the property, was acting in the capacity of constable, and levied upon the cattle as the property of one C. A. Hodge, by virtue of a writ of attachment issued by a justice of the peace before whom was pending an action brought by the Moline Plow Company against said Hodge. In the replevin action Burgwald and the Moline Plow Company were joined as defendants. Afterwards the Moline Plow Company made a special appearance, and, on its application, the case was dismissed as to it, and issues were joined for trial between Donelson and Burgwald. The action was commenced January 5, 1891, and was tried December 3, 1891. December 1, 1891, an application for a continuance of the case for trial was made on behalf of the Moline Plow Company, the affidavit therefor setting up that said company "is the owner and the real defendant in interest in above said action," and that it has not been able to ascertain, in time for a trial at that term, the whereabouts of certain persons who are material witnesses in the case. The continu-

ance was not applied for by Burgwald, nor by any one on his behalf. We think the plow company had no right to make an application of this kind, after having been dismissed from the case on its own motion. Whatever interest it had in the trial was represented by Burgwald, who had a right to control the case so far as the defense was concerned. The plow company had a right, under the statute, upon showing its interest, to be made a party defendant, with all the rights and privileges pertaining to a defendant in an action. Having voluntarily chosen to stand outside of the controversy, it could claim no right to be heard therein; and, upon this ground alone, the court committed no error in overruling the application. If we look at the showing made as the ground for a continuance, we do not find it to be such as would require the court, in the exercise of its discretion, to grant the application.

Various rulings of the court in the admission and the rejection of testimony were assigned for error. After a careful examination of these objections, we find no substantial error committed. Some of the testimony rejected related to conversations and transactions with third parties, which were clearly inadmissible as against the plaintiff. Certain questions which were asked on behalf of defendant, to which objections were made and sustained, were answered in other portions of the testimony of the same witness. Other questions, to which objections were overruled, elicited answers, otherwise irrelevant to the issues in the case, which were made relevant, on the redirect examination of the witness, by reason of the character of the cross-examination. Upon the whole, the rulings of the court upon the trial were fair, impartial, and without substantial error.

It is further contended, by counsel for plaintiff in error, that the court erred in refusing to instruct the jury that it was necessary for the plaintiff to prove that a demand was made on the defendant for the possession of the cattle before the commencement of the action. The court instructed the jury that no demand was necessary. In so doing it only followed the well-settled rule in such cases. The taking of the property of Donelson, under a writ directing the officer to attach the property of Hodge, was wrongful from the beginning, and a demand was not necessary. *Dickson v. Randal*, 19 Kan. 212. By a motion for a new trial, the verdict was challenged by the defendant, on the ground that it was not sustained by the evidence, and this contention is still urged in this court. The record shows that there was testimony introduced in support of all the material allegations of the petition. With respect to no material fact was there an entire absence of evidence. Upon the evidence introduced, the jury found for the plaintiff, and their verdict was approved by the trial judge. In accordance with well-settled rules,

such a verdict will not be disturbed by an appellate court. The judgment will be affirmed. All the judges concurring.

### HUSTON v. PETERSON.

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 9, 1896.)

SALE—WARRANTY—PAROL EVIDENCE—EVIDENCE—SUFFICIENCY.

1. Evidence of verbal statements and representations made during the negotiations for the sale of a horse is not admissible to contradict or enlarge a written warranty delivered at the time the sale is consummated, unless it is first shown that, through fraud or mistake, material parts of the warranty were omitted from the writing.

2. The evidence in the case examined, and held not to sustain the verdict.

(Syllabus by the Court.)

Error to district court, Phillips county; G. Webb Bertram, Judge.

Action by Reling J. Peterson against John C. Huston for breach of warranty. There was a verdict for plaintiff and an order granting a new trial, and from a judgment for plaintiff on the second trial defendant brings error. Reversed.

G. A. Spaulding, Frank McKay, and C. C. Flansburg, for plaintiff in error. C. A. Lewis and R. F. Stinson, for defendant in error.

GARVER, J. This was an action brought in the district court of Phillips county by Reling J. Peterson against John C. Huston to recover damages for an alleged breach of warranty, made by the defendant to the plaintiff, upon the sale of a horse. The amended petition, upon which the case was tried, alleged that the defendant warranted that the horse was identical with one named "Red Murdock," with a recorded number 3,997 in the Clydesdale studbook; that he was perfect in health, and a sure foal getter. A written bill of sale and warranty was given, at the time of the sale, that the horse was "Red Murdock," with a registered number of 3,997; that he had been imported by Huston; and that he was a foal getter with proper care and handling. The plaintiff alleged that the full warranty, as made at the time of the sale, was not inserted in the writing, and was omitted therefrom, by the fraud of the defendant. The horse was valued at about \$1,000, the consideration given by Peterson being 80 acres of land in Phillips county. Before completing the sale, Peterson saw, and had an opportunity to examine, the horse. On the morning of July 20, 1890, having completed the purchase by delivering the deed to the land and receiving the bill of sale and warranty, he started with the horse for his home, distant about 25 miles. After going about 8 miles, the horse showed signs of sickness, refusing to eat or drink, and, after going 3 or 4 miles further he lay down, and the next day died. Two trials of

this case have been had. The first, resulting in a verdict for \$200 in favor of the plaintiff, was set aside by the court, and a new trial granted. Upon the last trial there was a verdict and judgment for the plaintiff for \$500. The first trial was had on a petition which set up the written warranty, given at the time of the purchase of the horse, as the contract of warranty made by the defendant. After the new trial was granted, on the application of the defendant, the plaintiff, by leave of court, filed a second amended petition, in which he relied upon a verbal warranty.

The plaintiff in error first alleges error in the ruling of the court permitting the second amended petition to be filed, it being contended that by the amendment the plaintiff was allowed to change his cause of action from one on contract to one on tort for fraud and deceit. We do not think the ruling of court is subject to this objection. As we read the last petition, we do not understand that the pleader intended to change his case from an action on contract to an action of tort. There is still the allegation of the contract of warranty, the breach thereof, and the consequent damage. The allegation of fraud is made merely with reference to the contents of the writing, for the purpose of avoiding its legal effect. The amendment was such as the court, in its discretion, had a right to permit.

The principal contention is as to the evidence; the plaintiff in error insisting that the defendant in error failed to make out his case, and that the verdict is without support in the evidence. After a careful examination of the record, we think this contention must be sustained. The only evidence offered in support of the allegation of a warranty, independent of the writing, is the testimony of the plaintiff himself. He testified to conversations had during the negotiations; that the horse was represented to be sound and a sure foal getter; that a written warranty to that effect was to be given; that he could not read English; and that the defendant's agent, Pendarvis, read the writing over to him before he accepted it. We do not think the evidence discloses such facts as allow the admission of evidence tending to show a parol warranty. As a written warranty was given, all previous conversations and statements of the parties, so far as intended to be warranties, must be presumed to have been included in the writing. There is no evidence whatever to sustain the allegations that the actual warranty was fraudulently omitted from the written instrument, or to show that, at the time the writing was delivered, it was intended by the parties to be other than it was. The plaintiff was accompanied by his son, and there were also present Pendarvis, his wife, and a son, from either of whom Peterson could have informed himself of the contents of the writing if he was not able to read it for himself. The undisputed evidence in the case shows that the bill of sale and warranty was read by

Pendarvis to Mr. Peterson in the presence of the above-named parties. These persons were all examined as witnesses upon the trial, and from none of them, including the plaintiff, is there any claim that Pendarvis did not correctly read the instrument. How, then, can it be said that, by fraud, an instrument was imposed upon Peterson different from the one he supposed he was receiving? Under these circumstances, it must be conclusively presumed that the entire contract was reduced to writing, and that all previous negotiations of the parties were embraced therein. Consequently, parol testimony was not admissible for the purpose of showing that the contract was different from that evidenced by the writing. *Rogers v. Perrault*, 41 Kan. 385, 21 Pac. 287; *Willard v. Ostrander*, 46 Kan. 591, 26 Pac. 1017; *McMullen v. Carson*, 48 Kan. 263, 29 Pac. 317; *Association v. Scott*, 53 Kan. 534, 36 Pac. 978. But, if the warranty be taken in its broadest sense, as alleged by the plaintiff, as to the soundness of the horse, there is an entire failure of evidence tending to show that the horse was not sound at the time of the sale. The plaintiff himself says that the horse seemed to be all right until they had traveled about eight miles on their way; that then, when put into a stable, the horse broke out into a severe sweat, and appeared to be in great pain, showing a desire to lie down. The day is said to have been the hottest of the summer. That the horse had a severe attack of sickness is very evident, and it is reasonable to suppose it was caused by his becoming overheated, or otherwise afflicted, on the road. There is, at least, nothing tending to show any previous ailment or unsoundness of the horse. There is a like failure of evidence as to any other breaches of the contract of warranty. The judgment will be reversed, and the case remanded for a new trial. All the judges concurring.

SCHOOL DIST. NO. 80 v. BROWN et al.  
(Court of Appeals of Kansas, Northern Department, W. D. Jan. 9, 1896.)

#### SCHOOL DISTRICTS—OFFICERS—AUTHORITY.

The officers of a school district cannot by contract create a district liability for the building of a schoolhouse, unless they were first legally authorized so to do, on a site selected, and out of the funds provided for that purpose, by the electors of the district.

(Syllabus by the Court.)

Error from district court, Graham county; Charles W. Smith, Judge.

Action by William Brown and another against school district No. 80 on contract. There was a judgment for plaintiffs, and defendant brings error. Reversed.

F. D. Turck and Wm. Lamson, for plaintiff in error. Z. C. Tritt and G. W. Jones, for defendants in error.

**GARVER, J.** The defendants in error, Brown and Jackson, brought this action in the district court of Graham county to recover from school district No. 80 in said county the contract price for the building of a schoolhouse in said district. The petition alleged the making of a contract with the district board, and the construction, in accordance therewith, of a schoolhouse by defendants in error. The liability of the school district is the sole question presented by the record.

Having only limited authority in a matter of this kind, the officers of a school district can only carry out the expressed will of the electors of the district. If they act without such direction, or exceed the power conferred upon them, their action does not bind the district. They have no inherent power as a board to build a schoolhouse, or to create any district liability in a matter that is committed by the statute exclusively to the qualified voters of the district. Gen. St. 1889, par. 5587. This statute also confers upon the electors of a school district the exclusive right and power to select a site for the district schoolhouse. After the voters of a district, at a meeting duly called, have selected a site for the schoolhouse, have determined what kind of a house they will build, and have provided funds for that purpose, the district board, as mere agents, may carry out the will of the inhabitants of the district so expressed. Gen. St. 1889, par. 5614. Where, when, and how a schoolhouse shall be built having been thus first decided at a district meeting, such determination becomes the measure of authority which the board may thereafter exercise in that matter. Any one dealing with the board is bound to take notice of the limitations of its authority. Hence, in order to base a recovery upon a contract entered into with a school board, such as alleged in this case, it must be shown that the contract was authorized by the voters of the district. *School Dist. v. Perkins*, 21 Kan. 536; *Wilson v. School Dist.*, 32 N. H. 118. Applying these rules to this case, we are unable to find in the record any evidence of authority in the district board to make the contract in question. The first district meeting of which we have any record was held February 26, 1889, pursuant to a call by the board. At that meeting a certain site for a schoolhouse was selected, and it was agreed to build a stone schoolhouse, 19 by 30 feet in size. The site so selected was distant one mile south from the place where the board caused a schoolhouse to be erected. On March 15, 1889, there was another district meeting, not shown to have been legally called and held, at which time it was determined to change the site from the place selected at the February meeting, and to locate the schoolhouse where it was afterwards built. Another special meeting seems to have been held May 4, 1889, and it was voted to change the site back to the first

place selected. A majority of the voters were present at this meeting, all voting for the original site. We are not able to say from the record that either the March or the May meeting was legally called. Moreover, there is nothing in the record to show that at either of these meetings the board was instructed to proceed to the erection of a schoolhouse, or that any funds had been provided for that purpose. There is an intimation in portions of the record that, at some prior meeting, bonds had been voted for the erection of a schoolhouse, but there is no evidence of that fact. The district board, on April 6, 1889, let the contract to Brown and Jackson for the building of a schoolhouse on the site selected at the meeting held March 15th. What this contract was the record does not disclose, except that, after the work was done, the board allowed their claim in the sum of \$399.65. What the plans of the schoolhouse were, or whether it was constructed in accordance therewith, does not appear. The building was completed in July, 1889, about the time of the annual district meeting. At the annual meeting, in July, the treasurer and clerk, who had been active in making this contract, were succeeded in office by persons who were in favor of the other site. The new board refused to recognize any liability of the district under the contract made by the old board; hence this action. We think no legal liability has been shown.

It is claimed that the evidence shows a subsequent ratification by an acceptance and use of the building by the district. The only evidence of this is that the district clerk called the annual meeting to be held at this building July 25, 1889. The inhabitants of the district assembled there, but, so far as their action is concerned, it shows a disavowance rather than a ratification of the action of the district board; for at this meeting a resolution was adopted expressly directing the board "to make arrangements for a place to hold the next term of school." There being no schoolhouse, schools had previously been held at different places, as arrangements therefor could be made with residents of the district. The same course seems to have been pursued after the building of this house, and it was not used by the district for any purpose after the July meeting. We do not think it can be said from this that the acts of the board were ratified by the district.

It appears that about May 1, 1889, the county attorney of Graham county began proceedings in the district court of that county, in the name of the state, to enjoin the district treasurer and clerk from paying out or expending any of the funds of said district for the erection of the schoolhouse contracted for with Brown and Jackson, alleging that the contract was unauthorized and void. In February, 1890, that case was dismissed by the court, for the reason that the plaintiff had

failed to comply with a previous order of the court allowing an amendment of the petition, and the making of Brown and Jackson defendants. The proceedings in that case were pleaded by the defendants in error as res judicata as to the questions involved in this case, and as a conclusive determination of the validity of the contract. We do not think they can have that effect. The case was not tried upon its merits; neither was there identity of parties with the parties to this action.

For the reason that the evidence failed to show that the district board was authorized by the electors of the district to make the contract on which this action was based, the judgment will be reversed, and the case remanded for a new trial. All the judges concurring.

#### GOLDING et al. v. EIDSON et al.

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 9, 1896.)

##### APPEAL—REVIEW—ERRORS OF LAW—WAIVER.

The ruling of a trial court sustaining an objection to the introduction of evidence under the answer of the defendant, on the ground that it stated no defense, if erroneous, was "error of law occurring at the trial," for which a new trial could have been granted by the district court, and will be deemed waived, and not subject to review in this court, when a motion for a new trial was not made.

(Syllabus by the Court.)

Error from district court, Graham county; Charles W. Smith, Judge.

Action by G. H. Eldson and others against George E. Golding and others on a note and mortgage. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

S. L. Seabrook and G. W. Jones, for plaintiffs in error. F. D. Turck, for defendants in error.

GARVER, J. The plaintiffs in error, Golding and others, were the defendants in an action brought by Eldson and others on a note and mortgage. The case was tried by the court, and, as shown by the journal entry, "the court, after hearing the evidence, finds that all of the allegations and averments contained in the petition of said plaintiff filed herein are true, and that there is due from the said defendants, G. E. Golding and A. W. Golding, to the said plaintiff, on the note and mortgage sued on in this action, the sum of \$1,010." The error complained of, and urged as the ground for the reversal of this judgment, is the ruling of the court in sustaining an objection made by the plaintiffs below to the introduction of any evidence under the answer of the defendants, on the ground that the answer did not state facts sufficient to constitute a defense. The answer of the defendants was very inartistically drawn, and, except by the most liberal construction, could not be held to state any defense. But, conceding that the ruling of

the court upon the objection was erroneous, can it be reviewed by this court? If the trial was regularly conducted,—which we must assume to be the case,—the plaintiffs would, under the pleadings, have first introduced their evidence, and rested; and then, in the very midst of the trial, would have occurred this objection, and the ruling of the court thereon. The objection being sustained, there remained, as a basis for the judgment, the pleadings and evidence introduced by the plaintiffs. It was this ruling of the court during the trial of the case which deprived the defendants of the benefit of any evidence which they might have introduced in support of the allegations of their answer. This must be held to be a ruling occurring at the trial, for which, if erroneous, a new trial could have been granted by the district court. Gen. St. 1889, par. 4401. The record in this case does not show that a motion for a new trial was made in the district court on this or any other ground. The rule is well settled in this state that "errors of law occurring at the trial," for which a new trial may be granted by the trial court, are waived, and cannot be reviewed by an appellate court, when a motion for a new trial was not made. *Nesbit v. Hines*, 17 Kan. 316; *Decker v. House*, 30 Kan. 614, 1 Pac. 584; *Buettinger v. Hurley*, 34 Kan. 585, 9 Pac. 197; *Duigenan v. Claus*, 46 Kan. 275, 28 Pac. 699. On the authority of the above cases, the judgment must be affirmed. All the judges concurring.

#### TARPEY v. SHARP et al.

(Supreme Court of Utah. Dec. 21, 1895.)

##### APPEAL—SUPERSEDEAS BOND—DAMAGES—EJECTMENT—RENTS AND PROFITS—REVIEW—EVIDENCE.

1. Where, in ejectment, the mesne profits are recoverable, a supersedeas bond on error to the federal supreme court covers rents and profits pending the proceedings in error.

2. A finding by the jury as to the value of the rents and profits of land if used for the purpose of manufacturing salt thereon, based on the evidence of one party, will not be disturbed.

Appeal from district court, Fourth district; before Justice Harvey W. Smith.

Action by D. P. Tarpey against John Sharp and others, executors. There was a judgment for plaintiff, and defendants appeal. Affirmed.

P. L. Williams, for appellants. Evans & Rogers, for respondent.

KING, J. In 1885, plaintiff brought an action in ejectment against the Deseret Salt Company to recover possession of certain lands near the north end of Salt Lake. From verdict and judgment in his favor the defendant company appealed to the supreme court of the territory, where an affirmance of the judgment of the lower court was had. 17 Pac.



631. Thereupon, by writ of error, the case was taken to the supreme court of the United States, and the judgment of the supreme court of Utah affirmed. 12 Sup. Ct. 158. Upon suing out the writ of error, a supersedeas bond was given, in pursuance of section 1000 of the Revised Statutes of the United States, which provides that "every justice or judge signing a writ of error, shall \* \* \* take good and sufficient security that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and if he fail to make his plea good shall answer all damages and costs, where the writ is a supersedeas and stays execution." By the appeal and supersedeas the plaintiff was kept out of possession of the premises from March, 1888, until July, 1892, and this action is brought to recover damages for the use and occupation of said premises during said period. The jury awarded plaintiff damages and interest, amounting to \$2,372, against the defendants herein, executors of one of the sureties, now deceased, on said bond.

Appellants contend that under the bond upon which action is brought no recovery can be had for damages resulting from the detention of the premises, or at least that plaintiff was entitled to recover only nominal damages. It is said by their counsel that the bond is statutory, and its conditions are such that no liability attaches to the sureties for the "value of the rent, use, or occupation of the" property. In support of this position the cases of *Roberts v. Cooper*, 19 How. 373, and *Kountze v. Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911, are cited.

An examination of the first case referred to reveals the fact that the plaintiff recovered the premises in controversy in ejectment proceedings, with only nominal damages. A writ of error was brought, and the defendant required to give bond in the sum of \$1,000. Subsequently application was made to the supreme court of the United States for an order requiring additional security for the damages which would be occasioned by the delay and the working of the mine by appellant pending the determination of the cause by the supreme court. The application was denied, the court holding that, where nominal damages only are received in ejectment, the court cannot interfere to enlarge the security to recover damages which a plaintiff may obtain in an action for mesne profits or other losses he may sustain by being kept out of possession. It is apparent this case does not control the case at bar, and is clearly distinguishable from it. In the first place, the only point decided was that, the lower court having fixed the amount of security, there was no legislative provision authorizing the supreme court to increase such security. It is further to be observed that this decision was made in 1856, and under the common-law form of ejectment. In such action the proceedings were fictitious, and the plaintiff a nominal party. The damages were also nominal, in order to carry costs, there be-

ing no provision by which the jury were authorized to inquire into actual damages sustained by the plaintiff for the wrongful withholding of the possession of the premises. Such damages were recoverable in an action for "mesne profits," which was consequential to the recovery in ejectment. 3 *Suth. Dam.* § 992, and cases cited. Even if the court in *Roberts v. Cooper*, supra, had decided that damages for the detention of the premises could not be recovered upon the supersedeas bond therein given, it is clear that the reason for the same could only rest upon the ground that the form of action there employed precluded the recovery of any but nominal damages; and that for mesne profits resort must be had to that action. It is to be noted in passing, that our Code has abolished the common-law action of ejectment, and provided that in ejectment proceedings plaintiff may recover damages for withholding the property, and also rents and profits accruing therefrom. 2 *Comp. Laws* 1888, § 3220. In 1867 the supreme court of the United States adopted rule 32 in relation to supersedeas bonds. 6 *Wall.* p. v. By this rule it was provided that: "\* \* \* When the property in controversy necessarily follows the event of the suit, as in real actions, \* \* \* indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and 'just damages for delay' and costs and interest on the appeal." In the case of *Jerome v. McCarter*, 21 *Wall.* 17, an appeal was taken from a decree of foreclosure, and motion was made in the supreme court for additional security. *Roberts v. Cooper*, supra, was cited in support of the sufficiency of the bond, and to show that nothing could be recovered for the use and detention of the property. After considering rule 32, and other questions, the court say: "This is a suit on a mortgage, and therefore, under this rule, a case in which the judge who signs the citation is called upon to determine what amount of security will be sufficient to secure the amount to be recovered for the use and detention of the property and the costs of suit, and just damages for the delay, and costs and interest on the appeal."

We do not think the second case relied upon by appellants—*Kountze v. Hotel Co.*, supra—has any application to the case under discussion. In that case foreclosure suit was brought and a decree rendered ordering the mortgaged premises sold. Defendants appealed, and to obtain supersedeas of execution gave an appeal bond. Decree was affirmed, the premises sold, and deficiency judgment entered. After return of execution nulla bona, suit was brought on the appeal bond, to recover the entire penalty of the bond, and interest; and, while it was decided that no recovery could be had on the bond for the rents or profits, or use and detention of the property, pending the appeal, yet the court held that there was a difference be-

tween a suit in ejectment and for foreclosure of a mortgage, and say: "In ejectment, the property of the land is in question, and, if the plaintiff has the right, he is entitled to immediate possession, and to the perception of the rents and profits which belong to him, and for which the defendant in possession is accountable to him. \* \* \* But in the case of a mortgage the land is in the nature of a pledge; and it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged. They belong to the tenant in possession, whether the mortgagor or a third person claiming under him." The case of *Roberts v. Cooper* was before the court, and the only thing said to sustain appellants in this case was: "That even in ejectment it has at least been questioned by this court whether the bond in error covers rents and profits accruing pending the suit." In the case of *Refining Co. v. Wyman*, 22 Fed. 184, suit was brought on supersedeas bond given by defendant in an ejectment case, to carry the cause to the supreme court of the United States; and Justice Brewer emphatically declared that upon judgment the plaintiff was entitled to the premises, and, the supersedeas having been given, by which he was further deprived of their possession, and thereby lost the rents and profits, he was entitled to recover. Referring to the case of *Kountze v. Hotel Co.*, he says: "While, I say, there is an intimation in that opinion that the same rule might apply in an ejectment case, it is not so decided. A distinction is drawn between ejectment and foreclosure cases, so that, notwithstanding that intimation, I think that I ought to follow what seems to be to my mind the clear and unanswerable logic, and that is to hold that a supersedeas bond in an ejectment case covers rents and profits accruing pending the proceedings in error." In the case at bar, the bond provided that the sureties would "answer all damages and costs in full" if it failed to make its plea good. The bond is in the nature of a contract (*Crane v. Weymouth*, 54 Cal. 476), and we think plaintiff can recover thereon if he has sustained any damages, by the action of the defendant in the original suit, in having the premises withheld from his possession.

That brings us to appellants' second contention, viz. that the evidence was insufficient to justify the verdict, and that the damages were excessive. We fully concur with defendants' counsel that under the issues and facts of the case plaintiff's recovery must be limited to compensation merely for his actual loss by reason of being deprived of the premises, and such compensation must be adjusted as upon contract, and not upon the footing of tort. The court below charged the jury that the plaintiff was entitled to nominal damages in any event, and, if they found by a preponderance of the evidence that the premises were worth any substantial amount, then the plaintiff was entitled

to recover the value of the use of such premises for the period of their detention. No exceptions were taken to the charge of the court, and we think the law was fairly stated to the jury. Witnesses for plaintiff testified that the premises withheld from his possession were used by the salt company, and salt was manufactured and sold by it; that, if plaintiff had had possession, he would have sold the product manufactured, and which would have amounted to 4,000 tons per annum; that the cost of its production was 70 cents per ton, and the market price during this period was \$5 a ton sacked, and \$3 unsacked. The testimony offered by the defendants was clear and unequivocal, and showed that, not only was there but little salt manufactured, but that there was no market except for a limited supply; also that the expenses of producing the quantity sold exceeded the sum received therefor. While the evidence offered by plaintiff is not very satisfactory, we are of opinion that there was testimony tending to support plaintiff's allegations, and prove that the value of the use of the premises was of some monetary consideration to him. The lower court and the jury, "having had the witnesses before them, and having had an opportunity to observe their manner and bearing while testifying, are more able to judge of the weight which ought to be attached to their testimony than an appellate court, looking at the evidence only as it is written in the record. And we cannot say that the verdict is so manifestly against the preponderance of evidence that we cannot hesitate to declare the evidence clearly insufficient to support it, or that the jury acted from prejudice or passion." *Farr v. Griffith*, 9 Utah, 418, 35 Pac. 506. If the jury believed the testimony of Sparks, plaintiff's witness, that the cost of manufacturing the salt was but 70 cents per ton, and that the market price was \$5 and \$3 per ton for sacked and loose salt, respectively, then there would be evidence sufficient to justify the verdict. We see no error in the record, and affirm the judgment, with costs.

MERRITT, C. J., and BARTCH, J., concur.

#### In re KELSEY.

(Supreme Court of Utah. Dec. 21, 1895.)

APPEAL—FINAL JUDGMENTS—PAYMENT OF ALIMONY.

An order in divorce proceedings directing the payment of alimony is not a "final judgment" (2 Comp. Laws, § 3635), and therefore is not appealable, though enforceable by execution in the same manner as judgments in ordinary actions.

Application by Lewis P. Kelsey for a writ of habeas corpus. Denied.

Adrian C. Ellis, Sr., for petitioner. O. S. Varian, for respondent.

KING, J. An action for divorce was brought against the petitioner by Sadie Kelsey. The petitioner specifically denied that there had been a marriage between him and the plaintiff. Upon application for temporary alimony and suit money, the court ordered that, until the further order of the court, defendant in the action should pay \$40 per month to plaintiff, and that within 20 days from September 30, 1895, he should pay the further sum of \$75 suit money and \$200 counsel fees. On the 1st day of October, 1895, said defendant filed and served in due form a notice of appeal from such order, and made application to the court to fix the amount of a supersedeas bond in order to stay proceedings pending an appeal; but the court, being of opinion that the decision rendered in the cause was not a final judgment, declined to fix the amount of said bond. Thereupon defendant duly filed an undertaking on appeal from said decision in the sum of \$300, conditioned to pay all damage and costs which might be awarded against him on appeal, and also an undertaking in the sum of \$2,000 to stay proceedings upon said appeal, which contained the proper statutory conditions. No exceptions to the bonds, either as to form or sufficiency of the sureties, were ever taken. Defendant, having failed to pay the money as ordered by the court, was, after hearing upon citation, adjudged guilty of contempt of court, and committed to the marshal, to be by him confined and imprisoned in the penitentiary until the order of the court was obeyed. Application was made to one of the justices of the supreme court for a writ of habeas corpus, and the petitioner released upon giving a bond in the sum of \$2,000, conditioned to abide the decision of the supreme court to be made upon the hearing of said application.

It is conceded by counsel for the petitioner that the only question presented for the consideration of this court is: Did the district court have authority and jurisdiction over the petitioner to adjudge him guilty of contempt? That involves the further question, and the only one to be considered: Was the order of the court for the payment of alimony pendente lite, suit money, and counsel fees a final judgment? If it was, then an appeal would lie; and if the petitioner followed the statutory steps relating to appeals, the lower court had no jurisdiction to institute contempt proceedings, or punish for disobedience of said judgment. Section 3635, 2 Comp. Laws, provides that "an appeal may be taken to the supreme court from the district court, first, from a final judgment in an action or special proceeding commenced in the court in which the same is rendered. \* \* \* Third, from an order granting or refusing a new trial, from an order granting or dissolving an injunction, from an order refusing to grant or dissolve an injunction, from an order dissolving or refusing to dissolve an attachment, from an order granting

or refusing to grant a change in the place of trial, from any special order made after final judgment, and from an interlocutory judgment in actions for partition of real property, and from an order confirming, changing, modifying or setting aside the report, in whole or in part, of the referees in actions for the partition of real property, in the cases mentioned in the provisions of this Code. \* \* \* Counsel for petitioner insist that the order entered by the lower court in the divorce proceedings was a final judgment, because, as it was argued, it possessed all the essential elements of a final judgment, and could be enforced by execution in the same manner as judgments rendered in ordinary actions for the recovery of a specific sum of money. In support of this position, counsel cite the cases of *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, and 8 Pac. 709; *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; also, cases from Illinois, Arkansas, and Kentucky. The statute of California is identical with ours, and it is urged that we should follow the construction given the statute by the supreme court of that state. We entertain great respect for the decisions of that court, and have, from the beginning of the territory, manifested that respect by accepting, in very many adjudications by this court, the views by it enunciated; and because much of our Code was borrowed from California, and many of its provisions came charged with a construction by the supreme court of that state, we have with almost unbroken uniformity adopted such construction. But in this case the statute above quoted, while copied from the California Code, had not been construed at the time it was enacted by our territorial legislature. Therefore we feel at liberty to decide this question unembarrassed and untrammelled by any decision from our sister state.

In the case from California above referred to, it is decided that the order of the court for alimony pendente lite, together with counsel fees, is a final judgment, and therefore an appeal will lie. A dissenting opinion was written by Judge McKee, the reasoning of which we think sound, and from which we quote with approval. Judge McKee says: "Besides, the interlocutory character of the order appealed from is not changed by the fact that it commands payment of a large sum of money. Nor is it affected by the provision of the Code as to the process by which it may be enforced. It is the execution which may be issued upon the order to which the Code gives the same legal effect as if issued upon a final judgment; but it does not give to the order the effect of a final judgment. The order is unchanged in its nature by the remedy adopted for enforcing it, and the execution is given merely as an additional remedy for that purpose. As an additional remedy, the court making the order is not bound to resort to it. Especially, in actions of divorce, it is

left to the discretion of the court to enforce an order made *pendente lite* by execution, or by proceedings in contempt for not complying with it, or by requiring reasonable securities for making the payment of the money, or by the appointment of a receiver, or by any other remedy applicable to the case. \* \* \* Moreover, a judgment is the final sentence of the law in an original suit. A money judgment is a legal demand or a record debt upon which suit may be brought. The money order in this case is for alimony. Alimony is not an original suit. It arises out of some other suit, in which a marriage *de facto* is confessed or proved. The allowance of alimony pending such a suit is not a debt. It is a legal liability which arises out of the obligation imposed by law upon every married man to contribute to the support of his wife. When the fact of marriage is judicially ascertained, the jurisdiction of the court to award alimony *pendente lite*, as incidental to the suit before it, may be called into exercise by the motion of the wife; and the court in the exercise of its jurisdiction may award it out of the community property, or the separate property of the husband. In making the award, the court acts upon the principle that the husband and wife are jointly interested in the property and fortunes of the community, and that one is as much entitled as the other to maintenance and support out of it during the proceedings between them for a separation. So that allowing the wife alimony is only awarding her what she as a wife is lawfully entitled to. Her rights of property in the community estate are vested until divested by judicial decree which dissolves the marriage status, and makes distribution of the estate."

Under the various definitions of final judgment, as given to us by the courts and law writers, it seems clear that the order in question cannot be included. When an order is made pending the cause, and before a final hearing on the merits, it is interlocutory in every sense of the word. It is not a final decree disposing of the cause, either by sending it out of court before a hearing is had on the merits, or after such hearing decreeing either in favor of or against the prayer of the petitioner. The application for alimony *pendente lite*, in this case, is merely an incident to the action brought by plaintiff. It is so co-ordinated with it that it becomes inseparable from it. It is a mere shadow, following the substance, which is the original bill for separation. Because the order of the court may be enforced by execution does not deprive it of its interlocutory character. It certainly is as much of an incident to the main case as the examples given in subdivision 3 above quoted, and which the statute clearly denominates interlocutory orders. And, though execution may issue, it does not possess the element of finality. It determines no issue, and is a final adjudication

of no question. It may be changed, or entirely set aside. It can be modified upon application, or upon the court's own motion, as it exercises absolute control over it. And it must not be forgotten that the sole purpose of alimony *pendente lite*, and an order for suit money, is to enable the spouse to meet the case presented. No better argument can be offered to show the interlocutory nature of this order than to state that it is made to enable the party to try the cause which will result in a final judgment.

Much of the argument of petitioner's counsel is devoted to showing the hardship which may result from an unjust order. But because a judge may award an exorbitant sum is no argument against the court's power. It might be an argument of convincing and overwhelming force, when made before a legislative body as a reason for amending the statute relating to appeals. It is a discretionary power, possessed by the courts, to award or refuse temporary alimony. The legislature has seen fit to repose confidence and confer this power; and even if its abuse were conceded, it ought not to move the court to legislate words into the statute. There is also another view to be suggested relative to this question. Every wife who alleges statutory grounds for a divorce is entitled to present her grievances to the court. And she is entitled to support from the property of her husband, or the community property, until the final order of the court. A dismissal of the case or its indefinite postponement ought not to be the penalty to be visited upon her because of poverty or inability to prosecute the suit for lack of means, when the husband may be in possession of ample property. If appeals are permitted from these interlocutory orders granting alimony *pendente lite*, worthy persons, entitled to divorce, by appeals and the "law's delays," would be not only prevented from prosecuting their actions but deprived of sustenance pending final hearing. We merely mention this because of the emphasis given by counsel to the matter of the hardship resulting from the denial of an appeal.

Mr. Freeman, in his work on Judgments (volume 1, § 35), clearly recognizes that this order is interlocutory. He says: "Exceptions. But owing to particular circumstances and hardships, the courts have refused to dismiss appeals from some judgments which did not completely dispose of the cases in which they were entered. \* \* \* To avoid the necessity of being called upon to review such judgments, the superior courts have cautioned the inferior ones, and endeavored to impress upon them the evils resulting from the practice of entering interlocutory judgments capable of being at once enforced against a party, and doing him irretrievable damage before a final judgment can be entered. \* \* \* Probably to avoid special hardship resulting from the failure to give a right of appeal from other than a final

judgment or decree, the following have been decided, for the purpose of an appeal, to be final judgments: \* \* \* Fixing the amount of alimony pendente lite, and directing its immediate payment." The view expressed in the last sentence is the doctrine of expediency, and while, perhaps, it may be potential before a legislative body, it should not lead courts into the realm of legislation. Many of the cases cited by counsel for petitioner arose in states having statutes different from ours. We are of opinion that the order entered by the court below, directing the payment of alimony pendente lite, suit money, and counsel fees, was interlocutory, and not a final judgment. *Earls v. Earls*, 28 Kan. 178; *Cooper v. Mayhew*, 40 Mich. 528; *Chase v. Ingalls*, 97 Mass. 524; *Miller v. Miller*, 75 N. C. 71; *Ex parte Perkins*, 18 Cal. 60. And see *Thomson v. Thomson*, 5 Utah, 401, 16 Pac. 400; *Lapham v. Lapham*, 40 Mich. 527. The petition for a writ of habeas corpus is denied, and the petitioner remanded to the custody of the United States marshal.

MERRITT, C. J., and BARTCH, J., concur.

WALLACE, SMUIN & CO. v.  
McLAUGHLIN et al.

SYMNS UTAH GROCER CO. v. SAME.  
(Supreme Court of Utah. Dec. 21, 1895.)

SUPPLEMENTAL PROCEEDINGS.

Comp. Laws, §§ 3455, 3458, providing, in proceedings supplemental to execution, that the court may direct property of the judgment debtor in the hands of third persons to be applied on the judgment, and that, if any person alleged to have property of the judgment debtor claims an interest therein adverse to him, it may authorize the judgment creditor to institute proceedings for its recovery, does not authorize the court to declare fraudulent a sale by the judgment creditor to a third person, and direct the delivery of the property for the satisfaction of the judgment.

Appeals from district court, Third district; before Justice Samuel A. Merritt.

Actions by Wallace, Smuin & Co., a corporation, and by the Symns Utah Grocer Company, a corporation, against F. J. McLaughlin and another. From judgments in supplemental proceedings, defendants appeal. Reversed.

Brown & Henderson, for appellants. Jones & Schroeder, for respondents.

KING, J. Each of the above-named plaintiffs obtained judgment against the defendants on the 1st day of September, 1893, and instituted proceedings supplemental to execution against the defendants and H. V. Rice, D. C. McLaughlin, and E. C. Williamson; and the court ordered them to appear before a referee "to answer concerning property, moneys, rights, and credits of the said defendants F. J. McLaughlin and O. C. Lockhart." At the hearing before the referee, the

only witnesses called were those against whom the proceedings were instituted. Their testimony, so far as it is necessary to a decision in this case, was substantially as follows: For about five years prior to June 12, 1893, defendants Lockhart and McLaughlin had been engaged as copartners in a general merchandise business at Park City. On the day last mentioned, their liabilities amounted to \$25,000. Their assets consisted of merchandise of the value of \$18,000, and book accounts aggregating \$15,000. They were indebted to the Park City Bank in the sum of \$15,000, and to plaintiffs in the sum of \$1,625, and \$2,500, respectively. The bank, which was the principal creditor, on the 12th day of June, 1892, passed into the hands of an assignee. It was thought that the failure of the bank might precipitate an attachment, and, because of the stringency in the money market, it was felt that a forced sale of the assets would realize but a small part of their value, and most of the creditors would therefore be unpaid. Hoping to avoid this, a corporation was formed by the copartners, and all of the assets of the copartnership transferred to the new company. It was designed to place the stock of the corporation with the creditors, as security, and to continue the business, push collections, dispose of the goods as rapidly as possible, and apply all the receipts to the discharge of the partnership obligations. The witnesses said no fraud was intended, but that they acted in good faith, and for the best interests of their creditors. All the stock in the corporation, except four shares, was held by Lockhart and F. J. McLaughlin, who assigned their stock as security to the bank for its claim. Subsequently they executed a writing assigning to plaintiffs and other creditors their stock in the corporation, subject to the lien of the bank. The creditors seemed to approve of the action of the partners in organizing a corporation, and plaintiffs continued to sell merchandise to it, receiving payment therefor. Cash dividends were declared by the corporation, and paid to the bank on its claim. Later on, some of the creditors of the partnership commenced attachment proceedings, and the Symns Utah Grocer Company, one of the plaintiffs, attached a portion of the merchandise in the possession of the corporation. Thereupon the partners concluded, rather than involve the corporation in legal controversies with partnership creditors, that it would be better to make an assignment for the benefit of their creditors. The corporation was owing but a few hundred dollars. So, acting upon the advice of their attorneys, the stockholders of the corporation, who were its directors, sold and transferred the merchandise to Lockhart and F. J. McLaughlin; and they immediately executed a deed of assignment conveying all their property, both real and personal, except such as was by the law exempt, to H. V. Rice, for the benefit of their creditors.

The bank's claim, amounting to \$12,500, was preferred. Immediately upon the assignment being made, representatives of various creditors went to Park City, and threatened to attach the goods in the hands of the assignee; but D. C. McLaughlin,—who had been in the meantime appointed receiver of the bank, upon the death of its assignee,—learning of this fact, insisted upon the assignee's selling the merchandise to him, as the bank's claim had been preferred. After some negotiations it was agreed that, if the bank would cancel its claim of \$12,500, the assignee would convey the merchandise, valued at from twelve to fourteen thousand dollars, to the receiver. This arrangement was satisfactory to Lockhart and F. J. McLaughlin, and the goods were transferred to the receiver. The treasurer of the corporation, Lockhart, collected about \$2,000 from persons to whom merchandise had been sold by the corporation, and at the time of the hearing had it in his possession. Pending the hearing the directors of the corporation hastily met, and declared a dividend covering this amount. It appears this was done so that it could be passed to the creditors of Lockhart and F. J. McLaughlin. Williamson, one of the garnishees, testified that in June or July, 1893, Lockhart transferred to him, without consideration, 129 shares of stock, valued at about \$1,290, in a building association.

The referee made elaborate findings, and declared that the transfers made by the corporation and by the copartners were fraudulent and void, including the sale of the merchandise to the receiver of the bank, and also declared that said merchandise was subject to the claims of plaintiffs, and ordered that it should be sold to discharge their judgments. Orders were also made commanding the treasurer of the corporation to pay into court the \$2,000 above referred to, and requiring Williamson to indorse and assign the stock of the building association to the United States marshal, by whom it was to be sold. The order further stated that the proceeds arising therefrom, together with the \$2,000, should be applied to the satisfaction of plaintiffs' judgments. The report and orders of the referee were adopted and approved by the court, and judgments duly entered in conformity therewith. Subsequently, upon motion of defendants, the judgments were set aside by the court; but later, upon plaintiffs' application, the court found, after a submission of the testimony taken by the referee, that the \$2,000 in the possession of Lockhart was the property of defendants, and that the stock of the building association was the property of Lockhart; also, that the merchandise conveyed to the receiver was the property of defendants. The court ordered the building stock held by Williamson to be sold, and the \$2,000 to be applied in payment of plaintiffs' judgments; and plaintiffs were authorized to commence suits against the re-

ceiver for the recovery of the merchandise, or the amount resulting from the sales thereof, and the receiver was required to make no disposition of the moneys arising from sales of goods until "said action can be commenced, and prosecuted to judgment."

The points involved in these cases are the same, and both were brought into this court on a joint record. They will therefore be considered together. The garnishees contend that in supplemental proceedings the court is limited by the statute as to the order which it may enter, and that it was error, in such proceedings, to try the question as to the right of possession and title to property which was not acknowledged to belong to defendants, and that the judgments appealed from are void. Plaintiffs insist that there are no conflicting claims, in good faith, to the property in question, and that there is no real, but a simulated, controversy regarding its ownership, and therefore the court had jurisdiction to adjudge the property to belong to defendants, and order its application to the discharge of plaintiffs' judgment, without compelling them to litigate the questions involved in another action.

Sections 3455, 3457, and 3458 of the Compiled Laws of Utah provide: "After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors, in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same. The judge, or referee, may order any property of the judgment debtor not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. If it appears that a person or corporation, alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize by an order made to that effect, the judgment creditor to institute an action against such person, or corporation for the recovery of such interest or debt; and the court or judge, may by order, forbid a transfer, or other disposition of such interest or debt until an action can be commenced and prosecuted to judgment." It seems clear to us that under this provision the court exceeded its jurisdiction in rendering the judgments above referred to without having the corporation before it, and without granting it a hearing. It is practically saying and deciding that it has no existence, or, if so, that it and any property rights it may possess may be extinguished by means of these proceedings. Without pleadings, ex-

cept the affidavit upon which the order was issued, grave and important issues of fact respecting property rights and the bona fides of transactions of various persons are determined. Without allegations that the transfer of merchandise by the corporation to defendants was fraudulent, and without pleadings declaring that the assignment by defendants for the benefit of their creditors was fraudulently made, these issues of fact are determined. The receiver of the bank testifies that, in good faith, he purchased the goods from the assignee. Without having the bank before it, or the receiver, as such, a judgment is rendered which, in effect, declares the sale fraudulent, and the assignment of stock made by defendants to the bank invalid; and it is no answer to say that Lockhart and F. J. McLaughlin, the principal stockholders of the corporation, were before the court. They had been garnished, not as representatives of the corporation, but in their individual capacity. Nor can it be said that the receiver of the bank was before the court. D. C. McLaughlin, as an individual, and not as receiver, was garnished. How is it possible, in this summary way, without an opportunity to be heard, and in the absence of some of the parties, without issues, for the court or referee to determine the questions of fact which ought to be heard only in regular actions, and perhaps before a jury? It is clear from the record that "persons and corporations claimed an interest in the property adverse to the judgment debtors." That being true, the court had no authority to determine the conflicting claims. And the rule is not different where the property is in the hands of the judgment debtor. The purpose of the statute referred to is to aid the judgment creditor in discovering property or assets belonging to the judgment debtor, and to secure the application of the same to the satisfaction of his claim, without delay or an independent suit; and it would be a gross perversion of the statute to hold that in supplemental proceedings the court can exercise all the powers of a court of equity, and pass upon questions of fact, the determination of which, under our system of jurisprudence, rests with a jury. Under a similar statute, the supreme court of Nevada state: "When these various sections are construed together, it seems perfectly plain that the judge or referee can only order property to be applied to the satisfaction of the judgment when the title thereto is clear and undisputed. \* \* \* If there is any dispute as to the ownership of the property, or if the person proceeded against in good faith denies the debt, neither the judge nor the referee has any power or authority whatever, in these proceedings, to decide the disputed questions, and order the property delivered, or money adjudged to be due to be paid over, in satisfaction of the judgment." *Hagerman v. Tong Lee*, 12 Nev. 336. But we are referred to the second volume of *Freeman on Execu-*

tions (section 405), where it is stated that "neither the mere denial of a debt, nor mere pretense of an adverse claim, will prevent the court from making an order requiring the debt to be paid, or the property delivered." And it is argued that the adverse claims of the receiver, Williamson, and the corporation, to the property in controversy, are mere pretenses. The facts before us do not bring these cases within this rule. While there are disclosures in the record before us which do not relieve the transactions from suspicions of legal, if not moral, fraud, yet we cannot say that the adverse claims to such property are mere pretenses. Of course, where it is clearly apparent to the court that there is a simulated controversy, and that there is absolutely no foundation for an adverse claim to the property in controversy, and where the assertion of such a claim would be so clearly a pretense and evidence of fraud as to be tantamount to a disclaimer of interest, then the court can order its application to the judgment creditors' demand. We adopted this statute from California, and the supreme court of that state, in construing its provisions, say: "Under a similar statute in New York, the same ruling was made in *Town v. Insurance Co.*, 4 Bosw. 683, and the court held 'that the property was in possession of the garnishee, claiming title to it. No matter how fraudulent the transfer, no order can be made to compel him to deliver the property, and therefore no question can be put to the debtor or a witness to discover or prove fraud. \* \* \* The remedy of the creditor is by direct action against the fraudulent assignee, when the good faith of the assignment is in issue.' There can be no question but that this is the proper construction of the statute, and it results that when the garnishees explicitly denied, in their examination, their indebtedness to the judgment debtor, neither the court nor the referee had the power to compel them to pay over to the sheriff the amount of the alleged indebtedness." *Hartman v. Olvera*, 51 Cal. 501; *Rodman v. Henry*, 17 N. Y. 482; *Sherwood v. Railway Co.*, 12 How. Prac. 136; *Teller v. Randall*, 40 Barb. 242; *McDowell v. Bell*, 86 Cal. 615, 25 Pac. 128; *Bank v. Pugsley*, 47 N. Y. 368.

But it is claimed by plaintiffs that there can be no dispute regarding the building stock transferred by Lockhart to Williamson. We have no hesitancy in saying that the record seems to establish that the transfer was fraudulent; and it is held by many courts that an assignee has no interest in the property of the assignor previously conveyed, where it was fraudulently done. We do not desire to pass upon this question, or to determine what, if any, rights the assignee of Lockhart and McLaughlin has in this building stock. We think, whatever interests either of the parties to these proceedings may have therein, they should be determined in another form of action. If Lockhart had any interest in the stock at the time of executing the deed

of assignment to Rice, such interest passed to the assignee, providing the deed of assignment is valid; and the validity of this assignment, we think, cannot be determined in these supplemental proceedings.

Respondents contend that, even under the views herein announced, the judgment of the court as to the \$2,000 in the hands of Lockhart was proper; that the stock of defendants in the corporation was assigned to the bank, but that prior to the general assignment by defendants this stock was assigned to plaintiffs, subject to the bank's claim, but that the receiver of the bank took the goods in full payment of defendants' demands, and therefore they are entitled to the stock, and consequently to the money which is a dividend thereon. There are two objections to this contention: First. Plaintiffs base their right to the \$2,000 upon the judgment of the court, and not in virtue of any interest in the corporation stock. In other words, they repudiate the assignment, and do not claim under it. Second. The stock was assigned subject to the bank's claim, for the benefit of plaintiffs and other creditors. When this stock was fully discharged from the lien of the bank, it was subject to the claim of other creditors, including the plaintiffs, but the record nowhere indicates the proportion to which each creditor is entitled; and, even if the court had power to partition the stock and prorate the dividend, there was no evidence before it upon which to base such action. Without expressing any opinion as to the interest acquired in said stock by plaintiffs and other creditors of defendants, we think there was a sufficient "adverse claim" by the assignee, Rice, and the creditors named in the assignment, to preclude the court from making the order in the premises. If the stock passed to plaintiffs and other creditors by the special assignment, they were entitled to the dividends, if they recognize the validity of the transfer. If they do not recognize its validity, then the stock passes to the assignee, Rice, by the general assignment; and, if it is valid, he would be entitled to the dividends for disbursement to defendants' creditors. We think the court erred in entering the judgments appealed from. Each of the judgments is reversed, and the cases remanded, with directions for the lower court to enter such orders, in conformity with the views herein expressed, as may be proper.

BARTCH, J., concurs.

FENSTERMAKER v. TRIBUNE PUB. CO.<sup>1</sup>  
(Supreme Court of Utah. Dec. 21, 1895.)

**LIBEL AND SLANDER—PLEADING—JUSTIFICATION—MITIGATION—EVIDENCE—NEWSPAPERS—WITNESS—CROSS-EXAMINATION.**

1. Under Comp. Laws, § 3246, providing that in actions for libel it is sufficient to state

generally that the article complained of was published concerning plaintiff, and, if such allegation be contradicted, plaintiff must prove that it was so published, on failure of defendant to deny an allegation that a libel referring to a class was published of plaintiff, he cannot object on trial that the complaint fails to show that the libel referred to plaintiff, or require proof thereof.

2. Where one charges a family with criminal conduct, any one of the family may sue therefor, on proof that the words had application to him.

3. In libel, it is only where the imputation complained of is a conclusion or inference from certain facts that the plea of justification must aver the existence of a state of facts which will warrant the inference of the charge.

4. In libel, to render evidence in mitigation of damages admissible, the facts relied on in mitigation must be specially set out in the answer.

5. Where the libelous article fails to state the source of information, but purports to be derived from the writer's own knowledge, evidence that the facts were stated to him as true by a third person is inadmissible in mitigation of damages.

6. In an action for libel for charging plaintiff with having turned a child into a desert, that it might starve, statements of the child when found, and its condition, are inadmissible in support of a plea of justification.

7. In an action for libel for charging a man with driving a child from his home to starve in a desert, evidence of the cruel treatment by his wife of other children is inadmissible.

8. Statements of a witness on cross-examination on immaterial and collateral issues, for the purpose of attacking his credibility, cannot be disproved.

9. An instruction that if defendant, a newspaper company, published the alleged libel in good faith, it should be considered in mitigation of damages, and, with other mitigating circumstances, may be sufficient to reduce the damages to a mere minimum, and that it is not the policy of the law to unnecessarily abridge the freedom of the press, but to recognize it as a potent factor in society for good, which should be considered by the jury, is erroneous.

10. In actions for libel, evidence in mitigation of damages is admissible, though no exemplary damages are demanded.

11. In an action for libel in charging plaintiff with the cruel treatment of a child living in his family, evidence of the general reputation of other members of the family is inadmissible.

Appeal from district court, Third district; before Justice George W. Bartch.

Action by Amos Fenstermaker against the Tribune Publishing Company. There was a judgment for defendant, and plaintiff appeals. Reversed.

James A. Williams and John M. Zane, for appellant. O. W. Powers, D. N. Straup, and Ogden Hiles, for respondent.

KING, J. This is an action for damages, founded upon the publication of an alleged defamatory article. Plaintiff alleges that he resides upon a ranch known as the "Box Elder Ranch," and is the head of the family of Fenstermaker, residing thereon, and that defendant published in its daily and weekly newspapers (which he alleges were extensively circulated), of and concerning him, the following false and defamatory matter: "Fiend-like Act to a Child—A Little Child Turned Out into the Desert to Die—Her Rescue. One

<sup>1</sup> Rehearing pending.



of the worst cases of cruelty ever heard of in this section of the country comes from the county of Box Elder, and the facts, as stated, are enough to make the blood of an average man boil with indignation. Last summer a little girl named Caroline Hansen came here from Sweden with her grandparents. They went to live at Cottonwood, and continued to reside there until the old people died. The little girl then went to live with a family named Reddan, who reside in the Ninth ward, this city. After staying there a short time, the folks tired of her, and she was sent to a family named Fenstermaker [meaning the family composed of the plaintiff and others], at Box Elder ranch, where she lived until the 24th of this month, when she was told to get out and go somewhere,—they did not care where,—and never come back again. They told her at the time that she must not go near the sheep herders, or they would kill her, and with this fear in her heart the poor child started out to try and find another home. After wandering about the desert for two days and two nights, sleeping in the sagebrush, she was found by one of the sheep herders, and when discovered she begged piteously for her life, thinking that she was in danger of being killed. The herder, whose name is J. R. Murdock, had a hard time trying to quiet her, and when he finally did he took her to his cabin, and ministered to her wants. She was thoroughly exhausted and nearly starved, and it was no small task to get her back to a condition where it would be safe to give her all she wanted to eat and drink. \* \* \* Yesterday he started for Tooele, and there he will swear out a complaint against the people who have treated her so brutally, and will see to it that they are brought to the justice that they so fully deserve. The case is actually one of the most heartless of its kind on record, and the people that would be guilty of such a deed must be very bad indeed. The matter of sending her away was bad enough, God knows, but their action in telling the child that she must not appeal to any one—for that is what their warning amounted to—is absolutely fiendish. It would seem that they wanted her to go out and starve to death, and that they planned to that end. When found, the little girl was in an emaciated condition, and had had nothing to eat for nearly three days, and was almost famished for water. The Fenstermakers live at what is called 'Box Elder Ranch,' which is about ten miles from Grantsville, in the county of Box Elder. The inhuman people will have a chance to answer in the courts for the deed, and it is hoped that they will be made to suffer for their actions." One of the innuendoes stated that the article charged that plaintiff and other members of his family had been guilty of the crime of abandonment and neglect of children. The answer admits the publication, but denies that it was false, malicious, defamatory, or libelous. Upon the

trial it alleges that the matter set out and alleged to have been published of and concerning plaintiff was in every respect substantially true, and was not made with any intent to injure plaintiff, or any other person. It denied that it conveyed, or was intended to convey, the meaning that plaintiff or other members of his family had been guilty of the crime of abandonment and neglect of children; or any crime whatever. The amended answer alleged that the charge and supposed defamatory words in the article complained of, and each and all of them, were true; that the child, Caroline Hansen, mentioned in the article complained of, came from Sweden, and resided for a time in Salt Lake City, and was afterwards taken into the Fenstermaker family; that at about the time mentioned in the article she was found by J. R. Murdock, a sheep man, wandering in the desert; that she begged of him to spare her life, thinking she was in danger of being killed; that she informed Murdock that the persons with whom she had lived had told her to leave their house and go somewhere,—they did not care where,—and never return, and that she must not go near the sheep herders, or they would kill her, and that she averred that she had wandered in the desert for two days and nights; that Murdock took her to his cabin; \* \* \* that it was the intention of Murdock to swear out a complaint against the people who had so treated the child, and bring them to justice. "Defendant avers that the last paragraph of the article complained of was pertinent and proper comment, based upon the facts set forth in said article. \* \* \* And defendant hereby pleads the foregoing in mitigation, as well as in justification, of the said libel." There are more than 40 assignments of error, but it is unnecessary for us to consider all of them, for the reason that the few discussed herein convince us that the judgment of the lower court must be reversed.

Respondent contends that plaintiff failed to make out a case, and therefore, if error were committed, he cannot complain. In support of this position, it is argued that the article upon which the action was founded did not refer to an individual, but to a class. It seems that, after plaintiff had called his first witness to the stand, defendant objected to any testimony being introduced, for the reason that the complaint did not state a cause of action, as the article sued on did not refer to an individual, but to a class. During the discussion that followed, plaintiff's counsel stated that the innuendoes in the complaint which pointed the alleged defamatory words to plaintiff might be stricken out as surplusage. Whether this was done or not the record fails to disclose; but the respondent proceeds upon the assumption that they were eliminated from the complaint, and therefore it is urged there were no averments of facts, by way of innuendo, connecting the publication with the plaintiff. In answer to this it

is argued that defendant's answer, by failing to deny that the publication was of and concerning the plaintiff, is to be treated as an admission that the plaintiff is the person against whom it was directed, and that such admission dispenses with the necessity of averments or proof connecting plaintiff with the alleged defamatory matter. Respondent's counsel insist that the answer does contain a denial of this averment. But it is clear that they are mistaken. The answer simply denies that the publication was false or malicious, or that defendant published any false or defamatory matter of or concerning plaintiff, but there is no denial of the allegation that the article in question was published of and concerning the plaintiff. The important allegation to be denied, if a denial could be made, was that which imputed in the matter published the direct charge against plaintiff. Defendant having failed to make such denial, it was wholly immaterial whether the innuendoes in the complaint remained or not. The answer fastened the article upon the plaintiff, and obviated the necessity of any proof being offered connecting him with it, and severing him from any class. Section 3246 of the Compiled Laws provides that in an action of this character "it is sufficient to state generally that the article complained of was published concerning the plaintiff, and if such allegation be controverted the plaintiff must establish on trial that it was so published or spoken." Of course, to be actionable, the defamatory article must refer to some ascertained or ascertainable person, and no innuendo can make the words defamatory unless they reflect upon some individual, as such, or a class, in certain instances. Where the words used seem to apply only to a class of individuals, and not to be specially defamatory of any particular member of that class, still the action can be maintained by any individual of that class who can satisfy the jury that the words referred especially to himself. If the publication had charged that the people of Tooele county were guilty of the reprehensible—not to say criminal—conduct charged to the Fenstermaker family, the class so charged would be so extensive, the impossibility of fixing individual responsibility so apparent, that the court would pronounce the article not actionable; but where the words, by any reasonable application, impute a charge to several individuals, under some general description or general name, either one coming within such description may successfully maintain an action, if the jury determine that the words have a personal application to the person bringing suit. *Ryckman v. Delevan*, 25 Wend. 186; *Ellis v. Kimball*, 16 Pick. 132; *Smart v. Blanchard*, 42 N. H. 137; *Dwyer v. Journal Co.*, 11 Daly, 250. Plaintiff also alleged that he was the head of the Fenstermaker family. This was not denied. We think the publication concerned such a class that any member thereof could maintain an

action, on the principles laid down' and in this case the plaintiff having averred that he was the head of this class, and that the publication was of and concerning him, no proof in support of these allegations was necessary, under the admissions in the answer.

Appellant assigns as error the action of the court in permitting defendant to offer evidence tending to prove the truth of the charge contained in the publication, and the refusal of the court to give plaintiff's requests upon the question of justification. This presents the question, does the amended answer constitute a proper plea of justification? At common law, under the plea of general issue, in this class of cases, the defendant could give evidence tending to prove the extrinsic facts stated in the inducement, the publication of the alleged defamatory matter, the truth of the colloquium, or the application of the words to plaintiff, as well as certain other things, but evidence in support of the truth of the charge could only be given under a plea of justification. But interposition of this plea was attended with great danger to defendant, for the attempt to prove the truth of a libel was regarded as the reiteration of the charge, and conclusive evidence of malice, and no evidence in mitigation could be received. If defendant failed to establish the truth of the charge, the damages were aggravated. If he desired to mitigate, he was compelled to admit the truth of the charge, and could offer no evidence dehors it. Under the plea of mitigation, he could only introduce evidence tending to show that he had reason to believe the charge true when made. Our Code has removed the perils attending these pleas, and has established a more liberal rule. A defendant may deny generally or specifically the material allegations of the complaint to be by him controverted, and simultaneously plead the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and, whether he prove the justification or not, he may give in evidence the mitigating circumstance. Under this provision, defendant can plead both justification and mitigation, or either; and, while the Code seems to contemplate that each plea should be separately stated, we are not prepared to say that they may not be joined, if the answer clearly indicates that the facts and circumstances so pleaded are tendered both by way of justification and in mitigation. The adoption of the Code, however, does not abrogate the rule that justification must be specially pleaded, and the particular facts averring the truth of the imputation, whether it be general or special, must be clearly set forth. The justification must fully meet the charge, aver the facts showing it to be true, and present them in a traversable form. It must also meet the points in the sense imputed to them in the innuendo. *Wachter v. Quenzer*, 29 N. Y. 547; *Bush v. Prosser*, 11 N. Y. 347; *Willlover v. Hill*, 72 N. Y. 80; *Spooner v. Keeler*, 51 N. Y. 527; *Robinson v. Hatch*, 55 How. Prac. 55; *Newell*,

Defam. pp. 559, 658. It is clear that the averments in the answer reciting the finding of the child, her statements to Murdock, etc., utterly fail as a plea of justification. They nowhere meet the charge imputed to plaintiff. Is it a sufficient plea of justification to allege that the charge and supposed defamatory words are true? Appellant insists that this is not sufficient, because it fails to state the facts issuably. Respondent contends that the charge is specific, and therefore the general averment of its truth satisfies the rule. We have experienced considerable difficulty in answering this objection, and have reached a conclusion only after a patient examination of many authorities. "Where the imputation complained of is a conclusion or inference from certain facts, the plea of justification must aver the existence of a state of facts which will warrant the inference of the charge." Newell, Defam. p. 652; Hathorn v. Spring Co., 44 Hun, 608; Tilson v. Clarke, 45 Barb. 178; Downey v. Dillon, 52 Ind. 442; Bissell v. Cornell, 24 Wend. 354; Thrall v. Smiley, 9 Cal. 529; Van Ness v. Hamilton, 19 Johns. 349. It is true the plea ought to be certain to a common intent, at least, and direct and positive in the facts set forth; but we think there is a difference between the charge imputed in the article complained of, where specific acts are alleged, and a case in which a person is charged, for instance, with being a swindler or common cheat. In such case the plea of justification should state specifically the facts constituting the offense, and the instances when such person was guilty of swindling, together with the *animus furandi*. Is the charge in the alleged libelous article general? If the publication be construed as charging plaintiff with the statutory crime of abandonment and neglect of children, as alleged in plaintiff's complaint, then the imputation would be general. Without taking the trouble to examine in detail this question, we are clear that such crime is not charged. When the imputation is a charge of some specific act or acts, it is sufficient if the plea allege, in legal language, that the charge is true. The gist of the imputation in the article complained of, construed in the light of the admissions in the answer, is that plaintiff, tiring of the little girl, turned her out into the desert, under such circumstances and with such commands as would result in her death. The article further charges that plaintiff treated her brutally, and planned that she might starve to death. It is clear that these latter charges are general, and unless so inseparably connected with preceding specific acts, particularly described and so unmistakably interpreted by them as to relieve them of generality and stamp them with definiteness, the answer could not plead a justification. We think these charges, viz. of brutality, and planning for the death of the little girl, though general and conclusions, are substantially a reiteration of the specific charges previously made in the article complained of. It is to be noted, too, that the plaintiff never

demurred or interposed any motion with reference to these pleas interposed by defendant. Under all the circumstances, we are constrained to hold that the answer contained a plea of justification. Van Wyck v. Guthrie, 4 Duer, 47; Cooper v. Greely, 1 Denio, 347; Weaver v. Lloyd, 4 Dowl. & R. 230; Kelly v. Taintor, 48 How. Prac. 270; Odgers, Sland. (Bigelow's Ed.) p. 485.

Appellant next contends that the court erred in permitting evidence to go to the jury in mitigation of damages—First, because, as claimed, there was no plea of justification, and for the further reason that the evidence tended to prove justification, and was therefore improper in mitigation; and, second, because the evidence so introduced was not pleaded either in justification or mitigation. Undoubtedly, it was formerly the rule that evidence in mitigation could only be given when the defendant admitted the charge to be false, and, if any was offered which tended in any manner to prove the truth of the charge, it was inadmissible. Fero v. Ruscoe, 4 N. Y. 162; Cooper v. Barber, 24 Wend. 105; Petrie v. Rose, 5 Watts & S. 364. But, as stated above, our statute has abrogated this rule. Bush v. Prosser, 11 N. Y. 349; Thrall v. Smiley, 9 Cal. 529. Notwithstanding the statute, the facts relied on in mitigation must be specifically set forth in the answer. Willover v. Hill, supra; Halley v. Gregg (Iowa) 48 N. W. 974; Mielens v. Quasdorf, 68 Iowa, 726, 28 N. W. 41. The provision that the answer may allege both the truth of the matter charged as defamatory and in mitigation does not mean that it may be alleged in general terms, without any statement of facts or particular circumstances. The requirement that the answer should set up the matter to be relied on was intended to prevent surprise, by informing the plaintiff of what he must expect to meet. Wachter v. Quenzer, supra; Spooner v. Keeler, 51 N. Y. 527.

P. H. Lannan, president and manager of the defendant, was called by it as a witness, and testified that one Gilson furnished him the information upon which the article in question was based, and that he communicated it to the reporter of the paper, by whom the article was then written. The witness further stated that he believed the information to be true. Plaintiff objected to this evidence; alleging there was no proper plea of mitigation, and that the article did not purport to be made on the statement of another. We think both objections were well taken. Under the plea of justification, it could not be received, as it was hearsay; but it would be competent in mitigation, if properly pleaded. The mitigating circumstances particularized in the answer are that the girl, Caroline Hansen, was found by one Murdock, etc., to whom she made certain statements. There is no averment in the answer of any communication to defendant of these circumstances, either by Caro-

line Hansen, Murdock, or Gilson. In actions of this character the defendant may set forth in answer, and prove on trial, facts and circumstances tending to establish the truth of the defamatory matter, by way of mitigating, with a view to disprove malice; but, to be available to him in mitigation, it must be made to appear that he knew or had information of these facts or circumstances when the publication was made, and that he proceeded under the bona fide belief of the truth of the matter so published, and such facts and circumstances must be specifically alleged in the answer. 3 Suth. Dam. p. 630; Hatfield v. Lasher, 57 How. Prac. 280; Dolevin v. Wilder, 7 Rob. (N. Y.) 319; Gorton v. Keeler, 51 Barb. 475; Willover v. Hill, *supra*. In order to make the evidence of this witness competent, the answer must allege that, prior to the publication, defendant received the information contained in the article, and from such sources as induced an honest belief in its truth. Plaintiff is entitled to know the character of the proof to be offered, either in justification or in mitigation, and the answer must specifically point it out. This testimony was also incompetent because the article did not state the sources of information. The rule is that evidence to show that defendant did not originate the libel is inadmissible in mitigation of damages, and, in contemplation of law, the repeater of a libel is equally culpable as the author. But to this rule there is an exception. "If defendant, in repeating the story as it reached him, gives it as hearsay, and states the sources of his information, then, but only then, is the fact that he did not originate the falsehood, but has only repeated it, allowed to tell in his favor, as tending to prove that he bore the plaintiff no malice. When the libel does not on its face purport to have been derived from some other source, but is stated as derived from the writer's own knowledge, evidence is inadmissible to show that it was communicated to defendant, or copied from some other paper." Odgers, Sland. p. 302; Newell, Defam. 874; Peterson v. Morgan, 116 Mass. 350; Talbutt v. Clark, 2 Moody & R. 312; Marker v. Dunn, 68 Iowa, 720, 28 N. W. 38; Morey v. Association (Sup.) 1 N. Y. Supp. 475; Huffer v. Miller (Md.) 22 Atl. 205.

It is also insisted that the court erred in admitting the testimony of Gilson, Murdock, and Wilder. Their testimony was, substantially, that after the little girl was found in the desert she told them that they (referring to plaintiff and his family) had told her to leave and never come back, and not go near sheep herders, or they would kill her. Gilson also testified to having informed the manager of defendant of these conversations, and the physical condition of the little girl when found. If this evidence was admitted in support of the plea of justification, it was error. Evidence of statements

made by Caroline Hansen, not in the presence of plaintiff, was hearsay. Her statements to this witness were a narration of past events, and therefore not a part of the *res gestæ*. The test to determine whether this testimony was hearsay or not is: If plaintiff was being prosecuted for turning the girl into the desert, and forbidding her to seek relief from shepherds, could her statements made to third parties, not in plaintiff's presence, be given in evidence? It is so elementary as not to need citation that even the girl could not testify, in such a case, as to what she told these witnesses. Neither at the time this evidence was admitted, nor in the court's charge, was it limited to the plea of mitigation. But, conceding that it was received solely to disprove malice, we think, under the pleadings, its admission was erroneous, because, as above stated, the answer failed to recite the facts and circumstances concerning which this witness testified, and the communication by them to defendant. Such testimony was calculated to be highly prejudicial to plaintiff, and was only competent under a proper plea of mitigation, when coupled with cautionary instructions from the court that it was received only to disprove malice, but not in support of the plea of justification. If defendant had averred in its answer that it had been informed by Gilson that he had met the girl, and had set out the conversation ensuing between them, and Gilson's statement to Lannan, and all the circumstances which induced in the latter's mind a belief in the truth of the charge, and that he believed the statements to be true, Gilson's testimony would have been competent under the plea of mitigation.

Plaintiff further claims that the court erred in permitting counsel to cross-examine Mrs. Fenstermaker in rebuttal. She was called by plaintiff, and testified that, while Caroline Hansen resided at her husband's home, she was in the habit of running away, and that upon the occasion mentioned in the publication, without cause, she clandestinely departed, and, though diligent search was made, could not be found. She also testified to her affectionate regard for the child. On cross-examination defendant's counsel was permitted to question her at great length concerning other children whom she had taken to rear, with a view of showing that she had treated them with great cruelty. Among the questions asked were these: "Question. In June, 1891,—the same year that Caroline Hansen ran away,—you were arresting for abusing Ida Crockett, were you not? Q. Weren't you taken before Justice Williams, at Grantsville, and tried upon the charge of abusing the girl Ethel Crockett? Q. Did you whip this girl, Caroline Hansen? Q. Did you whip her with sticks of wood? Q. Did you whip her with a stove lifter? Q. In presence of Mary Grice, upon her return [speaking of Ethel Crockett], didn't you

hit her in the head with a stick of wood?" In answer to plaintiff's objections to these questions, and a great many others of like character (the objections being based upon the grounds of irrelevancy, immateriality, and that they were collateral to the issues involved), defendant's counsel stated that they desired to show "that plaintiff's wife was constantly obtaining orphan children, and that she abused them and drove them away, and that such cross-examination was proper to show her treatment of children,—her general character." The issue presented by the pleadings was as to whether Amos Fenstermaker had driven Caroline Hansen from home into the desert, and planned for her death. If plaintiff had been on trial for inhuman treatment of Caroline Hansen, it would not have been competent to prove that at different times his conduct towards some other child had been cruel. If proof of plaintiff's cruel treatment of others would not be admissible, upon what theory can it be claimed this testimony was relevant or proper? Mrs. Fenstermaker was not plaintiff. Her conduct towards Caroline Hansen was foreign to the issues of the case, except where it is shown to be so closely connected with the husband, by reason of proximity, directions, etc., as to charge him with being a participant. These questions called for answers upon immaterial and collateral matters. It is true that whatever shows the bias or prejudice of witnesses concerning the matter on trial, or tends to qualify or explain such testimony given in chief, is not collateral, but everything else not material is collateral. Her treatment of other children on other occasions would not tend in the remotest degree to prove or disprove the truth of the charge, hence would be immaterial, and upon a collateral matter. The test of whether the fact inquired of in cross-examination is collateral is this: "Would the party be entitled to prove it as a part of his case generally to establish his plea?" *Hildeburn v. Curran*, 65 Pa. St. 63; *Stokes v. People*, 53 N. Y. 175; *Attorney General v. Hitchcock*, 1 Exch. 91; *Thayer, Cas. Ev.* 1217. To prove that she was arraigned before the magistrate, charged with ill treatment of Ethel Crockett, offers no explanation of her husband's treatment of Caroline Hansen. There is only one ground upon which this cross-examination is permissible,—for the purpose of testing the recollection and credibility of the witness. Mr. Thompson states the rule that "such inquiry may be permitted by the court, in the exercise of a sound discretion." 1 *Thomp. Trials*, § 461; *Spenceley v. De Willott*, 7 East, 108; *Thayer, Cas. Ev.* 1186. He also states that all courts are agreed that a witness cannot be cross-examined as to independent, collateral facts, for the mere purpose of impeaching him by contradiction. "For the purpose of enabling the jury to weigh the testimony of a witness in a proper light, they must know somewhat of

his opportunities, and are entitled to know something of his moral worth, as evidenced by his conduct; and, to this end, courts should permit a reasonable cross-examination of witnesses." Whether there was an abuse of this discretion is not necessary to determine, but we are satisfied the testimony was improperly admitted, when placed upon the ground stated by counsel. "The general reputation of Mrs. Fenstermaker for treatment of children" was not in issue; and, if it had been, there is no principle of law which permits extraneous, specific charges to be inquired into for the purpose of establishing general reputation. *Haddock v. Naughton* (Sup.) 26 N. Y. Supp. 455. The record seems to indicate that these questions were put merely with a view to impeaching the witness by contradiction. Where it becomes apparent to the court that this is the obvious purpose of counsel, further cross-examination of the same character ought to be denied; and if the questions are of such a nature, and are pregnant with meaning, and suggestive of inferences which would be prejudicial, such cross-examination might be so continued as to render its admission error. The purpose for which these questions were propounded seems clear from subsequent proceedings. In surrebuttal, defendant called Ethel Crockett, Justice Williams, and other witnesses, to contradict Mrs. Fenstermaker. They were permitted, over plaintiff's objection, to testify, and denied the answers of plaintiff's wife above stated, and others of like import propounded to her. The authorities are unanimous in holding this to be error. In cross-examining upon immaterial and collateral matters, the cross-examining party makes the witness his own, in respect of such matters as contradict the testimony given. *Leavitt v. Stansell*, 44 Mich. 422, 6 N. W. 855; *People v. McKellar*, 53 Cal. 65. This court, in *People v. Hite*, 8 Utah, 475, 33 Pac. 254, said: "If a witness has been charged with a crime, or arrested or indicted for it, he may be asked about it on cross-examination; and, when such facts are irrelevant to the matter in issue, the party putting the questions is bound by the answers of the witnesses. He cannot call other witnesses, and prove that the answers are false." Baron Alderson, in a leading case, says: "I am not aware that you can with propriety permit a witness to be examined first, and contradicted afterwards, on a point which is merely and purely collateral; as, for instance, as to his personal character, and as to his having committed any particular act. The inadmissibility of such a contradiction depends upon another principle altogether. \* \* \* The reason why the party is obliged to take the answer of a witness is that, if he were permitted to go into it, it is only justice to allow the witness to call other evidence in support of the testimony he has given, and, as those witnesses might be cross-examined

as to their conduct, such a course would be productive of endless collateral issues. \* \* \* Then, in the next place, in my opinion, when the question is not relevant, strictly speaking, to the issue, but tending to contradict the witnesses, his answer must be taken,—although it tends to show that he is, in that particular instance, speaking falsely, and although it is not altogether immaterial to the matter in issue,—for the sake of general public convenience; for great inconvenience would follow from a continual course of these sorts of cross-examinations which would be let in in the case of a witness being called for the purpose of contradiction." *Attorney General v. Hitchcock*, supra. While, perhaps, the same results might be reached by the court or jury if improper evidence were admitted, or proper evidence excluded, still a strict adherence to well-established rules of evidence is essential, or our courts and systems of jurisprudence will be regarded as delusions and snares. "The rules of evidence are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of human life." And any departure from them can only be attended by evils immeasurable in their consequences.

Appellant next complains that the court erred in announcing the rule of damages. The jury were instructed that "the liberty of the press does not include immunity for publishing false and defamatory statements of any persons, and the fact, if it be a fact, shown by the evidence, that the defendant in a suit for libel published a libelous article in good faith, as a matter of news, without actual malice, against the plaintiff, is no defense to the action; but such fact should be considered in mitigation of damages, and it, with other mitigating circumstances, may be sufficient to reduce the damages to a mere minimum." The last part of this instruction plaintiff contends is erroneous, especially when construed with the further statement by the court that "it is not the policy and spirit of the law to unnecessarily or arbitrarily abridge the freedom of the press, but the law recognizes the press as a potent factor in society for good; and it is proper for you to bear this in mind, in determining the question of damages in this case, if you find in favor of the plaintiff." The court gave no rule by which to determine the measure of damages, although plaintiff submitted a request embodying the proper rule for the guidance of the jury. We do not think these instructions announce the correct rule of damages. Plaintiff did not seek punitive damages, but relied upon implied malice only. While it is clear from the evidence that plaintiff was not entitled to exemplary damages, it is equally clear that the jury should have been instructed that, if they found for the plaintiff, then he was entitled to actual and substantial damages. The charge of the court was equivalent to a declaration that if

the article was published in good faith, without actual malice, no matter what injury plaintiff had suffered, and no matter what damages the jury might find he had sustained, the law would uphold them in returning for the least possible amount. This cannot be the law. If the publication was false, malice is presumed, and plaintiff was entitled to actual damages resulting therefrom, regardless of the motives influencing the publication; and the instructions to the jury that the press is recognized by the law as a potent factor in society for good, and that it was proper for the jury to bear that in mind in determining the question of damages, was calculated to mislead the jury. The jury might be easily led to believe from this that newspapers possessed immunity for defamatory publications, because they were potential factors in society for good, and that the good accomplished should be regarded as an adequate compensation for wrongs done to individuals. The law accords the press no greater recognition as a factor in the growth of civilization than is accorded many other things. The law, as a judicial system, does not recognize the press either as a puerile or a powerful factor in society. It accepts it as a part of our civilization, and treats it as it treats other features—abstract and concrete—as they come within its jurisdiction.

Appellant insists that, inasmuch as exemplary damages were not demanded, no evidence in mitigation was admissible, because, if plaintiff was entitled to recover, the law must clearly award him actual damages. It is a rule frequently announced that such evidence is only receivable to reduce exemplary damages, but in slander and libel cases the authorities seem to hold that evidence in mitigation is always permissible, when properly pleaded. To the writer of this opinion this rule seems illogical. When a plaintiff seeks only actual damages for a defamatory publication, and offers no evidence whatever tending to prove express malice, why should the damages actually sustained be reduced by evidence in mitigation? If a wrong is done, and the aggrieved party seeks compensation only for that wrong, upon what principle of justice ought he to be deprived of a part of the monetary compensation because the party committing the wrong acted in good faith? If evidence to aggravate the damages can be offered by plaintiff, and he refrains from offering such evidence, and contents himself with a demand for actual damages, there can be no good reason, it would seem, why the defendant can reduce those damages by offering evidence of his good faith. However, the rule seems to be firmly established as above stated, and we do not feel warranted in asserting a different one. ?

The court further instructed the jury that: "the general character of the plaintiff's family at the time the alleged libel was publish-

ed is at issue, and it is proper for it to be considered by the jury, because such character is the foundation of the plaintiff's claim for damages." Defendant offered no direct evidence connecting plaintiff with any cruel treatment of Caroline Hansen, and in no manner attempted to impeach his character. So far as the record discloses, he possesses an unblemished reputation. Defendant offered evidence tending to prove that some of his relatives and members of his household had unsavory reputations. We do not think their reputations were involved in this case. We do not think that because some members of a family lead improper lives, and are held in ill repute by the public, that one who, by an honest and upright life, has established a spotless reputation, should suffer because of others' misdeeds, and when slandered or libeled, and redress is sought, be met at the threshold of the trial with the sins of his family, and be told that before he can prevail his righteousness must cover their enormities. That seems to be carrying the doctrine of vicarious atonement too far. The Mosak law visited the sins of the father upon the children to the third and fourth generation; but this goes further, and, in a measure, attaches responsibility to a person for the misdeeds of his entire family, be it large or small. We think this instruction was error. The plaintiff's reputation was in issue, not the family's. If he was libeled, he was entitled to recover, and their vices were not to be visited upon his head.

Numerous other errors are assigned, but we content ourselves with reference to the foregoing. The judgment of the lower court is reversed, and the case remanded, with instructions to grant a new trial.

MERRITT, O. J. I concur in the judgment of reversal in this case.

#### ARMSTRONG et al. v. OGDEN CITY et al. (Supreme Court of Utah. Dec. 21, 1895.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENT  
—COLLATERAL ATTACK—WITHDRAWAL OF OBJECTIONS—PUBLIC PROPERTY—REMEDY IN CASE OF VOID ASSESSMENT.

1. Under section 13 of the statute (Laws 1890, p. 64) providing that if, at or before the time fixed for hearing objections to street improvements, objections be not filed by the owners of one-half of the front feet abutting on the portion of the street to be improved, the city council "shall be deemed to have acquired jurisdiction" to order the improvement, the decision of the council that such objections were not filed may be attacked in an action to enjoin the collection of assessments levied therefor.

2. Where objections have been filed by the owners of more than half of the abutting property, the withdrawal of objections after the time fixed for the hearing does not give the council jurisdiction to order the improvement, but a new proceeding must be instituted.

3. In estimating whether the owners of half the property fronting on a proposed street improvement have objected thereto, property used exclusively for city purposes, against

which no part of the cost of the improvement is to be assessed, should not, in any way, be considered.

4. Sess. Laws 1890, p. 58, § 1, providing that a special tax for a public improvement shall be set aside for any irregularity, and that any person feeling aggrieved by such tax may pay the same under protest, with notice to the treasurer, and sue for its recovery within 60 days, does not apply to cases where the assessment is void for failure of the council to acquire jurisdiction to order the improvement, and in such case the property owner may resort to equity.

Appeal from district court, Fourth district; before Justice William H. King.

Action by J. C. Armstrong and others against Ogden city and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

J. N. Kimball and R. H. Whipple, for appellants. Zane & Zane and Evans & Rogers, for respondents.

ROLAPP, J. This action was originally brought to enjoin the levying of a special assessment to pay the expenses of paving a portion of Twenty-Fifth street, in Ogden city, under the name of "Paving District No. 2." A demurrer to the complaint was filed in the court below, and sustained. An appeal was taken to this court, and the judgment of the lower court reversed. *Armstrong v. Ogden City*, 9 Utah, 255, 34 Pac. 53. Thereupon a supplemental complaint was filed by the plaintiffs—for themselves, and on behalf of certain other parties similarly situated—to enjoin the further collection of the tax, and also to recover judgment against the city for the amount of taxes paid by them under protest. The lower court found that the assessment was invalid, because Ogden city never obtained jurisdiction to make the improvements contemplated, and perpetually enjoined the defendants from all proceedings under the ordinance creating paving district No. 2, and levying the tax for the improvement specified, and also directing that the plaintiffs recover the amounts paid by them to the city under protest. A motion for a new trial was made and denied, and the appeal is taken both from judgment and from the order denying a new trial.

The facts are that on March 7, 1892, the city council adopted and published a notice of intention, in which they designated the 29th day of March, 1892, at 10 o'clock a. m., as the time to hear objections in writing from any and all persons interested in said local assessments. Before the appointed time, at least 2,315 front feet abutting upon the street to be paved protested against the assessments. The city council did not act upon the protest at the time appointed, but adjourned from time to time until April 4, 1892. It then appeared that in the meantime owners theretofore protesting had withdrawn from such protest sufficient front feet to make the protest probably contain less than one-half of the entire frontage in the said

paving district. The entire frontage in the paving district was 3,960 feet, but this computation included 660 feet owned by the city, and used for city-hall purposes. The city council thereupon, without publishing a new notice of intention, proceeded to change the paving from macadamizing, as specified in the notice, to asphaltum and sandstone, and confined the competition to do the work to residents of the city. On March 22, 1893,—more than a year after the publication of the notice of intention,—the city council adopted an ordinance creating paving district No. 2. The improvements were proceeded with, and in December, 1893, the plaintiffs paid the tax levied against their property, under protest.

This court has already held that the original notice of intention was sufficient, and that, if a proper protest was filed, no jurisdiction was ever obtained by the city council of Ogden city to proceed with the assessment. *Armstrong v. Ogden City*, 9 Utah, 255, 34 Pac. 53. The original notice of intention provided as follows: "The boundaries of the district to be affected and benefited are lines running 150 feet back, and parallel with the outer lines of each side of the street on each and every block, and for the full length therein." The street referred to is described in the notice as "25th street from the west line of Washington avenue to the west line of Wall avenue." The statute requiring the notice of intention, and prescribing the statements it shall contain where local improvements in a city are proposed, is as follows: "Sec. 13. In all cases before the levy of any taxes for any improvements provided for in this act the city council shall give notice of intention to levy said taxes, naming the purposes for the which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within such city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefited by such improvements; the estimated cost of such improvements and designate the time set for such hearing. If at or before the time fixed written objections to such improvements signed by the owners of one half of the front feet abutting upon that portion of the street, lane, avenue or alley to be so improved, be not filed with the recorder, the council shall be deemed to have acquired jurisdiction to order the making of such improvements." *Laws 1890*, p. 64. It is not claimed by appellants that, at the time appointed in the notice of intention to hear these objections, a majority of the front feet abutting upon the street in question had not filed such written objections; but appellants contend that the publication of the notice of intention gave the city council jurisdiction, and that the attempt to dislodge that jurisdiction by a protest was a matter of judicial inquiry upon the part of the city council, and the fact of their having determined that a majority of the front feet

abutting had not properly protested precluded any further attack upon that decision. This reasoning is absolutely fallacious. The statute plainly provides that, if sufficient objections are not filed within the time required, "the city council shall be deemed to have acquired jurisdiction"; and, of course, by rule of statutory construction, it provides that, if a sufficient protest has been filed, they fail to acquire jurisdiction, notwithstanding any decision the city council might arrive at to the contrary. Two essential facts were necessary before the city council could acquire jurisdiction: First, that a proper and legal notice of intention had been published; and, second, that more than one-half of the front feet abutting upon the street to be improved had failed to object within the time specified. If these two requirements did not exist, no owner of property within the proposed paving district was concluded by the decision of the city council. *Zeigler v. Hopkins*, 117 U. S. 683, 6 Sup. Ct. 919; *Mulligan v. Smith*, 59 Cal. 206.

But appellants contend that, even if the decision of the city council was not conclusive, it was a correct finding of fact. They admit that at the time appointed more than one-half of the front feet abutting upon the street had not objected, but contend that the owners of a sufficient number of front feet withdrew their protest, and that, therefore, the city council acquired jurisdiction to proceed with the improvement. The statute above referred to sufficiently answers this contention. It expressly denies to the city council jurisdiction to proceed with the improvements, if, at the time fixed to hear objections, a sufficient remonstrance is presented. At that time such a remonstrance was presented. The city council was thereby wholly deprived of power to proceed. No power could be subsequently acquired in that proceeding. A new proceeding might be instituted, and, after due notice of intention, new power could be obtained. The parties protesting and not withdrawing acquired a right to rely upon the statute existing at the time appointed to hear objections, and were entitled to notice of any action affecting their interests. It may also be that others who desired to object refrained from so doing upon ascertaining that a sufficient protest was already filed. *Jersey City Brewing Co. v. Jersey City*, 42 N. J. Law, 575; *Vanderbeck v. Jersey City*, 44 N. J. Law, 626. Supposing that, at the time appointed to hear objections, less than one-half of the frontage abutting upon the street had protested, would it then have been seriously contended that thereafter, and before the city council acted upon the protest, enough more protests could have been filed to defeat the improvements? If that could not have been done, clearly, the reverse could not be done, either.

But, even granting that the contentions of appellants were either correct in law or true in fact, yet we think that the city council



failed to acquire jurisdiction, because, as a matter of fact, more than one-half of the front feet abutting upon the street properly protested, at all events. The total frontage of the district was 3,960 feet. The lowest number protesting, after deducting withdrawals, as claimed by appellant, was 1,878½ feet. But included in the 3,960 feet were 660 feet owned by the city, and used for city-hall purposes, which the city council claimed the right to count in favor of the improving, notwithstanding it was excluded in the paving ordinance from the property upon which the paving tax was levied, and notwithstanding the entire estimated expense of \$40,000 for the improvement was levied upon the remaining 3,300 feet, by assessing \$12 against each of these last-named front feet. If appellants' position were right, the statute permitting property owners in local assessment districts to vote for or against any proposed improvement would become entirely inoperative; at all events, so far as property owners living in close proximity to public property is concerned. If, for instance, the city council should create a paving district out of the four portions of streets that surround a square used exclusively for city purposes, it would only be necessary to secure the consent of the owner of a single front foot of the property abutting upon the opposite side of the street from the public square to abstain from protesting, and the remaining frontage would not only be powerless to prevent the improvement, but would be compelled to pay practically the entire expenses. Such a proceeding would only be the natural outgrowth of the actions exhibited by the appellants in this case, and would produce great injustice to property owners subjected thereto. So far as proceeding with the improvement or assisting in acquiring jurisdiction are concerned, we have been unable to find any case where public property situated within the confines of a local improvement district has been permitted to affect the result, either one way or the other; and we think that the establishment of such a rule would not only be wrong in principle and wrong in theory, but it would also be contrary to the spirit and intention of the statutes providing for special improvement assessments.

It is also insisted upon the part of the appellants that respondents cannot recover the taxes paid by them under protest, because section 1, p. 58, Sess. Laws 1890, provides that "any party feeling aggrieved by any such special tax or assessment or proceeding, may pay the said special taxes assessed or levied upon his, her or its property or such installments thereof as may be due, at any time before the same shall become delinquent, under protest, and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievance and grounds thereof, whereupon such party shall have the right to bring a civil action within sixty days

thereafter, and not later, to recover so much of the special tax as he shall show to be illegal, inequitable and unjust, the costs to follow the judgment to be apportioned by the court as may seem proper, which remedy shall be exclusive." In this case respondents did not give the notice required, nor did they commence action within 60 days after the taxes became delinquent. But this statute did not contemplate a case where the whole initiatory proceedings were absolutely void, and where no jurisdiction had ever been acquired to commence the improvements or levy the tax. This appears more clearly when the above provision is read in conjunction with the provision in the same section immediately preceding what we have just quoted. That part of the section reads as follows: "No such special tax shall be declared void, nor shall any assessment or part thereof be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings under this act." In other words, if, after having acquired jurisdiction, the city council should have erroneously levied a larger tax than was necessary to pay for the improvement, or if the city council should irregularly have assessed more property against a person than he owned, then, of course, the party injured would be compelled to remedy such error or irregularity by giving a proper notice and commencing action as in this section of the statute provided. But it cannot be maintained that where the tax was wholly void and illegal, as in this case, the parties injured were compelled to use this special and summary remedy, when the whole field of equitable relief was open to them. We think the proper remedy was employed in this action.

The record discloses many other grounds making the attempted improvement proceedings void and illegal, but it is unnecessary to discuss them in detail, as we deem the foregoing reasons decisive of the case. The judgment of the lower court is affirmed.

MERRITT, C. J., and BARTON, J., concur.

# HOLT LIVE-STOCK CO. v. WATKINS.

(Supreme Court of Colorado. Dec. 4, 1895.)

## CONDITIONAL SALE—RECOVERY OF PRICE.

Where, in an action for the price of goods, the evidence shows that the goods were to be paid for on certain conditions, it must be shown that the conditions have been fulfilled.

Error to Arapahoe county court.

Action by Leonard A. Watkins against the Holt Live-Stock Company for the price of goods sold and delivered. From a judgment for plaintiff, defendant brings error. Reversed.

Riddell, Starkweather & Dixon, T. J. O'Donnell, and W. S. Decker, for plaintiff in error. W. W. Anderson, for defendant in error.

**CAMPBELL, J.** The defendant in error, as plaintiff below, brought his action to recover of the defendant company the sum of \$875 for sheep dip alleged to have been sold and delivered by the plaintiff to the defendant. The answer contained a general denial of the allegations of the complaint, and a further defense that the plaintiff, as the agent of William Cooper & Nephews, and for and in behalf of his principals, sold this dip upon the express agreement that it was not to be paid for unless it effected a cure of defendant's sheep, which at that time were suffering from scab, and that such condition failed, because the cure was not accomplished. Trial was had before the court without a jury, and, while no specific findings of fact were made by the court, the issues generally were found in favor of the plaintiff, and judgment was rendered against the defendant in the sum of \$875. To reverse this judgment the defendant prosecutes this writ of error.

A number of errors have been assigned by the plaintiff in error, and, from an examination of the record, it would seem that some of the rulings of the court upon questions of evidence were wrong, and of themselves might be sufficient ground for reversal, but our judgment will be based solely upon the insufficiency of the evidence to support the findings. There was an apparent conflict in the testimony as to the character of the transaction, but a careful examination of the evidence shows that there is no real controversy as to the material facts. It is true that the salesman of the plaintiff, who testifies in the latter's behalf, states, rather as a conclusion than as a fact, that there were no conditions connected with the sale and delivery of that portion of the goods included in the first five shipments. At the same time, however, there is admitted as true the testimony of the president of the defendant company as to the existence of certain negotiations between the parties, which establish the fact that the condition set up in the answer attached to the sale and delivery of all the goods which the defendant received. The telegrams and letters which passed between the principals and their agent, and between the principals and the defendant company, which are uncontradicted, make it clear to our minds, beyond controversy, that from the admitted facts the conclusion of law is inevitable that the sale was a conditional one, and that no payment for the goods was to be made by the defendant unless the defendant's sheep were cured by the application of the dip. This evidence cannot be said to be shaken by the bald statement of the plaintiff that no condition attached, when he also admits the truth of defendant's testimony, the existence of which necessarily creates a condition. There being an entire absence of proof that this condition was fulfilled, we find no justification in the evidence or in the record for the findings and judgment of the trial court. The judgment will therefore be reversed, and the cause remanded. *Reversed.*

**DAVIS et al. v. PEOPLE.**

(Supreme Court of Colorado. Dec. 4, 1895.)

**FORMER ACQUITTAL—CONSPIRACY TO COMMIT FELONY—TWO OFFENSES—SEPARATE TRIAL—EVIDENCE.**

1. One who was acquitted as an accessory before the fact, having no other connection with the crime, cannot be convicted of conspiracy to commit the crime.

2. As, under Sess. Laws 1891, p. 125, § 2, a conspiracy to commit a felony is also a felony, one who has been convicted for committing a felony that is the object of a conspiracy may be also convicted of conspiracy to commit the felony.

3. Certain defendants having made statements which were admissible only against themselves, they must be tried separately from the other defendants, as Sess. Laws 1891, p. 132, § 1, provides that a defendant against whom there is evidence not admissible against other defendants shall be tried separately.

4. Sess. Laws 1891, p. 132, § 1, providing that a defendant against whom there is evidence not admissible against other defendants shall be tried separately, applies to conspiracy cases, as the acts and declarations of a conspirator after the consummation of the conspiracy are not admissible against the others.

Error to district court, Arapahoe county.

Esau Davis and others were convicted of a conspiracy to commit larceny, and bring error. *Reversed.*

Thomas Ward and H. L. Emerson, for plaintiffs in error. Byron L. Carr, Atty. Gen., and F. P. Secor, Asst. Atty. Gen., for the People.

**GODDARD, J.** The plaintiffs in error, Esau Davis, Thomas Drew, Maud Sullivan, James Burns, and Timothy Drew, were indicted upon a charge of conspiracy to commit a felony, to wit, larceny of money from one Mike Johnson. As a bar to prosecution under this indictment, Maud Sullivan filed a plea of former conviction, and Timothy Drew filed a plea of former acquittal. These pleas set forth that at the January term, 1894, of the district court of Arapahoe county, Maud Sullivan and Timothy Drew were tried upon an indictment charging them with stealing the money in question from Johnson; that upon such trial Maud Sullivan was convicted of the crime charged, and sentenced to the penitentiary for the period of six years; and that said judgment and sentence remained in full force and unreversed. Timothy Drew was acquitted. The indictment charged both as principals, but it appeared from the plea filed by Timothy Drew, and the admission of the prosecuting attorney, that he was tried thereunder as an accessory before the fact, and that, while he was not present at the time the larceny was committed, he had devised the transaction, and advised and encouraged Maud Sullivan to commit the crime. It is evident, therefore, that the facts necessary to show his guilt as accessory before the fact are essential to show him guilty of the conspiracy charged in this indictment. In other words, the criminal conduct that would constitute him an accessory before the fact,

where the object of the conspiracy has been consummated, is the same that would prove him a conspirator, where the contemplated crime is not completed. It is laid down by Wharton as a general rule that, "where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, \* \* \* the plea is generally good." Whart. Cr. Pl. § 456. And he also lays down the doctrine that an acquittal as principal bars an indictment as an accessory, when, as under our statute, accessories may be indicted as principals. *Id.* § 458. We think it too clear for discussion that the facts alleged, and admitted by the demurrer, constitute a good plea of former acquittal, and the court erred in sustaining the demurrer to the same.

The plea of former conviction on the part of Maud Sullivan presents a different question. As to her, the evidence necessary to sustain a conviction under the former indictment is not necessary to show her guilty under the present, since the actual commission of the larceny itself did not involve her conduct as a conspirator to perpetrate that crime. Therein her case differs from that of Timothy Drew, and the only question presented by her plea is whether one who has been convicted for committing the crime that is the object of the conspiracy can also be convicted upon the charge of conspiring to commit the crime. There is a diversity of opinion upon the question, in the adjudicated cases, some of the courts holding that if there is a conspiracy to commit a felony, conspiracy being a misdemeanor, if the felony is committed there can be no conviction for the conspiracy, since it merged in the felony. Bishop, in his work on Criminal Law (section 814) questions the correctness of this doctrine, and says the authorities agree that such rule is not applicable where the object of the conspiracy is also a misdemeanor. Under our statute (*Sess. Laws 1891, p. 125, § 2*) the conspiracy to commit a felony is also made a felony. The doctrine of merger, therefore, does not apply. *State v. Mayberry, 48 Me. 218*. The act of conspiracy and the act of committing the contemplated crime being different and distinct offenses, the conviction or acquittal of one cannot be pleaded in bar to an indictment for the other. *State v. Sias, 17 N. H. 558; Whitford v. State, 24 Tex. App. 489, 6 S. W. 537; Reg. v. Button, 11 Adol. & El. (N. S.) 929*. The demurrer to the plea of Maud Sullivan was therefore properly sustained.

Before the trial each of the defendants filed a motion for a separate trial, upon the ground that there was testimony admissible against each that was inadmissible as to any of the other defendants, predicated such motions upon the following statute: "Section 1. When two or more defendants are jointly indicted for any felony, any defendant against whom there is evidence, which does not relate to the reputation of such defendant, and which

would be material and admissible as to such defendant, if tried separately, but which would be inadmissible as to any other of said joint defendants if tried alone, such defendant against whom evidence as aforesaid, is material and admissible, shall be tried separately. In all other cases, defendants jointly indicted or prosecuted, shall be tried separately or jointly in the discretion of the court." *Sess. Laws 1891, p. 132*. In support of these motions the evidence taken upon the prior trial of Sullivan and Drew was presented, from which evidence it appeared that statements made by Maud Sullivan, as testified to by Cora Cowden and other witnesses, and which were admissible against her, if tried separately, were inadmissible as against any of the other defendants; and the testimony of the witness Carr, as to statements made to him by Davis were admissible against Davis, if tried separately, but inadmissible against the other defendants. In its instructions the court recognizes the fact that testimony had been admitted which was admissible against certain of the defendants, but inadmissible as to the others, and sought to limit the effect of such testimony as to such other defendants. The language of this statute is positive and unequivocal, and when a case, as therein contemplated, is presented, it is made the duty of the court to grant a severance, as a matter of right. *State v. Knight, 3 Baxt. 418; Willey v. State, 22 Tex. App. 408, 8 S. W. 570; Andy v. State, 87 Ala. 23, 6 South. 58*. It is clear that the legislature, by the enactment, intended to change the common-law rule that existed prior thereto, which left the granting of separate trials to defendants jointly indicted to the discretion of the court. But it is contended that the statute was not intended to apply to cases of conspiracy. With this we do not agree. We regard the statute as applicable to cases of conspiracy, under the well-settled rule that, after a conspiracy has been established to the satisfaction of the court, statements of one of the alleged conspirators while carrying out the common design are admissible, as a part of the *res gestæ*, against his co-conspirators, but after the conspiracy is consummated the acts or declarations of one are not admissible as against others jointly charged. A severance, therefore, would work no prejudice to the people, since it is a matter of right, and could be demanded only in case the testimony was of the latter character. That conspiracies are proper cases for severance, see *Casper v. State, 47 Wis. 535, 2 N. W. 1117; Watson v. State, 16 Lea, 604; Willey v. State, supra; Reg. v. Ahearn, 6 Cox, Cr. Cas. 6*. We think this case well illustrates the wisdom of the statute, and the injurious results that usually follow from the introduction of testimony admissible against one defendant and inadmissible as to the others, where such defendants are tried jointly, and the necessity of granting a severance upon the conditions prescribed in the statute. We

are unable to find, upon a careful reading of the evidence, any testimony that tended in any degree to show guilt on the part of some of the defendants, other than the statements testified to have been made by their codefendants, and admissible only as to those making them, and are satisfied that a verdict of guilty against them resulted solely from their being tried jointly with such other defendants. It follows that the court erred in refusing defendants separate trials. For this reason the judgment is reversed and the cause remanded. Reversed.

### HELLER v. PEOPLE.

(Supreme Court of Colorado. Dec. 16, 1895.)

CRIMINAL LAW—MISCONDUCT OF COUNSEL—BAILIFFS—JURORS—AFFIDAVITS.

1. The persistent misconduct of the district attorney in making remarks calculated to prejudice the jury against defendant after objection to such remarks were sustained, and the jury directed to disregard them, is ground for new trial.

2. Uncontradicted affidavits, showing that the bailiffs, in charge of the jury, allowed the jury to separate, permitted intoxicants in the jury room, and engaged in an altercation with a juror, and affidavits from three jurors that one of the bailiffs endeavored by argument to procure a verdict of guilty, which latter affidavits were denied only by the bailiffs and the statements of other jurors that they heard no such argument, are sufficient to require a new trial.

3. Misconduct of the jury cannot be shown by jurors' affidavits, though they may be received to show misconduct of third persons.

Error to court of appeals.

David Heller was convicted of embezzlement. The judgment of the district court was affirmed by the court of appeals (31 Pac. 773, 2 Colo. App. 459), and defendant brings error. Reversed.

Plaintiff in error was indicted at the January, A. D. 1890, term of the district court of Arapahoe county for the crime of embezzlement. The indictment contains four counts. In the first count—this being the one upon which the defendant was convicted and sentenced—he is charged with being the financial agent of one Caroline Spindler for the purpose, among other things, of borrowing and loaning money; and that while such financial agent, and by the virtue of his agency and the confidential relation existing between him and Caroline Spindler, he received from her and took into his charge and possession a certain promissory note of the value of \$1,200; and did then and there, contrary to the confidence and trust in him reposed by his said principal, as aforesaid, withdraw himself from his principal, and go away with said note, and did then and there unlawfully and feloniously convert the same to his own use, with the felonious intent to steal the same, etc. It is unnecessary to set forth the remaining counts in the indictment. Upon this indictment a trial was first had at the September, A. D. 1890, term of the dis-

trict court of Arapahoe county. As a result of this trial the jury disagreed. The defendant was again put upon trial at the January, A. D. 1891, term of the court. This second trial resulted in a general verdict of guilty upon the three counts of the indictment. The defendant, however, was sentenced only upon the first count. To reverse the judgment of the district court the case was brought into the court of appeals upon writ of error, where, however, the judgment of the district court was affirmed. See *Heller v. People*, 2 Colo. App. 459, 31 Pac. 773. To reverse the judgment of the court of appeals a writ of error was sued out from this court. After an examination of the record, this writ of error was made a supersedeas.

At the trial the defendant offered himself as a witness in his own behalf. On his cross-examination counsel for the state propounded this question to him: "Now, Mr. Heller, were you not convicted last month before Judge Decker? The Defendant's Attorney: The jury disagreed. Counsel for the State: He was standing in hock here three or four days." This language of the prosecuting attorney was objected to, the objection sustained, and the remarks withdrawn from the consideration of the jury. At another time, while this witness was being examined, counsel for the state said to him: "I desire now to caution this man Heller to answer the questions, and not interject stuff that is not testimony." Again, on the cross-examination of defendant, the prosecuting attorney addressed him as Mr. Spindler. The defendant answered, "Heller is my name," to which the prosecuting attorney responded, "I beg your pardon for calling you by the name of a gentleman." At another time this question was propounded to him: "After you paid the note, you had Mr. Tesch bring attachment proceedings against the Windsor Exchange for the purpose of freezing Mr. Spindler out, didn't you?" And when an objection to this question was sustained the private counsel employed to assist in the prosecution made this statement in the presence of the jury: "We propose to show borrowed on this \$556, \$300 from Mr. Tesch, and before the matter had ever been assigned back. We propose to prove by this man that he used Tesch's name without Tesch's consent, and that, taking advantage of the situation of affairs, we propose to prove by this witness that he then had an attachment levied upon the Windsor Exchange, so as to make this Anheuser-Busch Brewing Association mortgage fall due, thereby destroying the \$1,700, while he was agent for Spindler, that Spindler had upon that; and we propose to go further, and follow it up by other testimony for the purpose of explaining that item there."

Isadore Heller, a son of the defendant, was offered as a witness, and gave important evidence for the defendant. When another witness was upon the stand it was attempted to

be shown by this witness that the defendant's son had failed in business in Leadville. Objected to by the defendant. "Q. You were there when he failed, wasn't you? (Objected to, as immaterial and incompetent. Objection overruled, and the defendant excepted.) Q. Now, do you know of his failure? (We object, for the reason last stated, regarding all of this evidence regarding Isadore Heller. Objection overruled, and the defendant excepted.) A. I don't know anything about Mr. Heller's failure. I was not there at the time he failed."

Misconduct on the part of the bailiffs in charge of the jury, and misconduct of some of the jurors as well, was called to the attention of the trial court by affidavits filed in support of a motion for a new trial. The misconduct alleged in these affidavits consisted in the following acts: First. Allowing the jury to separate, in violation of the instructions of the court, and permitting jurors to enter a saloon, and drink at a public bar. Second. The introduction of bottles of whisky into the jury room for the use of the jurors. Third. Talking with jurors for the purpose of influencing their verdict against the defendant. Fourth. Taking a juror into a side room, and there engaging in a personal quarrel with him, using violent and abusive language to the juror, so that other members of the jury were obliged to interfere to prevent a breach of the peace. Fifth. Calling attention to a supposed natural infirmity of one of defendant's counsel, and saying to the jury that he had no case.

One of the affidavits filed in support of a motion for a new trial is as follows: "State of Colorado, County of Arapahoe—ss.: Thompson Dougan, being first duly sworn, on oath says: That he was a member of the jury in the above-entitled cause at the present term of this court. That after the jury was sworn and impaneled to try the issues in said cause, and on several occasions, bottles of whisky were brought into the jury room, and drank by the jury; and on one occasion every juror partook of said whisky. That on one occasion a juror remarked to the colored bailiff in charge of said jury, 'How would it do to send down a pitcher or a jug for whisky?' to which the said bailiff replied: 'That is your own business. I am supposed to be dead. I am in the background.' That said jury was fed at Mrs. Given's restaurant, near the St. James Hotel, on Curtis street, during their entire service, and frequently, when so at meals, the jurors would separate and go into the bar opening out of the dining room, and drink alcoholic drinks. That on one occasion, when sitting at the table and waiting for dinner, Mr. Stone, the bailiff in charge of the jury, remarked: 'Gentlemen, don't Taylor make you sick? Just wait until he gets started. He will whine and cry around, and can't present a case. He has no ability as a lawyer. He reads in a monotone. That old fellow Heller has no case.' That

'he has been tried twice, and found guilty. Taylor, before he gets through with it, will get down and cry, and you will get sick of him. Just wait, when Ward gets up; he can present a case like an attorney, and you can see through it.' That the above and like remarks were made not only at the table, but privately by said bailiff to affiant when walking along on the street. That the colored bailiff, on Saturday evening and on Sunday, shaved the different members of the jury Saturday night and Sunday morning; some in the room and some he would take into the hall, away from the rest of the jury, in doing so. That said bailiff took said affiant to task for his words and opinions in discussing the case in the jury room, and went so far as to tell affiant he lied in his statements in relation thereto, and created so much disturbance that other jurors interfered to avoid further trouble. That the conduct of the said bailiff Stone and the said colored bailiff became so notorious and offensive in making remarks and statements and interfering with the deliberations of the jury while said case was in progress, in order to prejudice the minds of the jury, in such frequency and to such an extent that affiant became disgusted, and threatened to report the matter to the court in regard to their said conduct. That said colored bailiff, becoming aware of affiant's intention of reporting said matters and things to the court, interfered, and tried to raise a prejudice between the members of the jury, and came to affiant and said, if affiant did so he would be sorry for it, and would never do it again. Thompson Dougan." Affidavits of like tenor and effect were procured from two other jurors, and placed on file, and quite a number of counter affidavits were filed on the part of the state. The motion was overruled, and the prisoner sentenced upon the first count of the misconduct.

W. S. Decker, T. J. O'Donnell, and Osborn & Taylor, for plaintiff in error. Joseph H. Maupin, for the People.

HAYT, C. J. (after stating the facts). As there are 70 errors assigned to the rulings of the district court, nearly all of which assignments of error are absolutely without merit, and are abandoned in this court, it should not be a matter of surprise that the court of appeals, in its opinion as filed, gave but slight consideration to matters to which our attention has been particularly invited, and which we think necessitate a reversal of the judgment of both the court of appeals and the district court. In so far as the errors assigned are discussed at length by the court of appeals, we are entirely satisfied with that discussion, and shall not attempt to review such errors. Our consideration will be given entirely to such errors as relate to the misconduct of counsel for the state during the trial, and to the misconduct

of the bailiffs in charge of the jury. Alluding to the misconduct of counsel representing the state, the court of appeals uses this language: "We admit that the remarks incorporated into the record as having been uttered by the prosecuting attorney were highly improper and unwarranted, but, in the face of the fact that the record shows that objections were interposed by counsel for defendant, and that those objections were sustained, and the remarks eliminated, and counsel cautioned by the court to refrain from further comments of that nature, that the defendant secured through the court a correction of this misconduct; and we are warranted in assuming that, in view of the action of the court, that the jury were not influenced or prejudiced against the defendant by the course pursued by counsel for the prosecution." We cannot agree with that court in the conclusion that the error was corrected by the district court, or that the defendant's case was not prejudiced by the improper conduct alluded to; for while it is true that, as often as appealed to, the court sustained the defendant's objection to the unwarranted statements and improper insinuations of the district attorney, it is equally true that the action of the court was had in such a manner as to have no effect upon the district attorney, who persisted in the improper conduct the same as before. The court does not seem to have made any attempt to punish counsel in any way for these improprieties, or to have reprimanded him for his unprofessional conduct. In this connection the language of this court in the case of *Smith v. People*, 8 Colo. 457, 8 Pac. 920, is directly in point: "The criticism on the action of the court is that the judge failed to assert and maintain the authority and dignity of the court, by reason whereof a prisoner upon trial was prejudiced. The law places at the command of all judicial tribunals ample power and means to enforce obedience to their lawful orders in such cases by the way of fines, and, if necessary, imprisonment. It is the duty of courts to require their proceedings to be conducted according to the rules of law, and to protect the rights of litigants. That the proceedings in this instance were defective in the essentials mentioned is fully shown by the record. We are further of opinion that the errors complained of were not cured, for which reasons the judgment must be reversed, and the cause remanded." So, in this case, we think that the covert insinuations as well as the direct attacks made by the district attorney upon the defendant were well calculated to prejudice the jury against him. Added to this, we have the offer on the part of the assistant district attorney to prove a crime against the defendant other than the one for which he was upon trial. An objection to this offer of proof was properly sustained by the trial court. The offer, however, becomes important for the purpose of

showing the extent to which the zeal of counsel carried them in this prosecution. In the light of this record we cannot say that the improper conduct of the district attorney did not have much to do in influencing the jury against the defendant. This undoubtedly was the effect desired, but whether it had such effect or not it is unnecessary to determine. It is sufficient for us to know that it might have been the means of procuring a verdict of guilty, and for this misconduct of counsel alone the defendant should be awarded a new trial.

The alleged misconduct of the bailiffs in charge of the jury is, however, a matter that we cannot overlook. These officers in the disregard of their sworn duty, and in violation of the instructions of the court, allowed the jury to separate, permitted intoxicants in the jury room, and engaged in conversations with members of the jury, which resulted in an altercation, so that a breach of the peace was narrowly averted. These are matters about which there is no conflict upon the affidavits filed. Added to this, we have the affidavits of three jurors to the effect that one of the bailiffs endeavored by argument and denunciation to procure a verdict of guilty; this officer going so far as to call attention to some supposed natural defect in one of the attorneys for the defense. It may be said, however, that these matters last mentioned are denied. By whom? First, by the officer charged with the improper conduct; second, by the negative statement of other jurors to the effect that they heard nothing of the kind. This is a matter that was presented to the district court entirely upon affidavits filed, and not upon oral testimony, and for this reason this court is as well qualified to judge as to the weight that should be attached to the several affidavits as the court below; and, taking into consideration the fact that the misconduct of the bailiffs in other respects is admitted, and that these additional irregularities are made to appear by the positive affidavits of three of the jurors, we are of the opinion that the further misconduct of the bailiffs is established by the weight of evidence.

We cannot consider the alleged misconduct of the jury, for the reason that the same is only brought to the attention of the court by the affidavits of members of the jury; and it is well settled that such affidavits cannot be received for the purpose of showing misconduct on the part of the jury, although, by the weight of modern authority, the affidavits of jurors may be received for the purpose of showing misconduct on the part of bailiffs and other third parties. *Proff. Jury*, § 408; *Thomp. & M. Jur.* § 449.

The defendant had been transacting business with and for Caroline Spindler for a long time prior to the transaction which formed the basis of this information. He claimed that she, being indebted to him at the time, requested him to sell or hypothecate

cate the \$1,200 note, and from the proceeds thereof to pay this indebtedness. This Mrs. Spindler denies. The evidence is very conflicting. It was the province of the jury to decide upon this conflict; and what influence the improper conduct of the officers of the court, the district attorney, and the bailiffs may have had upon the jury no human being can say with certainty; but of one thing we feel there is no doubt, and that is that the defendant did not have a fair trial, and for this reason the judgment will be reversed. Reversed.

OLD et al. v. KEENER et al.

(Supreme Court of Colorado. Dec. 16, 1895.)

RECORD—ABSENCE OF EVIDENCE—DAMAGES.

1. The evidence on an issue as to whether a ditch was located upon the strip of land which was conveyed for that purpose cannot be considered on appeal, where the exhibits sought to be introduced were omitted from the abstract, and particularly as the map and survey showing the present location of the ditch, and introduced in evidence, were omitted from the bill of exceptions.

2. On an issue as to the damages sustained by reason of defendant's negligent maintenance of a ditch running over plaintiff's land, a question as to how much the property was damaged in consequence of the condition of the ditch was improper, as calling for an opinion on the ultimate fact to be tried by the jury.

3. Where plaintiff had granted, and defendant paid for, the right to construct a ditch over plaintiff's land, a question as to what would be the value of the land without the ditch was improper, on an issue as to the damages sustained by the negligent maintenance of the ditch.

Error to district court, Arapahoe county.

Action by Robert O. Old and another against Frederick A. Keener and others to recover for the negligent maintenance of a ditch running over plaintiffs' land. From the judgment rendered, plaintiffs bring error. Affirmed.

Edwin H. Park, for plaintiffs in error.  
Benedict & Phelps and Waybright & Betts, for defendants in error.

GODDARD, J. On the 22d day of March, 1883, the plaintiffs in error, for the consideration of \$50, conveyed to defendant Keener the following described piece of land: "A strip of ground sixteen and one-half (16½) feet in width through the eighty-acre tract described as follows: The south half (½) of the southeast quarter (¼) of section fifteen (15), township four (4) south, range sixty-nine (69) west," etc.,—"for the purpose of a ditch for conveying water through and across the said eighty-acre tract; said strip of ground to be used for such purpose, and none other; and, should said strip be used for other purposes than is needful to the convenient use of said ditch, the title thereto, hereby conveyed, is to revert to said party of the first part; \* \* \* said strip of land being more particularly described as follows, being eight feet and three inches (8 feet and 3

inches) in width along and on each side of a line running and described as follows: Beginning at or near the northwest corner of said eighty-acre tract above described, running thence southeasterly, by most convenient route, for twelve hundred (1,200) feet, more or less, to the center of the natural gully or gulch running through said tract known as 'Wier's Gulch'; thence down along the center of said gulch, following the meanderings thereof, in an easterly and northeasterly direction, for nineteen hundred (1,900) feet, more or less, to a point on the east side line of said section fifteen (15), at or near the northeast corner of said eighty-acre tract." Ever since the date of this conveyance, Keener, and, during a part of this time, the other defendants in error, have conveyed water over the 80-acre tract described, by means of a channel originally made by plowing one or two furrows, but greatly enlarged by erosion caused by the flow of water therein. On the 7th day of August, 1891, plaintiffs in error instituted this action to recover for injuries which they allege have been caused by the negligent and improper manner in which the defendants in error have operated the ditch, or water course, and, in addition thereto, ask that the deed above mentioned be canceled. Trial was had to the court, judgment rendered for the sum of \$75 in favor of plaintiffs in error, and the other relief prayed for denied. Plaintiffs bring the case here on error.

It appears from the evidence that the water conveyed through this channel, by reason of the quantity and rapidity of its flow, has in some places cut the channel to the depth of five or six feet, and has widened it in some places so that it encroaches upon the adjoining land of plaintiffs in error. They seek to recover damages on account of both of these results. In other words, they claim the right to recover for the washing away of the soil within the 16½ feet claimed by defendants in error, as well as for the encroachment of the ditch on the land outside of such strip; predicated this right upon the claim that the ditch was not located upon the strip of land described in the deed, but runs over other portions of the 80-acre tract outside of it. If, after an acquiescence of upwards of eight years in the location of the ditch as originally made by their grantee, seemingly in conformity with the description in the deed, they may be allowed to show that it is not upon the strip of land conveyed, suffice it to say that neither their allegations nor proofs sustain their contention. The exhibits sought to be introduced in support of this claim are entirely omitted from the abstract of record, and not before us for consideration; but, if they were, we would still be powerless to review the finding of the court in this particular, since a very material portion of the evidence introduced upon the question as to whether or not the ditch, as constructed and operated, was upon the strip

of land described in the deed, is omitted from the bill of exceptions. While Exhibit 4 is before us, which it is claimed shows the line of the ditch as originally contemplated by the parties, and conveyed by the description in the deed, the map and survey of the witness O'Brien, showing its actual location, introduced upon the trial, is omitted from the bill of exceptions; and we are therefore unable to determine the weight of the evidence upon this point, and must assume that the court below correctly held that plaintiffs in error could recover only for the damages to the land lying outside of the limits of the strip. And its finding as to the amount of such damage, based as it is upon conflicting evidence, is conclusive upon us, and, unless some error intervened upon the trial prejudicial to the plaintiffs' rights, its judgment must be upheld.

The assignments from No. 3 to No. 15, inclusive, attempt to present such errors by a general statement that the court erred in refusing to allow plaintiffs in error to show certain matters, without specifying or pointing out the alleged erroneous action of the court, or referring to the testimony rejected, where it may be found in the record, or the name of the witness by whom the proof was sought to be made. Under rule No. 11, we would be justified in ignoring these assignments altogether, but, since they challenge the correctness of the rulings of the trial court upon propositions of law that are too well settled to admit of discussion, we have searched the record to ascertain whether it is true that the court made such erroneous rulings as are alleged in the assignments; and, from our examination, we are satisfied that the various rulings complained of are unobjectionable, and not open to the criticisms made by counsel for plaintiffs in error. We notice, as being the most important, the errors predicated upon the tenth, eleventh, and twelfth assignments, to the effect that the court erred in not allowing plaintiffs to show what damages their land had sustained by reason of the ditch being in its present condition, and not maintained as a proper ditch, and in refusing to allow them to show, by the proper rule, what damages they had sustained. All that the record shows upon this point is the following: Upon the examination of Salkeld Smith, a witness for plaintiffs, these questions were asked, and an objection thereto sustained: "Q. How much has that ditch damaged that property, by virtue of its being in its present condition, and not being maintained as a proper ditch?" And further on: "Q. What would be the value of that forty acres without that ditch upon it? \* \* \* The Court: That is, these two rods wide you are speaking of now? Mr. Park: As to the whole forty acres." The first question was objectionable because it called for the opinion of the witness upon the ultimate fact to be tried by the jury. The second question was objectionable for

the same reason, and for the further reason that it was an attempt to show the value of the land, with or without the ditch, notwithstanding the right to build and operate the ditch had been granted and paid for. We find no instance in the record where the court refused to allow any proper evidence as to the damages occasioned by the manner in which the ditch was kept and operated, or any denial of the proper measure of damages in such a case; but, on the other hand, evidence was admitted to show the extent of the damage to plaintiffs' adjoining land occasioned by the failure on the part of defendants in error to keep their ditch in proper repair. The provisions of the irrigation statute cited by counsel for plaintiffs in error as sustaining their contention were given their full force and effect, in so far as they were applicable to this case, and the court recognized that the duty was incumbent upon defendants in error to keep the ditch in repair, and their liability to parties who might be damaged by reason of their neglect to do so. In other respects these provisions have no application under the facts in this case.

Without discussing in detail the other assignments, it is sufficient to say that we find them equally groundless. The judgment of the district court will be affirmed. Affirmed.

PEOPLE ex rel. DARLEY v. CARR et al.  
(Supreme Court of Colorado. Dec. 4, 1895.)

ATTORNEY AND CLIENT—ADMISSION TO BAR—EXAMINATION—AUTHORITY OF EXAMINING COMMITTEE—DELEGATION OF EXAMINING POWER.

1. The committee appointed by the supreme court to conduct the examination of applicants for admission to the bar may require the certificate, required by the statute to be signed by one or more reputable counselors at law, and to state that the applicant had been engaged in the study of law for two or more consecutive years prior to the application, to be filed with such committee before an examination.

2. A petition for a rule against members of the committee appointed by the supreme court for the examination of applicants for admission to the bar, to show cause why they should not examine petitioner, and issue a certificate to him, must show that petitioner obtained a certificate from one or more reputable counselors at law, stating that he had been engaged in the study of law for two or more consecutive years prior to making application, as required by statute.

3. The committee appointed by the supreme court to examine applicants for admission to the bar, and issue certificates, has no authority to adopt the markings of the faculty of the state university in examinations conducted, without participation of the majority of the members of the committee, as a determination of the right to a license to practice.

Petition by Ward Darley for a rule against Byron L. Carr and another, members of the standing committee for the examination of applicants for admission to the bar, to show cause why such committee should not examine petitioner. Petition dismissed, and rule discharged.

The relator, Ward Darley, is a citizen of



Colorado, and a resident of Boulder county, in the Eighth judicial district of this state. The two respondents, Byron L. Carr and John H. Wells, together with Alpheus Wright, constitute the standing committee of said judicial district appointed by this court, under the statute, to examine applicants for admission to the bar. For two years the relator had been irregularly pursuing his studies at the law department of the state university at Boulder; and in May, 1895, along with other members of the senior class who were candidates for graduation, he presented himself for the final examinations prescribed by the faculty of that department as necessary to be passed as a condition precedent to the conferring of degrees. It appears that in 1894 these respondents, after carefully examining the course of study outlined by said law school, and the character of the questions propounded to the students for final examination, had agreed between themselves (to which agreement, however, Mr. Wright was not a party) to adopt such final examination of the faculty as their own, although it was the expectation that at least one of the committee should be present to take part in the oral examination at the close of the school year. As a part of such arrangement, these respondents also agreed that they would give certificates to those students who passed the examination prescribed by the faculty, and withhold certificates from such as failed. Pursuant to this agreement, in 1894, the entire committee conducted an oral examination of the students of the senior class of that year, and likewise examined the answers of the students to the written questions of the faculty, and awarded certificates to such of them as successfully passed. Just before the senior class of 1895 was to begin the final examination under the direction of the faculty, the respondent Wells was requested by a member of the class to be present and take part therein. He complied with this request, and assisted in the oral examination, in which neither of the other members of the committee participated, but it does not appear that his investigation extended further. At the close of the oral examination, Wells announced to the class his satisfaction at its result, and stated that the committee would grant certificates to such of the students as presented proper proof that they had, in addition, passed the written examination of the faculty. Within a few days thereafter the relator was notified by the faculty that he had failed to pass, and he at once applied to Mr. Wright, one of the members of the standing committee, for an examination. This was had before the latter, with the result that Wright, as one member, signed a certificate that relator was qualified for admission to the bar. This certificate the relator then presented to respondent Wells for his signature, on the strength of the examination of the relator given by Wells at the university; but Wells refused to sign

it, stating substantially that the case of relator came within the terms of the agreement just mentioned. In his answer, the respondent Wells says that he did not pronounce Darley's examination conducted by himself as sufficient to entitle the relator to a certificate from him, but Darley swears that such was the statement. This apparent conflict disappears when we consider that Darley may have been justified in believing that Wells' satisfaction at the result of the examination of the class was based, or was to be based, solely upon his own oral examination; while all the circumstances show that, so far as he was concerned, Wells' determination of the right of the students to receive certificates was to be grounded partly upon the result of his oral examination, and in part upon the written one conducted by the faculty, although the announcement in relation thereto was somewhat ambiguous, and may have led to the misunderstanding between himself and the relator. When Wells refused to sign the certificate, the relator applied to the respondent Carr for an examination, which was refused by him for substantially the same reasons as those given by Wells. By each of the respondents relator was informed that, if he would continue his studies for such additional time as to raise a presumption that he knew more law than when he failed to pass, they would give him an examination. Without complying with this suggestion, the relator filed his petition in this court, and asks for a rule against the two respondents, threefold in its object, viz. to show cause why Carr should not give him an examination, why the two respondents should not give him a certificate, and why they should not be removed from office for an abuse of power.

Ward Darley, pro se. Byron L. Carr, pro se. John H. Wells, pro se.

CAMPBELL, J. (after stating the facts). The charge made by relator in his petition that respondents conspired with the authorities of the university to deprive him and others similarly situated of their constitutional and statutory rights rests upon nothing stronger than mere suspicion. The relator is not entitled, either under the averments of his petition or by reason of the testimony, to the rule which he asks.

While the reason assigned by respondents for refusing to sign the certificate or give the relator an examination is not a good one, and was not sufficient justification for their action, yet, when the relator comes into court demanding his legal rights, thereby he must stand or fall. Before one is entitled to a license to practice law in this state, he must, among other things, obtain a certificate from one or more reputable counselors at law that he has been engaged in the study of law for two or more consecutive years prior to the making of such application. It does not ap-

pear that the relator has obtained such a certificate, or that he has pursued his studies for a sufficient length of time to get it. True, the statute does not expressly require that the applicant shall file such a certificate with the examining committee, but the standing committees in this state, for their own protection, may well establish a rule that no applicant shall be entitled to an examination unless he present at or prior to the making of his application a certificate of the character indicated; for it would be a waste of time, and entail unnecessary labor upon the committees, to examine applicants who, if they succeeded therein, nevertheless would not be entitled to a license because of the lack of other necessary qualifications. For this reason alone it would be an idle ceremony for this court to grant the rule in this case, and, while the respondents did not interpose the objection that relator did not present the necessary certificate, it can be waived neither by them nor this court.

It must be remembered that the members of the bar from whom these standing committees are appointed by the court are usually busy lawyers, actively engaged in the practice of their profession. They may, for their own convenience, as to time, and to relieve themselves of unnecessary labor, without surrendering to others the exercise of their own judgment, make such reasonable rules and regulations for the examination of applicants as will not materially interfere with or prejudice the rights of the latter. It therefore seems wise at this time, for the guidance of the committee, for the court to say that the rule adopted by respondents is not authorized, though, doubtless, framed partly in behalf of the university, and partly for the benefit of the students themselves. In a proper case this court might restrain the granting of a certificate by the committee, or withhold a license to a student holding a certificate from it, based upon the examination of the faculty, when at least two of the committeemen have not taken part in such examination, or where the applicant is not a resident of the judicial district. While we see no objection to the adoption by the standing committee of the examination prescribed by the faculty as the examination of the committee, and while we can see no injustice to the students themselves if such rule were adopted, but rather, by saving them an additional examination, we can see how such rule would be to their advantage, yet the determination by the committee of the right of an applicant for a license, be he student or not, must in no case be made to depend in any degree on the judgment of the faculty of the university, however that judgment is ascertained, or however sound it may be, but the granting or withholding of a certificate must be based solely upon the concurring judgment of at least two members of the standing committee, as a result of the exercise of their independent judgment upon whatever

test is made, although their judgment, in the case of a student, may be aided and informed by an examination of the answers to the questions propounded by the faculty. People v. Betts, 7 Colo. 453, 4 Pac. 42. This being so, in the absence of a distinct understanding that the committee has adopted as its own, and participated in, the examination given to the class by the faculty, the committee is not justified in refusing an examination to a student, if in all other respects he is qualified, merely because he has failed to pass such examination; nor can the committee substitute for its own judgment that of the faculty, whether the latter be favorable or unfavorable, as to the qualifications of one who is examined for admission to the bar. The petition is dismissed, and the rule to show cause discharged. Petition dismissed.

#### JOHNSON v. JOHNSON.

(Supreme Court of Colorado. Dec. 16, 1895.)

DIVORCE — DESERTION — NONSUPPORT — SUPPLEMENTARY PETITION — EVIDENCE — REVIEW ON APPEAL — ALIMONY — LIEN FOR.

1. Where a divorce is sought on the statutory grounds of desertion and nonsupport, and a decree for plaintiff for desertion was warranted by the evidence, the supreme court will not consider errors assigned on rulings as to nonsupport.

2. In an action for divorce for desertion, evidence of matters occurring after the separation is admissible to show that defendant left plaintiff with intent to desert her.

3. The court may allow the filing of a supplementary petition relating exclusively to property rights and permanent alimony, to make the original petition more definite.

4. In the absence of express statutory authority, the court has no power to make a decree for permanent alimony a lien on defendant's personal property.

§ 1 Mills' Ann. St. § 1567, authorizing the court granting a divorce to order payment of alimony to the wife, and to "enforce the payment of such alimony and maintenance in any other manner consistent with the rules and practice of the court," does not authorize the court to make a decree for permanent alimony a lien on defendant's personal property.

Error to district court, El Paso county.

Action by Mary E. Johnson against Timothy E. Johnson for divorce. Plaintiff had judgment, with permanent alimony, which was made a lien on defendant's real and personal estate, and defendant brings error. Modified.

The complaint in this case, which was filed by appellee, Mary E. Johnson, in the month of November, 1890, alleges, *inter alia*, the marriage of plaintiff and defendant in the state of Indiana in 1862. The complaint, aside from some general allegations, sets up two grounds for a divorce: (1) The desertion of the plaintiff by the defendant on the 30th day of April, 1889. It is averred that said desertion was without reasonable cause or justifiable excuse, and that it has continued from the last-mentioned date to the time of the commencement of this action. (2) As

a second ground for a divorce the plaintiff alleges failure on the part of the defendant to support either her or her minor child for the space of upwards of one year, the defendant during that time being in good bodily health. The plaintiff prays that the bonds of matrimony existing between the parties may be dissolved; that she be given the control of their minor child, and that the defendant may be decreed to provide for the support and maintenance of both mother and child; for a temporary writ of injunction restraining defendant from disposing of his property, etc., during the pendency of the action; and that on final hearing the plaintiff may have such other relief as may be proper in the premises. For answer to this complaint the defendant admits the marriage as alleged, but denies the desertion; denies failure to support; denies that during the time of which plaintiff alleges nonsupport he was in good health, etc. For a cross complaint and counterclaim the defendant alleges the marriage in 1862; that the plaintiff, unmindful of her marriage obligations, without any reasonable cause or excuse, did, in July, 1889, at the county of El Paso, in the state of Colorado, desert the defendant, and absented herself from him, and has continued to live separate and apart from him for more than one year, and so continued up to the time of the commencement of this action. The prayer of this cross complaint is for the dissolution of the marriage ties, and for the custody of the minor son. All the allegations of the cross complaint, except those relating to the marriage, are denied in the replication. The issues thus formed upon the pleas of desertion and nonsupport were submitted to a jury, and both resolved in favor of the plaintiff. A motion for a new trial was overruled, the question of permanent alimony being reserved for future consideration. Afterwards the plaintiff filed a further petition. This petition relates entirely to the question of alimony. It avers that defendant is possessed of property of great value, particularly describing the same, and alleging that this property was accumulated by the joint efforts and industry of plaintiff and defendant; that plaintiff has but little property, this being heavily incumbered. An answer and replication were thereafter filed, the cause coming on to be heard before the court upon the issues thus made upon the question of alimony. The following findings of fact were made and entered of record: (1) That the real and personal property owned by the defendant, Timothy E. Johnson, is of the value of \$35,000. (2) That the value of the property, both real and personal, of the plaintiff, Mary E. Johnson, is \$17,100, with an incumbrance thereon aggregating the sum of \$8,100, leaving her a net balance of \$9,000. (3) That the total value of the property of plaintiff and defendant, after paying all debts, is the sum of \$44,000. (4) That said property had all been accumulated

during the existence of said marriage by the joint industry and frugality of both parties. Upon these findings a judgment was rendered in favor of plaintiff and against the defendant for the sum of \$11,159, the same to be paid as follows: \$2,000 on or before January 1, 1894; \$2,000 on or before January 1, 1896; \$2,000 on or before January 1, 1898; \$3,159 on or before January 1, 1898,—the above amounts to draw interest at the rate of 7 per cent. per annum, payable semiannually,—and in addition the costs of the action were adjudged against the defendant. The amount allowed as permanent alimony, and the costs of suit, are made a lien on all property, both real and personal, belonging to the defendant. A decree of absolute divorce was also rendered in favor of the plaintiff upon the verdict of the jury. The defendant brings the case here upon error.

Taylor & Laws and T. A. McMorris, for plaintiff in error. J. K. Vannatta, J. M. Dorr, and Victor A. Elliott, for defendant in error.

HAYT, C. J. (after stating the facts). There are 16 assignments of error in the record. About one-half of this number refer to rulings of the trial court upon the charge of nonsupport contained in the complaint. The statute in force at the time this case was tried provides that the marriage relation may be dissolved for the following, among other causes: Desertion; nonsupport. In this case the jury resolved the issues made by the pleadings upon each of the above grounds in favor of the plaintiff. Desertion being established, unless overthrown, the judgment of divorce must stand, and therefore a consideration of the charge of nonsupport becomes unnecessary. The statute provides that, in all cases for a divorce, where the defendant shall appear and deny the charges alleged, the same shall be tried by a jury. By this statute the verdict of a jury in a contested case is absolutely essential as a prerequisite for a decree of divorce. The rule, therefore, which prevents appellate courts from overthrowing verdicts based upon a conflict of evidence, applies with particular force to divorce proceedings under this statute. A reference to the pleadings discloses that each party charges the other with desertion, alleging that the same had continued for more than one year. It is apparent from this, and also from the evidence, that the parties had been separated for more than one year immediately preceding the institution of the divorce proceedings. The plaintiff alleges that this separation was the fault of the defendant, while the defendant charges that it resulted entirely from the plaintiff's conduct. The issue thus raised having been resolved by the jury and district court in favor of the plaintiff upon conflicting evidence, it is not the province of this court to weigh the evidence, for the purpose of substituting its judgment for that of the

court and jury below. A careful reading of the evidence, however, convinces us that the verdict of the jury is right, and if we were at liberty to ignore the verdict, the result would not be other or different from that reached in the district court. It has been held that desertion consists in the actual ceasing of cohabitation, and the intent in the mind of the offending party to desert the other. *Stein v. Stein*, 5 Colo. 55. It cannot be denied that there is evidence in this record going to show the existence of both of these conditions in this case. It is contended, however, that improper evidence was admitted for the purpose of showing the intent with which the defendant left the plaintiff. The particular evidence objected to is not pointed out by the assignments of error, but we infer from the argument that it consists of evidence of matters occurring subsequent to the separation. It frequently happens that the intent can only be shown by the subsequent conduct of the party to be charged. Intent is always largely a matter of inference and presumption, and the subsequent conduct of parties frequently makes plain the intent with which a previous act was performed. That cause arises for the dissolution of the marriage relation is to be regretted in all cases, but where, as here, the parties have lived together as husband and wife for nearly 30 years, each enjoying the love and confidence of the other for a quarter of a century of that time, a separation in their declining years seems particularly distressing. Courts may regret, but they cannot prevent, this result. So, also, the task of making some just and equitable distribution of the estate, representing the accumulation of years of toil and deprivation, in which both have shared, is one that the courts would gladly avoid, if such a course were not inconsistent with duty.

It is apparent that the real contention between these parties is with reference to the distribution of the estate, and where the issue is made it must be resolved upon the same equitable principles as govern in other cases. It is not reasonable to suppose that absolute justice will be administered in all instances. The best that can be hoped for is that those principles which have stood the test of reason and judicial scrutiny will control. It is doubtless true that no two judges, acting independently upon the same state of facts, would distribute an estate between husband and wife exactly alike. Such exactitude is never required nor expected, but where the trial judge has given the matter due consideration, in the light of correct legal and equitable principles, appellate courts will not undertake to disturb the judgment, unless the decision is manifestly unjust or unreasonable. In this case widely different estimates were placed upon the value of defendant's property by the different witnesses. On the one hand, there is evidence in the record which would have justified the dis-

trict judge in increasing plaintiff's allowance, while, on the other, there is testimony which, if standing alone, goes to show that the amount awarded as permanent alimony is excessive; but when all the evidence is considered, the result reached seems to be fair and just. Certainly, nothing has been shown that would justify this court in setting aside the findings in this particular. Objection is, however, based upon the ruling of the trial court allowing the plaintiff to file a supplemental petition. This supplemental petition relates solely and exclusively to property rights and the question of permanent alimony, matters which were presented in the original petition, but in a general way only. It was eminently fit and proper, although not absolutely necessary, that such a pleading should be filed, in order that the issue might be made more specific than in the original pleading. The course pursued is not only free from objection, but it is in accordance with the better practice, and may be followed with advantage in other cases. 2 Bish. Mar., Div. & Sep. §§ 1066-1073.

The district court gave the plaintiff a lien for the amount allowed as alimony upon all the property, both real and personal of the defendant. Error is particularly assigned upon this part of the decree. In some of the states a decree for alimony is made by statute a lien upon real estate, and in some it has been held that the courts have power to create such a lien in the absence of expressed statutory authority therefor, although this latter proposition is denied in other states; but we know of no authority which permits the court to make a decree for alimony a lien upon the personal property of the defendant. The decided cases seem to deny the power of the courts to do this. 2 Bish. Mar., Div. & Sep. § 1100. We are referred to our statute in support of this part of the decree: "When a divorce shall be decreed it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care and custody of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just; and in case the wife be complainant, to order the defendant to give reasonable security for such alimony and maintenance, or may enforce the payment of such alimony and maintenance in any other manner consistent with the rules and practice of the court, and may also grant alimony pendente lite; and the court may on application from time to time make such alterations in the allowance of alimony and maintenance as shall appear reasonable and proper."<sup>1</sup> We do not find in the foregoing statute authority to make the decree a lien upon personal property. It provides, where the wife is a complainant, the court may re-

<sup>1</sup> This provision is found in 1 Mills' Ann. St. § 1567.

quire the defendant to give reasonable security; second, to enforce the payment in any other manner consistent with the rulings and practice of the court. No attempt was made in this case to require the defendant to give security as provided by this statute, and we need therefore only consider the second authorization. This gives us no new remedy, but provides simply that the old remedies may be applied. Decreeing a lien upon personal property is not one of the methods for collecting alimony provided by this statute, and it is inconsistent with the rules and practice in force in this state. This portion of the divorce act was under consideration by the supreme court of Illinois in the case of *Sapp v. Wightman*, 103 Ill. 150, and it was held that the words, "or in any other manner consistent with the rules and practice of the court" mean "no more than that resort may be had to the known modes, under the rules and practice of the court of chancery, of enforcing obedience to writs, orders, and decrees, as sequestration, attachment for contempt, etc., or the statutory method of creating a lien on lands within the court's jurisdiction." In the case of *Yelton v. Handley*, 28 Ill. App. 640, it was held that a court of equity has no power to make a decree for alimony a lien upon personal property. This is the only case that we have been able to find in which the question has been raised in any appellate court. Our statute appears to have been taken from Illinois, and the decisions of that state should be given great weight, although not rendered until after the adoption of the statute in this state. In Illinois, as we have seen, it has been held that the power of the court to make a decree for alimony a lien upon real estate is expressly upheld, and the power to make a lien upon personal property is as expressly denied. *Wightman v. Wightman*, 45 Ill. 167; *Yelton v. Handley*, supra; *Sapp v. Wightman*, supra. There seems to be no reason for extending this rule, and in practice we think that liens of this character upon personal property would lead to great inconvenience. Such a decree is unusual, and as the usual remedies for the enforcement of a decree for alimony are complete and adequate, there is no reason for resorting to a doubtful remedy. In so far as the decree attempts to make the allowance for alimony a lien upon the personal property of the defendant, it is hereby modified, and with this modification the judgment is affirmed. Costs in this court will not be awarded to either party. Judgment accordingly.

#### WOLFF v. HELBIG.

(Supreme Court of Colorado. Nov. 4, 1895.)  
CONTRACT FOR SALE OF LAND—CONSTRUCTION—  
PERFORMANCE.

A contract for sale by defendant of a tract divided into lots provided for part pay-

ment in cash, and the balance in installments, secured by a vendor's lien. Plaintiff had an option to sell any of the lots, and in such case defendant was to join in a deed to the purchaser, on receiving from him at least one-third in cash, with notes for the balance, secured by trust deed; payments and notes so received to be credited on plaintiff's notes. Plaintiff was not to sell any lots below a stated sum, but no maximum price was fixed. Held, that defendant was not liable for his refusal to convey to a purchaser procured by plaintiff, and to apply the price offered on plaintiff's notes, where such purchaser was to take a few of the lots at so high a price that plaintiff's notes for the price of all the lots would be canceled by the cash payment of one-third and the purchase notes, and that such cash payment was to be advanced by plaintiff. *Campbell, J.*, dissenting.

Appeal from district court, Arapahoe county.

Action by John W. Helbig against Hiram G. Wolff for breach of contract to convey land. Plaintiff had judgment for part of his claim, and defendant appeals. Reversed.

This suit was instituted in the district court by John W. Helbig against Hiram G. Wolff. There are three separate and distinct causes of action set forth in the complaint, and of these the first consists of three separate items, for which damages are claimed. As to two of these items, the plaintiff suffered a nonsuit at the trial, leaving only what is termed the "Calhoun deal" remaining in the first cause of action. The second cause of action relates to a small advance of money, alleged to have been made at the instance and request of the defendant, and paid for the cost of filing a certain plat. The third account is in the nature of an action of slander, for words spoken by the defendant of and to the plaintiff during certain negotiations with reference to what is denominated as the "Calhoun deal." The second and third causes of action were resolved by the jury in defendant's favor, and, for this reason, will not be more particularly described. Only the issues joined upon the Calhoun item, set forth in the first cause of action, were resolved in favor of plaintiff, and consequently the only matter in dispute at this time arises from that transaction. The contract which is the basis of the complaint reads as follows: "This agreement, made this 13th day of April, A. D. 1889, by and between Hiram G. Wolff, of Denver, Colorado, of the first part, and John W. Helbig, of Denver, Colorado, of the second part, witnesseth, that whereas, Hiram G. Wolff is the owner of the northwest quarter of the northeast quarter of the northeast quarter of section thirty (30), township three (3) south, range sixty-eight (68) west, and has this day agreed to sell the second party, John W. Helbig, the same, in form and manner hereinafter set forth: Now, therefore, the first party agrees with second party: 1st. That he will remove, or cause to be removed, within thirty (30) days from the signing of this instrument, the Rocky Mountain ditch, as now located through said land, to the outside of the sidewalk on the east side of Sterling avenue, and that he will fill in the old line of

said ditch as soon as water is turned in the new channel. 2nd. That he will pipe under the ground, within sixty (60) days from the signing of this instrument, the flume now in Wolff avenue, within the boundaries of the land above mentioned. 3rd. That he will properly grade said land and the streets of the same, as platted, within ten (10) days after the signing of this instrument. 4th. That he will survey and plat said land within ten (10) days, and file the plat thereof, in manner as following: In two (2) blocks of forty-eight (48) lots each; lots to be not less than twenty-five (25) feet in width, by one hundred and twenty-five (125) feet in length; lots to face east and west, with alley sixteen (16) feet wide through east block, north and south; with a street entirely around east block of thirty (30) feet in width. 5th. That he will, on request of second party, join in signing warranty deeds to the above-mentioned lots, except as hereafter mentioned, on the following conditions: The purchaser shall pay at least one-third of purchase price in cash; the balance to be paid in notes running to Hiram G. Wolff, secured by trust deed on the property conveyed to George Stidger, his trustee; said notes to bear interest at the rate of eight (8) per cent. per annum, interest payable semiannually; said notes to be made for not less than one-half of balance of said purchase price in not more than one year, and not more than one-half of balance of said purchase price in not more than two years. Now, in consideration of the above agreements, second party agrees to pay the first party the sum of twenty thousand (20,000.00) dollars, as follows: The sum of thirty-seven hundred and fifty (3,750) dollars on the signing of this instrument, the receipt of which is here acknowledged; the sum of two thousand (2,000) dollars in ninety (90) days; the sum of two thousand (2,000) dollars in six (6) months; the sum of three thousand (3,000) dollars in nine (9) months; the sum of three thousand (3,000) dollars in twelve (12) months; the sum of sixty-two hundred and fifty (6,250) dollars in fifteen (15) months. And second party agrees to execute notes for the above-mentioned payments on the day of the filing of the plat of said property. Said notes to bear interest at the rate of eight (8) per cent. per annum, with interest due at maturity. And it is agreed that each and all of said deferred payments shall at all times be a lien on the part of said land unconveyed by first party, until each and all of said notes shall be fully paid. Second party agrees that he will pay all taxes and assessments levied against said property during the continuance of this contract. And it is mutually agreed that, when first party shall make deed to lot or lots as mentioned above, that the cash payment, less five per cent. of the full purchase price, together with the notes as above set forth, be given to Hiram G. Wolff, and that the account thus delivered to Hiram G. Wolff shall be credited—First, on the note due in

ninety days, until the same shall be fully paid; second, on the note due in six months, until the same shall be fully paid; third, on the note due in nine months, until the same shall be fully paid; fourth, on note due in twelve months, until the same shall be fully paid; and, fifth, on the note due in fifteen months, until the same shall be fully paid. And, when each and all of said notes shall be fully paid, Hiram G. Wolff agrees to make a warranty deed to his interest in all of said lots remaining unsold, to John W. Helbig, or to such person or persons as he may designate. And second party agrees that he will not sell or dispose of any of said lots for a less sum than two hundred and twenty-five (225) dollars each. And it is here agreed that first party shall not be bound to sign a deed to any lot or lots where the actual consideration is less than the sum just mentioned. And to the faithful performance of these covenants the parties hereto bind themselves, their heirs, executors, administrators, and assigns. Witness our hands and seals this 13th day of April, A. D. 1889." This agreement was afterwards supplemented by others, whereby Helbig agreed to release Wolff from certain claims for damages; the former consenting to extend the time six months on the Helbig notes remaining unpaid, and the defendant also agreeing to do certain grading. By one of these supplemental agreements, the commission to be retained by Helbig from sales was increased from 5 to 10 per cent. A demurrer to the complaint was overruled, and thereafter an answer and replication were filed. At the conclusion of the evidence offered for the plaintiff, a motion for a nonsuit was interposed and overruled. The trial resulted in a verdict and judgment against the defendant for \$10,196.87 upon the Calhoun transaction, and from this judgment the defendant prosecutes this appeal.

Thomas & Thomas and V. A. Elliott, for appellant. Charles M. Bice, A. B. Seaman, and J. C. Helm, for appellee.

HAYT, O. J. (after stating the facts). The contract provides for the sale of 10 acres of land, which land was to be divided into 96 lots; the purchaser, Helbig, agreeing to pay therefor \$20,000. Of this amount, \$3,750 was to be paid in cash, and, for the balance, notes secured upon the land were to be executed by Helbig to Wolff. This cash payment was made, and the notes were duly executed and delivered with security, as provided in the agreement. By the terms of the contract, Helbig, at his option, might sell lots, and substitute the cash and notes received upon such sales, and receive credit therefor upon his notes held by Wolff. In the sale of lots, Helbig was limited to a minimum price of \$225 per lot, but the contract fixes no maximum price. The sales were to be made upon the following terms: One-third cash, one-third in one year, and one-third in two years. For the deferred payments and interest

thereon, the purchasers were to execute notes to Wolff secured upon the lots sold. It is alleged in the complaint that on the 11th day of April, 1891, there was a balance due upon the face of the notes given by Helbig of \$10,635.13, from which sum the plaintiff was entitled to a reduction of 10 per cent. commission, leaving a balance of \$9,571.62 as the amount actually due defendant; that about this time the plaintiff procured a purchaser, named William C. Calhoun, willing to buy lots 25 to 44, inclusive, in block 2, for the full purchase price of \$10,635.13, on the terms and conditions set forth in the contract between the plaintiff and the defendant,—the terms offered being \$3,545.05 in cash, less the 10 per cent. of the full purchase price, as provided in the amended contract, to wit, \$2,481.53 in cash, and two notes of \$3,545.05 each, payable in one and two years, respectively, bearing interest at the rate of 8 per cent. per annum, interest payable semi-annually; the notes being secured by trust deed on the 20 lots to be conveyed. It is also alleged that the purchaser executed the trust deed and notes as provided in the contract, and the plaintiff and purchaser offered and tendered to defendant, in lawful money, the cash and notes, together with the trust deed, at the time requesting the defendant to join the plaintiff in executing a warranty deed to the purchaser for the 20 lots; that the defendant willfully and without cause refused to execute or join in signing the warranty deed tendered, or to accept the cash, notes, and trust deed, or either of them, and refused to give the plaintiff the credit of \$9,571.62, or any portion thereof, on his notes; that the defendant refused to have anything to do with the transaction; and that he ever since has refused to carry out his part of the contract. As to these lots, plaintiff alleges that by the wrongful conduct of defendant he has been damaged in the sum of \$10,635.10. The answer of the defendant admits the execution of the contracts described in the complaint, but denies that the defendant has failed or refused to perform the covenants or stipulations on his part as required. He denies that plaintiff procured a purchaser, who was able or willing to buy lots 25 to 44, inclusive, in block 2, for the sum stated in the complaint, or for any sum. He alleges that Calhoun was a pretended purchaser, without any means whatever; that the price at which plaintiff pretended to have sold him these lots was a fictitious price, far in excess of their real value, and that plaintiff sought to induce the defendant to take a deed of trust back on these lots far in excess of their real value, thereby causing him to release his lien which he held on the remaining lots for the purchase price of the same; that the transaction which the plaintiff desired him to carry out was not within the contract contemplated by the agreement. The replication denied all the new matter set up in the

answer. The plaintiff also says that Hiram G. Wolff, the defendant, was ready and willing to carry out the sale to Calhoun until he was informed that the plaintiff was advancing the money to the purchaser, when the defendant refused to proceed any further therewith. The plaintiff further alleges in the replication that, at the time of making said original contract, it was understood and agreed by the parties that the plaintiff should not be limited to the market value in selling the property, but should be at liberty to obtain the best possible price for the same. Errors are assigned upon the overruling of the demurrer to the complaint, upon the motion for a nonsuit, upon the amendment made to the complaint at the close of plaintiff's case, upon the reception and rejection of evidence, and upon the instructions given and those refused.

The assignment of error based upon the overruling of defendant's motion for a nonsuit directly raises the question of the right of plaintiff to recover upon the merits, as disclosed by his evidence, and for this reason will be first considered. In support of this cause of action, plaintiff relied upon the following facts as disclosed by the evidence, viz.: Immediately after entering into the contract with Wolff, he endeavored to negotiate a sale of the lots singly and in pairs, from time to time, through real-estate brokers and others; his efforts in this behalf resulting in varying success, until he had sold about 36 lots, and, from the proceeds of such sales, had reduced pro tanto his indebtedness to the defendant. For the amount remaining the defendant held plaintiff's notes, secured upon the lots remaining unsold,—60 or more in number. At this time the transaction with Calhoun commenced, which finally resulted in the disagreement between plaintiff and defendant, out of which arose the sole cause of action under consideration upon this appeal. If the "Calhoun deal" had been consummated, as arranged by the plaintiff, it would have resulted in Calhoun taking 20 of the unsold lots at a price, payable in cash and notes, that, together, would have discharged plaintiff's outstanding notes held by the defendant; and plaintiff would have become entitled to a release of the lien held by the defendant upon the lots remaining unsold, and he would have had a clear title thereto. The facts with reference to the transaction with Calhoun are undisputed, and, as stated by Mr. Smith, the broker selected by the plaintiff to negotiate the sale, are as follows: "Plaintiff came to me, in my office, and asked me if I could procure a purchaser for 20 lots in Earl place, on certain terms; that is, the party buying the lots would give a certain trust deed, of about \$350 per lot,—he could not tell the exact figures,—and a second trust deed, payable to himself, of \$2,300, upon the whole 23 lots. He said he would like the party to be one that would take the

lots and handle them and trade them, or build on them, or sell them to parties that would build on them. I told the plaintiff I thought I could get a man to take hold of the lots, and a day or two later I spoke to Mr. Calhoun about it, and he said he would be glad to take the lots on those terms; and I then took him to the plaintiff's office, and introduced him to the plaintiff. I told Mr. Calhoun that those lots could be had on those terms, and gave him to understand that he was not to invest a dollar. I took him to the plaintiff, and told him that was the man I had found; that he would take the lots on those terms. The plaintiff showed me that, through this deal, that he would pay his notes to the defendant, amounting to \$10,000; that he would liquidate an indebtedness of \$10,000, or whatever the price was. I had not agreed with the plaintiff to build on those lots. Nothing was said about that, except that he would like to get a party that would trade and handle the lots, and, if possible, would put them in the hands of parties that would build on them." The transaction was afterwards consummated, in so far as the same could be concluded by Mr. Helbig and Mr. Calhoun, in exact accordance with the foregoing statement of Mr. Smith; there being at this time a balance of principal and interest due Mr. Wolff, amounting to \$10,635.13, less 10 per cent. commission, or \$9,571.62. In other words, the sale which the plaintiff had authorized his agent to make to Mr. Calhoun of the 20 lots in question was for an amount exactly sufficient to discharge plaintiff's obligation to the defendant. In this transaction, Helbig was the vendor, and Calhoun the vendee, and the latter was to pay nothing from his own resources. The only money agreed to be paid was to be advanced to Wolff by the vendor. Upon this state of facts, the court was called upon to determine, as a question of law, upon the motion for a nonsuit, whether or not the Calhoun transaction was one embraced within the written agreement between the plaintiff and defendant; this agreement providing, *inter alia*, that "the purchaser should pay at least one-third of the purchase price in cash." It is contended by appellant that the Calhoun transaction was fictitious and fraudulent,—made with "a man of straw," without financial responsibility,—and that it was one not contemplated by the parties to the original agreement, and not embraced within the true intent and meaning of such an agreement; while the contrary of these propositions is maintained by appellee.

A fundamental canon of construction with reference to contracts, oral and written, requires that the true intent or meaning of the contracting parties shall be ascertained, and the contract be construed, if possible, so as to carry out such intent. In the case of *Navigations Co. v. Moore*, 2 Whart. 491, it is said: "The best construction is that which is

made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention." A construction of the contract that will permit the plaintiff to discharge his obligations to the defendant in the manner attempted by the transaction with Calhoun is one that we think must strike the mind of the average man as so unreasonable that it could not have been contemplated by the parties to the written agreement. The defendant then held the plaintiff's notes for \$10,635.13, secured on upwards of 60 lots. Plaintiff could have canceled the lien and his obligations at any time by paying this amount less 10 per cent., or if he could secure a bona fide purchaser for a part of the lots, who would pay the amount in cash, or one-third in cash and the balance in notes, plaintiff's obligations might in this way have been discharged. It is obvious, however, that he could not do this by selling one lot for a price equal to the whole amount due,—such a consideration being many times the actual value of the lot, and so grossly unreasonable as to be in fraud of defendant's rights,—and thereby discharge his obligation, leaving him with little or no security for the unpaid amount. This illustration is sufficient for the purpose of showing that there must be found some rule governing contracts of this nature that will be reasonable and just to the parties, and adequately protect the rights of each. It is to be borne in mind that the chief purpose of the contract is that the defendant shall sell 10 acres of land, and that the plaintiff shall pay him therefor \$20,000. From the evidence it is apparent, I think, that the defendant was willing at all times to convey for this amount, whether the same was paid in cash, or in cash and notes secured as provided by the contract, as the defendant says he understood it, and as we think he had a right to understand it. It must be assumed that the defendant believed at the time of executing the contract that his payments would be sufficiently secured, if the terms were carried out; and it is certain from the evidence that he believed at the time he was asked to join in a deed to Calhoun that a part of his contract price would certainly be lost, should the Calhoun transaction be consummated, and we think it is equally as certain that his apprehensions in this regard were not unfounded. What, then, did the defendant anticipate would be the construction placed upon the written agreement, and what had he the right to expect, in view of the circumstances? Nothing less than a construction that would be at once reasonable, just, and equitable to the parties, if such can be reasonably deduced from the instrument. This is in accordance with well-settled legal principles, and would be interpreting the instrument as mankind in general would construe



it. We think that a construction which would require the plaintiff to find a purchaser or purchasers who would advance the cash required from their own resources, or at least independently of advances made by the plaintiff for the purpose of securing a release of a lien upon the remaining lots, is the only one that meets the requirements of good conscience and equity. The Calhoun transaction did not contemplate that the plaintiff would advance money to Calhoun because he (the plaintiff) had money of his own or of others that he was desirous of loaning. On the contrary, plaintiff's avowed purpose was to gain an advantage to himself, at the expense of the defendant's security upon the 40 or more lots remaining unsold. Helbig not being limited in the sale of lots to a maximum price, Wolff could only rely upon the self-interest of the purchasers to protect him. So long as such purchasers were required to pay one-third of the purchase price down, he was content, and it was not until Helbig attempted to remove this safeguard by advancing the cash payment from his own resources that Wolff refused to convey. Helbig could not thus destroy the defendant's security, and Wolff was justified in refusing to carry out the Calhoun deal. A construction such as contended for by plaintiff would permit him to dispose of lots to irresponsible parties at double, treble, or any other multiple of the price that such lots would command in the market, if sold in the usual manner. In our opinion, an interpretation of the contract that will permit this was not contemplated by the parties, is not within the letter of the agreement, but is utterly foreign to the spirit and intent thereof. For this reason I think a nonsuit, as to the Calhoun transaction, should have been granted.

Aside from these 20 lots, the contract between Wolff and Helbig seems to have been fully executed, by Helbig's paying his notes in full, and Wolff's deeding the lots remaining. Wolff should now deed to Helbig lots 25 to 44, inclusive, in block 2, and thereby terminate the controversy. The judgment of the district court will be reversed. Reversed.

CAMPBELL, J. (dissenting). I cannot agree with the construction put upon this contract by the CHIEF JUSTICE. As I understand the scope of the opinion, one to whom lots are sold, and in whose behalf any part of the consideration is advanced by Helbig, by loan or otherwise, cannot be a "purchaser," under this contract. The record shows that one-third of the purchase price of the lots sold to Calhoun was advanced by Helbig, to secure the payment of which Helbig gave, or was to give, a second trust deed upon the lots. If Wolff got the cash payment provided for in the contract, which was one-third of the amount of the purchase price, less, possibly, the commission belonging to Helbig, and got, in addition thereto, security for the

unpaid portion of the purchase money, by a trust deed which was a first lien upon the lots sold, which this contract required, then, if the selling price agreed upon was a fair one, Wolff got exactly what he bargained for; and, as it seems to me, it could make no possible difference to him whether Helbig, or some third party, advanced to the vendee the cash payment. Wolff's only additional right, under the contract (that of having an adequate security for the two-thirds of the purchase money unpaid), could always be preserved by demanding good faith in the sale of lots, and this right could be protected and enforced by submitting the question to a jury. A sufficient inducement for Calhoun to carry out his contract and pay the balance due to Wolff, and as a further evidence of good faith, is to be found in the fact that his obligation was out to repay Helbig for the cash payment, and it was secured by a second lien upon the lots. Upon the trial of this case, all the issues of fact, including the good faith of the so-called "Calhoun deal," as to whether or not Calhoun was merely a "man of straw," and the reasonableness of the price at which the lots were sold to him, were submitted to the jury under appropriate instructions from the court, and these issues of fact were all resolved in Helbig's favor. In my judgment, this was the proper course to pursue, and thereby Wolff's rights, if he had any, would be amply protected. The hardship of the construction adopted by the majority of the court is to be seen when it is said that, as the record shows, Helbig has paid the entire consideration of \$20,000 to Wolff, and the latter still holds the 16 lots attempted to be sold to Calhoun. We cannot close our eyes to the fact that, since the time when Calhoun bought, this property has greatly depreciated in value; and for Wolff now to convey these lots to Helbig, without being required to do more, when the value of the property to be conveyed is much less than it was when Wolff should have conveyed it to Calhoun, and much less than Helbig would thereby and at that time have received, is not such a compliance upon Wolff's part with his contract as fair dealing and equity demand. I think the judgment of the district court should be affirmed.

# VAN HOUTEN v. PEOPLE.

(Supreme Court of Colorado. Dec. 4, 1895.)

HOMICIDE—BILLS OF EXCEPTIONS—TIME OF SIGNING—CHANGE OF VENUE—RECORD ON APPEAL—HARMLESS ERROR—IMPEACHING RECORD—ABSENCE OF DEFENDANT.

1. Sess. Laws 1865, p. 92, § 3, providing that in all cases in the district court bills of exceptions may be signed during the term of court at which they were taken, or at any time thereafter to be fixed by the court, applies to criminal cases, and supersedes Mills' Ann. St. § 1477 (originally enacted in 1861), providing that

in criminal cases bills of exceptions shall be signed during the progress of the trial.

2. As Const. art. 5, § 21, provides that "no bill \* \* \* shall be passed containing more than one subject, which shall be clearly expressed in its title," Laws 1865, p. 92, providing for the signing of bills of exceptions, in so far as it applies to criminal cases, was not affected by the adoption of the Civil Code, entitled "An act providing a system of procedure in civil actions," etc.

3. Where defendant was jointly indicted with another, but a separate information was afterwards filed against him, a motion for change of venue under the former indictment cannot be considered on appeal from a conviction under the second.

4. The denial of a motion for change of venue cannot be considered on appeal in the absence of the motion and affidavits from the bill of exceptions.

5. Defendant having failed to exhaust his peremptory challenges, the overruling of his challenges to jurors who did not sit in the case was immaterial.

6. A record showing defendant's presence during the trial cannot be impeached by affidavit showing his absence during the examination of a juror.

7. Defendant's voluntary absence from the court room during the examination of a juror who was challenged by defendant's counsel, and did not sit in the case, is no ground for reversal.

8. It was proper to refuse requests to charge fully covered by the instructions given by the court.

9. Where the evidence for the state showed that deceased, who was the superintendent of a railroad company, called at a cabin temporarily occupied by defendant, to see the owners of the cabin relative to the removal thereof from said company's right of way, and that after some discussion of the matter deceased stepped outside the cabin, followed by defendant, and that defendant, armed with a rifle, pointed it at deceased, and after a minute's time fired at deceased, the bullet striking over the heart, and that deceased at the time had his hand raised in argument, and was unarmed, a verdict of murder in the first degree will not be disturbed.

Error to district court, El Paso county.

A. W. Van Houten was convicted of murder in the first degree, and brings error. Affirmed.

J. K. Goudy and J. K. Vanatta, for plaintiff in error. B. L. Carr, Atty. Gen., and F. P. Secor, Asst. Atty. Gen., for the People.

HAYT, C. J. Before entering upon a consideration of the errors assigned by plaintiff in error, we will consider an alleged defect in the record to which our attention is directed by the attorney general. This relates to the bill of exceptions which has been certified to this court. This bill was not signed until after the trial in the court below had been concluded and judgment rendered, and it is contended that it was then too late; hence we are asked to exclude the bill from consideration upon this review. The position of the attorney general in this behalf is based upon section 1477, Mills' Ann. St., in which it is provided that: "In the trial of any person or persons for any crime or misdemeanor, it shall be the duty of the judge before whom such trial is pending, to sign and seal any bill of exceptions rendered to the

court during the progress thereof." At common law the right to preserve for review by bill of exceptions matters not appearing upon the record proper must find support in some statute. The right being statutory, a statute providing for the signing of the bill during the progress of the trial does not, it is said, permit a bill to become a part of the record if signed even one day late, as in this case. Plaintiff in error has presented no argument in opposition to the position taken by the attorney general, but we find upon examination that there is a statute other than the one above quoted, which appears to be in full force and effect. By this later statute it is provided that the bill may be signed at any time during the term or within any time beyond the term fixed by the court. Our investigation shows that the section relied upon by the attorney general was passed in 1861, while the one to which we allude was enacted four years thereafter. It reads: "In all cases in the district court where either party shall except to any ruling, decision or opinion of the court and shall reduce such exception or exceptions to writing, it shall be the duty of the judge to allow the same, and to sign and seal the same at any time during the term of the court at which such exceptions were taken, or at any time thereafter to be fixed by the court." See Sess. Laws 1865, p. 92, § 3; Rev. St. 1868, p. 508, § 21. The act of 1865 was under consideration by this court as early as the case of *Smith v. People*, 1 Colo. 141, and was then held to apply to criminal cases. A careful investigation fails to disclose that this statute has ever been repealed in so far as it applies to criminal cases. It is true, there was an ineffectual attempt to repeal it by the Civil Code, enacted under the following title: "An act providing a system of procedure in civil actions in the courts of justice of the state of Colorado." The constitution (section 21, art. 5) provides: "No bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." It is obvious that the attempted repeal of the act of 1865, in so far as the same relates to criminal practice, was ineffective and void under the title adopted for the Code of Civil Procedure. We have not overlooked the statement by the compiler of the Revised Statutes of 1863 to the effect that the statute of 1865 was repealed; but, as the repealing act re-enacted the paragraph under consideration verbatim, in effect this paragraph was not repealed, but has been the law all the time. We are therefore of the opinion that the act of 1865 is still a live statute in so far as criminal cases are concerned, and that bills of exceptions in such cases may be signed during the term at which such exceptions were taken,

or at any time thereafter to be fixed by the court. This construction is in accordance with the practice for 30 years, and we are not now disposed to consider favorably objections to it.

Plaintiff in error complains because the district court overruled a motion for a change of venue. This motion bears date February 14, 1895, and by its terms refers to an information filed January 15, 1895, while the record in this case shows that the plaintiff in error was tried and convicted upon an information bearing date May 14, 1895. The record is not complete, but sufficient appears to show that the defendant was first indicted jointly with one Yeoman and one Hoskins for the murder of the deceased, but that afterwards a separate information was filed, charging this defendant with this murder. The trial and conviction were had upon this last information, while the motion for a change of venue appears to have been filed in the first case, and for this reason cannot be considered in connection with the record now before us for review. Aside from this, neither the motion nor the affidavits in support thereof are preserved by a bill of exceptions, and for this additional reason cannot be reviewed by this court. Under our practice, a motion for a change of venue is addressed to the sound discretion of the trial court, and its rulings thereon will not be reversed upon review except in cases of manifest abuse of such discretion; but where, in a criminal case, the defendant desires a review of an order overruling his motion for a change of venue, the motion, together with all affidavits filed, whether in support or in opposition, should be preserved by a bill of exceptions properly certified into this court.

The next error discussed brings up for review the action of the district court in overruling certain challenges for cause interposed by plaintiff in error to certain jurors upon the panel out of which the jury to try the cause was selected, but, as none of these jurors served upon the trial of the case, the ruling of the court with reference to such challenges is immaterial, as plaintiff in error failed to exhaust his peremptory challenges.

It appears from an affidavit to be found among the files of the case that during the examination of one of the jurors plaintiff in error voluntarily absented himself from the court room for a few minutes. While absent he was in charge of a sworn officer, but his absence does not appear to have been noticed by court or counsel for a time. When noticed, the proceedings were stopped until the defendant came into the court room, when the examination of the jury was renewed. The juror examined during defendant's absence was challenged by his counsel, and did not serve upon the panel that tried the case; but we are now asked to grant a new trial on account of such voluntary absence of the defendant. The record shows the personal presence of the defendant, and it cannot be

contradicted in the manner resorted to in the case. Moreover, the facts alleged would afford no ground for a new trial if they were properly authenticated.

The charge of the court to the jury is plain and explicit upon every proposition of law applicable to the evidence, and is free from error prejudicial to the defendant. The presiding judge not only gave full instructions upon the law of self-defense, which seems to have been the chief reliance of the accused, but he repeats in varying form such portions of this law as would be likely to appeal most strongly to the jury in behalf of the defendant. So, also, the distinguishing features between murder of the first degree and murder of the second degree, and between both kinds of murder and manslaughter, are carefully pointed out and emphasized by repetition. The complaint that is now made because certain instructions asked by defendant were not given in the precise language of his counsel is fully answered by the record, showing, as it does, that such instructions were fully covered by the charge as given by the court.

It is claimed, finally, that the evidence does not justify a verdict of murder of the first degree. Every witness to the shooting of the deceased by the defendant that could be found was introduced by the state, thus giving the defendant whatever benefit might arise from a thorough cross-examination of the many witnesses to the homicide. In this respect the conduct of the district attorney is to be commended. There is but slight conflict in the evidence upon the material facts of the case except as such conflict arises by reason of the testimony of the defendant himself. The circumstances leading up to and culminating in the homicide are as follows: In the year 1894 the Midland Terminal Railroad was in progress of construction from a point on the Colorado Midland Railroad to the gold fields of Cripple Creek. The deceased, Richard Newell, Jr., was the superintendent of construction, and the general superintendent of the road. The line as surveyed ran across a mining claim known as the "Black Wonder," the cabin on this claim standing in the direct line of the road. This mining claim was owned by Sylvester Yeoman, and the cabin by Yeoman and two others, of whom the defendant was not one. There was a dispute between the owners of the claim and the railroad company in reference to this right of way, which dispute seems to have engendered hot blood on both sides. Pending an adjustment of the matter, the road was constructed across the claim or roadbed, curving sharply to avoid the cabin. The controversy over the right of way was finally submitted to two arbitrators with power to select a third in case of failure to agree. The two arbitrators selected by the parties reached an agreement to the effect that the company should pay the sum of \$100 to Yeoman as damages to the mining

claim, and the further sum of \$50 to the owners of the cabin to cover the expense of moving the same; and, award having been made in accordance with this agreement, the entire sum was paid over a short time prior to the date of the homicide. On the 19th day of December, A. D. 1894, the cabin, at the time not yet having been removed, was occupied by the defendant, Van Houten, and the witness Hoskins. The occupants had been at work the day of the homicide upon neighboring properties, but were at the time occupying the cabin upon the Black Wonder claim by permission from the owners. Upon that day the men had worked as usual, returning to the cabin shortly after 4 o'clock in the evening. Hoskins, who acted as cook, immediately set about preparing the evening meal, the defendant being at the time in the cabin. About this time the deceased was on a special train that was going up the railroad from a point named "Grassy." When the engine of this train reached a point directly opposite the Black Wonder cabin the train was brought to a stop at a signal from Newell, who was on a car which stopped a short distance from the cabin. As soon as the train stopped, Newell jumped from the car, and walked rapidly towards the cabin, entering the open door. There were then in the cabin the defendant and the witness Hoskins. As to what immediately followed, Hoskins, who was a witness in the district court, states: "When Newell came in, the defendant came forward to Newell, and Newell said, 'Where is the man I saw the other day?' Defendant said, 'I guess it is me you mean, Mr. Newell.' Newell said: 'No; it is not you I mean at all. I mean the man I saw the other day.' I knew, of course, who he meant; and I said, 'I guess it is Mr. Yeoman you mean, Mr. Newell.' Mr. Newell then pulled a letter out of his pocket, and the defendant said the same, 'I guess it is Mr. Yeoman you mean.' Mr. Newell pulled a piece of paper out of his pocket, and said 'I have a letter here,' and the defendant took that letter and read it. The defendant held the letter in just this position [illustrating]; just that way. The defendant stood by the side of the doorway. The door opened on the inside of the cabin. Newell stood with his back opposite the defendant's, on one side. I stood back and sort of between both men. In the meantime, while defendant was reading the letter, I looked out, and saw two men on that train. One man was Conductor Blizzard, on the top of Newell's car, and the other was on the platform of the car, but who he was I don't know. I stepped a little further back, and while the defendant was reading the letter I saw 150 marked on the letter in figures. I could not swear whether it was \$150 or not, but it was 150 in figures all right. When the defendant got through reading the letter, he said to Mr. Newell, 'Well, Mr. Newell, that is all right, but'—going to explain himself. Newell spoke up, and said, 'I shall pull this

cabin down to-morrow morning.' The defendant said, 'I don't know about that.' Newell said, 'I will pull it down anyhow.' Then Newell moved to go out of the doorway. Then I turned around to go to the other side of the cabin, to take off my coat and hat and hang them up, as I had them on when I came in the cabin, with the intention of going to the stove and attend to the supper, as there was no one else to do that. It was understood that when the defendant had anything else to do, I did the cooking, which I did. When I turned around from hanging up my coat and hat I saw Newell on the outside of the cabin and the defendant on the inside, and they were talking both at the same time, but I could not hear for the steam what they were saying. I stood there probably half a minute or a minute, and then went to the stove. I concluded it was none of my business anyway, so I went to the stove. After I had been at the stove a very short time I could not hear the other man talking, so I said to myself Newell must be gone, and wondered why the defendant did not come in. I stepped back in the cabin. There was a pile of wood behind the door that came out farther than the door, so I stepped back far enough to see Newell and the defendant. The defendant had his fist up against Newell, and Newell had his hands raised. I thought I would go back to the stove to save the things from burning, and then go and interfere; but when I got back to the stove I heard Newell say, 'You come outside and fight.' I just lifted a few dishes off the stove, and put the lids on, when I heard the defendant say, 'You son ———,' and I turned around, and the defendant had his gun, lifting it from the side of the bunk. All he had to do was to turn half way round, and reach the gun from where he was standing. I jumped back just enough to see how he held the gun, then I took my eyes off him, to put a pan or pot on the floor, but before I got them on the floor the shot was fired. All the words that were said from the time the defendant got his gun down were, Newell said, 'That is the only way you will come out.' \* \* \* I did not see that Newell was hurt, and felt glad of it. The trainmen had started from the car to Newell, and I kept my eyes mostly on Newell. I looked at the defendant once or twice. I could see Newell, and there was a big tie right behind him, and he seemed to be trying to step back to it, but on account of that tie he could not make any headway backward. The men from the train were getting close to Newell at that time, and I could see that Newell was in a terrible condition, with his hand on his side, trying to support himself; and the men from the train got around Newell just in time to save him from falling on the ground. He fell in their arms, and they took him to the car. The defendant stood there on the bank, and never moved at all. I did not go anywhere myself. The conductor came out of

the car, going back to give the engineer orders or something, and as both men walked back—the defendant and conductor—the defendant on the bank and the conductor down on the grade, the cabin was between the two men and I was between the men, and the defendant said to that conductor, 'I don't allow any \* \* \* to pull a cabin down after me.' Q. Who was that conductor? A. I don't know his name. Q. Was it Conductor Blizzard? A. No, sir; I know him. Q. Was it the conductor of the work train? A. He was the man that went back to the cabin after that. Q. Proceed with your story. A. That conductor said to the defendant: 'You don't need to talk about it, my friend. That man is dead.'

The ball entered Newell's breast near the left nipple, and passed through his body. After he was shot, he ran sideways about 20 feet, where he fell, and immediately expired. During most of the time that Newell was in the cabin he was out of the sight of the men upon the train, and during the entire period from the time he entered the cabin until the mortal wound was given the steam from the engine was making so much noise that none of the trainmen could hear what was being said by either Newell or the defendant, although some of them were on the cars only a few feet away; but from the time the deceased stepped from the door of the cabin until he fell mortally wounded he was in the plain view of a large number of the trainmen and others. As to what occurred during this brief period the evidence of these witnesses is in all substantial particulars identical.

The testimony of Ira Blizzard, the conductor of the special train, is in substance as follows: "We reached the cabin about 4:45 p. m. The train stopped upon a signal from Mr. Newell. The pilot of the engine stood about even with the south corner of the cabin, and the cars were on the south end of the train, as the train was running backward. Mr. Newell was on the platform of the special car, and this was about 75 feet from the cabin when the train was brought to a standstill. Mr. Newell got off, and went into the cabin. I stood on the top of the second car, and about 60 feet from the cabin. Mr. Newell was in the cabin perhaps three or four minutes, and then I saw him back out. As Mr. Newell stepped out of the cabin, Van Houten followed to the doorstep, and I think put one foot outside; but about that time he stepped back, and reached with his right hand, and got a rifle or gun; then stepped again to the door, pointing the gun towards Mr. Newell. Mr. Newell then grabbed the gun. Van Houten stepped back into the cabin, jerking the gun away. Newell then stepped back a little further from the cabin. The defendant then stepped to the door again, and Newell was making some motion with his hand, as though he was arguing some point. He had taken a step towards the cabin, when the defendant raised the gun

partly to his shoulder, and fired. I could not hear the conversation between these men. When Mr. Newell stepped out of the cabin he had a piece of writing paper in his left hand, which he folded up, and placed in his inside left-hand coat pocket." The paper which Newell took out of his pocket and handed to Van Houten in the cabin, and which the deceased subsequently folded and replaced in his coat pocket, is shown to have had reference to the award of the arbitrators. The paper, as identified by the witnesses for the state, reads as follows: "Orippe Creek, Colo., Dec. 13th, 1894. R. Newell, Jr., Gillette, Colo.—Dear Sir: Yours of the 12th to hand; contents noted. The decision in the case of The Midland Terminal Railway Company vs. The Black Wonder Claim was that the sum of \$150.00 covered every and all damage sustained by the Black Wonder owners by reason of said road going through their claim. The damage to the cabin entire was fixed at \$50.00, and the damage to the entire claim was fixed at \$100.00, making a total sum of \$150.00 for all damages. Yours, truly, J. W. Watson." Van Houten says that the foregoing is not the paper which he was handed by the deceased, but he admits that the paper given him to read was similar in character. This paper and the evidence in reference thereto were properly admitted as part of the *res gestæ*.

Some ten or a dozen witnesses were examined on the part of the prosecution. Their testimony is not materially different from that of the witness Blizzard. The evidence of these witnesses is to the effect that about one minute elapsed from the time Newell stepped from the cabin until the fatal shot was fired, during which time the defendant, standing with his gun in his hands, pointed towards the deceased, had him completely at his mercy. But two witnesses are introduced on the part of the defendant. One was J. O. Sterling, a deputy sheriff. This witness was not present at the time of the shooting. He testified that Newell told him a few days before that "there was liable to be trouble there at the cabin,—that they had threatened to shoot some of the railroad men,—and said he would like to have me go up and see them. In pursuance of this conversation I did go up, and talked with the men at the cabin. The defendant was not present at the time. I told the men that were there that there was a better way to settle the controversy than by shooting, but that if there was going to be any shooting I should like to be present."

Van Houten, the defendant, testified in his own behalf. His testimony, in so far as it differs essentially from that of the prosecution, will sufficiently appear from the following summary: The witness stated: That he and Newell were strangers to each other. That he (the witness) had no interest in the Black Wonder claim or in the cabin. That he noticed that at the time Newell came up

he was either under the influence of liquor or was angry about something. "I did not know his name until after the shooting was over. When he came in he asked who was the general here. I said, 'I am supposed to have charge of the lease on the Nancy Hanks and Victoria claims.' He says, 'I have a letter for you,' and selected from a package a letter, took it out of the envelope, opened it up, and handed it to me. I read the letter, and handed it back to him, and told him he would have to see Mr. Yeoman, as it did not concern me. He says, 'I am going to tear this cabin down if I have to kill you people to do it.'" The witness then testifies to much foul and abusive language, which he says the defendant used towards him, and that he made an attempt as though to strike the witness. He says that after Newell passed out of the door he threatened to come back in and pull him out; that it was at this time that he reached up and grabbed his gun, "and I said, 'I have no occasion to go out,' and asked him to go away. He said, 'I will come in there, and take the gun away from you, and kill you.' He made a grab at the gun, and pulled his pistol at the same time I fired. At the time the shot was fired he was outside, in the act of stepping upon the high bank. He made a step like this [illustrating], and threw his hand behind his back as if to grab my gun with his left hand and draw his gun with his right hand. That was the time I fired. I did not take aim. The gun was down not higher than my thigh."

All the other witnesses to the transaction swear positively that Newell had no weapon of any kind in his hand at the time, and that he did not attempt to draw a pistol, and made no motion that could be construed as indicating any such attempt; while several swear that Newell's attitude was argumentative, rather than aggressive; that at the time of receiving the mortal wound he stood with one hand raised, as "though explaining something." It is conclusively shown that Newell had no weapon on his person at the time.

Is there evidence in this record which, if believed by the jury, will support a verdict of murder of the first degree under the statute of this state, which reads as follows: "Malice shall be implied when no considerable provocation appears, or when all circumstances of the killing show an abandoned and malignant heart. All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any kind of wilful, deliberate and premeditated killing; or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary; or perpetrated from a deliberate and premeditated design, unlawfully and maliciously, to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and

indicating a depraved mind regardless of human life, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree. The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree." 1 Mills' Ann. St. § 1176. The entire evidence, excepting only that of the accused, negatives the conclusion that this was a case of mutual combat, and thereby excludes the idea of manslaughter. So, also, the plea of self-defense is not within our consideration, as it is negated by all the evidence except that of the defendant, and was resolved against him by the jury.

The crime of murder alone remains. This the statute divides into two degrees; i. e. murder of the first degree and murder of the second degree. Murder being established, the law, in its humanity, declares it to be murder of the second degree in the absence of circumstances showing it to have been murder of the first degree. In this case the proof must establish deliberation and premeditation to support the verdict. Time, however, is not essential if there was a design and determination to kill formed in the mind of the defendant previous to or at the time the mortal wound was given. It matters not how short the interval, if it was sufficient for one thought to follow another, and the defendant actually formed the design to kill, and deliberated and premeditated upon such design before firing the fatal shot, this was sufficient to raise the crime to the highest grade known to the law. By the statute the jury are expressly authorized to designate the degree in case murder is established. In this respect it is quite similar to the act of 1870. Under these acts premeditation and deliberation are the subject of inference and presumption to be drawn by the jury from the facts and circumstances leading up to, surrounding, and explanatory of the homicide. *Hill v. People*, 1 Colo. 436; *Power v. People*, 17 Colo. 178, 28 Pac. 1121. The evidence for the state shows that when Newell stepped outside of the cabin the defendant followed him to the door; that he armed himself with a loaded rifle, and pointed it at the deceased; that he had his victim entirely within his power for the space of perhaps one minute before firing, the deceased at the time having his hand raised in argument; that the rifle, when discharged, was aimed at the most vital part of the human body,—the heart. In view of these circumstances, we cannot say as a matter of law that the verdict is not warranted by the evidence. Finding no error in the record, the judgment will be affirmed, and the calendar week commencing December 22, A. D. 1895, is designated as the week for carrying the judgment of the district court into effect. **Affirmed.**

## MACKEY v. TABOR.

(Supreme Court of Colorado. Dec. 16, 1895.)

## JURISDICTION OF COURT OF APPEALS — CONSTITUTIONAL QUESTION.

The complaint in an action by a colored man against the owner of an opera house for wrongful expulsion therefrom alleged that the expulsion was made on account of his race and color. The action was dismissed on the ground that defendant was not legally responsible or liable for the acts of those who made the expulsion. *Held*, that plaintiff had no right of appeal, under the act creating the court of appeals, on the ground that a violation of his rights as a citizen, declared in Const. U. S. Amendments 13, 14, and Bill of Rights, art. 2, § 3, was shown.

Error to district court, Arapahoe county.

Action by James Mackey against Horace A. W. Tabor for wrongful expulsion from an opera house. From a judgment for defendant, plaintiff appeals. Appeal dismissed.

J. Warren Mills, for plaintiff in error. I. N. Stevens, for defendant in error.

GODDARD, J. This is an action brought by James Mackey against H. A. W. Tabor to recover damages for wrongfully expelling him from the Tabor Grand Opera House. As a cause of action, he alleges, substantially: That defendant, at the time of the grievance complained of, was the owner and in the occupancy of the Tabor Grand Opera House, in the city of Denver. That a club or organization called the "Denver Single Tax Association" engaged the opera house for the evening of January 26, 1890, for the purpose of a lecture by the Reverend Father McGlynn upon the subject of "Anti-Poverty," and agreed to pay therefor the sum of \$100. That, in consideration of that sum, defendant agreed that the house should be at the absolute disposal of the association for that evening, except that the internal conduct thereof should remain under the exclusive control of the ushers, doorkeeper, and ticket agents in the employ and service of defendant. That plaintiff, an officer in the association, purchased tickets of admission for himself and a friend which entitled them to seats upon the lower floor. While he and his friend were rightfully occupying such seats, a person then and there in charge of the internal affairs of the opera house commanded them to vacate their seats and exchange the tickets they then held for tickets calling for seats on the floor or balcony above. Upon his refusal to comply with this demand, this person ordered a policeman in attendance to put them out; and thereupon the police officer assumed to, and did, arrest and forcibly eject the plaintiff and his guest from the opera house. The defendant denies that he or his agents had any charge or control whatsoever of the internal affairs or management of said opera house on the night in question, or that he or his manager, agents, or servants, in the scope of their employment, or acting under

his order or direction, ejected or caused the plaintiff to be ejected therefrom. The trial of the cause was proceeded with before a jury, and upon the close of plaintiff's evidence the court sustained a motion for nonsuit, and dismissed the plaintiff's action, upon the ground that the evidence was not sufficient to show any liability on the part of defendant, and that the plaintiff's grievance was not against him, but against the persons who removed him. To reverse this judgment, Mackey brings the case here on error.

The record fails to disclose any ground upon which the jurisdiction of this court can be invoked. Section 1 of the act creating the court of appeals enacts that: "No writ of error from, or appeal to, the supreme court shall lie to review the final judgment of any inferior court, unless the judgment, or in replevin, the value found exceeds two thousand five hundred dollars, exclusive of costs. Provided, this limitation shall not apply where the matter in controversy relates to a franchise or freehold, nor where the construction of a provision of the constitution of the state or of the United States is necessary to the determination of a case." Laws 1891, p. 118. Plaintiff in error contends that a construction of the thirteenth and fourteenth amendments to the constitution of the United States, and section 3, art. 2, of our bill of rights, is necessary to a determination of the case; and in support of this contention it is urged that because the plaintiff is a colored man, and for this reason was subjected to the indignity and outrage complained of, his constitutional rights as an American citizen are involved in the controversy. But this claim is, we think, unwarranted. The complaint, as originally filed, contained certain allegations to the effect that plaintiff was discriminated against on account of a certain rule established by defendant, that excluded persons of African descent from occupying seats in that portion of the opera house. On motion these allegations were stricken out. This action of the court is assigned as error prejudicial to plaintiff, in this: that he was thereby prevented from proving the animus or motive that prompted the commission of the wrong, and thus debarred from showing a violation of his civil rights under the foregoing constitutional provision. After these allegations were eliminated, the complaint still contained the following averments: "That this plaintiff is of African descent, and belongs to that class usually called 'colored people,' and on the date last aforesaid, to wit, Sunday evening, January 26, A. D. 1890, \* \* \* repaired to the said opera house in company with an invited guest of his own race. \* \* \* And plaintiff alleges that the said arrest and ejection, so as aforesaid made, were made alone by the said policeman, in full uniform, and in the presence of hundreds of spectators, and was deliberately

and maliciously and unlawfully done, solely on account of the race and color of this plaintiff and his guest, and for no other reason or cause." And since the answer of defendant does not deny these allegations, nor attempt to justify the acts complained of by reason of any rule established by him, but rests the defense solely upon a denial of any connection with or responsibility for the wrongful and illegal conduct of the persons who actually perpetrated the outrage, it is clear that plaintiff's civil or constitutional rights are not involved in the consideration of the case. In other words, under the issues upon which this case was tried, his right, as an American citizen, to occupy the seats, is in no way questioned or denied. The motion for nonsuit was sustained solely upon the ground that the evidence submitted failed to show that the defendant authorized, or was in any way responsible for, the actions of the persons who arrested and removed plaintiff from the opera house. It is apparent, therefore, that this court has no jurisdiction to review the judgment, and the writ of error is for this reason dismissed. Dismissed.

#### STUYVESANT v. WESTERN MORTGAGE & INVESTMENT CO., Limited.

(Supreme Court of Colorado. Dec. 16, 1895.)

RECEPTION OF EVIDENCE—HARMLESS ERROR—CONTRACTS—CONSTRUCTION—EVIDENCE—PLEADING—ANSWER—SUFFICIENCY—ATTACHMENT—WHEN LIES.

1. Where a vendee of land assumes the payment of a mortgage thereon securing notes of the grantor to a corporation, in an action by the corporation against the vendee on the notes, his privity with the grantor, who is estopped from denying the corporation's right to sue, and his payment of interest on the notes, render the admission in evidence of insufficient articles of incorporation harmless error.

2. After maturity of a note for \$3,376.25 secured by a mortgage which included lots 13, 14, and 15 in one block and 3, 5, and 6 in another block, the owner gave his bond for a deed, whereby he agreed to convey these lots, clear of all incumbrances, to defendant, or such person as he might designate, after defendant should "first make the payments and perform the covenants" mentioned, one of which was the payment of a "mortgage of \$3,376.25 on said lots 13, 14, and 15." Held that, until payment of the mortgage, defendant was not entitled to have conveyed to the person designated by him lots 3, 5, 6, unincumbered by the mortgage.

3. Where a deed has been executed in compliance with a bond for a deed, the intention of the parties is to be determined from both instruments.

4. Where the complaint on a note secured by a mortgage on land alleges that defendant assumed the payment of the note in part consideration for a conveyance of such land, and has accepted a deed and gone into possession of the land, an answer which, as a defense, alleges no liability because the deed does not comply with the terms of the bond under which it was made, but fails to deny the allegation of possession, is insufficient.

5. An agreement to pay a mortgage is, when the mortgage is given to secure a note, an agreement to pay the note.

6. A bond for a deed, which recites as the consideration a cash payment to the grantor, and the payment of two certain mortgages, of specific amount, to the mortgagee, provides for the payment of a sum certain, so that, in an action on it, attachment may issue.

Appeal from district court, Larimer county.

Action by the Western Mortgage & Investment Company, Limited, against John R. Stuyvesant, to compel payment of a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

The Western Mortgage & Investment Company, Limited, is a corporation incorporated under the laws of Great Britain, and doing business in the state of Kansas. On the 15th day of October, 1885, John Harms, of Marion county, Kan., there borrowed of the said corporation the sum of \$3,376.25, giving to said company, in its corporate name, his promissory note therefor, payable one year after date, and, to secure the payment of the same, gave a mortgage, executed by himself and wife, upon lots 13, 14, and 15 in block 1, Beebe's addition, and lots 3, 5, and 6 in block 11, and five other lots in block 2, of Beebe's addition, all in the town of Hillsboro, Marion county, Kan., which mortgage was duly recorded on the 19th of November, 1885. After the maturity of this note, and on the 22d day of February, 1887, John Harms and his wife entered into a contract for the sale and conveyance to the defendant, Stuyvesant, of said lots 13, 14, and 15 in block 1, and lots 3, 5, and 6 in block 11 (which were included in said mortgage), together with certain other lots in the town of Hillsboro, not therein embraced, which agreement was evidenced by the following bond for a deed: "This instrument, made and entered into this 1st day of December, A. D. 1886, between John Harms, of the county of Marion and state of Kansas, party of the first part, and John R. Stuyvesant, of the county of New York and state of New York, party of the second part, witnesseth, that the said party of the first part hereby covenants and agrees that, if the said party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part will convey and assure to the party of the second part, or to such person as the said second party may designate, in fee simple, clear of all incumbrances whatever, by a good and sufficient warranty deed, the following lots or parcels of ground, to wit: Lots thirteen (13), fourteen (14), and fifteen (15) in block one (1), Beebe's addition to the town (now city) of Hillsboro, lots three (3), five (5), and six (6) in block eleven in the town (now city) of Hillsboro, and lots one (1), two (2), three (3), and four (4) in block one (1), Hill's second addition to the town (now city) of Hillsboro, all being in the county of Marion and state of Kansas. And the party of the second part hereby agrees and covenants to pay the said party of the first part the sum of eight



thousand two hundred and thirty-three and 75/100 dollars on the execution of this instrument, and assume the payment of a mortgage of \$3,376.25 on said lots 13, 14, and 15, block 1, in said Beebe's addition to said town of Hillsboro, and also the payment of a mortgage of \$800 on said lots 1, 2, 3, and 4 in block 1 in Hill's second addition to said town of Hillsboro; said sum of \$8,233.75 having been paid to said party of the first part on and before the execution of this instrument, the receipt whereof is hereby acknowledged by said party of the first part. Now, therefore, the said party of the first part is hereby held and firmly bound unto the said party of the second part, in the sum of \$16,467.50, upon condition that if the said party of the first part shall on or before the 1st day of March A. D. 1887, convey to said party of the second part, or to such person or persons as the said second party shall designate, by a good and sufficient warranty deed in fee simple, clear of all incumbrances whatever, except said above-mentioned mortgages, the said parcel of real estate above mentioned, then this obligation shall be void and of no effect; otherwise to be and remain in full force and virtue." As a part of the consideration for the purchase price of said premises, Stuyvesant, it will be seen, assumed and agreed to pay the said mortgage, and another mortgage for \$800. In performance of said contract, and on the 22d day of February, 1887, Harms and his wife executed their deed for lots 13, 14, and 15 to Stuyvesant, as grantee, subject to the foregoing mortgage, the payment of which the grantee assumed, and also their deed to the wife of Stuyvesant, at his request, for lots 3, 5, and 6 in block 11, the said deed containing the same recital as to the mortgage. The note being overdue and unpaid, the plaintiff brought this action against Stuyvesant, upon his said covenant with Harms, to recover the amount due. The answer of the defendant contained a general denial, and set up, as a further and second defense, the foregoing contract of sale between John Harms and himself; alleging that defendant had kept and performed all of the conditions of the contract to be performed by him, except the payment of the said mortgage for \$3,376.25. The defendant then alleged that he requested Harms to execute and deliver deeds according to the terms of said contract of sale, conveying lots 13, 14, and 15 to himself, and lots 3, 5, and 6 to his wife; and the answer further alleges that a deed of the three lots to his wife should, under the contract, have been conveyed free and clear of all incumbrances, whereas in fact it was made subject to the mortgage, the payment of which, by the deed, the grantee (his wife) was made to assume. The defendant further alleges that this failure upon the part of Harms to make the deed of the three lots to the wife of the defendant conform to the agreement escaped his attention,

because of his neglect, at the time of their delivery, closely to scrutinize the deeds which were drawn by Harms, the latter being then the confidential agent of the former. Wherefore, as it is said, Harms having failed to convey these three lots free from all incumbrances, according to the said agreement, and that being the sole consideration which moved the defendant to assume the payment of the mortgage, he is relieved of his obligation to pay the note. The plaintiff demurred to the second defense on the ground that it did not contain facts sufficient to constitute a cause of defense, and the court sustained the demurrer. Trial was had before a jury, and a verdict was given for the amount of the note, upon which judgment was rendered, from which the defendant appeals to this court. Such additional facts as will throw light upon the controversy will be mentioned in the opinion, in their appropriate place.

Robinson & Love, for appellant. Jefferson McAnelly, for appellee.

CAMPBELL, J. (after stating the facts) The specifications of errors assigned and discussed by counsel are: First, that the court improperly admitted in evidence the articles of incorporation of the plaintiff company; second, that the court erred in sustaining a demurrer to the second defense in the answer; third, that the court should have granted a nonsuit at the close of plaintiff's testimony; fourth, that the court should have directed the jury to find for the defendant on the issue raised by the traverse of the affidavit in attachment; fifth, that the court should have admitted in evidence the deed of Harms to Mrs. Stuyvesant; sixth, that the court erred in giving certain instructions.

Counsel for both parties concede that the articles of incorporation were not authenticated as required by our statute; but the appellee contends that the ruling of the court admitting the articles in evidence was not prejudicial error, because, under a general denial which goes only to the merits of an action, the plaintiff's capacity to sue is admitted, and that the incapacity of the plaintiff to sue must be taken advantage of by an affirmative defense in the answer, specifically alleging the incapacity, because such a plea is dilatory in character, and in the nature of a plea in abatement under the old practice. As to this the authorities are conflicting. *Beach, Priv. Corp.* § 869, and authorities cited; *Bank v. Tibbits*, 80 Cal. 68, 22 Pac. 66; *Insurance Co. v. Robinson*, 8 Neb. 452, 1 N. W. 124; *Dietrichs v. Railroad Co.*, 13 Neb. 43, 13 N. W. 13; *Pom. Rem. & Rem. Rights*, §§ 697, 698, 708-711; *Blass, Code Pl.* (3d Ed.) § 246 et seq. We need not decide this controverted question here, for, as the appellee contends, the evidence shows that not only did the defendant expressly agree with Harms to pay this indebtedness to the plaintiff company, but in his subse-

quent dealings with the company, in the way of paying interest to it upon said note, and in other respects, he repeatedly recognized the plaintiff, and dealt with it, as a corporation; and, besides this, he is a privy in estate with Harms, and as Harms could not, in a suit brought by the company on the note against him, be heard to deny or question the capacity of the plaintiff to sue as a corporation, the relation which the defendant sustains to Harms would likewise preclude him from raising a similar objection. *Beach, Priv. Corp.* § 866; *Stoutimore v. Clark*, 70 Mo. 471; 2 *Herm. Estop.* § 822; 2 *Mor. Corp.* (2d Ed.) §§ 774-778. So, whether we hold the defendant technically estopped to deny plaintiff's capacity to sue, or merely that his dealings with the plaintiff constitute prima facie evidence, at least, of its incorporation and its capacity to sue, the result would be the same, and the error of the court in improperly admitting in evidence the certificate of incorporation is not prejudicial error.

The second and third assignments of error may properly be considered together. They relate to the main controversy in this case, which is over the construction of the bond for the deed. If the defendant's agreement to pay the mortgage was made because of a promise by Harms which the latter never kept, then, in a suit by Harms against the defendant upon this promise, the plaintiff could not recover, for the consideration upon which the agreement rested failed. The rule should be the same when the plaintiff, for whose benefit the promise was made, brings a suit directly against the defendant; certainly in the absence of a showing that the plaintiff has acted upon the promise, and, relying upon it, has changed its condition for the worse. The vital question, therefore, is, what was the agreement of Harms in relation to the conveyance of the property described in the bond for the deed? This particular mortgage included, not only lots 13, 14, and 15, which, at the request of the defendant, were conveyed directly to him by Harms, subject to the mortgage, but it included also lots 3, 5, and 6, which the defendant requested Harms to convey to his wife. The amount of this mortgage and the mortgage of \$800 mentioned in the agreement, together with the cash payment made by the defendant to Harms, constituted the full consideration which the defendant agreed to pay Harms for all of the lots sold. This mortgage, therefore, was part of the consideration of their purchase price. The only respect wherein the defendant claims that Harms failed to perform the covenants of his bond is that in the deed of lots 3, 5, and 6 to the defendant's wife, the conveyance was made subject to the mortgage, whereas it should have been free and clear of all incumbrances. The ground upon which defendant bases his claim that three of the lots covered by this mortgage were to

be conveyed free from the mortgage lien is that, in the fourth paragraph of the agreement, it is recited that Stuyvesant "agrees to \* \* \* assume the payment of a mortgage of \$3,876.25 on said lots 13, 14, and 15, block 1." We agree with counsel for appellant that the rights of these parties should be determined, not merely from the recitals of the deeds of conveyance which were given in carrying out the terms of the agreement for sale, but that we should also look to the latter for determining the intention of the parties. We may also examine the agreement of the parties, whether expressed in one or more writings, for the purpose of ascertaining what object they had in view, and to this end may look also to the bond which Stuyvesant gave to Harms on December 1, 1886. From all these written instruments, it appears that Harms desired to sell Stuyvesant certain property. The price agreed upon was \$12,410. Of this, \$8,238.75 was paid in cash. The balance was represented by this particular mortgage and a smaller mortgage of \$800, which Stuyvesant agreed to pay. The mortgage in question here covered, not only lots 13, 14, and 15, but also lots 3, 5, and 6, and five other lots. But the construction sought to be put upon this agreement by the appellant is too narrow. The entire contract shows that what Stuyvesant really agreed to pay was the amount of this mortgage, or, rather, the note secured by this mortgage, which embraced, not only lots 13, 14, and 15, but lots 3, 5, and 6. Merely describing the mortgage which the defendant agreed to pay as covering a portion only of the lots therein subject to its lien does not give to the defendant the right to insist upon a deed of the lots not mentioned as covered by the mortgage, but actually included therein, free from its incumbrance. The agreement of Harms was to convey the property free from all liens except the mortgage mentioned, and this particular mortgage constituted a lien, as an examination of the record would show, upon the lots which the defendant directed Harms to convey to his wife, as well as a lien upon the three lots conveyed by Harms to him. This covenant Harms carried out literally, and according to its true spirit. Another part of this bond for a deed provides that, before Harms should be required to make a conveyance, Stuyvesant should "first make the payments and perform the covenants hereinafter mentioned." Stuyvesant made the cash payments and paid the \$800 mortgage. The mortgage for \$3,876.25 was due at the time this agreement was executed, but Stuyvesant has not yet paid it. His own wrong, in not paying this mortgage as he agreed, prevented Harms from deeding any of the property covered by it free from its lien; and Stuyvesant should not be allowed to profit by his own wrong merely because, in response to his request, Harms conveyed this property before he could have

been required to do so by the terms of the agreement, when Stuyvesant could at once free the lots conveyed to his wife, by paying, according to the very terms of his covenant, the mortgage which constitutes the lien.

There is another reason why this second defense is subject to the demurrer. It is a familiar principle that each defense of an answer must be complete in itself. The complaint alleges that the defendant accepted the deed from Harms to the property in controversy, placed the same upon record, and went into possession of the property under the deed. This allegation of possession is not denied in this second defense. Certainly, if Harms should have sued the defendant on his agreement to pay this mortgage, the defendant could not be heard to allege that Harms' consideration for defendant's agreement was not kept, and at the same time retain possession of the property, nor could defendant do the same in this action by the plaintiff. *Gifford v. Society*, 104 N. Y. 139, 10 N. E. 39. While the language of the agreement is that plaintiff shall pay the mortgage, the real meaning of the covenant is that plaintiff shall pay the note which the mortgage secures; for the discharge of the note is the only way to pay the mortgage,—the latter being only the incident, the note being the principal thing. In this view, the cause of action sued upon is the overdue promissory note, and that was a good ground of attachment, under our statute, when this action was instituted. But, if the cause of action should be held to be upon this written agreement, the latter is for the unconditional, absolute payment of a sum certain; and, under the doctrine that that is certain which can be made certain, this agreement binds the defendant to pay, not only a sum certain, but within a certain time and to a certain payee, so that upon it an attachment was permissible. The case of *Hurd v. McClellan*, 14 Colo. 213, 23 Pac. 792, held that an attachment bond was not a written instrument for the direct and unconditional payment of money; hence, in a suit upon such a bond, an attachment could not issue. But that is entirely different from the agreement in this case. *Schmucker v. Sibert*, 18 Kan. 104; *Drake, Attachm.* (7th Ed.) 27a.

In view of our determination as to the nature of Harms' agreement, the refusal of the court to admit in evidence the deed of Harms to the defendant's wife could not have been prejudicial error; for that deed was merely evidence of the allegation in this second defense that the conveyance of lots 3, 5, and 6 was made subject to the payment of this mortgage, and, as we have already determined, this was in strict accordance with the agreement made by Harms.

An examination of the instructions given to the jury shows that the law was given by the court substantially in accordance with the views set forth in this opinion.

There being no substantial errors committed by the court below, it follows that the judgment should be affirmed. Affirmed.

### JENET et al. v. NIMS.<sup>1</sup>

(Court of Appeals of Colorado. Nov. 11, 1895.)

CORPORATIONS—CAPITAL STOCK—CERTIFICATE OF PAYMENT—REPORT OF DEBTS—EVIDENCE OF NON-FILING—LIABILITY OF DIRECTORS—OFFICERS DE FACTO—ESTOPPEL.

1. Evidence of the clerk and county recorder that the certificate required by law to be filed by corporations was not on file in his office, and that he learned that fact from examining the index in his office, warranted a finding that the certificate was never filed.

2. The fact that, by statute, directors of a corporation named in the certificate of incorporation can hold office for one year only, does not operate to exempt directors who, on failure of the corporation to elect their successors, continued to act as directors after the year expired, from liability for debts contracted by the corporation while they were so acting, under *Mills Ann. St.* §§ 487, 491, making directors of a corporation liable for its debts in case of failure to file the certificate therein mentioned.

3. One who assumed to act as an official of a de jure corporation, and as such contracted debts for the corporation, could not, in an action on the debts, deny his official character.

Appeal from Pitkin county court.

Action by John D. Nims, individually and as assignee, against Louis Jenet and others, as directors of a corporation, on claims for wages. From a judgment for plaintiff, defendants appeal. Affirmed.

Downing, Stimson & McNair, for appellants.

REED, P. J. Appellee brought suit against appellants and others for wages earned by himself, and as assignee of claims for wages earned by others, in the publishing of a newspaper in the county of Pitkin called the *Aspen Leader*. On January 19, 1892, appellants and others became incorporated as the *Aspen Leader Publishing Company*; executed a certificate of incorporation, in which Henry Webber, John M. McMichael, Edwin Arkell, James N. Bennett, and Louis Jenet were named as directors for the first year, a copy of which was filed for record in the office of the county clerk of Pitkin county on the 20th day of July, 1892. No directors of the corporation were afterwards elected. The business of publishing was carried on for some indefinite time, and during the year 1892 appellants contracted debts for labor, the different debts for which this suit was brought amounting in the aggregate to \$1,074.30. The suit was brought against the individual directors, under sections 248, 252, Gen. St. (sections 487, 491, *Mills' Ann. St.*). It is alleged in the complaint that the corporation failed, neglected, and refused to file in the office of the clerk and recorder of Pitkin county, within 60 days after the 1st

<sup>1</sup> Rehearing denied January 13, 1896.

of January, 1893, the annual report required by law, stating the amount of its capital, the amount actually paid in, and the amount of its existing debts, and that no such report had been filed since; had also failed to file, as required by law, a certificate that the capital stock of the company had been paid in, etc.; that all the debts for which the action was brought were contracted in the year 1893,—the year preceding the failure. After interposing a demurrer, which was overruled, appellants answered, denying generally all the allegations of the complaint; also alleging as a defense the nonjoinder of one Henry Webber, one of the directors, at the time the debts were contracted. A trial was had, and finding and judgment for the plaintiff for the sum of \$1,074.30, from which an appeal was prosecuted to this court.

The evidence established the fact that corporate business was carried on until some time subsequent to January, 1894, and appellants continued through the year 1893 to act as directors, and the business was carried on in the corporate name. The indebtedness to the respective parties, and the amounts, were not contested by the defendants. Proof that the certificates required by law had never been filed was very meager; consisted of the evidence of the county clerk and recorder that no such papers were on file, and that he learned the fact from examining the index in his office. Slight as it was, it was sufficient, *prima facie*, to put the corporation or defendants to proof that such papers had been filed. No such claim or effort was made. So the finding of the court that they had not been filed was warranted. Such facts having been established, the statute fixes the liability of the parties, and the judgment properly followed.

It is contended, as the statutes in regard to corporations provide that the directors named in the certificate can only hold office for one year, that, failing to elect, it lost its corporate character, and, although remaining in as directors, the individuals were not officers in fact, and could not be held. This contention cannot prevail. Assuming and continuing to act as the directors of a corporation, and contracting debts as a corporation, the parties cannot avail themselves of their own dereliction, in matters known only to themselves, to defeat the payment of those debts. It has long been well-settled law that parties acting in a corporate capacity might, as to outsiders, be a corporation *de facto*, when not one *de jure*. Authorities upon the proposition are abundant, and citation unnecessary. Again, having assumed to act as the officers of a *de jure* corporation, and as such contracted the debts in question, they are estopped to deny such official character. *Thomp. Liab. Off.* p. 471, § 35, notes; *Tayl. Corp.* § 145 et seq.; *Duggan v. Investment Co.*, 11 Colo. 113, 17 Pac. 105; *Bates v. Willson*, 14 Colo. 140, 24 Pac. 99; *Baker v. Neff*, 73 Ind. 68; *Close v. Glenwood Co.*, 107

U. S. 466, 2 Sup. Ct. 267; *Hasenritter v. Kirchhoffer*, 79 Mo. 239; *Swartwout v. Railroad Co.*, 24 Mich. 889.

This disposes of the principal assignments of error,—that the court erred in refusing a nonsuit, and erred in finding the issues in favor of appellee. There are several other supposed errors assigned, mostly technical, in regard to the admission of evidence, which we do not find it necessary to review, as, in view of what has been said, their determination either way could not affect the result. The judgment of the county court must be affirmed. Affirmed.

#### MELDRUM et al. v. HENDERSON.

(Court of Appeals of Colorado. Nov. 11, 1895.)

BANKS AND BANKING—CHECK—COLLECTION—INSOLVENCY—TRUST FUND—DRAFT—ASSIGNMENT—VALIDITY—PARTIES.

1. In an action on a check payable to plaintiffs as agents of the government, against the assignee in insolvency of the bank, to which one of the payees, for himself and as agent of his copayee, indorsed the note for collection by indorsement showing the official character of the payees, to recover the proceeds thereof as a trust fund in the hands of the assignee, there was evidence that the payee who deposited the check told the president of the bank that it was a check given plaintiffs as public officers, in payment for public lands, and that he would not call for the amount thereof till collected; that the depositor subsequently included the check on a deposit slip to be credited to his personal account, and that it was so credited; that on the date of deposit he drew on his account to an amount that left a balance less than the amount of the check; and that he continued to draw on such balance, and did not make the amount good until several days later. *Held*, that the identity of the check was destroyed, so as to preclude plaintiffs' recovery.

2. A draft is not an equitable assignment of the fund on which it is drawn until accepted by the drawee.

3. A draft which on its face notifies the drawee that the drawer has assigned in insolvency cannot operate as an assignment of the fund on which it is drawn, though accepted, since the drawee would not be justified in honoring it.

4. Where one of the payees of a check payable to two persons as government officers indorses it for both, and deposits it to his individual account in a bank, with the consent of his copayee, the copayee is not a proper party to an action against an assignee in insolvency of the bank to recover the proceeds of the check.

#### On Petition for Rehearing.

Where a check payable to two persons as government officers is indorsed by one of them for both, by indorsement showing their official character, and deposited in a bank to be credited to his individual account, and thereby becomes mingled with the funds of the bank, the fact that the check was intrusted to them as officers cannot be urged by the payees to charge the proceeds as a trust fund in the hands of an assignee in insolvency of the bank, in an action to which the government is not a party, and in which the authority of the depositing payee to act for his copayee is not denied.

Appeal from district court, Logan county.

Action by N. H. Meldrum and H. B. Tedmon against George A. Henderson, assignee, to recover on a draft deposited with defend-

ant's assignor for collection. From a judgment for defendant, plaintiffs appeal. Affirmed.

G. Q. Richmond and C. L. Allen, for appellants. S. A. Burke, for appellee.

THOMSON, J. This suit was brought by the appellants to recover from the appellee, as assignee of M. H. Smith, a banker at Sterling, Colo., the unpaid balance of a draft alleged to have been deposited with Smith for collection, and collected by him before making the assignment. A trial of the issues made by the pleadings resulted in a judgment for the defendant, from which the plaintiffs appealed.

On, and for a considerable time before, the 17th day of June, 1893, the plaintiff Tedmon was register, and the plaintiff Meldrum receiver, of the United States land office at Sterling. On that day the Union Pacific Railway Company delivered to the plaintiffs its check for \$2,614, payable to their order, upon the Omaha National Bank of Omaha, Neb., for funds due them, as officers, upon a list of lands selected by the railway company under a grant from the government of the United States. The check was payable to them in their official capacity, and was kept in their office until the 1st day of July following. On the latter day, the check was, as the plaintiffs allege, delivered to Smith for collection by Meldrum, who indorsed it: "H. E. Tedmon, Register, by N. H. Meldrum, N. H. Meldrum, Receiver." Instead, however, of forwarding it for collection as the agent of the plaintiffs, Smith credited the money it represented to the personal account of Meldrum on the books of the bank, and sent the draft to the Denver National Bank, at Denver, Colo., receiving a notice two days later from the latter bank that it had placed the amount of the draft to the credit of Smith's bank. On the 19th day of July, Smith made an assignment of all his property for the benefit of his creditors to John M. Henderson. The latter immediately resigned, and upon the next day the defendant was duly appointed as his substitute. About 8 o'clock on the morning of the 19th, and about 30 minutes, as Smith says, before he executed the deed of assignment, Meldrum, who was present in the bank at Smith's request, drew his check upon Smith's bank (known as the "Bank of Sterling") for the entire amount of his balance in the bank, and received from Smith \$1,000 in cash, and a draft on Kountze Bros., bankers, New York City, for \$1,943.71. The payment of this draft was stopped by the defendant as assignee, and it was returned unpaid.

The principal question discussed by counsel relates to the right of the owner of a trust fund to follow it into an insolvent estate, and enforce full payment from the assets. We have no disagreement with counsel upon their general statements of the law. If the check was given to Smith by the plaintiffs for col-

lection only, if he collected it, and if the money realized from it went with his other property into the possession of his assignee, the right of the plaintiffs to reclaim it is unquestionable; and the right would not be in the least affected by any unauthorized act of Smith in destroying its identity by intermingling it with his own funds. *Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986. The difficulty, however, in this case does not arise out of any law which may be applicable, but out of the facts. To warrant us in reversing this judgment, it must clearly appear that the draft was delivered to Smith, to be by him collected for the plaintiffs, thus constituting him their agent for that purpose, and that the money was collected by him, and passed into the hands of his assignee. These two conditions must concur before the estate is chargeable with the fund. *McClure v. Commissioners*, 19 Colo. 122, 34 Pac. 763; *Holden v. Piper* (Colo. App.) 37 Pac. 34.

An examination of the evidence upon the subject of the deposit of the check will be first in order. Meldrum and Smith both testified that it was deposited with Smith for collection. Each related a conversation had between them about the time of the deposit, in which Meldrum said to Smith that the check was sent to pay the expenses of the balance of the selection of the Union Pacific Railway Company in the district; that it was quite a large sum of money; and that he would not call on Smith for the cash until the check was collected. No other conversation upon the subject was given. We have no reason to doubt that it occurred as stated, or that both parties, properly or improperly, interpreted it as meaning that the draft should be received by Smith to be collected by him for Meldrum. But there was in evidence a deposit slip of which the following is a copy:

Deposited in the Bank of Sterling, by N. H. Meldrum.

Sterling, Colo., July 1st, 1893.

Please list each check separately.

	Dollars.	Cents.
Currency .....	\$	45 00
Gold .....		
Silver .....		
Checks .....	2,614	00
	50	95
	16	00
	16	00
	16	00
	16	00
	15	00
	20	00
	8	20
	8	25
	8	50
	7	00
	7	00
	5	00
	<b>\$2,852</b>	<b>90</b>

This is the form of slip filled out by a customer of a bank upon making a general deposit, and from which it makes the entries in its books. It was shown, and is not disputed, that the slip in evidence was

filled up in the handwriting of Mr. Meldrum. The slip shows that, on July 1st, Meldrum deposited, for the purpose of being credited to his personal account, a sum aggregating \$2,852.90, one of the items of which was the check in question. It is not claimed that it was intended that any other check or any other item embraced in the sum total should be deposited specially, or that it was not proper to credit any of them, except the Union Pacific check, to Meldrum's general account; and no distinction was made in the slip between one and another. The identity of each was lost in the general aggregate. The slip amounted to a written direction to the bank to credit Meldrum's account with the sum of \$2,852.90, and accordingly this was what the bank did. The amount was immediately thrown among the other funds of the bank, and was thereafter undistinguishable from them, not by the unauthorized act of the bank, but in consequence of the act of Meldrum himself. Meldrum and Smith may both have intended that this particular check should be taken upon some condition, or subject to some limitation, not applicable to the other sums embraced in the slip; but their intention was not carried into effect, and it is with their acts, and not their naked intentions, that we are at present concerned.

Pursuing our investigation a little further, we find strong reasons for concluding that whatever might have been the intentions of Meldrum and Smith in relation to the check prior to its deposit, at the time Meldrum made the deposit slip, and actually delivered the check to the bank, it was understood that it should go into his personal account. The books of the bank, showing the dealings between it and Meldrum for some time before and after the 1st of July, were introduced by the defendant. They show a running account of deposits and checks during the entire time. On the evening of June 30th, Meldrum's balance was \$625.93. On July 1st he made the deposit of which we have spoken. It was the only deposit may by him that day. Adding together his balance and the amount of that deposit, we find that he had then in the bank to his credit \$3,478.88. On that day he drew out of the bank upon his check \$1,066.67, leaving to his credit only \$2,412.21, which was \$201.79 less than the amount of the Union Pacific check. The natural, if not unavoidable, conclusion is that, in making a check the payment of which would necessarily impair the fund in question, he regarded it as being on deposit subject to withdrawal by check, and therefore belonging to his general account; and Smith, in paying his check, must also have so regarded it. He continued checking against his balance without further deposit until July 11th, but this fund was not made good until July 15th. On July 19th he made a check

payable to himself for his entire balance then in bank, amounting to \$2,943.71, and received, as has been stated, \$1,000 in cash, and a draft on Kountze Bros. for \$1,943.71. The entire history of the money represented by the Union Pacific check, as written by Mr. Meldrum and Mr. Smith, is the history of money placed by Mr. Meldrum to his individual credit in Smith's bank, and withdrawn by him from time to time at his pleasure; and the claim that there was anything more sacred about it than about his other moneys, with which he intermingled and confounded it, is unsubstantial.

As to whether the money realized from the check ever went into the hands of the assignee the evidence is unsatisfactory and inconclusive; but it is unnecessary to give it particular notice, because we are unable to say that the decision of the trial court upon the character of the deposit made by Meldrum was not right. But there is another theory upon which the plaintiffs claim a right to prevail in this suit; and it is that the bill of exchange drawn by Smith upon Kountze Bros., payable to Meldrum, was an equitable assignment to him of money of the drawer in the hands of the drawees. The making of a draft does not *ipso facto* operate as an assignment. Before this draft was presented, the assignee notified the drawees of the general assignment made by Smith, and directed them not to pay the draft. The draft could not operate as an assignment of the money in Kountze Bros.' hands until its presentation to them, and not then unless they accepted it. Without acceptance, Meldrum could have maintained no action against them for the money; and the reason why he could not do so is because the mere act of making the draft did not transfer title in the money to him, and, until it should operate to invest him with ownership of the money, it was no assignment. The failure to realize the money upon the draft left him a creditor of Smith on account of the unpaid balance due him; and as a creditor his position was no better and no worse than that of any other general creditor. See *Grammel v. Carmer*, 55 Mich. 201, 21 N. W. 418; *Ray v. Hiller*, 11 Colo. 445, 18 Pac. 622.

But there is a peculiarity about this draft which we cannot avoid noticing. The following is a copy of the paper:

"\$1,943. Bank of Sterling. No. 7821.  
"M. H. Smith.

"(Drawees are advised that M. H. Smith has assigned.)

"Sterling, Colo., Jul. 18, 1893.

"Pay to the order of N. H. Meldrum \$1,984.71 (nineteen hundred forty-three and 71-100) dollars.

M. H. Smith,

"(King) Cashier.

"To Kountze Bros., New York."

It appears from the face of this document that the assignment had been made before the bill was drawn. If so, Smith had no

right to draw it. But, however this may be, it advised the drawees that the fund was no longer the property of Smith, and that the draft was therefore worthless. With that notification staring them in the face, they would not have been justified in honoring the draft; and, with that introduction, the bill did not purport to be drawn against any fund, and therefore could not operate as an assignment of anything. Whatever indebtedness there is, is owing to Meldrum alone, and not to Tedmon and Meldrum; and Tedmon is not a proper party to any proceeding for its allowance or recovery. The judgment must be affirmed. Affirmed.

On Rehearing.

(Jan. 13, 1896.)

**PER CURIAM.** This application for a rehearing is based upon three grounds: First. That the Union Pacific check represented money belonging to the United States; that it was intrusted to Meldrum and Tedmon as United States officers; and that, therefore, Meldrum was without authority to deposit the fund to his own credit. Second. That the words, "Drawees are advised that M. H. Smith has assigned," were placed upon the draft by Kountze Bros., when it was presented for payment, in consequence of a telegram from the assignee, previously received, notifying them of the assignment. And, third, that as the original check was payable to Tedmon and Meldrum as register and receiver, and as both register and receiver were alike responsible to the government for the money, they were equally interested in the suit, and it was therefore error to hold that Tedmon was not a proper party.

1. The plaintiffs are hardly in a position to say that the fund they seek to recover belonged to the United States. Whatever may have been the fact in that regard, Meldrum deposited the fund as his own money. By his own direction it was placed to his individual credit, and went to swell the apparent assets of the bank. He mingled it with his other funds in such manner that its identity was lost, and drew against the consolidated account from time to time for his own purposes. If the fund was ever impressed with a trust, its trust character was destroyed by the act of Meldrum in so mingling it with his own money that, as a distinct fund, it could no longer be traced. Tedmon, by his silence at least, acquiesced in what Meldrum did. He is a party to this proceeding, and, with full knowledge of all the facts, makes no claim that Meldrum acted for him without his authority. Besides, the United States is not a party to this proceeding. It is not complaining, and its rights cannot be adjudicated in this action. Meldrum treated the money as his own; Tedmon does not gain-say his acts; and, as against the creditors of the bank, the claim of the plaintiffs that the money was not theirs cannot be considered.

2. It may be true that the objectionable words which appear on the face of the draft were placed there after its execution, as counsel state. We are referred to no evidence upon the subject, and we are unable to find any. The following is from the record:

"Thereupon plaintiffs offered in evidence draft in question, marked 'Exhibit A,' which is in the words and figures following, to wit: "**\$1,943.** Bank of Sterling. No. 7821. "**M. H. Smith.**

"(Drawees are advised that M. H. Smith has assigned.)

"Sterling, Colo., Jul. 18, 1893.

"Pay to the order of N. H. Meldrum \$1,943.71 (nineteen hundred forty-three and 71-100 dollars. M. H. Smith,

"(King) Cashier.

"To Kountze Bros., New York."

The foregoing is an exact representation of the draft as it appears in the printed abstract. In the transcript the words of advice are upon a printed slip, pasted to the draft. But it would seem from the quotation, that the paper, with all it contained, was given in evidence as the draft which Meldrum received from Smith. Still, it may be that counsel's statement is correct; but, conceding that it is, our decision would be the same. The draft was not an assignment of money in the hands of Kountze Bros., unless they accepted it. This they never did.

3. Whatever obligation Meldrum may have been under to account to Tedmon for the money, or any part of it, as between Meldrum and the bank, in virtue of the deposit and credit to Meldrum's individual account, the money belonged to Meldrum. Tedmon was not known to the bank in the transaction. The draft upon which this suit was brought was the balance due Meldrum, not upon the Union Pacific check, but upon his entire account, in a considerable portion of which Tedmon had and claimed no interest. Even if Tedmon had an interest in the original check of the railroad company, he suffered Meldrum to use it as his own, and this draft, which embraced all of Meldrum's money then in bank, does not represent it. Mr. Tedmon's remedy, if he has any, is against Meldrum.

The petition for rehearing will be denied.

CUNNINGHAM v. BOSTWICK et al.<sup>1</sup>

(Court of Appeals of Colorado. Dec. 9, 1895.)

SPECIAL CONSTABLE—ILLEGAL SERVICE—WAIVER OF OBJECTION—VARIANCE—HARMLESS ERROR.

1. Under Mills' Ann. St. 1891, § 2794, providing for the appointment of a special constable "whenever no qualified constable can conveniently be found in the township," a justice has no authority to appoint such special officer unless some legal right is liable to be jeopardized before a regular constable can be found.

2. Where, after a motion to quash the sum-

<sup>1</sup> Rehearing denied January 13, 1896.

mons was denied, defendant moved for a change of venue to another justice, answered to the merits, and afterwards appealed to the county court, he will be deemed to have waived the illegality of service of summons; and such illegality cannot be reviewed by the county court, also, because the act of 1885, p. 230, § 19, relative to forcible entry and detainer, provides that, in all appeal cases from a justice, the appellate court shall try the case *de novo*, and no exception shall be allowed because of the proceedings taken before a justice having jurisdiction of the subject-matter.

3. An alleged variance between the pleading and proof will not be considered on appeal, where no motion for judgment or objection to the introduction of testimony was made on account of the variance.

4. Unless it appears that the error committed worked manifest injustice, it will not be regarded as sufficient to overturn the judgment.

Appeal from Arapahoe county court.

Action in forcible entry and detainer by Joseph W. Bostwick and another against Henry P. Cunningham, begun in the justice court. There was a judgment for plaintiffs, and defendant appealed to the county court, where the judgment of the justice was affirmed. Defendant appeals. Affirmed.

Henry B. O'Reilly, for appellant. Teller, Orahoad & Morgan, for appellees.

BISSELL, J. This proceeding in forcible entry and detainer was begun by Bostwick and Best to recover possession of a section of land in Arapahoe county. The petition was filed with Morse, as justice, about the 20th of January, 1894. The justice issued a summons, and delivered it to one Duffield, who returned it "Served," signing his service as special constable. No appointment was indorsed on the summons, nor was Duffield otherwise commissioned as an officer. On the 27th, Cunningham appeared, and moved to quash the summons and abate the suit because it was not served on him three days before the return day, and because it was not served by one duly or at all authorized to serve such process. The motion was denied, and the case continued for service. Another summons was issued to one Tait; the writ bearing the indorsement "that there was no qualified constable who could conveniently be found in the township." This summons was served on Cunningham, who appeared and filed a motion to quash because the indorsement was not true. Cunningham substantiated his statement by an affidavit which undoubtedly showed there were plenty of constables, within convenient distance of the office of the justice, who could readily have been found to serve the writ. The motion was denied, whereupon proceedings were begun in the district court to prohibit the justice from proceeding further with the case. When this matter was disposed of adversely to Cunningham, he moved to change the venue, and the case was sent to Pickens, justice, for trial. When it came up before him the defendant filed an answer denying generally the allegations of the petition, and set up an agreement of a lease for five years,

and a transfer of the possessory interest of the petitioners. The case was tried, and went against Cunningham, who took an appeal to the county court, where the cause was again tried, and resulted in a judgment in favor of the petitioners, from which the defendant appealed to this court.

The appellant practically presents but two propositions for our consideration. Since each of these must be resolved against him, the result will be the affirmance of the judgment. The principal point respects the attempted delegation of authority to a special constable to serve the process. We accept counsel's contention respecting the authority of justices in this state, and, generally speaking, the limitations which he would put on their power to appoint special officers. The practice of appointing such special officers is, as all lawyers and judges know, a crying and a growing evil. It comes partly from the loose phraseology of the statute,<sup>2</sup> and partly from the desire of litigants to have particular persons appointed to serve writs and to execute process. With the policy which led to the adoption of the act which gave a justice the power to appoint a suitable person to act as constable in a case where there was a probability that a party charged with a crime might escape, or a likelihood that goods would be removed, before a regular officer could be found to serve the process, we have nothing to do. In and of itself, the statute doubtless frequently subserves a useful purpose; and, if the authority which it confers was always wisely and discreetly executed, very little harm would come from it. Unfortunately, there is added to this general grant of authority, by a disjunctive conjunction, a clause which seemingly enlarges the authority conferred, and permits its exercise apparently under other circumstances, and when neither of the contingencies suggested by the earlier clauses may exist. The clause is, "whenever no qualified constable can conveniently be found in the township." It is quite impossible to determine whether the legislature had other conditions in mind than those expressed in the other clauses, nor whether the lawmaking power intended to grant generally to justices the right to appoint special constables. Whatever may have been their purpose, it is, of course, impossible to attach the limitation to the last clause that a special constable can only be appointed when a criminal is about to escape, or when personal property is liable to be removed, before a regular officer can be found to execute the process. There was an evident intention on the part of the legislature to confer the power in still other classes of cases than those first mentioned. The language, however, is not broad enough to give the justice the right to appoint a special constable under any and all circumstances, as he may see fit or proper. The latter clause

<sup>2</sup> Mills' Ann. St. 1891, § 2794.



cannot be taken as a grant of general authority to appoint constables to act in all cases. But for its existence, we should undoubtedly agree with the authorities in other states, where the justice is held to have no power to appoint a special constable to serve a summons, because it is not within the possibilities that a regular constable cannot be found to serve the writ within any necessary or indispensable time. But the words of limitation, to wit, "conveniently found," must be construed to have a restricting significance. In other words, the justice may not, of his own motion, appoint a special officer, nor may he do it on request of a litigant, unless there exists a legal necessity for the appointment. In other words, it must be made to appear to the justice, before he is authorized to appoint a special constable, that some legal right is liable to be jeopardized, or some substantial detriment or harm come to a litigant. If the phrase may be so applied, the convenience must be a legal one. This is manifest from the general policy of the law. There are statutes which provide for the election of constables, specify their duties, define their powers, and provide for the execution of bonds which shall secure the faithful discharge of the duties which the law imposes on the officer. This policy has a strong and marked significance in this connection. The defendant has a right to insist that the person deputed to serve the writ shall be a legally elected officer, who shall discharge his duties under his oath of office, and under the restrictions of a liability on his bond if he oppressively or wrongfully exercises his powers. A special constable is a totally irresponsible person. If he oppressively execute the power given him, the defendant is remediless, and he can get no redress for the abuse. These considerations show that the justice must see that some injury will come to the litigant if he waits for a regularly appointed officer. We agree with counsel in his propositions respecting the original inception of this case. The process ought to have been quashed and held insufficient, and the service bad. There were several regularly elected or appointed constables within easy reach of the court, and the justice had no right to make the appointment of a special officer, either from motives of economy, the request of the litigant, or for any other reason than to prevent possible harm to the plaintiffs.

The question, however, is not saved, and, though we assent to the position, it is not available to reverse the case. The appellant did not stand on his motion and let the proceedings go on, but he took a great many steps which, under the various authorities in this state, bar him from now insisting on the illegality of the service as a defense to the judgment. The statute which regulates these proceedings contains a broad, sweeping clause, which adds much force to the authorities which will be hereafter cited, and the posi-

tion taken with reference to the force and effect to be given to the defendant's acts. The act of 1885, respecting forcible entry and detainer, by section 19, p. 230, enacts generally that in all appeal cases which have originated before a justice the appellate court shall try the case de novo, and that no exception shall be allowed because of the proceedings taken before the justice, where he has jurisdiction of the subject-matter. That this justice, according to the present record, had jurisdiction of the subject-matter, goes without saying. The land was situate in Arapahoe county, and both Morse and Pickens were justices in that county, and the petitioner had the right to initiate the proceedings before either one of them. What the defendant did also bars him from raising the question. He did not rest on his motion to quash, but first filed a motion to change the venue, and took the case before another justice, which in many instances has been held to be a general appearance, which will waive a defect in the service. Further, when the case got before Pickens, he filed an answer setting up the defenses which have been stated. On this issue the cause was tried, and judgment followed. Not content with this proceeding, he took an appeal to the county court, came in generally, and tried the case on its merits in a court which had jurisdiction of the subject-matter, and which acquired jurisdiction of the person of the defendant by virtue of this general and voluntary appearance. These circumstances all conspire to deprive him of the right to raise the question on which he now insists. *Railway Co. v. Caldwell*, 11 Colo. 545, 19 Pac. 542; *Milling Co. v. Gurley*, 17 Colo. 199, 29 Pac. 668; *Burkhardt v. Haycox*, 19 Colo. 339, 35 Pac. 730; *Manufacturing Co. v. Marsh*, 20 Colo. 22, 36 Pac. 799. There is nothing in the case of *Cort v. Newman*, 40 Pac. 242, decided in this court at the April term, which at all conflicts with this general doctrine. In that case it was stipulated by counsel that the person who took the goods in execution of the process had not been duly or otherwise appointed as special constable, with authority to serve. It was accordingly held that the acts of the alleged special officer were trespasses, for which the plaintiff might recover. It did not transpire that the defendant had appeared generally in the action, whereby the justice acquired jurisdiction of his person as well as jurisdiction of the subject-matter, and there was no question of any waiver on the part of the defendant of the irregularities in the execution of the process. Whatever may have been the facts respecting the ultimate levy of the execution on the goods, there was nothing in the case which tended to show that the defendant had in any way so waived his right as to deprive him of his cause of action against the trespasser who took the goods. The case lacks all of the features and facts which both permit and compel us to apply the rule which has been

settled by so many cases in the supreme court. We have thus disposed of appellant's principal question.

There is another matter on which an argument is based, which is without sufficient foundation. The petition alleged a lease made on or about the 20th of December for the term of one year then next ensuing. The proof showed a leasing near the last of December, and for one year from the 1st of January, according to the several judgments which were entered against the appellant. Of course, he insists if the lease was to commence on the 1st of January, and not on the 20th of December, there was a variance between the proof and the plea. There are two answers to the position. The findings are all against him, and with the appellees. It is doubtful whether there was any variance between the pleading and the proof, but, if it is conceded the allegata and probata do not agree, whether such a variance will ever be fatal when there has been a hearing on the merits, and prejudice cannot be demonstrated, is open to question. If we should admit the general proposition, the appellant is in no condition to urge error. He made no motion for judgment because of the variance, nor did he object to the introduction of any testimony because it did not correspond with the pleading. Not having saved the question in any wise, he cannot be heard in this court to complain of the judgment.

There are some other minor questions suggested in the brief of counsel, but they are not of the sort which, if found in his favor, would require us to reverse the judgment. The tendency of the appellate courts of this state is not to restrict, but rather to extend, the application of the statute which forbids us to reverse a judgment for any errors which do not affect the substantial rights of the parties. We recognize the force of the enactment, and, unless we can see that the error which has been committed has worked manifest injustice, we do not regard it as sufficient to overturn the judgment. For this reason we do not generally regard assignments of error based on such matters of enough importance to require extended analysis or discussion. Perceiving no error in the record, and accepting the conclusions of the trial court on the matters of fact as correct, we conclude that justice has been done between the parties, which permits us to affirm the judgment. Affirmed.

#### KNOWLES v. LEGGETT.<sup>1</sup>

(Court of Appeals of Colorado. Dec. 9, 1895.)  
DAMAGES—EVIDENCE—SUFFICIENCY—CROSS COMPLAINT.

1. In an action for breach of an agreement by a landlord to furnish the tenant water for irrigation, whereby the tenant's crops were injured, evidence merely as to the amount of

crops which could have been raised if the proper amount of water had been furnished, together with evidence of the market value of such crops, is insufficient as a basis for recovery, without proof of the cost of raising and marketing the crops.

2. In an action for breach of contract by a landlord to furnish the tenant water for irrigation, whereby the tenant's crops were injured, the landlord cannot by cross complaint bring in as a party a corporation which had agreed to furnish him with water, though at the time the lease was executed the tenant knew that the water was to be supplied by such corporation.

Appeal from district court, Arapahoe county.

Action by Orville J. Leggett against Joseph O. Knowles for breach of contract. From a judgment for plaintiff, defendant appeals. Reversed.

Wells, McNeal & Taylor, for appellant.  
Fred L. Shaw, for appellee.

BISSELL, J. Knowles being then the owner of what is called the "Ike Ranch," on the north side of Platte river, in Arapahoe county, on the 2d of November, 1885, leased it to Leggett, the appellee, for a term of years, at an agreed rental, covenanting on his part "to furnish him with sixty inches of water in the irrigating ditch on said premises." Leggett was to keep the ditch in repair, seed the land with clover and timothy, and leave it with a good stand and in good condition at the end of his term. There were sundry other conditions in the lease, which are unimportant. Leggett occupied the premises for some years, but did not pay the whole of the agreed yearly rental, basing his refusal on Knowles' failure to furnish water according to the terms of the covenant. He brought this action to recover his damages, set up the contract in so far as it related to the water, averred the injuries, and prayed judgment accordingly. The owner defended, and relied partly on performance, partly on Leggett's failure to perform the contract on his part in the preparation and care of the land, and alleged a release on Leggett's part of the covenant to supply the water. He set up by way of counterclaim the notes for the unpaid rent, and prayed the appropriate judgment. He likewise filed a cross complaint against Leggett and the Platte River Mill & Ditch Company, wherein he set up the obligation of the company to furnish him water as a shareholder in the corporation, stating the obligation of the company to furnish the water with which he had agreed to supply Leggett. In this cross complaint he averred Leggett's knowledge of the source of supply when the lease was executed, and Leggett's reliance on his right to procure water from the company. The purpose of this cross complaint was to compel Leggett to litigate with the ditch company, and recover his damages from them. Leggett proved all the general facts set out in his complaint which were not admitted in the answer, and made an attempt to establish his

<sup>1</sup> Rehearing denied January 13, 1896.

injury. The chief difficulty springs from his neglect or failure to prove what was essential to entitle him to judgment. It is quite apparent that proof of the lease and of the failure to supply water according to the agreement would not suffice. Of necessity he must prove some injury. To meet this burden, he offered evidence which tended to show the amount of crop which could have been grown on the land had the water been furnished, and the value of that crop in the market at the time. He went no further than to show the probable total crop and its market value. The other essential items of the cost of raising and harvesting it, transporting it to market, and all other expenses ordinarily incident to raising and harvesting timothy and clover, were left unproven. Thus the only basis furnished the jury was the tonnage and the market value. The trial resulted in a judgment in his favor for \$715.

The appellant presents several questions for our consideration, some of which must be disposed of in view of the succeeding trial, though they are not of themselves sufficient to reverse the case. The appellant insists the court erred in striking out his cross complaint. We cannot accede to this position. Whatever may have been Knowles' rights as between him and the ditch company as corporation and shareholder respectively, the record fails to disclose anything which renders it necessary for Leggett to litigate that question, or to take part in that dispute. There was no privity between Leggett and the ditch company, and, whatever may have been his knowledge as to the source of the water supply, he was compelled to look no further than to the contracting party for his damages. Leggett's contract was with Knowles. The breach being established, a cause of action arose; but it did not give Leggett a right to sue the company, nor was he compelled, under the circumstances, to look to the corporation for redress. If he had brought suit against the company, it would have had a perfect defense in the denial of any contract between them. Under these circumstances it is not easy to see how the company can be brought into the present litigation, or Leggett be compelled to have his issue incumbered by the trial of the controversy between the company and one of its shareholders. Whether, under the existing circumstances, Knowles could have given the corporation notice of the suit, and required them to appear and defend, so as to bind the company by the amount of any judgment which Leggett might recover, is a question which need not be considered, anticipated, or determined. Leggett could not be forced to try the question with the ditch company, or have his suit embarrassed by the controversy between it and Knowles. The determination of Knowles' rights against the ditch company was in no manner essential to the settlement of Leggett's claim, and the provision of the Code which permits the intro-

duction of a third person into a suit where there cannot be otherwise a complete determination of the controversy has no application whatever to a case of this description. There is no allegation in the answer, nor, for that matter, in the cross complaint, to the effect that Leggett agreed to look to the company for his water. Whatever knowledge he may have had respecting the source of the supply cannot affect the construction of the contract, nor can it be made operative as a limitation on the agreement. The court was right in striking out the cross complaint. Eliminating this pleading from our further consideration, the position that the contract is to be construed with reference to Knowles' relation to the company is easily disposed of. The matter is entirely settled by a reference to the answer, which only sets up a subsequent agreement on Leggett's part to look to the ditch company for his water, to take 30 inches in place of 60, and to release Knowles from any liability under his contract. This was the only issue respecting this part of the dispute which Knowles tendered. This is disposed of by the very simple statement that there was no evidence tending to show the release, and the other matters went to the jury. The court was entirely right in instructing the jury to dismiss from their consideration all the evidence on that subject. It was wholly insufficient to establish the release. The defendant undoubtedly offered testimony tending to show Leggett's failure to properly seed the land or care for his crop, but this evidence went to the jury under proper instructions, and there is nothing in the record which would lead us on this ground to overturn the judgment.

The appellant objects to certain instructions, which are possibly open to criticism. The balance of the charge is presented neither in the abstracts nor in the briefs, and we feel quite excused to make any extended reference to the charge either by way of analysis or approval. It is, of course, quite impossible to determine whether there is error in a given instruction without the entire charge before us, that we may therefrom determine whether what is complained of has been modified, or is in any wise changed by subsequent instructions which were properly given and are unobjectionable. We have taken the trouble, however, to examine the record, and find that the court directly instructed the jury that, if the water was furnished for any of the four years specified, the defendant could recover of the plaintiff on the note or notes which became due in the year or years for which the water was furnished. Taken in connection with those complained of, it thoroughly informed the jury with reference to their duty in the premises, and the two taken together seem to be entirely unobjectionable.

The only remaining error respects the damages. There is probably no class of cases wherein it is more difficult to furnish a suffi-

cient basis for the jury's judgment. The matter has very recently received consideration in this court, and the rules have been quite clearly and fully expressed in two opinions. *Water Co. v. Hartman*, 38 Pac. 62; *Reservoir Co. v. Hamlin*, 40 Pac. 582. The learned writer very accurately stated the different methods which might be adopted. It was, of course, in those cases conceded that no one method need be adopted to the exclusion of the others, but that either one or all might be resorted to, as the necessities and circumstances of the particular case might require; the sole thing aimed at being to give the injured party compensation for his loss. It is impossible to understand how the jury arrived at their verdict. The lease was for 120 acres of land, which was to be sowed in timothy and clover. The letting covered a period of years, and was on a rental, speaking generally, of about \$600 a year. It had apparently run for about five years at the time of the trial, whereby rent to the extent of from \$2,400 to \$3,000 had accrued. The water was conceded to have been furnished for a part of the period, and some crops were raised. Just how the jury could wipe out the rent account, give the tenant damages over, without some data on which to show that the tenant had been damaged to this extent, is impossible to apprehend. Manifestly the jury did not take the plaintiff's statement as being literally true, for it would show him entitled to recover for the loss of upwards of 2,000 tons of timothy and clover, of which the market value was somewhere from \$15 to \$20 per ton. These difficulties are simply suggested to show the danger of submitting matters of this description to a jury without offering some intelligible basis on which they may act. The tenant could not recover for the value of the total crop which might have been raised, for this result would not take into account the cost of the seed, the labor of planting it, caring for it, or harvesting and marketing it. All of these elements must be considered in order to determine what is the real and true measure of the tenant's damages. The evidence does not make out a case in which the jury could find a verdict based on the probable amount of the crop which might have been raised in any one year, and the probable loss of it by reason of the want of water. Viewed from this standpoint, the plaintiff failed to show how many acres he seeded, how much seed he put into an acre, what the yield from that amount of seed might have been, whether it started and failed to come to maturity for the want of irrigation, and in general wholly came short of establishing such a performance on his part as to permit him to charge the landlord with the resulting failure. These things are simply suggestions of the difficulties which beset the case as the plaintiff made it. The difficulties, perhaps, may be wholly overcome on the succeeding trial, wherein, if the plaintiff fur-

nishes the data, and the court properly instructs the jury with respect to his right of recovery, any verdict which he may obtain may be upheld. The proof falls so far short of the legal requisites, whatever method of computing damages may be resorted to, that the court does not feel justified in stating what particular rule should be adopted. When the case is again tried, and the plaintiff puts in proof which will entitle him to a verdict under any one or more of the rules which were suggested in the two cases cited, the trial court can easily protect the landlord's rights, and assure the tenant the relief to which he may be entitled. The total want of evidence on which to rest the verdict compels us to reverse the case. It will accordingly be reversed, and sent back for a new trial in conformity with this opinion. Reversed.

#### COE et al. v. WATERS.

(Court of Appeals of Colorado. Dec. 9, 1895.)

##### TRIAL—SUBMISSION OF CASE TO JURY.

In an action by a principal against her agent, it appeared that plaintiff refused, on the advice of defendant, an offer made to her for the exchange of some property, on which there was a mortgage in the hands of the agent for collection, and placed the property in the hands of the agent for sale. Soon thereafter the agent took possession of the property under the mortgage, and for himself made the exchange which he had advised plaintiff not to make. The complaint asked for the recovery of the value of the property, and, in the alternative, that defendant be compelled to convey to her the land received by him in the exchange. The latter prayer was subsequently eliminated. *Held*, that the action was not necessarily an equitable one, so as to prevent the submission of the case to the jury and the entry of judgment for damages on a general verdict, the prayer for the equitable relief having been eliminated.

Appeal from district court, Arapahoe county.

Action by Sarah E. Waters against Fred E. Coe and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Earl B. Coe and S. L. Carpenter, for appellants. Norlin & McDuffie, for appellee.

**BISSELL, J.** This suit was originally brought in the county court of Arapahoe county by Mrs. Waters against Coe Bros., because of a transaction which she had with that firm. The case went by appeal to the district court, where it was again tried, and in both cases the judgment went against the appellants. The appeal, as argued by counsel, is based on one principal error, concerning the form of the action and the method of trial, with some other collateral matters, which may be very briefly disposed of. Omitting whatever is unnecessary to an apprehension of the contention, the case is

briefly this: Mrs. Waters was the owner and in possession of a restaurant, which she valued at about \$1,200. The question of value is of no particular consequence. It was mortgaged for \$350, and the notes which the security covered were due and unpaid. Mrs. Waters was unable to raise the money to liquidate the indebtedness, and went to Coe Bros., who were brokers and dealers in real estate and such securities, to make some arrangement for the disposition of the mortgaged property. At this time Coe Bros., according to their statements, held the notes for collection. Some interviews had been had between the parties with reference to the paper, which culminated in the transaction about which Mrs. Waters complains. At about the time of the interview with Coe Bros., one Fuller was a prospective purchaser of the restaurant and its fixtures; and he offered, according to her claim, to assume the incumbrance and to pay an additional consideration for the transfer. This was to be paid by a deed on certain property in Topeka which Fuller owned. Mrs. Waters insists that she counseled with the Coe Bros. with reference to the expediency of this transaction, who advised her to reject the offer, on the basis of a probability that they would be able to dispose of it, if it was placed in their hands, at a better figure. This was accordingly done, and she left the property with them for such trade or sale as they might be able to make. Shortly afterwards the Coe Bros. attempted to foreclose the mortgage on the property, and, in execution of their purpose, took possession of it; stating, as Mrs. Waters says, that they were unable to make any sale or other disposition of the property. Being otherwise unable to settle the claim which they held, she made no objections to the proceedings in foreclosure which they took. There is some little controversy about that, but it is of no moment. At all events, within a day or two of the time when they took possession under their security, Fuller went into control. He seems, according to the evidence, to have made the same identical trade with the Coe Bros. that he had offered to Mrs. Waters. In other words, he assumed the incumbrance, agreed to take care of the notes, took them up with his own paper, and deeded to one of the firm the property in Topeka. When Mrs. Waters learned of this, she insisted on some adjustment with the firm, and that their conduct was in bad faith and in derogation of her rights, and in violation of their obligations as her agents, which position they had assumed in the matter. The case has been stated according to Mrs. Waters' contention, though none of the facts essential to her recovery were admitted, but were strenuously denied by the parties who were connected with it. Since the case has been twice tried, and once by a jury, and on both occasions the findings were adverse to the appellants, we must assume the plaintiff's

case to have been made out, and those facts as to which she offered evidence, which were essential to her recovery, to have been sufficiently established by proof. Bringing her suit on this basis, she stated the case generally in her complaint, and originally prayed for the recovery of what she alleged to be the value of the property, to wit, \$1,200, and also to compel the Coe Bros. to deed to her the Topeka lots. In other words, her prayer was in the alternative, and would seem to be for equitable relief. In the county court, however, the latter part of the prayer was eliminated, and she sought to recover only what would be damages for the injury. The appellants contended the action to be one in equity, and objected to the calling of the jury, and the submission of the issue to them for a verdict. It was insisted the court had no power to submit the cause generally, but, while it had a right to impanel a jury to try any question of fact, it was powerless to call for a general verdict, or to do otherwise than take it as advisory, and render thereon such judgment as the court should conclude was proper.

Possibly, the complaint is somewhat inartistic, and, in its form and allegations, lends some support to the appellants' contention. We do not, however, concede that on the facts stated the case, as made, was one which of necessity was equitable in its character. In other words, the plaintiff possibly had the right to bring her action, and, treating the transaction as having been done in her favor and on her behalf, to affirm it and compel the Coe Bros. to account for the value of the property, or invest her with the title. The complaint was not aptly conceived for this purpose, nor was it the evident design of the pleader. In reality the action took the form of one for deceit, and a recovery was had for the alleged fraudulent character of the Coe Bros.' acts while they were attempting to discharge for Mrs. Waters the duties of an agent in the premises. It therefore follows the court was not in error in submitting the question to the jury, and permitting them to return a general verdict in the premises. The case of *Hulley v. Chedic*, 36 Pac. 783, from Nevada, which is so largely relied on by appellants' counsel, is inapplicable to the present case, and we do not intend to express an opinion as to the rule which that court has declared. It was undoubtedly there held that, where the action is one of purely equitable cognizance, the court cannot submit the issues to a jury, take a verdict, and render judgment as in a law action. The case, however, was purely an equitable one; for it was an attempt to follow money which had been paid by a debtor, who was garnished, to a third person, to whom a judgment had been assigned with an intent on the part of the assignor to defraud his creditors. The court held that garnishment created no lien on the money, but, to follow it into the hands of the person who had received it, the party must establish the alleged fraud, attack

the transfer, and by decree compel the assignee to pay over the money which the creditor had attempted to reach by his garnishment proceedings. Of course, in a case of this description, an action at law would not lie against the assignee, nor could a money judgment be properly entered against her. There is no analogy between the two cases. It was based on what was alleged to be a fraud or wrong done by the agents in the transaction of the business of their principal, whereby injury came to the principal, for which an action would lie. In a case of this sort, not only could a money judgment be had, but it could properly be enforced, if the verdict should be found against the wrongdoers. Whether, in any suit under our system of practice, this would be a substantial error, requiring the reversal of the case, is a question of some gravity. Our supreme court, in one of the cases which will be hereafter cited, has gone to a very considerable length in the application of the statute which forbids the appellate courts to reverse a case where the error complained of has worked no substantial injury to the parties. We do not decide whether the case is absolutely within the scope of the decisions, but it certainly approaches it. The entry of the judgment might be taken to be the conclusion of the court on the facts, since it was necessarily entered after a motion for a new trial had been overruled. The other conclusion, however, is so entirely satisfactory, we do not attempt to protect the judgment by the application of what is usually found to be a very satisfactory rule.

There are several other errors assigned and argued in the brief, based principally on the instructions. The objections to the charge were with reference to two paragraphs of it. These are probably sufficiently definite to be the basis of assignments of error, but they are so completely separated from the balance of the charge that we are quite able to say the appellants were not harmed by them. They may be in some respects technically erroneous, and they may have been given respecting some matters which could well have been taken away from the consideration of the jury. In the main, however, the charge was entirely correct, and on the principal and only question, to wit, the good faith of the Coe Bros., was a fair statement of the law, and left this issue to the jury. Errors of this description have been repeatedly adjudged insufficient to reverse a judgment, if the verdict of the jury is accepted, and the case has been fairly tried, and substantial justice has been thereby done between the parties. We are unable to conclude otherwise, and consider the case fairly within the scope of this principle. *Sandstone Co. v. Skoman*, 1 Colo. App. 323, 29 Pac. 21; *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614. These considerations dispose of all the matters which are presented to our attention, and, finding nothing in the record to warrant any other result, we affirm the judgment. Affirmed.

### On Rehearing.

(Jan. 13, 1896.)

**PER CURIAM.** This petition for rehearing deals principally with a proposition to which no particular attention was given in the original opinion. It was disregarded because it was deemed of slight importance, and little reliance seemed to have been placed on it in the argument. It is totally unnecessary for us to give it the attention requisite to a full expression of our views on the subject, and we shall only briefly state them. There is no need for a controversy between the court and counsel respecting the impossibility of bringing certain classes of actions in particular cases which are used as illustrative of the argument. It is quite true, as a general proposition, the plaintiff is bound to state in his complaint the cause of action which he attempts to prove, and his proof must correspond with his allegations. While this is conceded to be the law, we cannot admit the result which the argument suggests. A variance at the common law was undoubtedly fatal, and advantage might be taken of it by way of demurrer, or by motion in arrest of judgment; and it made very little difference whether the variance was complete, or simply extended to some material matter involved in the action. Under our Code, by virtue of section 78, this rule is entirely abrogated. The court is bound to disregard any error and defect in the proceedings which does not affect the substantial rights of the parties, and whenever there may be a variance between the allegations and the proof a specific remedy is provided. The court is bound to permit amendments of the allegations, to make them correspond with the proof,—subject, of course, to the provision which will protect the rights of the complaining party. It is equally true, when the case comes to this court by appeal, we are bound to disregard any defect in the pleadings, if, in our judgment, the substantial rights of the parties remain unaffected. The fundamental difficulty, of course, rests in the difference between the court and counsel respecting the nature of the action which the plaintiff brought. The astute counsel has always insisted the action was equitable, as contradistinguished from a legal one. We were impelled to differ with him, and we still adhere to our conclusion as expressed. When this stumbling-block is removed, it deprives the appellants' case of any substantial merit. During the progress of the trial the defendant interposed no objections to the introduction of the testimony, but, on the conclusion of the plaintiff's proof, moved to strike it out because it was variant from the case as laid. When the legal character of the action is once conceded, that motion was manifestly not sufficient to preserve the question in the record, if it is a question on which he has a right to insist. Doubtless, if the defend-

ant had been surprised by the testimony, and a totally different case had been made from that which he was called upon to answer, he would have been entitled to a continuance. He might likewise, perhaps, in the present instance, have compelled an amendment of the complaint so as to have presented a legally accurate statement of the plaintiff's action. Taking no steps in either one of these directions, we do not regard the question of variance as so saved in the record as to call for a specific judgment respecting it. While we concede the complaint is not so drafted as to present with technical accuracy the cause of action which was, according to the verdict of the jury, sustained by the proof, it did contain all the allegations requisite to the plaintiff's recovery. The action may not have been by the court designated with extreme accuracy when it was called an action for deceit. It is useless to quarrel about terms, for what the court intended to express was the idea that the transaction between the parties, having occasioned damage to the plaintiff, and being done in wrong of her rights, entitled her to maintain suit for whatever damages she might be able to demonstrate by her testimony. She undoubtedly had either one of two remedies. She might have brought an action to compel the defendants to convey the Topeka property, or she might have brought an action for the damages occasioned by their wrongdoing; and their measure would be, of necessity, the value of this property as it might be established. The case was tried on the latter hypothesis, the verdict establishes the acts of the appellants to have been wrongful, and the jury have fixed the value of the property by their verdict. While we are very frank to say our conclusion on the testimony as presented by the record might not harmonize with the conclusions at which the jury arrived, we regard ourselves as concluded by their verdict, and without the right to disturb the judgment because it is against the evidence. Since we accept the result and the facts as they are thus exhibited in concrete form, we are unable to see that any error has been committed which substantially affects the rights of the parties. We therefore conclude the rehearing must be denied, and the judgment affirmed, according to the original opinion. Affirmed.

**GREAT WESTERN MUT. AID ASS'N v. COLMAR.**

(Court of Appeals of Colorado. Dec. 2, 1895.)

**MUTUAL BENEFIT INSURANCE—ASSESSMENT—NOTICE—EVIDENCE OF DEFAULT—ENFORCEMENT OF POLICY—MANDAMUS—PLEADING—SUFFICIENCY OF COMPLAINT.**

1. Where the only evidence, in an action on an endowment policy, of the sending of notice of assessment was given by an employé of defendant, who testified solely from the records in the office and from the usual course of defendant's business, and his testimony as to

when the remittance of the assessment was received by defendant in response to the notice was in conflict with the date of the sender's letter and of the letter of the company acknowledging receipt of the remittance, a default in not remitting the assessment in time was not established.

2. Where a remittance of part of an assessment was retained by the company nearly two months after its receipt without objection or demand for the balance, the company could not, at the end of that time, and after making another assessment against the member, which, together with the balance due on the former assessment, was paid, declare a forfeiture because the remittance of such balance was not sent in time.

3. Where the policy required assessments to be paid "within forty days after receiving due notice" thereof, the time within which the assessment could be paid should be computed from the date on which insured received the notice, and not from the date of the notice or the date of mailing the notice.

4. The remedy for recovery on a policy insuring a life "in the amount of such sum as will equal 75 per cent. of the amount collected of the assessment made for the payment" thereof was not by mandamus to compel the company to make an assessment to pay the claim under the policy.

5. A complaint in an action on a policy insuring a life in an amount equal to 75 per cent. of the amount collected of the assessment made for payment of the claim, but containing no restriction as to the amount which could be assessed against each member, need not allege a demand for an assessment, and a refusal of the association to make it, nor aver the number of members subject to assessment, nor the amount which would be realized by assessment, nor that an assessment was made and collected.

**On Rehearing.**

6. The complaint in an action on a policy insuring a life in an amount equal to 75 per cent. of the amount collected of the assessment made for the purpose of paying the claim, which assessment should not exceed \$2,000, stated generally the issuance of the policy, which was set out in *hæc verba*: alleged performance of all conditions by plaintiff; averred that \$1,500 was due plaintiff on the policy, and that no part of it had been paid, though payment had been demanded; and the sole defense was a forfeiture for nonpayment of assessments. *Held*, that the complaint was not subject to the objection first raised on appeal that it did not show that there were sufficient members subject to assessment to produce the sum sued for, and that the company refused, after demand, to levy an assessment to pay such sum.

**Appeal from district court, Arapahoe county.**

Action by Martin Colmar against the Great Western Mutual Aid Association on an endowment policy. From a judgment for plaintiff, defendant appeals. Affirmed.

Carpenter & McBird, for appellant. B. L. Dickerson, for appellee.

REED, P. J. Appellee brought suit against the appellant to recover \$1,500, or 75 per cent. of the sum of \$2,000, on a policy or certificate of insurance executed upon the life of appellee, delivered the 8th day of February, 1881. By the terms of the contract the amount was to be paid to insured after the expiration of 12 years from date in case the insured was still living, and upon his death, before that time. The complaint alleges the

payment of \$15 on the day of the date of the policy, compliance on the part of the insured with all the requirements of the contract, that the time (12 years) had expired, that the insured was still living, demand for the sum for which suit was brought, and refusal of appellant to pay. The company (appellant) was a mutual concern, in which, in case of the death of a member, calls or assessments were made upon the individual members to pay the policy of the deceased member. The defense relied upon in answer was that the plaintiff failed to pay a call made and due June 21, 1892, and another on the 4th of August, 1892, and "that thereafter, and by reason of the violations aforesaid, the said certificate of membership ceased and determined, and the plaintiff was no longer treated or regarded as a member of this association, and said certificate of membership, and the insurance or endowment thereunder, from thence hitherto has not been, and is not now, in force, nor the plaintiff entitled to any of the benefits thereof." Trial was had to a jury, and at the close of the evidence plaintiff asked the court to instruct the jury to find for the plaintiff, which motion was granted, and a judgment for plaintiff for \$1,500 entered, from which this appeal was prosecuted.

It appears that for about eleven years and a half the contract of insurance was in force and unquestioned. The insured had paid all demands. Six months before it would expire and the insured be entitled to all its benefits it is claimed that the insured made such default in payment of assessments as to warrant the company in declaring it forfeited, and in refusing to renew on account of the age of appellee. Condition No. 3, upon which the supposed forfeiture was based, is as follows: "If the assured shall, at any time within forty days after receiving due notice, fail to pay, or cause to be paid, the assessments at the office of the association, and in accordance with the rules and regulations of said association, then, and in every such case, the association shall not be liable for the payment of any sum whatsoever, and this certificate shall cease and determine." Condition No. 5 is: "A printed or written notice directed to the address as last given by a member and deposited in the post office, or delivered by an agent of the association, shall be deemed a legal notice." The only witness sworn was one A. H. Northrop, who testified for the defendant, was employed by it, and had been for six or seven years. He identified the different papers. His knowledge was very limited, and evidence very indefinite. He said: "I am testifying from the records of my office. It would be a matter of impossibility to testify from my own memory in a matter of dates and figures such as this, regarding dates, numbers, or assessments I could not remember." As the whole defense or forfeiture depended upon dates, numbers, and assessments, it was important that the facts be established from better data than infer-

ence from the usual course of business and files in the office. It appears from the data and files in the office and the testimony of the witness that three assessments of one dollar each were made and embraced in a notice dated May 13, 1892, in response to which appellee sent two dollars, leaving one dollar unpaid. Witness testified that the two dollars paid was not within the 40 days, but he did not show when it was received, but it appears to have been accepted and retained, and that no notice was taken of the default at that time, or that appellee's attention was called to it. Subsequently another notice of assessments for two dollars was sent to appellee, dated June 25, 1892, which was remitted; also the former dollar until then unpaid. Witness testified it was received one day too late. It should have been at the office August 4th, but was not received until the 5th. Here is a discrepancy I fail to understand, which shows the want of knowledge on the part of the witness, or the unreliable character of his evidence. The letter containing the remittance from appellee was dated "Durango, 15th Aug." The reply of the company put in evidence is dated "August 17th," in which it is said, "Which we this day received." That reply contained the three dollars received and the two dollars received in response to the call of May 13th, which had been retained from some time in June, and appellee was then informed that he had forfeited his insurance, and "that on account of your age it will be impossible for us to reinstate." The learned district judge found the alleged notices sent to appellee void and insufficient, and with this we agree. If they were sent, the uncertainty of the evidence establishing the time they were sent and the date of receipt of money was so vague and indefinite as to be worthless to establish a default. The two dollars in response to the May call were received about June 21st and retained until August 17th. The default of \$1 existed all that time, and was either waived or overlooked. The witness said the "money was received conditionally." We are not informed what the conditions were, and there is no evidence of notice to appellee of a conditional acceptance, a forfeiture of insurance, or demand for the payment of the one dollar in default. Witness testified, "We always send as much as two notices." There was no evidence of a second notice in either instance to the appellee. In regard to the second case witness testified the money came one day too late. Taking the date of the notice, June 25th, and the day of payment, August 5th, excluding one date and including the other, there was no default. The witness testified that the notice bearing date June 25th would be sent out from the 24th to the 26th. Thus the date of sending or mailing, and not the date upon the paper, becomes important. There is also a very marked discrepancy between the testimony of the witness to establish a default,



the notice put in evidence, and condition No. 3 of the contract upon which the forfeiture is supposed to be based. In the notice sent is the following: "By referring to the conditions of your certificate of membership, you will observe that the assessment made for the following deceased members must be received within forty days from May 13th, 1892 [the date of the notice], or not later than June 21st," regardless of the date of sending. This shows great ignorance of the condition relied upon for the forfeiture. The language of the condition is: "If the assured shall at any time within forty days after receiving due notice fail to pay or cause to be paid the assessments," etc. It will readily be seen that the computation of time cannot be determined by the date upon the notice, nor from the date of mailing, if such proof was offered, but must be computed from the date the insured received due notice. See *Grand Lodge v. Besterfield*, 37 Ill. App. 522. Hence we conclude that as to the last assessment of two dollars no default was proved.

Forfeitures must be clearly established. They are defenses closely scrutinized, and not favored by courts. As to the supposed forfeiture by failure to pay the one dollar, the claim seems technical and trivial. To have been available, it must have been asserted while the insured was delinquent. Having during all that time waived the default, and followed up by a subsequent assessment, it was too late, after receiving the money to go back and declare forfeiture. Authorities in support of these positions are numerous. See *Nibl. Mut. Ben. Soc.* §§ 339, 345; *Insurance Co. v. Warner*, 80 Ill. 410; *Insurance Co. v. Amerman*, 119 Ill. 339, 10 N. E. 225; *Viall v. Insurance Co.*, 19 Barb. 440; *Sweetser v. Association*, 117 Ind. 97, 19 N. E. 722; *Association v. Jones*, 84 Ky. 110; *Insurance Co. v. Amerman*, 16 Ill. App. 528; *Insurance Co. v. Pierce*, 75 Ill. 426; *Insurance Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582.

It is next contended: That appellant, being a mutual insurance concern, and having contracted in this language, "Does assure the life of Martin Colmar in the amount of such sum as will equal 75 per cent. of the amount collected of the assessment made for the payment thereto, but not to exceed two thousand dollars," in suing for the amount that he was insured, or for \$1,500, he had mistaken his remedy; that it should have been a proceeding by mandamus to compel the company to make an assessment to pay the claim. (2) That if the plaintiff is permitted to sue the association, and recover a money judgment, he must allege and show the amount that would be realized by an assessment, and have a verdict for only such amount. (3) That he must prove a demand for an assessment and the refusal of the association to make it. (4) That he must aver the number of members subject to assessment for his benefit. (5) Or must show that an assessment has been made and collected. Several

authorities are cited in support of these positions, some of which, particularly those from the state of Iowa, sustain the contention; but those decisions were by a divided court. In others cited the contracts were different. The amount to be realized was one dollar to each member. Here there was no restriction as to the amount that could be assessed against each member shown or claimed. Presumably the amount to be assessed upon each member would be sufficient to make the aggregate amount required. Nor can we agree to the proposition that mandamus was the proper remedy. The amount assured might possibly, under the peculiar wording of the contract, be reduced and limited by the amount of the assessment collected. If not sufficient, it should be matter of defense. Nor could the plaintiff reasonably be required to make proof, where the data was entirely within the control of the defendant, as to the number of members, and the amount that could be collected by an assessment. By the contract of insurance it was the duty of the officers to make an assessment when the payment was due. There is nothing in the contract compelling a party to resort to a proceeding by mandamus to make them perform such duty. The contract for payment having matured, and the money being due, it was their only duty to provide funds, more or less, and pay the claim. The contract is absolute to pay within 90 days after proof of death or the lapse of the time named. As shown by the evidence, 40 days was required to collect the assessment, giving 50 remaining days in which to pay. The power of the corporation to make the assessment could be exercised voluntarily. It did not depend upon a mandamus to set it in motion. The evidence shows that the voluntary exercise of it had been the course pursued. It does not appear that in any former case parties had been required to bring a compulsory suit. On a contract identical with the one under consideration and those of the same character, or nearly identical, the authorities are numerous in support of the views announced above. See *Nibl. Mut. Ben. Soc.* §§ 388, 392, 394-401; 2 May, Ins. § 563a; *Freeman v. Society*, 42 Hun. 252; *Association v. Clancey*, 70 Md. 101, 16 Atl. 391. *Bates v. Association*, 47 Mich. 646, where it is held: "Mandamus does not lie to compel a mutual benefit insurance company to levy an assessment to pay the amount falling due upon the death of a member. The proper course is to bring suit upon the undertaking of the company." See, also, *Association v. Houghton*, 103 Ind. 286, 2 N. E. 763; *Supreme Lodge v. Knight*, 117 Ind. 489, 20 N. E. 479; *Lueder's Ex'r v. Insurance Co.*, 4 McCrary, 149, 12 Fed. 465; *Union v. Whitt* (Kan. Sup.) 14 Pac. 275; *Union v. Gardner* (Kan. Sup.) 21 Pac. 233; *O'Brien v. Society*, 117 N. Y. 310, 22 N. E. 954. Several authorities hold that the suit should have been brought for the maximum, \$2,000, in-

stead of \$1,500, and putting the burden of reducing it and showing the proper amount upon the defendant; but in this case the failure to sue for the full amount cannot prejudice appellant. The judgment of the district court will be affirmed. Affirmed.

On Rehearing.

(Jan. 13, 1896.)

PER CURIAM. In the argument filed in support of the petition for a rehearing counsel have urged one proposition in which they seem to have great confidence, and on which they rely for a reversal of the court's conclusions. We do not deem the matter of vital consequence, nor consider it available to the appellant on this hearing. The point urged respects the sufficiency of the complaint in its statement of a cause of action. Many cases are now cited, as they were in the original brief, which sustain the contention that in an action on a policy like that sued on, the pleader should allege the number of members who were associated in the organization subject to assessment, and introduce proof which would tend to show that, if an assessment had been levied, a sufficient sum would be produced to pay the amount of the certificate. Undoubtedly there are reputable authorities which hold the allegation essential to the statement of a cause of action, and likewise some evidence tending to establish it, requisite to proof of the case. There is another line of equal repute which adjudges the allegation of the issuance of the certificate, the performance of the conditions on the part of the insured, coupled with the necessary proof to support the allegations, enough to make out a prima facie case for the plaintiff, which will put the burden to establish either a deficiency in the number subject to assessment, or in the amount of funds which would be produced, on the defendant company, in whose possession and under whose control are all the data necessary to make a defense if they see fit to plead such an issue. The principal opinion was not put on this basis, nor was there any extended discussion respecting it, though it cites the leading authorities which support the proposition that the burden is on the defendant company. It was not deemed essential to directly declare our convictions respecting the line which the court would follow in a case where the decision of this particular matter was indispensable. The court inclined to the view that the burden of proof lay with the defendant, who should plead the facts essential to maintain such an issue. Waiving, however, any express declaration on this question, it is not conceived the present case is brought within the scope of either of those lines of authorities, or that any adjudication respecting this particular point need be made. The complaint stated generally the issuance of the certificate, which was set out in *hæc verba*, and alleged the performance of all the condi-

tions imposed on the defendant, which accords with the requirements of the special rule of pleading respecting contracts prescribed by the Code. It also contained an allegation that the sum of \$1,500 was due and owing to the plaintiff on the agreement; that no part of it had been paid, though it had been frequently demanded, and payment had often been requested of the defendant company. It is important to bear this proposition in mind. According to the abstract, the defendant did not demur to the complaint, or take issue on any of its allegations. The defense was a forfeiture, and an alleged nonperformance by the plaintiff of a condition precedent, to wit, the payment of the assessments which had been levied on him. The company did not otherwise contest the claim, and, failing to deny the allegations of the complaint, admitted them to be true. Under these circumstances, we have a right to assume that the allegation of a debt due from the company, of the demand and refusal, to be a sufficient statement both of the existence of the requisite number subject to assessment to produce the sum sued for, and to mature the certificate according to its terms, and a refusal on the part of the company to levy any assessment to pay it. Since this is true, we have a right to presume all these matters against the defendant, and to take this allegation as a sufficient statement of a cause of action, especially after a verdict in the plaintiff's favor. This statement of the court's position was probably not essential to the decision, but it was deemed best to express it, because, in our judgment, it is a complete answer to the argument filed on the petition. For the reasons stated in the original opinion, and on the basis of the authorities therein cited, the judgment will be affirmed, and the opinion will be adhered to. Affirmed.

#### STATE v. SECURITY SAVINGS & TRUST CO.

(Supreme Court of Oregon. Jan. 13, 1896.)

#### DEMURRER—FINAL ORDER—APPEAL—BILL OF DISCOVERY—REQUIREMENTS.

1. Where a bill of discovery is filed for the sole purpose of obtaining defendant's answers to several interrogatories in aid of a contemplated action at law, an order overruling a demurrer to the bill is a final order determining the rights of the parties.

2. Misc. Laws, c. 25, § 3137, providing that "when the governor is informed or has reason to believe" that any banking institution holds funds of any kind which have escheated to the state, he shall direct the proper district attorney to file a bill of discovery with proper interrogatories to be answered by such bank, does not require such interrogatories to be answered when the bill sets up no facts except that defendant is a banking institution, and that it is possible some person may have died, leaving money in defendant's hands, to which the state is entitled.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Proceeding by the state of Oregon against the Security Savings & Trust Company by a bill of discovery to ascertain whether defendant had in its possession any funds which had escheated to the state. From an order overruling defendant's demurrer, and requiring it to answer the interrogatories, defendant appeals. Reversed.

Joseph Simon and S. B. Linthicum, for appellant. O. M. Idleman, Atty. Gen., and John H. Hall, Dep. Dist. Atty., for the State.

BEAN, C. J. This is a proceeding brought by the district attorney of the Fourth judicial district, by direction of the governor, to ascertain whether the defendant bank has in its possession, on deposit or otherwise, any funds or other property which has escheated to the state. The information, after averring the official title of the informant, and that it is filed by direction of the governor, alleges, in substance: That the defendant is a private corporation organized and existing under the laws of this state, and is now, and has been for four years last past, engaged in a general banking business in the city of Portland. That during such time divers and sundry depositors in defendant's bank have, since the date of making their deposit, died intestate, without heirs, leaving sundry and divers amounts of money and personal property on deposit and in the custody of defendant, which has escheated to the state; the exact amount thereof, the names of the depositors, and date of deposit being to the informant unknown. That, in order to recover such escheated property for the use and benefit of the state, it is necessary for the informant to bring and maintain an action at law against the defendant, and in order to enable him to do so "it is necessary and proper for plaintiff to learn from defendant the name of the depositor, the amount and nature of the deposit, the date of deposit of such funds and other property as now are in the possession of the defendant, which have escheated to the state." That he intends and proposes, as directed by the governor, to commence an action at law pursuant to the provisions of chapter 25 of the Miscellaneous Laws of Oregon for the recovery of such escheated funds or other property "as may be found in the custody of said defendant bank," but that he is unable to do so without full discovery from said bank, wherefore he prays an order of the court directing and requiring the defendant, its officers and agents, to appear at a time certain, and answer under oath the information and the several interrogatories contained therein. The first, second, third, fourth, sixth, and seventh of such interrogatories require the defendant to state the names of all persons depositing or leaving money or other property with it whose deposits, whether evidenced by an open account, certificate of deposit, suspense account, or otherwise,

have been dormant or uncalled for, or upon which no payments have been made, or against which checks have not been drawn, for a period of seven years, together with a description of the property or amount of money standing to the credit of each of such depositors. The fifth interrogatory requires the defendant to give the names of any and all depositors whom it knew or believed to have died prior to August 1, 1894, the date of the commencement of this proceeding, and against whose accounts no checks had been drawn or deposits made by any executor, administrator, or other representative, and the amount standing to the credit of each of such depositors. The eighth requires the defendant to give a list of any money or property held by it or in its possession at the time this proceeding was commenced which it thinks should escheat to the state. And the ninth requires the bank to give the name, date, and amount of deposit of any and all persons whom the defendant knew or believed had died intestate without heirs in this state, and the date of such death, as near as it might know or be informed. The defendant demurred to the information on the ground that it did not state facts sufficient to constitute a bill of discovery or to entitle the plaintiff to the relief demanded, which demurrer was overruled, and an order entered directing and requiring the defendant to file, on or before a certain date, fixed in the decree, an answer under oath to the information and interrogatories, and especially to answer each and every interrogatory contained in such information. From this order or decree the defendant appeals.

On this appeal two questions have been presented for consideration: First, whether the order overruling defendant's demurrer, and requiring it to answer the information and interrogatories as prayed for in the bill, is an appealable order; and, second, whether the information states facts sufficient to constitute a bill of discovery. The right of appeal is purely statutory, and, unless the order from which defendant's appeal is taken is a final order, judgment, or decree within the meaning of the statute, the appeal, of course, cannot be entertained. The law, as we understand it, is that an order or decree is final for the purposes of an appeal when it determines the rights of the parties; and no further questions can arise before the court rendering it, except such as are necessary to be determined in carrying it into effect. *Freem. Judgm.* § 36; *Elliott, App. Proc.* § 90; *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 108 U. S. 24, 2 Sup. Ct. 6. Within this principle we think the present order or decree is final. The suit was brought for the sole and only purpose of obtaining from the defendant an answer under oath to the several interrogatories, and for no other relief. The information is a pure bill of discovery, in aid of a contemplated action at law, asking no relief; and the only litt-

gated question in the case is the right of the informant to the discovery sought. When, therefore, the demurrer was overruled, and the court held that the plaintiff was entitled to the relief demanded, and ordered and directed the defendant to answer the interrogatories, it effectually determined all the issues in the case, and ended the controversy between the parties so far as it could do so, leaving nothing to be done but to enforce its determination as made. No subsequent question could arise in the case except as to the form or sufficiency of the defendant's answers, and therefore, in our opinion, it was a final order or decree within the meaning of the statute, and consequently appealable; otherwise the defendant would be without remedy by an appeal, though it should be admitted that the order complained of was in violation of its clear legal rights. If, as contended by the plaintiff, before it can appeal it must comply with the order of the court, and answer fully the information and interrogatories, an appeal would be a vain and useless proceeding, for the sole object of the suit would have been accomplished, and defendant's appeal could avail it nothing. In support of the demurrer it is contended that the information is insufficient as a bill of discovery, because it does not aver any facts showing a right of action in favor of the plaintiff and against the defendant in aid of which the discovery is sought, while the contention for plaintiff is that the section of the statute under which it was filed does not contemplate a common-law bill of discovery, but an inquisitorial proceeding to compel a bank or banking institution to disclose by answers to interrogatories propounded to it whether it holds or is in possession of any property which has or may escheat to the state, in order that the proper action may be brought in case escheated property is thus discovered. In a word, the effect of plaintiff's contention is that the statute is intended to enable the plaintiff to fish for a cause of action, and not to prove an existing case out of its opponent's mouth, or from documents in its possession, as is the object and purpose of the common-law bill of discovery. The statute in question provides that: "When the governor is informed or has reason to believe that any bank, banker, or banking institution in this state now has or holds on deposit or otherwise, any fund, funds, or other property of any kind or nature which has escheated to this state, he shall direct the district attorney in the district where such bank or banking institution is located to file in the circuit court an information or bill of discovery, with proper interrogatories to be answered by the owner, agent, or manager of such bank or banking institution, and upon the filing of such information or bill, the court shall order and direct, at a time to be designated in said bill, that said owner, agent, or manager of such bank or banking institution shall, under

oath, file an answer to said information and interrogatories, and shall specially answer each and every interrogatory contained in such information or bill. If it appears to the court from such answer that said bank, banker, or banking institution has any property in its possession which has or may escheat to this state, it shall direct the said bank, banker, or banking institution forthwith to bring the same into such court, and the court shall proceed to dispose of said property as provided elsewhere in this act." Hill's Ann. Laws Or. § 3143. Under this statute, whenever the governor is informed or has reason to believe that a bank is in possession of any fund, funds, or other property which has escheated to the state, he is required to direct the proper district attorney to file an information or bill of discovery, with proper interrogatories to be answered by the bank; but, there being no statutory provision as to what the bill shall contain, it seems to us the principles and doctrines governing such proceedings which have long been settled by courts of equity must apply to and determine the sufficiency of the proceedings under the statute. A bill of discovery has a well-known and universally recognized meaning in the law, and, in the absence of anything in the statute to the contrary, it is but fair to presume that the legislature intended to use the term in its generally accepted legal sense. In that sense it is a mere instrument of procedure in aid of relief sought by the party in some other judicial controversy filed for the sole purpose of proving the plaintiff's case from the defendant's own mouth, or from documents in his possession, and asking no relief in the suit, except, it may be, a temporary stay of the proceedings in another suit to which the discovery relates. Pom. Eq. Jur. § 191. As so construed, the design of the statute is to authorize the governor to direct the district attorney to file an information or bill of discovery whenever he is in possession of facts the averment of which would support such a proceeding, and not otherwise. This is strengthened by the fact that before the governor can direct the proceedings to be commenced he must be informed or have reason to believe that the bank has in its possession some fund or other property which has escheated to the state, and this seems to negative the idea that he may cause a proceeding to be instituted for the purpose of searching for such information, or for some facts upon which to base his belief. The statute does not authorize the information or bill of discovery to be filed at the pleasure of the governor, but only when he is informed that the bank is in possession of escheated property, or when he has knowledge of such facts and circumstances as give him reason to so believe. If he is so informed, he may direct the district attorney to file the proper information without a bill of discovery; but if, from the facts and circumstances within

his knowledge, he deems it advisable, he may direct that a bill of discovery, setting out such facts and circumstances, be filed in aid of an action at law about to be brought, and thus require the bank to answer interrogatories concerning the condition, amount, etc., of the particular fund or property which he has reason to believe is in its possession, and has escheated to the state. But, as we read the statute, he has no authority to institute purely inquisitorial proceedings in an endeavor to unearth some possible cause of action, and thus require the bank not only to disclose, but to make a public record of, the confidential and private relations existing between it and its depositors, without a showing of any kind that the whole proceeding will not be fruitless in every way. Before such a proceeding can be maintained, it should clearly appear that the legislature so intended. We think, therefore, the sufficiency of the bill in this case must be determined by the ordinary rules defining the nature and scope of bills of discovery. Such bills had their origin in the fact that under the inflexible rules of the common law the parties to an action were incompetent as witnesses, and no means were provided by which an adverse party could be compelled to produce documents in his possession for the use of his opponent on the trial. For this reason resort was early had, in courts of equity, to bills of discovery in aid of an action at law either then pending or about to be commenced, by which either party could obtain the testimony of his adversary or compel the production of documents in his possession material to his case. And, while our statute has made the parties competent witnesses, and furnishes a simple, expeditious, and summary means by which one party may obtain the evidence of another, or compel the production of documents in his possession, the proceeding by bill of discovery perhaps still remains, although the necessity for resort to such a remedy is much lessened. But, if so, the fundamental principles governing such a bill have remained unchanged, and are as binding to-day as they have ever been. Its object is to enable the plaintiff to obtain from his opponent evidence material to his case, either by requiring him to answer under oath interrogatories the answers to which may be used on the trial of the action at law, or to produce documents in his possession material to plaintiff's case. But it is never suffered to be used to enable him to fish out a case to bring, or a defense to offer, and the interrogatories contained in such a bill must be directed to the inquiry as to whether a specific fact is true, and not as to what are the facts of some supposed case. 62 Law T. 146. Consequently it has long been established that among the essential and indispensable requisites of such a bill are that it must disclose on its face a cause of action in favor of the plaintiff in aid of which it is brought, and that the informa-

tion sought is material thereto. In the language of Mr. Daniell, it must state "the matter touching which discovery is sought, the interest of the plaintiff and defendant in the subject, and the facts and circumstances upon which the right of the plaintiff to require the discovery from the defendant is founded." 2 Daniell, Ch. Prac. & Pl. (6th Am. Ed.) \*1557. And Mr. Story says that: "If the bill does not show such a case as renders the discovery material to support or defend a suit, it is plainly not a case for the interposition of the court. Therefore, where a plaintiff filed a bill for a discovery merely to support an action, which he alleged by his bill he intended to commence in a court of common law, although by this allegation he brought his case within the jurisdiction of a court of equity to compel a discovery, yet, the court being of the opinion that the case stated by the bill was not such as would support an action at law, a demurrer was allowed; for, unless the plaintiff had a title to recover in an action at law, supposing his case to be true, he had no title to the assistance of a court of equity to obtain from the confession of the defendant evidence of the truth of the case." Story, Eq. Pl. § 319. And by Mr. Pomeroy it is said: "The plaintiff in the discovery suit must show by his averments, at least in a prima facie manner, that, if he is the plaintiff in the action at law, he has a good cause of action, and, if he is the defendant, he has a good defense thereto." Pom. Eq. Jur. § 198. And in *Mayor, etc., of London v. Levy*, 8 Ves. 398, Lord Chancellor Eldon, in enforcing the rule that the bill must set forth with reasonable certainty the nature of the action which is brought, or, if not brought, the nature of the claim or right to support which the action is intended to be brought, remarks: "That where the bill avers that an action is brought, or where the necessary effect in law of the case stated by the bill appears to be that the plaintiff has a right to bring an action, he has a right to a discovery to aid that action so alleged to be brought, or which he appears to have a right and an intention to bring, cannot be disputed. But it has never yet been, nor can it be, laid down that you can file a bill, not venturing to state who are the persons against whom the action is to be brought, not stating such circumstances as may enable the court, which must be taken to know the law, and therefore the liabilities of the defendants, to judge, but stating circumstances, and averring that you have a right to an action against the defendants, or some of them." Indeed, to this effect are all the authorities. Story, Eq. Jur. § 1493a; *Adams*, Eq. 133; 2 *Beach*, Eq. Jur. § 856; *Bailey v. Dean*, 5 Barb. 297; *Newkerk v. Willett*, 2 Caines, Cas. 296. Applying these rules to the case before us, the bill must fail. It does not purport to show that the plaintiff has a cause of action against the defendant, but discloses on its face, both by

averment and by the interrogatories, that it is simply searching for one.

The averments are that the proposed action cannot be commenced until the plaintiff learns from the defendant "the name of the depositor, the amount and nature of the deposit, and date of deposit of such funds or other property as are now in the possession of the defendant, which have escheated to the state," and that such action is to be "for the recovery of such sums or other property as may be found in the custody of said defendant bank." It is true, the information alleges that divers and sundry depositors have, since the date of making their deposits, died intestate, without heirs, leaving sundry and divers amounts of money on deposit and in custody of the bank, which have escheated to the state. But this does not state a cause of action in favor of the plaintiff and against the defendant. As shown by the other parts of the information, it is but the merest guess, based on no facts whatever, unless it is that the defendant has been in the banking business for four years; and it is barely possible, although nothing appears to render it probable, that some person or persons may have died intestate, without heirs, leaving money or property in possession of the bank. But mere possibilities are not enough to sustain a proceeding of this kind. It must be based upon some tangible and substantial facts. Indeed, the information states no case whatever. It is clear from the allegations and interrogatories that the animating cause which prompted the suit was simply a hope that something would result from the investigation. No action at law could be maintained, so far as the bill discloses, upon the information sought to be obtained by it, unless upon further investigation it should be ascertained that some of the depositors whose names are sought by this suit have died intestate and without heirs. If defendant was required to answer the interrogatories, and should place the plaintiff in possession of all the information sought by the bill, it would still require further investigation and proof to show that the depositors, or some of them, died intestate and without heirs. So that the bill not only fails to show a cause of action in favor of plaintiff, but the discovery sought, even if obtained, would not furnish facts upon which to base one. It is true, it might furnish data which would lead to the discovery of evidence sufficient to support an action by the state to recover escheated property. But from the earliest times the courts have with one voice declared their hostility to such proceedings. "I am not to compel a discovery to create evidence for some future case," says Lord Eldon in *Finch v. Finch*, 2 Ves. Sr. 490, decided in 1752, and Judge Story declares that "no discovery will be compelled except of facts material to the case stated by the plaintiff, for otherwise he might file a bill, and insist upon a knowledge of facts

wholly impertinent to his case, and thus compel disclosures in which he had no interest, to gratify his malice or his curiosity or his spirit of oppression. In such a case his bill would be most aptly denominated a mere fishing bill." 2 Story, Eq. Jur. § 1497. So universal is this rule that it is needless to cite further authorities in its support.

The information or bill does not name the person or persons whose property it is claimed has escheated to the state, nor are the interrogatories directed to an inquiry as to any specific fact or fund, or the condition of the account of any particular person or persons, but it is a mere inquisitorial investigation of defendant's business affairs, with the possibility that such investigation may disclose the existence of some fund or property which, upon further inquiry, the informant may determine has escheated to the state, and for which an action at law or some other proper proceedings may be instituted. Whether some such investigation into the affairs of a bank ought to be made is a question for the legislature, but until it so provides there is no rule of law of which we are aware that will permit it to be done. The decree of the court below is reversed, and the bill dismissed.

#### PEARSON v. DRYDEN.

(Supreme Court of Oregon. Jan. 13, 1896.)

EJECTMENT—DISPUTED DIVISION LINE—ADVERSE POSSESSION—INSTRUCTIONS.

1. Where adjoining owners adopt a division line, and each takes possession of his respective tract as of right, and one of them subsequently, claiming another line as correct, brings ejectment for the land included between the two lines, and defendant sets up adverse possession as a defense, it is error to instruct that adverse possession cannot be based on a possession having its inception in license.

2. Where adjoining owners adopt a division line as surveyed, and each takes possession of his respective tract as of right, and one of them, on a resurvey of the line, 13 years later, claiming the resurveyed line as the correct one, brings ejectment for the land between the old and new lines, and defendant pleads adverse possession in defense, defendant is entitled to an instruction that, if he has been in adverse possession from the adoption of the old line to the date of the resurvey, such resurvey could not affect his title thus acquired.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Ejectment by Samuel Pearson against William H. Dryden. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

E. Mendenhall, for appellant. C. S. Hannum, for respondent.

BEAN, C. J. This is an action to recover the possession of real property. The complaint is in the usual form, alleging title and right to possession in plaintiff, and a wrongful withholding by the defendant. The answer denies the allegations of the complaint, and

sets up title by adverse possession in the defendant, which is denied by the reply. The trial resulted in a verdict and judgment in favor of plaintiff, and defendant appeals.

From the pleadings and evidence, it appears that plaintiff and defendant have been the owners of adjoining tracts of land in Multnomah county for many years; that in 1877, at plaintiff's request, Mr. Burrage, the then county surveyor, surveyed out and marked a line between the premises of the respective parties for a division line; that immediately thereafter a fence was built along such line by the parties, which has been maintained ever since as a division fence; that each party occupied, cultivated, and improved their respective lands up to the fence, claiming to own to the line so marked, without objection from the other, until 1890, when another line was run by Hurlburt, the then county surveyor, differing from that formerly run by Burrage, whereupon the plaintiff, for the first time, claimed to own the land between the two lines which had been inclosed and occupied by the defendant, and subsequently brought this action to recover possession thereof.

On the trial, the court, among other things, charged the jury that "the answer sets up title by adverse possession; that is, open, notorious, and adverse possession for a period of ten years consecutively. You have heard the evidence concerning that matter. It is a general rule, however, that a possession that begins by consent which has its inception by license can never ripen into adverse title until such possession has returned to the party from whom the license comes, and then commences anew." It is contended by the defendant that, although this instruction may be correct as an abstract proposition of law, the court erred in giving it in this case, because it has no application to any issue therein; and in this, we think, he is correct. There was no question of license in the case. It was admitted by plaintiff all through the trial that defendant was and had been in the exclusive, undisputed possession of the tract in dispute from the time of the Burrage survey, in 1877, up to 1890, when the Hurlburt survey was made, under the belief of both parties that it belonged to him. The only witnesses in regard to the circumstances under which the possession was taken were the plaintiff and defendant, and neither of them testified to anything from which a license could in any way be inferred, but they both testified that defendant entered into and took possession of the land in controversy as his own. It has been repeatedly held by this court that abstract propositions of law, not applicable to the facts in evidence, are misleading and mischievous, however correct in themselves, because they necessarily tend to draw the minds of the jury away from the real facts in the case to something which they may conceive to exist, although not found in the evidence. The

authorities on this question are collated by Strahan, C. J., in *Bowen v. Clarke*, 22 Or. 563, 30 Pac. 430. The instruction complained of had a tendency to mislead the jury by leaving them to infer that, in the opinion of the court, the acquiescence of plaintiff in defendant's occupancy up to the Burrage line might be considered as a mere license, when the undisputed evidence showed to the contrary. For this reason, we think it was error to give it.

The court refused the defendant's request to instruct the jury that if he had been in the adverse possession of the property in dispute from 1877 up to the date of the Hurlburt survey, in 1890, such survey could not affect in any manner his title thus acquired; and this, in our opinion, was also error. If defendant had been in the adverse possession of the land for more than 10 years prior to the Hurlburt survey, his possession had ripened into a title (*Joy v. Stump*, 14 Or. 301, 12 Pac. 929), which could not be affected in any way by such survey. It was peculiarly important to defendant that an instruction to this effect should have been given, because much prominence was given in the evidence and charge of the court to the testimony tending to show that the Burrage survey was incorrect. Indeed, the court began its charge to the jury by saying that "the controversy here has arisen out of conflicting surveys"; and then proceeds to instruct them very carefully as to the rules by which they should be governed in determining the effect of the several surveys, and, in doing so, intimated very strongly, if it did not state in so many words, that the Hurlburt survey was the more reliable. It was therefore easy for the jury to imagine that the Hurlburt survey, if correct, was conclusive upon the title, and to overlook the effect of defendant's adverse possession. The real question in the case, as disclosed by the record before us, does not seem to be so much a controversy about conflicting surveys as one of adverse possession; and while the court, in its general charge, seems to have instructed the jury quite fully upon this question, yet we think the defendant was entitled to the instruction requested, as to the effect of the Hurlburt survey upon his adverse possession, if the jury should find that he had been so in possession.

It follows that the judgment must be reversed, and a new trial ordered.

#### STATE v. HANSCOM.

(Supreme Court of Oregon. Jan. 13, 1896.)

PROCURING SIGNATURE BY FRAUD—INDICTMENT—EVIDENCE.

1. An indictment under Hill's Ann. Laws, § 1777, making it a penal offense to obtain by false pretense a signature to a writing, the false making of which would be forgery, which alleges that defendant, by falsely representing to W. that he was authorized by a corporation

to draw a draft on it to W.'s order to procure funds to be used for the corporation, obtained W.'s indorsement to such a draft, is sufficient without an allegation that the indorsement was for defendant's accommodation.

2. Where an indictment set out the substance of a false telegram used to procure a fraudulent indorsement, which defendant retained, it was proper to admit secondary evidence of the contents of the telegram without giving defendant notice to produce it.

3. As it is not necessary to constitute the offense of obtaining a signature by false pretenses that the indorser should have sustained loss, defendant was not prejudiced by testimony that he and the indorser went to a bank to get the draft cashed, and that the money was paid to defendant, and that the indorser was compelled to repay the bank.

4. It was proper to exclude evidence of what was due defendant from the corporation on which the draft was drawn.

5. Where an indictment for obtaining a signature by false pretense charged that defendant, by falsely representing to W. that he was authorized to draw to the order of W. on a corporation, obtained W.'s indorsement to such a draft, and it appeared that, at the time, defendant was in the employ of the corporation, it was error for the court, in reply to a question by a juror as to whether the responsibility of an employer for the acts of his agent applied to the case, to say: "An agent is not supposed to exceed his authority. He cannot bind his company if he exceeds the instructions that are given him or the authority vested in him,"—as implying that he would be guilty if he innocently exceeded his authority.

Appeal from circuit court, Multnomah county; T. A. Stephens, Judge.

F. A. Hanscom was convicted of obtaining a signature by false pretense, and appeals. Reversed.

J. C. Leasure, for appellant. C. M. Idleman, Atty. Gen., and W. T. Hume, Dist. Atty., for the State.

MOORE, J. The defendant was indicted, tried, and convicted of the crime of obtaining the signature of another to a writing, the false making whereof would be punishable as forgery, and sentenced to the penitentiary for the term of 18 months. From this judgment he appeals, assigning as errors the action of the trial court in overruling his demurrer to the indictment, admitting incompetent and rejecting material testimony, refusing to instruct the jury to acquit, and in giving certain instructions. The indictment charges, in substance, that the defendant, with intent to defraud, represented to the members of the firm of Woodard, Clarke & Co. that he was an agent of the El Montecito Manufacturing Company, a corporation existing under the laws of California, and had authority to draw a draft or bill of exchange upon it for \$150, and exhibited to them an alleged false telegram, purporting to have been sent from Santa Barbara, Cal., in the usual course of business of the telegraph company, to the defendant at Portland, Or., by one W. P. Gould, president of said corporation, instructing the defendant to "proceed to Chicago; draw for necessary funds through Woodard, Clarke & Co."; and that, by means of said

false representations and false token, the defendant, with intent to defraud, obtained the signature of Woodard, Clarke & Co., who, relying thereon, indorsed their firm name upon a written instrument, of which the following is a copy, to wit: "\$150.00. Portland, Or., Aug. 26, 1895. At sight, pay to the order of Woodard, Clarke & Co. one hundred and fifty dollars, value received, and charge the same to the account of Frank A. Hanscom. To El Montecito Mfg. Co., Santa Barbara (Santa Barbara Co. Nat. Bank), Cal." The indictment then negatives said representations and token, and alleges that the indorsement was obtained contrary to the statute, etc.

1. The defendant's first contention proceeds upon the theory that, the bill of exchange having been drawn to the order of Woodard, Clarke & Co., it must be presumed to have been executed by the defendant in payment of his pre-existing debt to them, and that they indorsed it for value, and the failure to allege that Woodard, Clarke & Co. indorsed it for the defendant's accommodation renders the indictment fatally defective, and hence the court erred in overruling his demurrer thereto. In support of this proposition, the defendant cites the case of *People v. Chapman*, 4 Parker, Crim. Cas. 56, which shows that Chapman executed a promissory note for \$1,000, payable to the order of one Boardman, and by falsely representing that he owned a large quantity of barley and oats, and was able to pay every dollar he owed, induced Boardman to indorse it for his accommodation. The defendant, having been arraigned upon an indictment which charged the commission of the offense in a manner similar to the indictment in the case at bar, demurred thereto; and it was held, upon appeal, that the failure to allege that the indorsement was obtained for the defendant's accommodation rendered the indictment defective. Welles, J., in deciding the case, says: "Unless, therefore, it sufficiently appears by proper averments that the note was made by the defendant for his own benefit, and that he obtained the indorsement of Boardman with intent afterwards to negotiate it on his own account, and that Boardman, after indorsing the note, delivered it to the defendant, and that the defendant received it for that purpose,—in other words, that it was an accommodation indorsement,—the case made by the indictment is that Boardman, having taken the note in question, payable to his own order, for a debt due to himself from the defendant, was induced, by the representations set forth, to indorse and deliver it back to Chapman." The promissory note in that case was executed by Chapman, and made payable to the order of Boardman, who, by reason of the false representations, must have relied upon the maker's responsibility, and indorsed the note solely for Chapman's accommodation. There were two parties only to that contract, and, when Boardman delivered the note to Chapman, he knew that the indorsement was made for the



maker's accommodation. "The theory of a bill of exchange," says Mr. Daniel in his work on Negotiable Instruments (section 17), "is that the bill is an assignment to the payee of a debt due from the acceptor to the drawer; and it is undoubtedly true that the payee has a right to suppose that the drawee has funds of the drawer, upon the faith of which understanding he receives the bill directing them to be paid to him." It will be presumed that a bill of exchange was given or indorsed for a sufficient consideration. Hill's Ann. Laws Or. § 776, subd. 21. While a bill of exchange may have been received by the payee in liquidation of the drawer's antecedent debt, we cannot think that it should be so presumed, for the use it subserves is not so much the payment of a debt as to facilitate exchange and avoid the transmission of money from one place to another. 1 Daniel, Neg. Inst. § 4. But, conceding that the presumption of the payment of an antecedent debt prevails upon proof of the execution of a bill of exchange, we think the allegations of the indictment rebut such presumption, and show that the indorsement of Woodard, Clarke & Co. was not made for the defendant's accommodation. In the case at bar there were three parties to the contract, and the indictment alleges that Woodard, Clarke & Co. relied upon the faith of the supposed telegram and the representations of the defendant, and these negative any presumption that they indorsed the bill of exchange for the defendant's accommodation. They did not rely upon the defendant's responsibility, but upon that of the El Montecito Manufacturing Company, for whose accommodation they indorsed the instrument, and delivered it to the defendant, supposing the contract was entered into with his principal. The indictment is based upon an alleged violation of section 1777 of the statute, which provides that "if any person shall, by any false pretenses or by any privy or false token, and with intent to defraud, obtain or attempt to obtain from any other person, any money or property whatever, or shall obtain or attempt to obtain with the like intent the signature of any person to any writing the false making whereof would be punishable as forgery, such person, upon conviction thereof, shall be punished," etc. If an indictment be direct and certain as to the party charged and the crime alleged to have been committed, and states the particular circumstances of the offense in ordinary and concise language, and in such a way that a person of ordinary understanding can know what was intended, it is sufficient. *People v. Saviers*, 14 Cal. 29. In speaking of the sufficiency of an indictment, *Savage, C. J.*, in *People v. Herrick*, 13 Wend. 91, says: "It must be remembered, however, that the object of all specification in indictments is to apprise the defendant of what he is to meet upon the trial, and that certainty to a common intent is all that can reasonably be required." Based upon these rules, we think the indict-

ment shows that the indorsement was not obtained for the defendant's accommodation, and sufficiently notified him of what he was expected to meet upon his trial, and hence there was no error in overruling the demurrer.

2. It is contended that the court, without notice to the defendant to produce the original false telegram, erroneously admitted, over the defendant's objection, secondary evidence of its contents. The bill of exceptions shows that William F. Woodward, being called as a witness for the state, testified, in substance, that on August 26, 1895, the defendant called at the store of Woodard, Clarke & Co., and obtained a telegram that had been delivered at their place of business by a messenger for him; that he opened the message, read it in the hearing of the witness, and retained it; that the witness had made an ineffectual attempt to obtain the dispatch, and did not know what had become of it. He was then permitted to give from memory, over the defendant's objection and exception, the language of the message. When a written instrument is in or traced to the possession of the opposing party, it is necessary to give such party notice and a reasonable time before the trial within which to produce it, before secondary evidence of its contents can be received; but this rule does not require that notice should be given to produce documents which are the subject of the indictment. *Whart. Cr. Ev.* (9th Ed.) § 212. "It is well settled in criminal cases," says *Elliot, C. J.*, in *McGinnis v. State*, 24 Ind. 500, "that the court cannot compel the defendant to produce an instrument in writing, in his possession, to be used in evidence against him, as to do so would be to compel the defendant to furnish evidence against himself, which the law prohibits. And it is also evident, where the instrument in writing is the subject of the prosecution, and is described in the indictment in such a manner as to give the defendant an advantage on the trial by producing it, that he will do so. The description of the instrument in the indictment must be such that it would always serve to notify the defendant of the nature of the charge against him, save him from surprise, and enable him to be prepared to produce the writing when it was his interest to produce it. But when its production would be likely to work an injury to the defendant, by aiding in his conviction, it could not be expected that he would produce it in response to the notice. It is therefore difficult to perceive what benefit could result either to the state or the defendant from the giving of such a notice, while to the defendant it is liable to work a positive injury, by producing an unfavorable impression against him, in the minds of the jury, upon his refusal to produce it after notice." In the case at bar the gravamen of the charge is the allegation that the defendant, by means of false representations and a false and forged tele-

gram (the substance of which is set out in the indictment), and with intent to defraud, obtained the signature of Woodard, Clarke & Co. to a bill of exchange, a copy of which is also set out therein. The statute makes the offense equivalent to forgery when the instrument to which the signature has been obtained purports to be of or represents value. "This statute," says Bronson, J., in *People v. Galloway*, 17 Wend. 540, in construing the words of a similar section, "like that against forgery, was made to protect men in the enjoyment of their property; and, if the instrument obtained can by no possibility prejudice any one in relation to his estate, it will not be an offense within the statute. If the rule were otherwise, a man might be punished criminally for obtaining the signature of another to an idle letter or any other writing of no importance." The indictment having set out a copy of the bill of exchange, there can be no doubt of the state's right to introduce secondary evidence of its contents, without notice to the defendant, if unable to procure the original. The right to offer secondary evidence in such cases proceeds upon the theory that, the indictment having set out a copy of the forged or stolen instrument, the defendant has notice of what he may be expected to meet upon his trial, and hence another notice to produce the writing is unnecessary. The indictment in this case having set out the alleged false telegram in substance, the defendant was thereby notified of what the state expected to prove. This being so, secondary evidence of its contents, without additional notice, infringed no substantial right of the defendant, while the proof of a notice to produce a written instrument, and his failure or refusal to comply therewith, might have prejudiced his interest in the minds of the jury. If the indictment, however, had not set out what purported to be a copy of the alleged telegram, notice to the defendant and a reasonable time before the trial to produce it would have been necessary before secondary evidence of its contents could have been admitted. The telegram was so intimately connected with the offense charged in the indictment, and the execution of the bill of exchange so dependent upon the alleged false token, that we think there was no error in admitting secondary evidence of its contents without notice to the defendant to produce the original.

3. It is contended that the court erred in the admission of evidence tending to show that the defendant, after having obtained the indorsement of the bill of exchange, secured the money thereon. The evidence of Mr. Woodward shows that he went to the bank with the defendant, who drew the instrument, and the witness indorsed the firm name thereon; but he could not state whether it was delivered to the defendant or to an officer of the bank, nor whether the money was paid by him or such officer to the defendant. His evidence further shows

that the defendant received the money at the bank; that the bill of exchange was not accepted by the El Montecito Manufacturing Company, but was protested on account thereof, and that his firm was compelled to repay the bank. The crime alleged in the indictment is that the defendant, by means of false representations and a false token, and with intent to defraud, obtained the signature of Woodard, Clarke & Co. to a writing which was or might become prejudicial in relation to their estate. In *People v. Stone*, 9 Wend. 180, Sutherland, J., in construing a statute similar to section 1777 of our Code, says: "Under this statute, the offense is complete when the signature is obtained, if it were obtained by false pretenses and with a fraudulent intent, although it may never be used to the prejudice of any person." This doctrine was affirmed in *People v. Genung*, 11 Wend. 18, the court saying: "The offense is complete when the signature is obtained by false pretenses, with intent to cheat or defraud another. It is not essential to the offense that actual loss or injury should be sustained." The bill of exchange upon its face expressed a money value, the false making whereof would have been forgery, and the crime was therefore committed if the defendant, with intent to defraud, and by means of the alleged false token and false representations, obtained the signature of Mr. Woodward, who, relying thereon, indorsed the instrument; and hence it is immaterial whether the money was paid to the defendant upon it, except so far as to show a delivery of the bill of exchange to him. The indictment, having stated that the defendant obtained the signature, was equivalent to an allegation that the instrument had been indorsed and delivered to him, and proof of this allegation was necessary to support a conviction. Mr. Woodward testified that he indorsed the bill of exchange, and thinks he delivered it to the defendant, but is not positive about the matter, and cannot state whether he or the defendant presented it to the bank. The indorsement which gave a commercial value to the instrument having been obtained, we think it is immaterial whether the defendant or Mr. Woodward presented it to the bank, and the evidence that the defendant obtained the money thereon becomes material only to show an implied delivery, for if it be conceded that the bill of exchange was delivered to the bank by the witness, and that the money drawn thereon was paid by him to the defendant, it would show that Woodward was acting in the presence of the defendant as his agent; and hence the receipt of the money by the defendant, being a part of the transaction, shows an implied delivery of the instrument. But as the offense charged consisted in the unlawful obtaining of a signature to a written instrument representing value, which might prejudice the indorsers thereof in respect to their estate,

it was certainly immaterial whether they had paid the money back to the bank.

4. It is contended that the court erred in its refusal to allow the witness T. B. Izard, the manager and secretary of the El Montecito Manufacturing Company, to answer any questions tending to show what amount of money, if any, was due the defendant from said corporation at the time the bill of exchange was drawn by him. This witness, having been called by the state, stated on cross-examination that the defendant, at the time he drew the bill of exchange, was in the employ of said corporation as a salesman, at a salary of \$75 per month, whereupon the witness was asked: "On the 26th of August, how much was due him upon salary?" An objection to the question having been sustained, the following was asked: "Was there any money due from El Montecito Manufacturing Company to the defendant, F. A. Hanscom, on the 26th day of August, 1895, on the day that this draft was drawn?" To which the court also sustained an objection. These questions could become material only upon the theory that the indorsement was obtained for the defendant's accommodation. If the defendant had represented to Woodard Clarke & Co. that he had money on deposit with or due him from said corporation, and they, relying thereon, had indorsed for his accommodation, the questions asked by defendant's counsel would have been vital; but the indorsers, by means of the alleged telegram and the defendant's representations, relied upon the responsibility of the El Montecito Manufacturing Company, for whose accommodation they indorsed the instrument, and hence we fail to see how evidence of any money the defendant had on deposit with or due him from said corporation could be material.

5. It is insisted that the court erred in overruling the defendant's motion, made after the state had rested, to instruct the jury to return a verdict of acquittal. The bill of exceptions contains all the evidence given at the trial, and hence an examination of this question becomes necessary. Evidence was introduced tending to establish all the elements of the offense, but upon the falsity of the alleged telegram it is somewhat obscure. R. L. Brockett, being called as a witness for the state, testified in substance that he was bookkeeper and telegraph operator of the Postal Telegraph Company at its office at Portland, Or.; that, on August 24th last, he, as the operator, received a telegram from Oakland, Cal., to F. A. Hanscom, which was delivered to Woodard, Clarke & Co., and produced an office copy thereof, as follows: "Office No. 92. Oakland, California, Aug. 24, 1895. To F. A. Hanscom, & Woodard, Clarke & Co., Portland, Oregon: Go to Chicago; draw on us funds Woodard, Clarke & Co. W. P. Gould." The witness Izard testified, in substance, that he knew W. P.

Gould, who was the president of the El Montecito Manufacturing Company; that Gould was at Santa Barbara, Cal., between the 24th and 27th of August last; that the Postal Telegraph Company had no office at that city, but the Western Union maintained one there. It is possible that Gould may have been at Oakland, Cal., on August 24, 1895, and at Santa Barbara between that date and the 27th of said month, or that he may have ordered some one at Oakland to send the message in his name; but as the state had alleged and relied upon the defendant's false representations, as well as upon the alleged false token, we think there was no error in denying the motion.

6. It is also contended that the court erred in its instruction, and particularly in answer to a question from one of the jurors. After the court had instructed the jury upon all the issues pertinent to the case, one of the jurors asked the following question: "Could I ask your honor to give us the law in regard to the responsibility of an employer for the acts of his agent? Would that apply in this case?" To which the court answered: "An agent is not supposed to exceed his authority. He cannot bind his company if he exceeds the instructions that are given him or the authority vested in him." We think this answer misleading for two reasons: (1) The principal is often bound by the act of his agent in excess or abuse of his actual authority, but this is only true between the principal and third persons, who, believing and having a right to believe that the agent was acting within and not exceeding his authority, would sustain loss if the act was not considered that of the principal. *Walsh v. Insurance Co.*, 73 N. Y. 5. (2) It seems to leave the impression that the defendant would be criminally responsible if he, however innocently, exceeded his authority in the smallest particular. This being so, we consider the remark of the court erroneous, for which reason the judgment is reversed, and a new trial ordered.

#### GODFREY et al. v. DOUGLAS COUNTY et al.

(Supreme Court of Oregon. Jan. 13, 1896.)

EQUALIZATION OF TAXES—JURISDICTION OF COUNTY COURT—APPEARANCE—APPEAL.

1. Hill's Ann. Laws, § 2781, provides that, where a county board of equalization is unable to complete the equalization during the week in which it is required to meet, the county court shall, at its next term thereafter, complete the equalization. Section 899 provides that, in addition to its regular terms, a county court may hold terms at such times as the court may appoint. *Held*, that the words "next term" mean next session of the court, and where a county court adjourned its regular September term to October 9th, it might, at such adjourned term, complete the work of an equalization board which sat during the first week in October.

2. In a proceeding before a county court to

equalize an assessment, it will be presumed that an appearance by a taxpayer was a general one.

3. The fact that it appears from an assessment roll that assessments on pages 53 and 114 thereof were acted on by the county board of equalization does not show that an assessment on page 57 was acted on by the board.

4. Where an assessment roll contains a column headed "As Equalized by the County Board," it will be presumed, where no entry appears in that column opposite an assessment, that the assessment was not equalized by the county board.

5. Where a taxpayer notified to show cause before a county court why his assessment should not be increased appeared on the hearing, it will be presumed, on a writ to review a judgment increasing the assessment, that the judgment was rendered on sufficient evidence, though it does not show on what it was predicated, or that it was rendered on any evidence.

Appeal from circuit court, Douglas county; J. C. Fullerton, Judge.

The Douglas county court made an order increasing the assessment of O. F. Godfrey and others, and on a writ of review to the circuit court the order was set aside, and Douglas county appeals. Reversed.

This is a special proceeding by O. F. Godfrey, Peter Hume, and S. C. Flint, partners doing business under the firm name of the Douglas County Bank, to have the action of the county court of Douglas county in the matter of increasing an assessment reviewed by the circuit court. The record shows: That on July 17, 1893, the county court made an order extending the time until the first Monday in October for the county assessor to return the assessment roll. That on September 6th the court met, and continued in regular session until the 11th of that month, at which time it adjourned to October 9th. That the assessor within the extended time returned the assessment roll, in which the said bank was assessed upon money, notes, and accounts in the sum of \$6,600. That on October 2d the board of equalization met, pursuant to notice, and continued in session until the 7th of that month, during which time the assessments of several persons were examined and altered, but no change was made in that of the bank. That on October 7th the board ordered a reduction of 10 per cent. to be made in the assessed value of certain property, not including money, notes, and accounts, and delivered the assessment roll to the county court, with its certificate, attached thereto, showing that the equalization had not been completed. That on October 9th the court met, pursuant to the adjournment of September 11th, to complete the equalization, and a notice having been served upon the bank to appear and show cause why its assessment of money, notes, and accounts should not be increased, the court, on October 12th, made the following order: "In the Matter of Equalization of Assessment Roll for 1893. Assessment of Douglas County Bank. Now, at this time, it is ordered by the court that the assessment of money, notes, and accounts of the Douglas County Bank for the year 1893 be in-

creased to \$15,000; S. C. Flint, O. F. Godfrey and Peter Hume each appearing in person for said bank." That, the assessment having been increased in pursuance of said order, this proceeding was instituted, and it is alleged that the county court, in making said order, exceeded its jurisdiction, to the injury of the plaintiff's substantial rights; that the attempted increase of said assessment is unjust, and unauthorized by any facts proved before or found by said court; that the assessment roll was not returned until October 2d, at which time the board of equalization met and approved the assessment of the Douglas County Bank; that the county court thereafter, without legal notice thereof, and in the absence of any certificate that the assessment had not been examined and approved, attempted to act as a board of equalization at an adjournment of the September term of said court; that no evidence whatever was taken or produced before the court upon which it could base an alteration of said assessment; and that its action in so doing was capricious and arbitrary. A writ of review having been issued and served, the county court returned the same with a certified copy of the record, as above recited, from which the circuit court found that the county court had exceeded its jurisdiction in making said order, and rendered a judgment setting it aside, from which the defendant appeals.

J. W. Hamilton, for appellants. W. R. Willis, for respondents.

MOORE, J. (after stating the facts). The record presents two questions for consideration: (1) Did the county court have jurisdiction of the subject-matter and persons of the interested parties at the time it attempted to increase the assessment; and, if so, (2) does the record show a judgment unimpeachable upon a direct attack? The first question suggested requires an examination of the statute prescribing the duties of the assessor, board of equalization, and county court in the matter of returning the assessment roll and equalizing the assessment. The law requires the assessor to assess all the taxable property within his county and return the roll thereof to the county clerk on or before the first Monday in September (Hill's Ann. Laws Or. § 2752), and it is made the duty of the county judge, county clerk, and assessor, as a board of equalization, to meet on the last Monday in August, and, if necessary, to continue in session one week, for the purpose of examining and correcting the assessment roll and equalizing the assessment (Id. §§ 2760, 2778). And to guard against the possible contingency of lack of time the statute provides that the county court shall, at its term in September in each year, complete the equalization (Id. § 2782), but if the assessor is unable to complete the assessment by the last Monday in

August the county court may, at any regular term thereof, prior to the first Monday of September, extend the time for returning the assessment roll to a day certain, not later than the first Monday in October (Id. §§ 2752, 2777). It is also made the duty of the assessor to give three weeks' public notice of the meeting of the board of equalization prior to the date of returning the roll (Id. §§ 2760, 2777), and, if the board is unable to complete the equalization during the week in which it is required to meet, it shall be the duty of the county court, at its next term thereafter, sitting to transact county business, to complete such examination and correction, in the same manner and with like effect as the board of equalization is required to do (Id. § 2781). The record shows that the county court, on July 17, 1893, at a regular term thereof, made an order extending the time for the return of the assessment roll to the first Monday in October, at which time, the roll having been returned, the board of equalization met, pursuant to the assessor's notice, and continued in session one week; but, being unable to complete its labors within that time, the roll was submitted to the county court for final equalization, and that on October 12th the court increased the plaintiffs' assessment. The plaintiffs contend that, the court having, at its regular session in September, adjourned to the 9th of October, when it convened on the latter date its session was a continuation of the September term, and not its next term after the meeting of the board of equalization, and hence the county court was at that time powerless to equalize or correct the assessment roll, and had no authority to do so until the next regular term after the September term.

The point for which the plaintiffs contend demands an examination of the terms of the county court required to be held in Douglas county, and a definition of the word "term," as applied to a session thereof. The terms of said court, appointed by law, are held on the first Monday in January, March, May, July, September, and November (Hill's Ann. Laws Or. § 2335), and a term may also be held at such other times as the court, in term, or the county judge, in vacation, may appoint (Id. § 899). In *Tompkins v. Clackamas Co.*, 11 Or. 364, 4 Pac. 1210, it was held that, when the statute referred to the terms of a county court, it meant the regular terms prescribed by law, and not the special terms appointed by the court or judge thereof. This opinion was rendered in the construction of a statute under the authority of which the county court of Clackamas county sought to establish a county road across the plaintiff's premises, and, the proceedings taken being for the purpose of appropriating private property to a public use, the court very properly construed the statute strictly. The commencement of every term is fixed by statute, and the end by the final adjourn-

ment for that term, so that, if it should sit pursuant to an order of adjournment made and entered upon the record in term time, it would not be another session of the court, but a continuation of the statutory term, and this is the case whether the adjournment be from one day to the next, or for a longer period (*Bronson v. Schulten*, 104 U. S. 410); and hence it follows that when the county court met on October 9th, pursuant to the adjournment of September 11th, it was a continuation of the September term, and, if the statute is to be construed strictly, not its next term after the meeting of the board of equalization.

Every citizen owes a duty to the state to bear a just proportion of its burdens, and if the assessor should undervalue his property, or omit a part thereof assessable for general taxation, he has no just cause for complaint if a board of equalization or county court adds thereto or increases the value placed upon it by the officer chosen for that purpose. The duty of supporting the state being incumbent upon the citizen in proportion to his taxable property, the right to equalize the measure of his burden must be in the state, which, in the interest of the citizen, delegates this power to the board of equalization, and if not completed by it within a given time, then to the county court for final equalization. It is presumed that official duty has been regularly performed (Hill's Ann. Laws Or. § 776, subd. 15), and, this being so, the list of property of the citizen returned by the assessor, as well as the value placed thereon, must be deemed *prima facie* correct, and, the right of the board or court to add to the list or alter the value so ascertained being a delegated power, the measure of such power must be found in the statute conferring it. This would require the board or court, if the statute was held to be mandatory, to alter the assessment at the time and in the manner only as prescribed by law; but, as we understand the law, proceedings to equalize assessments of this character are to be construed much more liberally than an equalization of an assessment for municipal purposes. 2 *Desty, Tax'n*, 615. In the counties of Josephine, Curry, Coos, and Willows no terms of the county court are held after the first Monday in September until the first Monday in January. Section 2335, *supra*. The county court, at its term in September in each year, is required to levy the county, state, and school taxes (Id. § 2783), and if the assessor in either of these counties should be unable to return his roll on the last Monday in August, and further time was granted him for that purpose, the county court could not, to give the statute a strict construction, equalize the assessment until the January term, if the board of equalization was unable to complete its labors within one week. The result of this would be that the county court must omit either the equalization or the levy of taxes, and for this reason we can-

not think that the legislative assembly meant, by "the next term thereafter," the next regular term after the meeting of the board of equalization. We are strengthened in this belief from the language of section 2777, *supra*, which provides that the county court, at any regular term thereof, may extend the time for the assessor to return his roll, thereby implying that all other statutory requirements in relation to the assessment, equalization, and levy of taxes may be complied with at an adjourned term of the court. The assessment having been made to raise a public tax, there is no necessity for construing the statute strictly, and we hold that the language, "at its next term thereafter sitting to transact county business," means at the next session of the county court after the meeting of the board of equalization.

The court, having jurisdiction of the subject-matter, obtained jurisdiction of the persons of the plaintiffs by their voluntary appearance before it, for it is a universal rule, which admits of no exception, that if the court has jurisdiction of the subject-matter, a general appearance gives jurisdiction of the person (2 Enc. Pl. & Prac. 639), and if the record falls, as in the case at bar, to show that the appearance was special, it will be presumed to have been general (*Deshler v. Foster, Morris* [Iowa] \*403). The plaintiffs' assessment having been entered on page 57 of the roll, they contend that it was approved by the board of equalization, and that this conclusively appears from the fact that the board altered an assessment entered on page 53 and another on page 114 thereof. This could only be so by inducing the presumption that the board of equalization began at the first page of the assessment roll, and continued to examine and correct the successive entries therein, in regular order, during the week it was in session. The assessor published a notice of the meeting of the board of equalization, inviting interested taxpayers to attend its session for the purpose of having their assessments corrected; but, in appearing in response thereto, it cannot be presumed, or even supposed, that the persons whose names were entered on the assessment roll appeared before the board of equalization in the order in which their names were written or arranged by the assessor; nor does the fact that alterations were made on the roll upon pages before and after that upon which the assessment of the Douglas County Bank was entered show that the board approved the assessment of the bank.

It is contended that the county court could acquire jurisdiction to alter an assessment only by means of a certificate from the board of equalization that it had not acted upon or equalized a given assessment, and, no certificate of that character having been issued, the county court had no authority to alter this assessment. The assessment roll contains a column for the "Total Value of Taxable Property," in which the assessor carried

out the aggregate value of the several classes of property assessed. The next column to the right is entitled, "As Equalized by the County Board," and it must be presumed that the board of equalization entered in this column every assessment it corrected or equalized, and no entry of that character having been made in this column opposite the assessment of the Douglas County Bank, it was apparent to the county court, from the certificate made by the board of equalization, that the plaintiffs' assessment had not been equalized, and authorized the court to examine, correct, and equalize the same. The county court having jurisdiction of the subject-matter and of the persons, it only remains to be seen whether the order complained of is sufficient in form to withstand a direct attack.

It will be observed that the judgment contains no recital that it appeared to the court, from any evidence taken before it, that the assessment complained of was incorrect, or that it should be increased; and the question is presented whether the entry of a judgment, without a statement that any sum is due, or of any facts upon which it is predicated, is binding upon the parties affected thereby, except in a collateral proceeding. Mr. Freeman, in speaking of the sufficiency of the journal entry of a judgment, says "that whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal if it shows (1) the relief granted; and (2) that the grant was made by the court in whose records the entry is written" (Freem. Judgm. § 50); and in another section the same learned author says: "No particular form is required in the proceedings of the court to render their order a judgment. It is sufficient if it is final, and the party may be injured" (Id. § 51). Mr. Black also says: "It is further to be noted, in connection with matters of form in judgments, that a much less degree of technicality and formality is required in the judgments of justices of the peace and other inferior courts than is exacted in respect to the judgments of courts of record." 1 Black, Judgm. § 115. "The judgment," says Wheeler, J., in *Hamilton v. Ward*, 4 Tex. 356, "raises a legal presumption of the truth of every material averment in the petition or motion, which can only be rebutted by a statement of facts showing the absence of proof." And further in the opinion the same learned justice says: "It cannot, therefore, be a valid objection to the judgment that it does not recite the facts alleged in the motion and proved at the trial." If there be any ambiguity therein, the pleadings may be read in connection with the judgment for the purpose of explaining the uncertainty. The judgment is the final order predicated upon the prior proceedings, which may always be examined in aid of and to support the judgment. 1 Black, Judgm. § 123.

The plaintiffs, under the provisions of section 2780, Hill's Ann. Laws Or., were serv-

ed with a written notice which required them to appear before the county court to show why their assessment of money, notes, and accounts should not be increased, and in obedience thereto they personally appeared for that purpose. This notice is the pleading by which the court obtained jurisdiction of the persons, and may be read in connection with the order founded thereon for the purpose of explaining the latter. An examination of the notice conclusively shows the nature of the inquiry proposed, and the order of the court based thereon is equivalent to a finding that the class of property specified in the notice and order was assessed too low, and for that reason it was the judgment of the court that the assessment thereof be increased. No board of equalization can arbitrarily increase the assessment of a taxpayer, for to do so would be a confiscation of property; but the pleadings having, in effect, stated a cause of action, and an order having been made thereon, it must be presumed that sufficient evidence was adduced from which the court concluded that the assessment should be increased to the amount found by it. In *Becker v. Malheur Co.*, 24 Or. 217, 33 Pac. 543, Bean, J., in speaking of the duties of a board of equalization, and the presumptions indulged in favor of its conclusions, says: "There is no provision of law of which we are aware making it the duty of the board to reduce to writing or preserve the evidence before it in the matter of the equalization of taxes, and, although it is an inferior tribunal, every presumption exists in favor of the regularity of its proceedings after it has once acquired jurisdiction." The judgment of the court annulling the increase in the assessment being erroneous, the judgment will be reversed, and the cause remanded, with instructions to dismiss the writ of review.

#### WALKER v. BLOOMINGCAMP et al.<sup>1</sup>

(Supreme Court of Oregon. Jan. 13, 1896.)

##### TRESPASS—HERDING SHEEP ON UNINCLOSED LAND.

1. A complaint for trespass on uninclosed land in a portion of the state to which the fence law applies, which alleges that defendant unlawfully herded sheep on the land, whereby plaintiff was disturbed in his possession, does not state a cause of action.

2. Where the fence law is applicable, the common-law liability for injury to uninclosed land by domestic stock is abrogated.

Appeal from circuit court, Klamath county; W. C. Hale, Judge.

Action of trespass by W. Albert Walker against Henry Bloomingcamp and others. A demurrer to the complaint was overruled, and defendants appeal. Reversed.

Henry L. Benson and W. R. Willis, for appellants. L. R. Webster, for respondent.

BEAN, C. J. This is an action brought to recover for the alleged trespass of defend-

ants' sheep upon the uninclosed lands of the plaintiff. The complaint, after alleging plaintiff's ownership of the land, avers: "That on divers days and times between April 13, 1894, and April 21, 1894, the defendants unlawfully and willfully herded, and permitted to be herded, their bands of sheep upon the above lands, of which plaintiff was, by reason thereof, disturbed in his possession, and plaintiff's grass on said land was trodden down, eaten up, injured, and destroyed, to the plaintiff's damage in the sum of two hundred and forty-five dollars." The defendants demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action; and, the demurrer being overruled, judgment was rendered in favor of plaintiff, from which defendants appeal.

The common-law rule by which the owner of domestic stock was made liable for the injury done by them to the uninclosed lands of another is not in force in the portions of this state to which the fence law is applicable. *Campbell v. Bridwell*, 5 Or. 312. Here the rule prevails that uninclosed and unimproved lands are regarded as common of pasture, and the owner of stock may suffer them to go at large and depasture such lands without being liable in trespass therefor. If the owner of the land would protect himself from such damage, he must inclose it, or keep the stock off in some other way. But the contention for the plaintiff is that this rule applies only to animals running at large, and not to the willful trespass of an owner who knowingly and intentionally drives and confines his stock upon the land of another without his consent or against his will, for the purpose of eating or destroying the grass and herbage growing thereon; and the authorities seem to be to that effect. 7 Am. & Eng. Enc. Law, 892; *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. 477; *Harrison v. Adamson*, 76 Iowa, 337, 41 N. W. 34; *Delaney v. Erickson*, 11 Neb. 533, 10 N. W. 451; *Powers v. Kindt*, 13 Kan. 74. But, in our opinion, the doctrine established by these cases cannot be made to apply to this record. The complaint does not aver that the sheep were actually and purposely driven upon the land of plaintiff by defendants, or driven there at all, or kept there without plaintiff's consent, or even that defendants or their herders knew that the lands belonged to the plaintiff; nor does it state any facts showing a willful or intentional trespass by the owner of the sheep. It is true the complaint alleges that the sheep were unlawfully and willfully herded, and permitted to be herded, upon the land; but this amounts to nothing more, in effect, than an averment that the defendants suffered their sheep, in charge of a herder, to graze and pasture upon the uninclosed lands of the plaintiff. It is well known that the flock masters of the section of the state where this controversy arose are required, by the necessities of the case, to keep their

<sup>1</sup> Rehearing pending.

sheep in charge of a herder, in order to protect them from loss or destruction while ranging and feeding upon the common, uninclosed lands. The sheep, however, are generally permitted to roam substantially at will over the range, under the care and supervision of the herder; and if, in doing so, they go upon the uninclosed land of another, for the purpose of pasturage, the owner of the land, in our opinion, has no cause of action for the trespass. *Fant v. Lyman*, 9 Mont. 61, 22 Pac. 120. It follows that, when one permits his stock to run at large or graze upon uninclosed land, he is guilty of no actionable injury; and the fact that the character of the stock requires that he should have them in charge of some person, to protect them from loss or destruction, does not, in our opinion, change the rule. By so doing, he does nothing more than has been, by common consent, done by the owners of such stock since the earliest settlement of the state; and, if the practice is now to be changed, it should be done by legislative enactment. Judgment reversed, and cause remanded, with directions to sustain the demurrer to the complaint.

STATE ex rel. ATTORNEY GENERAL v.  
McGRAW, Governor, et al.

(Supreme Court of Washington. Dec. 26,  
1895.)

STATUTE — CONSTRUCTION — REPEAL — DISBURSEMENT OF STATE FUNDS.

1. Act March 21, 1893, created a commission for the erection of a state capitol building, and provided that the disbursements therefor should be paid in warrants on the state capitol building fund, which fund was to be derived from the sale of lands granted the state by the federal government for such purpose. *Held*, that the commission was authorized to provide for the sale of warrants at not less than par, drawn on the building fund, on the letting of the contract for the building, and to use the money so received to make cash payments as the work progressed, as such plan does not constitute a borrowing of money.

2. Const. art. 8, § 4, prohibiting the payment of money out of the state treasury unless the payment is made within two years from the 1st of May after the appropriation, does not apply to the disbursement of the state capitol building fund, which is to be derived from the sale of lands granted the state by the federal government for the purpose of erecting capitol buildings.

3. Act March 20, 1895, prohibiting the state auditor from issuing any warrants except on vouchers for services rendered or material furnished, does not apply to the disbursement of the capitol fund provided for by Special Act March 13, 1895, and to be derived from the sale of lands granted the state by the federal government for the purpose of erecting capitol buildings.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Action, on the relation of the attorney general, against John H. McGraw, governor, and others, as members of the state capitol commission, and others. There was a judgment

for defendants, and relator appeals. Affirmed.

Harold Preston, for appellant. James A. Haight, for respondents.

GORDON, J. The question to be determined in this case is the legality of a resolution of the state capitol commission, which resolution is as follows: "Whereas, it appears to the state capitol commission that said commission can dispose of warrants on the 'state capitol building fund' for the full amount of the unexpended appropriation for said state capitol at par in cash, if issued on the letting of the contract for the superstructure of the capitol building, for which bids are or will be invited, and that, by so doing, the completion of said capitol building wholly and solely from said 'state capitol building fund,' and without resort to any other fund of the state, is insured,—and the contract price for said letting can be reduced several thousand dollars, and said sum saved to the state, and, without so doing, said contract cannot be let: Therefore, be it resolved, that, on the letting of the contract, the commission, with the consent of the contractor, issue to the auditor its certificate or certificates directing the auditor to issue warrants on the 'state capitol building fund,' payable to the order of the contractor, to be indorsed by the contractor, and to be delivered as so indorsed by the auditor in exchange for cash at not less than par, said certificate or certificates and warrants to be for a sum or sums not exceeding the amount of the appropriation still unexpended; said moneys realized by the commission from said warrants to be held by the state treasurer solely to be disbursed upon certificates issued by the board upon and with vouchers duly presented, passed upon, examined, audited, and allowed in the method provided in section 14 of chapter 138, Laws of 1893, certifying that services have been rendered and material furnished, and that the person therein named is entitled to be paid the amount therein named; said certificates to be audited and allowed by the state auditor."

Upon behalf of the relator it is contended that the plan proposed by said resolution involves the borrowing of money, and that no authority exists in the commission or in the auditor of the state for that purpose; that the acts contemplated by said resolution are not within the powers conferred by law upon said capitol commission and the several officers of the state, made respondents herein; that it would be a breach of the official duty of the state auditor to issue warrants contemplated by said resolution in advance of the performance of labor and the furnishing of material by the contractor; and that it would be a breach of duty for the state treasurer to pay out the funds received from the sale of said proposed warrants upon the certificates proposed by said resolution; that



the proposed plan contemplates the violation of the constitutional provision forbidding the disbursement of money from any fund after the lapse of two years from May 1st following the date of the appropriation. Chief of these objections, and the one most strongly relied upon by counsel, is the first above mentioned, viz. that the borrowing of money is of the essence of the proposed plan.

The act of congress approved February 22, 1889, commonly known as the "Enabling Act," in substance granted to the state 132,000 acres of the unappropriated public lands therein, "for the purpose of erecting buildings at the capital of said state for legislative, judicial and executive purposes."

Section 1 of the act of the legislature of this state approved March 21, 1893, provides "that for the purpose of erecting and completing a state capitol building for the state of Washington on the site now owned and occupied by the state of Washington for the purpose at the city of Olympia in said state there is hereby created a board to be known as the 'state capitol commission.' \* \* \*

Section 5 of said act is as follows: "It shall be the duty of said board: (1) To locate said capitol building at the place in the present capitol grounds most slightly and suitable therefor. (2) To secure the submission of plans and designs appropriate to a capitol building of the state of Washington, the reasonable cost of which shall be one million dollars and no more, and from such plans and designs as may be worthy and adequate, to secure the selection of the most desirable plan and design, and to obtain proper architectural designs, plans and specifications and details, in conformity with such plan and design. (3) To secure the erection and completion of said capitol building conforming faithfully to such plan and design."

Sections 14 and 15 of the same act read:

"Sec. 14. All disbursements on account of the construction of the capitol building shall be made pursuant to certificates issued by the board. All claims, bills and demands for labor performed, work done or material furnished shall be presented to the board in duplicate, and shall be passed upon by said board only at regular sessions thereof, and after a careful examination of every item named. If found correct they shall audit the same, preserving one duplicate and transmitting the other as audited and allowed to the state auditor, and shall issue a certificate to the effect that services have been rendered or material furnished, and the person therein named is entitled to a warrant on the treasury for the amount therein named. Upon the presentation of said certificate and a duplicate of the vouchers therefor as audited and approved by the board as herein provided, to the state auditor, he shall draw his warrant on the state treasury on the 'state capitol building fund' for the amount stated, and to the order of the person named in said certificate: provided, that no certifi-

cate shall be issued in excess of the amount appropriated for that year. All certificates issued shall be recorded in a book kept for that purpose.

"Sec. 15. In order to carry out the provisions of this act, there is hereby created a fund to be known as the '(state) capitol building fund,' into which fund shall be paid the proceeds of all moneys derived from the sales of lands granted to the state of Washington for the purpose of erecting public buildings at the state capital, from which fund there is hereby appropriated the sum of two hundred and twenty-five thousand dollars for the fiscal year ending March 31, 1894, and two hundred and seventy-five thousand dollars for the fiscal year ending March 31, 1895: provided, that no appropriation shall be made from any fund except the fund derived from the sale of lands granted for erecting public buildings at the state capitol."

Section 17 of the same act recites that "the state having no suitable building for capitol purposes, and a long interval necessarily elapsing after this act goes into effect before the work of construction on the capitol building can be begun, an emergency is hereby declared to exist. \* \* \*

Section 15, above quoted, was further amended by the act approved March 13, 1895, as follows:

"Section 1. That section 15 of chapter xxxviii. of the Laws of Washington of the Session of 1893, be amended to read as follows: 'Sec. 15. In order to carry out the provisions of this act, there is hereby created a fund to be known as the "state capitol building fund," into which fund shall be paid the proceeds of all money derived from the sales of land granted to the state of Washington for the purpose of erecting public buildings at the state capital, from which fund there is hereby appropriated the sum of nine hundred and thirty thousand dollars: provided, that no appropriation shall be made from any fund except the fund derived from the sale of lands granted for erecting public buildings at the state capital: provided, further, that any future contract shall be for the completion of the building according to the plans and specifications, adopted by the capitol building commission, and shall be paid for in warrants on said "state capitol building fund." \* \* \*

"In interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject), and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature. \* \* \*" *Brown v. Duchesne*, 19 How. 183.

We must presume that the legislature, by the acts so passed, intended to secure the building and completion of a capitol building from the proceeds of sales of the lands

so granted by congress, without resort to other funds. We are also bound to presume that the commission which it authorized thereto is in good faith endeavoring to effectuate the object and purpose of the legislature. We think a reference to the acts of 1893 and 1895, and particularly to sections 1 and 17 of the act of 1893, above quoted, is sufficient to indicate that the "object of the law" was to secure the erection at the state capital of a suitable building "for legislative, judicial and executive purposes," out of the lands granted for that purpose to the state by the general government, without burdening the treasury of the state, and that the "policy of the law" was to intrust to the commission provided by said act discretionary power to determine (subject only to the limitations and restrictions imposed by said act) the best means to accomplish that object. What are these limitations? First, that the cost of said building should not exceed \$1,000,000; second, that no portion of such cost should be borne by any fund excepting "the fund derived from the sale of lands granted for erecting public buildings at the state capital"; and, thirdly, that said building "shall be completed by the 1st day of January, 1899." Such being the "objects and policy of the law," as indicated in its various provisions, the method of procedure is subordinate and secondary thereto; and in so far as such procedure is not inconsistent with the main object and policy, nor in conflict with express mandatory provisions, of the act, the precise method of its adoption and exercise must be left to the determination of the commission charged with the duty of effectuating the legislative will. In *Platt v. Railroad Co.*, 99 U. S. 48, the supreme court of the United States had under consideration the act of congress approved July 1, 1862, granting lands to said railroad company "for the purpose of aiding in the construction of the railroad and telegraph line," etc. It was provided in the third section of said act that all lands not sold or disposed of before the expiration of three years after the completion of the road should be subject to settlement and pre-emption like other lands. Thereafter the company accepted the grant, located its line of road, and filed its map within the requisite time. Thereafter, in order to raise the funds necessary to build and complete its line of road, it issued its bonds, and, to secure said bonds, executed a mortgage upon said granted lands. The court held that the mortgage executed by the company for the purpose of raising money necessary to continue and complete the construction of the road "disposed" of said lands, within the meaning of the act, and was authorized thereby; also, that the provisions of the act should be construed so as to effect their primary object, which was to furnish aid in and during the construction of the road; and that it could not be defeated nor controlled by the secondary and subordi-

nate purpose of opening to settlement and pre-emption such of the lands as should not be sold or disposed of within the designated period. At page 64 the court say: "The principal objection urged against the interpretation we have given to the words 'sold or disposed of' is that it is repugnant to the governmental policy. \* \* \* It must be admitted that congress had that policy in view, \* \* \* but this policy was manifestly subordinated to the higher object of having the road constructed and constructed with the aid of the land grant. If, as we think it manifest, the leading primary policy of the act was to place the lands in the hands of the company to be used for the completion of the road as this work progressed, any secondary policy the government may also have had in view ought not to be allowed to embarrass or defeat that which was primary. And we are to give such construction to that language as will carry out the congressional intention."

We cannot agree with the contention of counsel that the proposed plan of the commission, as expressed in the resolution, constitutes a borrowing of money, but we think that it falls within the principle involved in the cases decided by this court of *Cloud v. Lawrence*, 40 Pac. 741, and *Winston v. City of Spokane*, 41 Pac. 888, and is in furtherance of the objects and policy of the law creating such commission. It was entirely competent for the legislature to commit to a board of commissioners the business of erecting the building, and to invest such board with the power necessary to accomplish the object for which it was created; and this does not constitute a delegation of legislative functions, but the authority conferred and the duty imposed are administrative. *Nelson v. Troy* (Wash.) 39 Pac. 976. Such board is neither a corporation nor a public quasi corporation, but is merely the ministerial disbursing agent of the state for that purpose, and, upon the completion of its duties, ceases to exist. The proposed plan involves merely an exchange of warrants (drawn upon the fund from which the capitol building must be built), at par for cash, on the letting of the contract, and is not antagonistic to any provision of law upon the subject; nor does it conflict with the language contained in section 1 of the act of March 13, 1895, "that any future contract shall be for the completion of the building according to plans and specifications, adopted by the capitol building commission, and shall be paid for in warrants on said state capitol building fund." *Cloud v. Lawrence*, supra; *Winston v. City of Spokane*, supra; *In re State Warrants* (S. D.) 62 N. W. 101.

Nor do we think that the acts which it is alleged that the auditor threatens to and will perform would constitute any breach of duty by him, or constitute any violation of the law pertaining to his office. In so far as the acts in question and the proceedings of

said board of capitol commission thereunder involve a discharge of duty by the respondents, the state auditor and the state treasurer, they are special to that subject, and are not affected by prior or subsequent general provisions of statute concerning the discharge of their official duties. It is a well-settled proposition that a general law does not abrogate a special one by mere implication. *Brown v. Commissioners*, 21 Pa. St. 37; *State v. Judge of St. Louis Probate Court*, 38 Mo. 529. "Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language.

\* \* \* The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction." *End. Interp. St. § 223*, and authorities there cited. In accordance with this general rule, we think it is very clear that the provisions of the act of March 20, 1895,<sup>1</sup> do not apply to the case. The resolution in question accords with the spirit of section 14 of the act of 1893, and contains all of the safeguards imposed by that section. In addition thereto, we think that the provisions of that section are merely directory, and prescribe a method by which any party entitled to a warrant could, upon complying with its provisions, compel the issuance of such warrant; but, however that may be, it is very clear that these provisions relate, at most, merely to matters of policy which, within the principle decided by the supreme court of the United States in *Platt v. Railroad Co.*, supra, is manifestly subordinate to the higher object of having the building completed from the fund arising from the sale of lands granted by congress for that purpose. We think, further, that it will be the duty of the treasurer to disburse the money received in accordance with the terms so proposed, and that such plan is not in conflict with any provision of the laws or the constitution of this state relating to the subject. He becomes the proper custodian of the moneys so received by virtue of *Hill's Code*, § 105, which makes it his duty to "receive and keep all moneys of the state not expressly required by law to be received and kept by some other person"; and he becomes charged with the trust of dis-

bursing them in accordance with the terms upon which they are received by him. In this respect the disposition of such funds may be likened to that imposed by the law governing the revolving fund (*Id.* § 1173); also to the provisions of the law relating to indigent patients at the hospital for the insane (*Id.* § 1263); and of *Laws 1895*, p. 122, c. 68, providing for the apportionment of the school fund of the state. Nor do the moneys so received fall within the provision of the constitution forbidding moneys to be paid out by the treasurer, "except in pursuance of an appropriation by law, nor unless its payment be made within two years from the first day of May next, after the passage of such an appropriation act" (*Const. art. 8, § 4*), since these moneys are charged with a special trust, as above noticed, and "must be disbursed in accordance with the terms of the trust."

For these reasons, we think that the acts complained of do not constitute any violation of law, or of duty imposed upon the several respondents in the premises, and that the resolution of the state capitol commission is in accord with the objects and policy sought to be attained by the several legislative enactments relating to the subject of the building a state capitol, and is authorized and warranted by law. In thus disposing of the case, we give full force to the various provisions of the constitution relating to the different officers of the state who are made respondents in this proceeding; but it may well be doubted whether the limitations of the constitution are at all applicable to the subject which we are here considering, inasmuch as the whole subject-matter of this case relates to the donation from the congress of the United States of lands for the purpose of erecting a suitable building at the capital of the state. For such purpose, and only for such purpose, were the lands granted. It would be beyond the power of the legislature to use an acre of said lands for any other purpose, or to appropriate a dollar of the funds arising from their sale to the accomplishment of any other object. It would have been entirely competent for congress, the donor, to have particularly designated the manner in which the lands should be sold, and their proceeds applied. Instead, however, of so doing, it has left their disposition to the control of the legislature of the state. It would seem to follow that the legislature might properly deal with the subject as to it might seem most beneficial, without regard to any limitations imposed by the different provisions of the constitution of the state. To illustrate: Suppose that congress had provided that the moneys arising from the sale of such lands should be drawn from the treasury of the state upon the written order of the secretary of the state capitol commission. Would any one contend that the provisions of section 4, art. 8, of the constitution, supra, rather than the act of congress making the

<sup>1</sup> *Laws 1895*, p. 191, c. 98, entitled "An act relating to the duties of state auditor, and declaring an emergency:

"Be it enacted by the legislature of the state of Washington:

"Section 1. That it shall be unlawful for the state auditor to issue any warrant or warrants except upon vouchers for services rendered or material furnished duly certified and authenticated as provided in sections 3131 and 3132 of the General Statutes of the State of Washington, volume 1, as arranged and annotated by William Lair Hill.

"Passed the house March 4, 1895.

"Passed the senate March 14, 1895.

"Approved March 20, 1895."

grant, would control? Inasmuch, however, as this proposition was not argued upon the hearing, we have not considered it in the decision of the case, and prefer to rest the decision upon the views above outlined, rather than upon this latter suggestion. The judgment will be affirmed.

HOYT, C. J., and SCOTT, DUNBAR, and ANDERS, JJ., concur.

#### WALSH v. BOARD OF TRUSTEES OF HELENA SCHOOL DIST. NO. 1.

(Supreme Court of Montana. Jan. 13, 1896.)

CONTRACT OF ATTORNEY—INADEQUATE CONSIDERATION—RESCISSION.

Where one proposes to assist a school board in the trial of a suit for a certain fee, and renders his services therein with the knowledge and consent of the board, such proposition cannot be withdrawn after the services are completed.

Appeal from district court, Lewis and Clarke county; William H. Hunt, Judge.

Action by T. J. Walsh against the board of trustees of Helena school district No. 1, to recover on quantum meruit for professional services rendered to the defendant. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The plaintiff brought this action to recover on quantum meruit for professional services rendered to the defendant in trying a lawsuit. He sued for \$1,000. There seems to be no dispute but this sum was reasonable. The defense of the school board, however, was that they had an agreement with the plaintiff to try the lawsuit for a sum not exceeding \$300. This \$300, it appeared, had been paid. Judgment was therefore in favor of the defendant board. Plaintiff appeals.

Henry C. Smith, for appellant. Walsh & Newman, for respondent.

DE WITT, J. (after stating the facts). If the plaintiff and the board had agreed that Mr. Walsh should render his services, and that the board should pay him therefor \$300, this judgment must be affirmed. We think it is perfectly clear in the case that Mr. Walsh offered to help try the lawsuit mentioned for a sum not to exceed \$300. Appellant argues, however, that there was no official action of the board making such a contract with him. It probably is true that the board, in session, did not officially make such contract. The negotiations were carried on largely through the county attorney, who was the official counsel for the board. Mr. Walsh participated in the trial of the case, which lasted for many weeks. He made his proposition to render these services for a sum not over \$300; and, while there is some conflict in the testimony between the plaintiff and

the chairman of the board as to whether Mr. Walsh withdrew this offer before the completion of his services in the trial of the case, we think there is sufficient in the record to sustain the finding of the lower court that the plaintiff did not withdraw his offer until after the services were wholly rendered. He remained in the case throughout the whole trial, and the board allowed him to go on with the services after he had made the \$300 proposition. We are clearly of the opinion that, the proposition by the plaintiff being made, and he rendering his services with the knowledge of the members of the board, he could not withdraw that proposition after the services were completed. For all that appears in the testimony, the plaintiff's only attempt to withdraw the \$300 proposition, and to arrange for a larger compensation, was after the services were completed. The chairman of the board of trustees testified that, as they already had assistant counsel, they would not have employed another assistant for a sum greater than \$300. The plaintiff was unfortunate in getting himself into a position to render very extended and valuable services for a compensation which is conceded, and which appears to us, to be very inadequate. But, under the facts as they appeared to the district court, we think the testimony was sufficient to sustain the judgment of that court, and the same must therefore be affirmed. Affirmed.

PEMBERTON, C. J., concurs. HUNT, J., having tried this case as district judge, does not participate in this decision.

#### NEWELL et al. v. NICHOLSON et al.

(Supreme Court of Montana. Jan. 13, 1896.)

CONTRACTS—DOUBTFUL WORDS—CONSTRUCTION—NEW CAUSE OF ACTION—RECOVERY.

1. The words, "Don't sell we to exchange any goods that don't sell; credit for same," are mercantile terms; and in construing a contract in which they appear, evidence of their meaning may be received, under Code Civ. Proc. § 633, providing that, when terms have a technical or otherwise peculiar signification, evidence of such signification is admissible.

2. In an action to recover money alleged to be due for all goods delivered by plaintiff to defendants, where it appears that defendants are liable only for the goods which have been sold by them, and that there is a balance due plaintiff on such sales, plaintiff cannot abandon the contract sued on, and in the same action insist on a judgment for such balance.

Appeal from district court, Lewis and Clarke county; William H. Hunt, Judge.

Action by George R. Newell & Co. against Herbert Nicholson & Co. to recover the value of goods alleged to have been sold by plaintiffs to defendants. From an order denying plaintiffs' motion for a new trial, and from a judgment in favor of defendants, plaintiffs appeal. Affirmed.

The plaintiffs brought their action to recover the value of goods, wares, and mer-

chandise alleged to have been sold to the defendants. The defendants in their answer admitted the delivery of the goods to them, but denied that the sale was, as counsel expressed it, a straight sale. The defendants set up that the transaction was as follows: That the plaintiffs offered to sell the goods, which were a large quantity of cigars, with the condition that if they were not sold within a reasonable time, plaintiffs would exchange the cigars for other goods. Defendants allege that they declined to enter into that proposed contract, but did offer to take the cigars with the condition that plaintiffs would agree to credit the defendants, whenever defendants requested it, with any goods remaining unsold, and that plaintiffs would guaranty the sale of the goods shipped to the defendants; that is to say, in effect the contract was that the goods should be shipped to the defendants, that they should sell them, and that plaintiffs would help in the selling thereof, and that defendants should pay for the goods sold, and that such goods as were not good sellers the defendants might return to the plaintiffs and have credit for the same. Defendants further allege that they frequently demanded that plaintiffs take back the goods unsold. Defendants admit the selling of the goods by them in the amount of \$776.05, and allege that they paid thereon \$650.50. Defendants also set up a small counterclaim of \$9.44. In reply the plaintiffs denied that the condition pleaded by defendants was a part of the contract. It was shown by the defendants' testimony that they did decline to make the contract as originally proposed; that is to say, with the condition that the goods unsold should be exchanged for others. They further show, in their testimony, that the plaintiffs' agent, in making out the memorandum of sale, placed thereupon the words: "Don't sell we to exchange any goods that don't sell." With this memorandum, so indorsed, defendants declined to enter into the contract. Mr. Nicholson, one of the defendants, stated that he would not accept that kind of a proposition, but that it was the understanding that defendants were allowed to return any goods for credit that were not sold, at any time when defendants felt so disposed, or when either party was convinced that the goods could not be sold. Thereupon the plaintiffs' agent said, "I will fix that," and added to the memorandum of sale the following words, "Credit for same." Some of the other sales were made, not with the indorsement above quoted, but accompanied by the words, "Sales guaranteed." The plaintiffs brought their action for the value of all the goods which they had delivered to the defendants. The jury found against the plaintiffs, and gave a verdict in favor of the defendants for the amount of their counterclaim, \$9.44. From an order denying plaintiffs' motion for a new trial, and from the judgment, this appeal is taken.

Walsh & Newman, for appellants. Toole & Wallace, for respondents.

DE WITT, J. (after stating the facts). The issue upon which this case was tried must be kept in mind at the outset. The defendants claimed a contract with certain conditions. The plaintiffs denied that any such conditions existed, and demanded a recovery as upon an ordinary plain sale and delivery of personal property. There was a direct conflict in the evidence between plaintiffs and defendants upon this issue. There was ample evidence before the jury to sustain their finding that the contract was as defendants claimed it to be. That question is therefore now at rest. Sections 632 and 633 of the Code of Civil Procedure (Comp. St. 1887), are as follows:

"Sec. 632. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

"Sec. 633. The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is, nevertheless, admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly."

The conditions attendant upon the sale were expressed, as above stated, at one time, in the language, "Don't sell we to exchange any goods that don't sell; credit for same," and at another time, with the words, "Sales guaranteed." To one not wholly familiar with mercantile transactions, these words do not seem to be wholly clear. Over the objection of the plaintiffs the court took the testimony of a number of merchants and salesmen and business men as to the meaning of these words. In this we think the court committed no error. By the authority of the sections of the Code of Civil Procedure above quoted, the court took evidence to show that the words had a technical or peculiar signification, and were so used and understood in the particular instance before the court. There was also a conflict in the testimony of the mercantile gentlemen who testified as to the meaning of these words, but there was ample evidence introduced showing that the words meant that, if the goods were not sold, or if they proved to be, as one witness said, not good sellers, the defendant might return them and have credit for their value. It is apparent from the verdict that the jury believed this line of testimony. Therefore, as far as we are concerned in this review, the contract was a conditional one, as defendants claimed, and they, the defendants, had the right to return the goods unsold, and to have credit for the same. We think the evidence is also whol-

ly sufficient that defendants constantly insisted that plaintiffs should take back the unsold cigars and give credit for their value.

This brings us to another point in the case. It appears that the defendants were indebted to the plaintiffs for some \$95, the difference between the value of the cigars which defendants had actually sold and the sum which it had remitted to plaintiffs. Plaintiffs now contend that they should at least have had judgment for this \$95. But for plaintiffs to claim judgment for the \$95 is wholly inconsistent with and contrary to their position in the case, and the position which they took in endeavoring to sustain their pleadings by evidence. If plaintiffs are to have judgment for the \$95, that would be a ratification by them of defendants' view of the contract. But that view they have always contended against. By pleadings, evidence, and argument, plaintiffs have insisted that the sale was a straight-out one, and that they should recover the full value of all goods sent to the defendant. Assuming this position, they cannot also take the contradictory one of asking for a recovery in this action of a sum which could be due only upon another and different contract, and one wholly inconsistent with the plaintiffs' contention. *Newell v. Meyendorff*, 9 Mont., at page 262, 23 Pac. 333; *State v. Judge of Second Jud. Dist. Ct.*, 10 Mont. 460, 25 Pac. 1053; *State v. Board of Canvassers of Choteau Co.*, 13 Mont. 34, 31 Pac. 879; *Reed v. Poindexter*, 16 Mont. —, 40 Pac. 596. It may be that they could recover in another action, but certainly not in this. The judgment and order denying a new trial are affirmed.

PEMBERTON, C. J., concurs.

HUNT, J., having tried this case as district judge, does not participate in this decision.

#### STATE v. METCALF.

(Supreme Court of Montana. Jan. 13, 1896.)

MURDER—INDICTMENT—CONTINUANCE—NECESSITY TO CALL WITNESS—INSTRUCTIONS.

1. Under Comp. Laws 1887, p. 505, § 21, making "willful, deliberate, and premeditated killing" murder in the first degree, an indictment charging the killing to have been done by defendant "of his deliberate, premeditated malice aforethought" sufficiently charges that the killing was deliberate and premeditated.

2. Where defendant's affidavit for a continuance, which is corroborated, shows that he has used due diligence to secure the testimony of an absent witness, who was present at the killing, but who had left the state, but had only succeeded in locating him three weeks before the trial, and since then had been diligent in attempting to get his depositions, it is error to refuse a continuance.

3. Where, in a prosecution, the evidence relied on for conviction is circumstantial, it is error for the state to fail to call a witness who, though not an eyewitness of the killing, was near enough to hear the conversation between

defendant and deceased preceding the killing, though the prosecuting attorney was under the belief that such witness was too drunk to understand what was going on.

4. It is error to refuse to instruct that the fact that accused "is the defendant is not of itself sufficient to impeach or discredit his testimony or evidence," but in weighing his evidence the jury may consider the fact that he is defendant.

Appeal from district court, Beaverhead county; Frank Showers, Judge.

Paul Metcalf was convicted of murder, and appeals. Reversed.

Henry R. Melton and Smith & Word, for appellant. Henri J. Haskell, for the State.

PEMBERTON, C. J. The defendant was tried in the district court in Beaverhead county upon an information charging him with the crime of murder in the first degree, alleged to have been committed in that county. He was found guilty of murder in the second degree, and sentenced to imprisonment in the penitentiary for a term of 30 years. From an order denying a new trial and the judgment of the court the defendant appeals.

The information, omitting the formal parts, is as follows: "That Paul Metcalf, late of the county of Beaverhead, on or about the 12th day of August, A. D. 1894, at the county of Beaverhead, in the state of Montana, in and upon one Frank G. Hunter, then and there being, willfully, feloniously, and of his deliberate, premeditated malice aforethought did make an assault, and that the said Paul Metcalf a certain pistol, to wit, a revolving pistol, then and there loaded and charged with gunpowder and leaden bullets, which said pistol he, the said Paul Metcalf, in his hands then and there had and held, then and there willfully, feloniously, and of his deliberate, premeditated malice aforethought did discharge and shoot off to, at, against, and upon the said Frank G. Hunter, and that the said Paul Metcalf, with the leaden bullets aforesaid out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Paul Metcalf discharged and shot off as aforesaid, then and there willfully, feloniously, and of his deliberate, premeditated malice aforethought did strike, penetrate, and wound him, the said Frank G. Hunter, in and upon the left side of the head of him, the said Frank G. Hunter, giving to him, the said Frank G. Hunter, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Paul Metcalf, in and upon the left side of the head of him, the said Frank G. Hunter, two mortal wounds, of which said mortal wounds he, the said Frank G. Hunter, then and there instantly died. And so the said Everton G. Conger, county attorney as aforesaid, who prosecutes as aforesaid, doth say and charge that the said Paul Metcalf him, the said Frank G. Hunter, in the manner and by the means aforesaid, willfully, feloniously, and of his deliberate, pre-

meditated malice aforethought did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Montana." The defendant demurred to the information generally and specially. The grounds of the special demurrer are that: "The acts constituting the offense (if any is stated) are stated in an indefinite, ambiguous, and uncertain manner, in this: It cannot be determined therefrom whether the defendant is charged with a simple assault, an assault and battery, or murder in the first or second degree, or with any other offense known to the laws of the state of Montana; that the defendant herein is not charged with a premeditated killing or murder, or that the act was done to, at, and towards the said Hunter with premeditation; and that said information does not charge a premeditated and deliberate murder or killing." The court overruled the demurrer, and defendant assigns this action of the court as error.

Our statute (section 21, p. 505, Comp. Laws 1887) defines the crime of murder, and the two degrees thereof, as follows: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree." Our statute is a copy almost literally of the Pennsylvania statute of 1794, the only difference being that our statute has the word "torture" in it. The information in this case is a substantial copy of the indictment given as a precedent by Bishop to be used under the Pennsylvania statute and statutes of like character. 2 Bish. Cr. Proc. (3d Ed.) § 564. It is also in substantial conformity with the indictment in *Territory v. Stears*, 2 Mont. 324, and cited with approval in *State v. Northrup*, 13 Mont. 522, 35 Pac. 228. Counsel for the defendant insist that the information does not charge that the killing or murder was premeditated and deliberate; that the words of the information charging the killing or murder to have been done "of his deliberate, premeditated malice aforethought" do not fill the requirements of the statute that the killing shall be deliberate and premeditated. There are authorities holding this view. But it is difficult to discern any substantial difference or distinction between the expressions "deliberate and premeditated killing" and "killing with deliberate and premeditated malice aforethought." Some authorities do draw the distinction, but we do not think it can be held that there is such a distinction as to prejudice the substantial rights of the defendant. Under statutes like the Pennsylvania law, the parent of our statute, as said in *Territory v. Stears*, *supra*, such information or indictment, as used in this case, has been quite generally held to be

sufficient to charge murder in the first degree, and to support a conviction of such offense. Having borrowed our statute from Pennsylvania, we prefer to hold to the familiar rule that we adopt also the construction given thereto by the courts of that state.

The defendant assigns as error the action of the court in refusing to grant his motion and application for a continuance of the case. The affidavit of defendant for a continuance is as follows: "Paul Metcalf, being first duly sworn, on oath deposes and says: That he is the defendant in the above-entitled cause. That the information in said cause was filed in this court charging affiant with the crime of murder on the 23d day of February, 1895, and that affiant was arrested in the state of Missouri on the 27th day of December, 1894, and was brought to Beaverhead county, Montana, immediately thereafter, and lodged in the county jail of said county, where he has ever since been, and is now, confined. That ever since affiant's incarceration in jail, through the efforts of his counsel and friends, he has been preparing for this trial, as hereinafter detailed. That, notwithstanding the efforts of defendant and his friends to be prepared for said trial, he cannot safely go to trial at this term, for the following reasons, to wit, the absence of witnesses and evidence material to defendant, and which defendant has been unable to procure at this term of the court. That Alden Harness is a witness material to defendant. That defendant could prove by said Harness, if present as a witness, that the deceased, Frank Hunter, was killed at his saloon, at Medicine Lodge, in Beaverhead county, on the afternoon of August 12, 1894, by affiant. That affiant and said Harness, earlier in the day, had been to said saloon, and in company with other persons there present had taken several drinks of whisky or other liquor. That this affiant and said Harness left the saloon together, and parted from said Hunter without any difficulty. That after affiant and said Harness had been gone some time affiant discovered that he had left his gloves at said saloon, and proposed to return and get them. That said Harness and this affiant, in company, and on horseback, returned to said saloon, and dismounted, and entered the same. That Metcalf was a little in advance of and to the right of said Harness as they entered into said saloon, and that they passed one person, called 'Irish Jack,' sitting on or near the saloon door steps. That no one was in the saloon when said Metcalf and Harness entered except said Hunter. That upon said Hunter seeing Metcalf enter, and when said Metcalf was a few feet within said saloon, and three or four feet from the front door, Hunter said to Metcalf, 'Get out of my saloon, or I will kill you, you son of a bitch;' to which Metcalf answered, and said, 'I want my gloves; that is all I want.' That as Hunter spoke to Metcalf, Hunter started to go behind the bar in said saloon,

and in doing so was facing rather towards Metcalf and the front of the building. That Hunter spoke in a loud, angry, and very threatening manner to Metcalf, and was in the act of reaching under the bar, where he always kept a revolver or pistol, and at the same time was watching said Metcalf, and was slightly stooping, and watching Metcalf, with his head above the counter. That Hunter's manner was extremely threatening and menacing; and that while said Hunter was thus advancing towards said Metcalf, and reaching in the direction of his pistol, said Metcalf fired, hitting said Hunter. That no other person was in said saloon, or within sight of the act, or saw the shooting, than said Harness and this affiant, during all of this time. That said Harness would swear he was near Metcalf, a little to Metcalf's left and rear, but in full view of both Hunter and Metcalf. That said Harness would swear that he and this affiant both knew Hunter kept a pistol at the place under the bar to which Hunter was advancing, and for which he was reaching, when he was shot. That said Harness would further swear that he knew the character of Hunter for peace and quiet, and that he was a bad character; very quarrelsome and dangerous. That said Harness would further swear that Hunter began the difficulty with Metcalf, and was distant from him only 14 to 16 feet when he was shot by Metcalf, and was advancing towards Metcalf, and towards his (Hunter's) pistol. That said Harness would further swear that he had known Hunter for some considerable time prior to the shooting. That Hunter was unfriendly towards affiant, and that on several occasions said Hunter had said to Harness that he (Hunter) would kill Metcalf, and that prior to the shooting of said Hunter said Harness had communicated to this affiant the threats Hunter had made to kill affiant. That after the said shooting the said Harness left Montana with affiant, and was present with affiant at Metlin's ranch a short time after the killing, and affiant says he cannot prove the foregoing by any other witness. That on the night after the killing said Harness and this affiant left the state of Montana. That as soon as affiant was charged and arraigned for the killing of Hunter, through the aid of affiant's brother and his attorneys, he began inquiries to ascertain the whereabouts of said Harness, and on or about May 25th this affiant, through his brother, Theodore Metcalf, learned for the first time that said Alden Harness was in or near the town of Horton, Brown county, state of Kansas, and that said Harness' deposition could be taken in said town and county; and, relying upon said statement and information, the facts were given to affiant's counsel, and steps were taken to procure his deposition of said Harness before the clerk of the district court of Brown county, state of Kansas; and on the 28th day of May, 1895, notice to take said depo-

sition was served on the county attorney of Beaverhead county, Montana, with interrogatories attached thereto. A copy of same is hereto attached, and made a part of this affidavit. That said notice provided for the taking of said deposition on the 8th day of June, 1895. That said deposition has not as yet arrived, and affiant cannot state positively whether said deposition has been taken, but affiant has expected the same to arrive in time for this trial; but whether it has been taken or will arrive in time for trial at this term affiant cannot state. The last information had from the officer designated to take said deposition was that the witness Harness had not then been found by said officer, so that his deposition could not be taken; but affiant says that if this cause is continued to the next term of this court affiant verily believes that he can have the deposition of said Harness, or have him present in person as a witness. That affiant also secured a subpoena for said Harness, to be placed in the hands of the sheriff of Beaverhead county for service if said Harness should return to or be found in this county, and the same has been returned 'Not found.' That this affidavit is not made for delay merely, but is made in good faith, that affiant may have a fair trial, and that justice may be done."

The defendant's affidavit is supported and corroborated in every particular as to the diligence used to ascertain the whereabouts of the absent witness and to secure his testimony by the affidavits of defendant's brother and his attorneys. The affidavit of the defendant discloses the name and absence of the witness; the materiality of his testimony; his inability to prove the same facts by any other witness; the expectation of the defendant's ability to secure the presence or testimony of the absent witness at the next term of the court; the facts in detail that he can prove by the testimony of the absent witness, as well as the exercise of the utmost diligence to secure his attendance or testimony. The corroborating affidavits of the defendant's brother and attorneys show, it seems to us, that every reasonable effort had been made to locate the absent witness and secure his testimony in time for the trial. It appears that they located the witness on or about the 25th day of May, at or near Horton, Kan.; that they immediately sent out a commission to take his testimony, gave notice to the county attorney of the time and place, to wit, Horton, Kan., on the 8th day of June, accompanying the notice with the proper interrogatories; that the case was called for trial on the 12th of June; that on that day a letter was received from the person commissioned to take the deposition stating that the witness had not been found. The county attorney refused to admit that the absent witness, if present, or if his deposition could be taken, would testify to the facts stated in defendant's affidavit for a



continuance, or consent that the affidavit might be read to the jury as the evidence of the absent witness. After such refusal of the county attorney to permit the affidavit of the defendant to be read to the jury the court overruled the application for a continuance. We are at a loss to determine what more perfectly meritorious or sufficient showing for a continuance could have been made than is here presented. The defendant was entitled to have a reasonable time and opportunity to secure the attendance of his witnesses or their testimony. That he was remarkably diligent in his efforts to do so is amply shown. We think the showing he made entitled him under the law to a continuance, and that the order of the court denying his application therefor was error. *State v. Lund* (Kan.) 31 Pac. 146; *Territory v. Davis* (Ariz.) 10 Pac. 359; *Code Civ. Proc.* (Comp. St. 1887) § 253.

The counsel for defendant assign as error the action of the court in refusing to require the prosecution to produce and place upon the witness stand on the trial of the case the only two eyewitnesses to the homicide. One of these witnesses was Alden Harness, the witness on account of whose absence defendant applied for a continuance. The other was a person who is, with a familiarity impolite, if not vulgar, called "Whisky Jack." It was impossible, from defendant's own showing, for the state to have produced Harness. He was out of the state. The only reason appearing for not placing "Whisky Jack" on the stand was shown in the affidavit of the county attorney that he had investigated the matter, and from the best information he could obtain was able to state on information and belief that Jack was stupidly drunk at the time of the killing. It appears that Jack was sitting on a little porch near, but outside of, the door of the saloon in which the homicide occurred. He did not see what occurred inside the saloon, but was located so he could hear what was said at the time of the shooting. The state resorted to circumstantial evidence to establish its case. We think the proper rule in such cases is stated in *Wellar v. People*, 30 Mich. 16. In this case the court says: "In cases of homicide, and in others where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called, unless possibly, where too numerous." *Hurd v. People*, 25 Mich. 405; *Scott v. State*, 19 Tex. App. 325; 1 Greenl. Ev. (15th Ed.) § 82; *Territory v. Hanna*, 5 Mont. 248, 5 Pac. 252. *State v. Russell*, 13 Mont. 164, 32 Pac. 854, is not in conflict with *Territory v. Hanna* on this question. We think, under the circumstances, the witness Jack should have been put upon the stand by the state, and the belief of the prosecuting attorney that he was stupidly drunk at the time of the homicide was not a sufficient reason for not introdu-

cing him as a witness. Had he been placed upon the stand it could have been determined by his examination whether he was too drunk to hear or see anything material to the case. He was not even subpoenaed as a witness in the case. We think, under the great weight of authority, that resort should not be had to circumstantial evidence in such cases when it appears that direct proof can be reasonably had. The best evidence of which the case admits should always be introduced.

The defendant, at the trial, requested the following instruction: "*The jury are instructed that the fact that Metcalf is the defendant is not of itself sufficient to impeach or discredit his testimony or evidence.*" The law makes him a competent witness in the case; and his evidence, like all other evidence in the case, should be considered by the jury; but in weighing his evidence the jury may take into consideration the fact that he is the defendant." The court modified the instruction by striking out the words in italics. We think the instruction as requested should have been given.

The other assignments of error as to the instructions complained of by the defendant we think are not well taken. If there was error in these respects, it was error in favor of the defendant. Certainly he was not prejudiced thereby, and cannot complain. For the reasons given above, the judgment and order appealed from are reversed, and the cause remanded for new trial.

DE WITT, J., concurs. HUNT, J., absent.

## COURTNEY v. CONTINENTAL LAND & CATTLE CO.

(Supreme Court of Montana. Jan. 13, 1896.)

SALE—EMPLOYMENT OF BROKER—EVIDENCE—RATIFICATION.

1. In an action against a vendor of cattle for commission under a contract of sale negotiated by telegraph, it appeared that plaintiff commenced negotiations on May 26, 1890, at the instance of the vendee's agent, by asking defendant's lowest price for cattle of a certain description, delivered; that plaintiff, up to July 2d, spoke of the vendee as his buyer, and asked for an option, and for time for his buyer to go to the ranches and see the cattle; that on June 22d defendant asked plaintiff to whom it was to make the contract, and on June 24th telegraphed a contract naming plaintiff as purchaser, which plaintiff refused to sign. Plaintiff then drew up a contract naming his buyer as purchaser, and in his letter transmitting it, for the first time, claimed commission from defendant. *Held*, that defendant did not employ plaintiff to negotiate the sale.

2. In an action against a vendor of cattle for a broker's commission under a contract of sale negotiated by telegraph, it appeared that plaintiff was not employed by defendant to negotiate the sale; that plaintiff refused to sign a contract of sale to himself, and forwarded a contract including only one brand, though he knew defendant had several brands, and naming a third person as vendee, and, in his letter transmitting it, claimed the usual commission

of 1 per cent. Defendant's agent refused to sign because it included only one brand and allowed plaintiff commission. Plaintiff replied that there would be no trouble about the brand, as it was intended as defendant's general brand. Defendant's agent replied that he was willing to make a contract covering all brands, but would not pay commission. Plaintiff replied, "My buyer is out of town, and, as you wish to back out, will wire him that can duplicate purchase from you at much lower prices, and recommend that deal with you be dropped." Defendant's president wired plaintiff that the agent was en route, but defendant "will stand by contract allowing commission. Is this final and satisfactory?" Plaintiff replied that it was. A letter from plaintiff to defendant, written after the deal had fallen through, stated, "I was legally acting for both seller and buyer, and had a right to correct a clerical error or omission in a document drawn up by myself." Plaintiff testified that he was acting solely for defendant. Defendant's agent met the third person intended as vendee, and, on his refusing to sign a contract including all brands, destroyed the contract. *Held* no ratification of contract by defendant, so as to entitle plaintiff to commission claimed.

3. In an action for commission due by virtue of the ratification by a vendor of the contract of sale, a letter written by plaintiff to defendant after the alleged consummation of the contract, stating that he was legally acting as agent for both defendant and the vendee, is admissible as bearing on the good faith of plaintiff in the transaction.

Appeal from district court, Custer county; George R. Milburn, Judge.

Action by William Courtney against the Continental Land & Cattle Company for commission for procuring a sale of cattle. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

The plaintiff alleges in his complaint that he is a broker at Miles City, in this state, engaged in selling range cattle and live stock generally, on commission, which fact was known to defendant; that the defendant is a foreign corporation, organized under the laws of the state of Texas, and doing business in this state; that the business of said defendant corporation in this state is the raising, breeding, branding, buying, and selling of cattle and other live stock; that in the month of May, 1890, the defendant, by its authorized agent, John W. Buster, desired and requested the plaintiff to sell for it 6,000 three and four year old spayed heifers, and 2,000 steers of the same ages, which cattle the defendant then had on its ranges; that, in pursuance of such request, plaintiff did secure a purchaser for said cattle, and did secure an offer for said cattle from Nelson Morris, of Chicago, through his authorized agent, I. Myer, of \$26 per head for said heifers and \$38 per head for said steers, which said offer plaintiff immediately communicated to said defendant, and which said offer defendant accepted by and through its said agent, Buster; that said Morris was a responsible purchaser; that defendant agreed to pay plaintiff a commission of 1 per centum upon the total amount of such sale, the total amount being \$232,000 that after the nego-

tiation of such contract for the sale of said cattle, and after the defendant had accepted the same, the defendant refused, and still refuses, to ratify the same, or to deliver said cattle, or to pay plaintiff his commission, although the time for the performance of the contract has elapsed. Plaintiff sues for \$2,320, claimed to be due as commission on the amount of the sale of the cattle. The material allegations of the complaint are denied by defendant's answer. The case was tried by the court without a jury. The court made the following findings of fact: "(1) That the plaintiff was at the time of bringing this action, and for five years previous to that time had been, a broker in Miles City, engaged in the business of selling cattle and live stock on commission, as such broker. (2) That the defendant is a corporation organized and doing business in Montana, as in plaintiff's complaint in this action alleged. (3) That in the year 1890 one I. Myer was the duly-accredited agent for Nelson Morris, of Chicago, Illinois, for the purchase of cattle in the state of Montana for said Morris, with authority to draw drafts and make payments for cattle so purchased on account of the said Morris by his said agent. (4) That in the month of May, 1890, the said Myer, as such agent, approached the plaintiff in this action for the purpose of purchasing cattle of the defendant company. (5) That the said plaintiff on the 26th day of May, 1890, opened negotiations by telegraph with John W. Buster, who was then in Texas, and was the general manager of the defendant company, in relation to the sale of its cattle to Morris. (6) That the said I. Myer, agent for the said Nelson Morris, visited the range where the cattle of the defendant were running, for the purpose of inspecting them with a view to the purchase thereof. (7) The court finds that the telegrams mentioned in the stipulation filed June 18, 1891, are true copies of the telegrams sent by and between, and received by, the plaintiff and officers of the defendant. (8) That subsequently, and after the said Myer had visited the ranges for the purpose of inspecting the said cattle, the plaintiff, by telegrams dated June 15 and June 16, 1890, informed the said Buster that the buyer would take all the defendant's spayed heifers at twenty-six dollars; that it is shown by the evidence in this case, and found as a fact herein, that this offer of the buyer was intended to embrace in the purchase all the spayed heifers, three and four years old, at twenty-six dollars per head, estimated at six thousand head, more or less, and also two thousand steers, three and four years old, at thirty-eight dollars per head, branded with the brand known as the 'Hash-Knife Brand,' which cattle were on the ranges of the defendant company in Montana and Dakota; that the said plaintiff, in sending the offers of said Myer to said Buster on the dates in this finding named, requested from said Buster an answer to such

offer. (9) That Exhibit A to deposition of John W. Buster is a true copy of the contract drawn up by William Courtney and signed by the agent of Nelson Morris. (10) That on the 27th day of June, 1890, upon the signing of said contract by the agent of Morris, a draft for forty thousand dollars was made by the said Nelson Morris, payable to the Stock-growers' National Bank, to be paid to the defendant company when the contract should be executed by said defendant company. (11) That immediately upon the signing of the said contract by the said Nelson Morris as aforesaid, and the depositing of the draft as hereinbefore found, the said contract was by the said William Courtney forwarded to John W. Buster, general manager of said company, to Dallas, Texas, with a telegram sent at the same time by the said William Courtney to the said John W. Buster, stating that he had sent a pro forma contract for approval by the said defendant; that there was transmitted with the said contract a letter from the plaintiff in this action to the said John W. Buster, informing said Buster that contracts in duplicate were inclosed, signed by Morris, and requesting the said defendant to sign one copy and retain one, and further informing the said Buster that he could either make draft for forty thousand dollars on I. Myer, Mr. Morris' agent, which would be paid on presentation at the Stock-growers' Bank at Miles City, or that, immediately upon receipt at Miles City of contract duly executed by the defendant company, the plaintiff would telegraph said Buster, and send the amount of forty thousand dollars in New York exchange, or exchange on the Bank of Commerce, St. Louis, as the defendant might desire; that the contract referred to in these findings is the contract in evidence in this cause. (12) That the said contract so sent by the said William Courtney, and signed as aforesaid, was received by the said John W. Buster on the 2d day of July, in the afternoon of said day, at Dallas, Texas. (13) The court finds that William Courtney was not acting as broker for Nelson Morris, but was acting with the sole intent of earning a commission of one per centum on gross sales, from the defendant. (14) That William E. Hughes, president, and John W. Buster, general manager, through the whole transaction, acted for the defendant company in the negotiation of the attempted sale to Morris. (15) That after the sending of the contract to Buster to sign, and after his said telegram of July 2d to plaintiff, said Buster, instead of executing the said contract, took it, acting for the company, to Chicago, and interviewed the said Morris, and that, after conversation with him, he, the said Buster, destroyed the said contract, having declined to sign the same, giving as his reason (see Buster's general deposition) that the company could not possibly furnish cattle in the said brand (hash-knife), inasmuch as they did not have more

than a small percentage of the number required by the contract, and that the destruction of said contract was made without further consultation with the plaintiff, and without his knowledge or consent. (16) That one per centum of the amount of the gross sales of the character contemplated in this matter is a reasonable commission for completed services. (17) That the defendant company did not, in the matter of the contemplated sale, request or employ the plaintiff to act as its broker in the premises. (18) That the voluntary acts of the plaintiff in the negotiations in this matter were adopted, and his voluntary acts as agent were ratified. This finding is outside of the pleadings, and solely for the purpose of review, and is not considered by this court in arriving at its judgment. Paragraph 5 of plaintiff's amended complaint alleges that the said defendant has hitherto refused, and still refuses, to ratify the said sale, although the time in which the said contract was agreed to be performed has elapsed. (19) The court finds that the acts of the plaintiff were voluntary until the receiving of the contract, July 2d; that the plaintiff had no contract, express or implied, with the defendant, by which he became its agent or broker to sell its cattle. (20) That plaintiff never disclosed to the defendant during the whole of the negotiations for the sale of these cattle, beginning with the first telegram, May 26, 1890, to the sending of the contract dated June 27, 1890, that he claimed to be the agent or broker of defendant. (21) That after this contract had been signed by Morris, and in the same mail to Mr. Buster manager of the defendant company, then in Texas, plaintiff sent a personal letter to such manager of defendant, making the claim for the first time that he had been representing the defendant, and demanding commissions for the alleged sale of its cattle; and the defendant did not know of said claim until the afternoon of July 2, 1890. (22) That the contract in controversy, and signed by Nelson Morris on the 27th day of June 1890, and forwarded to defendant, is in words and figures following, to wit: "This agreement made and entered into this 27th day of June, 1890, by and between the Continental Land & Cattle Company of Dallas, in the county of Dallas, in state of Texas, party of the first part, and Nelson Morris, of Chicago, in the county of Cook, and state of Illinois, party of the second part, witnesseth, that the said party of the first part hereby sells and agrees to deliver unto the said party of the second part all their spayed heifers, three and four years old, estimated at almost six thousand head, more or less, and two thousand head of their steers, same ages, now on the ranches of the said party of the first part, Little Missouri river and Box Elder and Little Beaver creeks, in Montana and Dakota, branded and marked (known as the "Hash-Knife Brand") on both sides; said spayed heifers to be

good, merchantable cattle, with no stags, runts, shanghais, cripples, or big jaws among them; one-half of said steers to be three years o'd, and one-half to be four years old, and all full ages, with no short threes among them. For and in consideration of the above sale, said party of the second part has purchased and agrees to receive said cattle, and pay therefor at the price of twenty-six (26) dollars per head for said spayed heifers, and thirty-eight (38) dollars per head for said steers; the sum of forty thousand dollars (\$40,000) to be paid at the execution of this contract, the receipt on which is hereby acknowledged, and the balance on delivering of said cattle on the cars at Dickinson, on the N. P. R. R., during the months of August, September, and October, 1890. Party of the second part to receive from said party of the first part a clear and good bill of sale of said cattle on completion of delivery of said cattle and payment of same. In witness whereof, the parties to this agreement have hereunto set their hands and seals this 27th day of June, A. D. 1890. Nelson Morris. [Seal.] I. Myer, Agent. [Seal.] Witness: William Courtney. J. B. Collins.' (23) All of the negotiations, excepting as to commissions, beginning with the first telegram, on the 26th day of May, 1890, were finally merged in the written instrument set out in finding No. 22. (24) That the defendant company could not have furnished more than six hundred head spayed heifers in the hash-knife brand, and could have furnished the two thousand steers in the said brand. (25) The cattle attempted by defendant to be sold under said contract, as set forth in finding No. 22, were branded with three brands, to wit: The hash-knife, the mill-iron, and the letter W. About one-fourth of said cattle were branded with the hash-knife brand, and the others with the other two brands. (26) The plaintiff had been a cattle broker at Miles City, Montana, the place where this attempt was made to sell the defendant's cattle, for about ten years previous to the attempt to make said sale; and at the time of such sale he had the Montana Brand Book before him, and knew that there was recorded there more than one brand of the defendant. (27) I. Myer, the agent of Nelson Morris; and Nelson Morris, both refused to modify the contract set out in finding No. 22, so as to make it include the other brands of the defendant, when requested so to do by J. W. Buster, manager, etc., and said Morris insisted that he had purchased only the hash-knife brand of cattle, with which he was personally acquainted, and not the other brands of the defendant company, with which he was not acquainted. (28) William E. Hughes, the president of the defendant company, promised, by telegram dated the 5th of July, 1890, to pay the plaintiff commissions at the rate of one per cent. upon the gross amount of the alleged sales of said cattle, but when he

made this promise he had been assured by the plaintiff that the brand matter was all right. (29) Said promise to pay commissions, as set out in finding 28, was made without consideration. (30) The defendant company was not able to avail itself of any benefits from said contract, as set out in finding No. 22, because it embraced only the hash-knife brand; and said company did not have cattle enough in said brand to fill said contract, and could not derive any benefit whatever from said contract. (31) The limitation in the contract, in finding No. 22, that the cattle were branded with the hash-knife brand, applies to all the cattle, both spayed heifers and the steers. (32) The defendant could not have fulfilled said contract, except by the delivery of all of their spayed heifers three and four years old, estimated at almost six thousand head, more or less, and two thousand head of their steers, same ages, etc., all branded in the hash-knife brand; and this being impossible, as the court has before found as a fact, said limitation rendered said contract nugatory, and the same was of no benefit to the defendant. (33) The promise 'to pay commissions to the plaintiff on the part of Hughes, being without consideration, is void, and does not entitle the plaintiff to recover said commissions on account of said promise.' Upon such findings the court rendered judgment for the defendant for costs. Plaintiff moved the court for a new trial, which was denied. From the judgment and order denying a new trial, the plaintiff appeals.

Strevell & Porter, for appellant. McConnell, Clayberg & Gunn, for respondent.

PEMBERTON, C. J. (after stating the facts). The principal contention of counsel for appellant is that the evidence does not justify the findings and judgment of the court. The negotiations of the parties in reference to the alleged sale of cattle were conducted almost entirely by telegraph. The telegrams are all in the record. Without embodying them, we will quote so much of them as shall seem necessary, as we proceed in the discussion of the case. From an inspection of these telegrams, it clearly appears that the negotiations in reference to the sale of the cattle were opened and begun on the 26th day of May, 1890, by the plaintiff's telegraphing the defendant company at Dallas, Tex., asking for the lowest price for 500 or 2,000 spayed heifers, delivered at Mingsville or Newcastle. Telegraphic communication was kept up, in relation to prices, numbers, kind, and time and place of delivery, until the 5th of July, when it was claimed the contract was finally consummated. We think it cannot be contended, from anything in these dispatches or communications, that the defendant knew or believed the plaintiff was even pretending to represent it, in endeavoring to negotiate the sale of the cattle, until about the 1st of July. The evi-

dence shows that the plaintiff commenced negotiations with defendant by wire at the instance of I. Myer, agent of Nelson Morris. All along, up to July, in his dispatches to the defendant, plaintiff speaks of his buyer; asks for an option, and for time for his buyer to go to the ranches and see the cattle. So apparently satisfied was the defendant that the plaintiff was not representing it in the transaction, that it telegraphed plaintiff, on the 22d of June, asking to whom it should make the contract; and on the 24th of June the defendant telegraphed a contract, in which it named the plaintiff as the purchaser. Nor did the plaintiff ever intimate that he expected commission to be paid by defendant until, the last of June, declining to sign the contract defendant had wired him, he forwarded a contract to the defendant, prepared by himself, and in a personal letter to Buster, received July 2d, claimed commission. In reply to this communication, Buster telegraphed on the 2d of July: "Have dealt with you as principal, leaving no margin for commission, but, as the thing has gone so far, am willing to sign contract allowing you five hundred dollars." From this consideration of the record, we are clearly of the opinion that there was ample evidence to sustain finding No. 17, to the effect that the defendant did not employ the plaintiff as its broker to negotiate the alleged sale of cattle. We think the evidence also supports finding No. 20, to the effect that plaintiff made no claim to commission from the defendant until the 27th day of June, when he forwarded the contract prepared by himself, and sent the personal letter to Buster. But counsel for appellant contends that, even if no contract, express or implied, has been shown, as alleged in the complaint, still the evidence shows a ratification of the contract of sale by the defendant. When plaintiff sent the contract of sale, on which he sues, to the defendant for its signature, which was received at Dallas, Tex., on the 2d of July, there was only one cattle brand (the "hash-knife") mentioned therein, although the defendant owned other brands, which fact plaintiff knew, or should have known, as the evidence shows. Buster, immediately on receipt of this contract, telegraphed plaintiff: "Cannot sign contract, as it only includes one brand,—we have three. Besides, don't think, under circumstances, we should pay commission. Shall start Montana at once." Upon receipt of this dispatch, plaintiff telegraphed Buster: "Will not be any trouble about brands,—merely used hash-knife as general brand your company. Buyer gone east for ten days. Answer if you will sign contract, yes or no." Buster on the same day replied, "I'm willing to sign contract covering all brands, but will not pay commission." Upon the receipt of this dispatch, plaintiff wired Buster: "At commencement correspondence about your cattle, May 26th, I stated, 'Have two buyers spayed heifers,' and showing clearly I was not the prin-

cipal, and, if sale was made, it would be subject to my usual commission. You accepted price and terms, and I made contract, which has been executed by my buyer. My buyer is out of town, and, as you wish to back out, I will wire him that can duplicate purchase from you at much lower prices, and recommend that deal with you be dropped. I will not sell cattle for any one without commission, and cannot understand your course. My buyer will not pay any commission, and my expenses for telegrams in this matter are considerable. Brand matters all right. Answer." This dispatch deserves to be noticed with some particularity. The telegraphic correspondence in evidence shows that, prior to Buster's notifying plaintiff that he would start at once for Montana, plaintiff had urged him to come and see buyer and arrange about brands, which seemed to be an obstacle in the way of consummating the sale. As soon as Buster notifies plaintiff that he is coming, plaintiff wires him that his buyer "has gone East for ten days." In the dispatch now under discussion, plaintiff says: "At commencement correspondence about your cattle, May 26, I state, 'have two buyers spayed heifers,' and showing clearly I was not the principal, and, if sale was made, it would be subject to my usual commission." The evidence does not bear out this part of the dispatch, in a single particular. This is clearly a misstatement of the facts, as shown by the correspondence itself. Further on in this dispatch is this remarkable statement, coming from one who claims to be the broker of the defendant: "My buyer is out of town, and, as you wish to back out, I will wire him that can duplicate purchase from you at much lower prices, and recommend that deal with you be dropped." This seems to us strange language, coming from plaintiff, who claims to be the broker of the defendant, and consequently under legal obligation to act in good faith towards, and for the best interest of, his principal. It seems to us that, when matters had arrived at this stage, it became the duty of the plaintiff, if he claimed to be acting as defendant's broker, to have made some effort to arrange and settle the difficulties arising on account of the brands of the cattle. He claimed that he could arrange these matters, and assured the defendant that there would be no trouble about brands. In a letter written by plaintiff to defendant after the deal had fallen through, he says, "I was legally acting as agent for both seller and buyer, and had a right to correct a clerical error or omission in a document drawn up by myself." This language appears strange, too, when we consider that the plaintiff testifies that he was acting solely for the defendant in the matter. This evidence does not impress us with the conviction that plaintiff was acting in good faith in the matter towards his alleged principal, or for the promotion of its best interests. But, passing the question of the good faith

of the transaction on the part of plaintiff, let us notice the further showing, in which plaintiff undertook to conduct the negotiations for his alleged principal. The defendant telegraphed a contract to plaintiff that was free from any complications or difficulties as to brands, for signature, as shown above, supposing plaintiff to be the principal in the deal. Plaintiff saw fit not to adopt this contract, but prepared one himself that stated the cattle should bear the hash-knife brand on both sides, and, when objections were urged to it on that account, he assured his principal that no trouble would result therefrom; claiming authority or ability to adjust the difficulty with the buyer, and threatening to declare the deal off unless defendant signed it as he had written it. Upon the receipt of this rather remarkable telegram, W. E. Hughes, president of the defendant company, wired plaintiff: "Can't reach Buster, as he is en route. Will stand by contract allowing commission. Is this final and satisfactory?" Plaintiff replied it was satisfactory. It seems that Buster took the contract plaintiff had prepared and forwarded to the defendant, and went to Chicago, where he met Morris, the buyer. He there called the attention of Morris to the fact that the defendant did not have the number of cattle, or anything like the number, especially of spayed heifers, bearing the brand specified in the contract, and sought to have the contract amended so as to include other brands, from which defendant could furnish the number of cattle called for by the contract. Morris refused to take any other cattle than those branded with the hash-knife brand, as specified in the contract. Defendant could not possibly furnish that brand of cattle, to the number named in the contract, although anxious to do so from other brands. It does not appear anywhere that plaintiff, if he had the power or ability to remedy the contract as to the brands, ever did so, or attempted to do so. Morris having declined to take any cattle not in the hash-knife brand, and the defendant being unable to furnish the number of that brand mentioned in the contract, Buster wired plaintiff the contract was off.

From this statement of the facts, does it follow, as contended by counsel for appellant, that defendant ratified the contract, and legally bound itself to pay plaintiff his commission, by the promise of Hughes to "stand by contract and allow commission"? Appellant's counsel contend that the court so found, as shown by finding No. 18. It is true that the court found in said finding that the voluntary acts of plaintiff in the transaction had been ratified. But the court attached no importance to this finding, as in connection therewith the court says the finding is outside of the pleadings, as the complaint alleged a refusal on the part of the defendant to ratify the contract made by the plaintiff. At any rate, this finding must be construed in connection with the other findings, if it is

material at all. In finding No. 28 the court says: "William E. Hughes, the president of the defendant company, promised, by telegram dated the 5th of July, 1890, to pay the plaintiff commissions at the rate of one per cent. upon the gross amount of the alleged sales of said cattle, but when he made this promise he had been assured by the plaintiff that the brand matter was all right." We think there is ample evidence to sustain the conclusion reached by the court that the pretended ratification of the contract made by plaintiff for the sale of the cattle, and the promise of defendant to pay commission, were based upon the assurance given by plaintiff that the brand difficulty would be arranged, and cause no trouble. The agreement to stand by the contract, and the promise to pay commission, were made upon such assurance on the part of plaintiff; and, but for such assurance, there is nothing in the record to sustain the contention that such agreement and promise would ever have been made by defendant. They were made upon a misunderstanding and want of knowledge as to the true facts of the case. For such misunderstanding and want of knowledge of the facts, plaintiff is certainly responsible. He was responsible for the complications and difficulties contained in the contract as to the brands of the cattle. He wrote it himself. He assured defendant that these difficulties could be removed, or would give no trouble. It was his duty to see that this was done. He did not do it, or attempt to do it. He left his alleged principal with a contract it could not comply with or enforce without expensive, serious, and doubtful litigation. When defendant became aware of the true condition of affairs, and ascertained that Morris would not accept a modification of the contract, it had a right to repudiate the action of plaintiff, which was valueless to it. Before it can be contended that defendant legally ratified the acts of plaintiff, and agreed to pay commission, it must appear that the ratification and promise to pay occurred and were made with full knowledge of all the conditions and facts pertaining to the transaction. This does not appear. The court rightly so found.

There are but two material questions of fact involved in this case: First. Did the defendant employ plaintiff, by express or implied contract, to sell the cattle mentioned in the complaint? Second. Did the defendant legally ratify the acts of plaintiff in the matter of the contract and sale of the cattle, with a full knowledge of all the facts and conditions pertaining thereto, and, with such knowledge, agree to pay plaintiff the commission he claims? The court found on both these issues in favor of the defendant. We think the evidence amply sustains the findings.

The appellant contends that the court erred in admitting in evidence a letter written by plaintiff to defendant, in which he admitted

that he was legally acting as agent of both parties to the contract, on the ground that this letter was written after the contract had been abandoned. But this letter contains an admission as to the capacity in which plaintiff was acting pending the negotiations in controversy, and, we think, throws light upon the question of the good faith of plaintiff essential to a proper determination of the case. We think it was admissible.

Having fully considered the assignments of error involved in this appeal, we are of the opinion that the evidence amply supports the material findings of fact made by the court. The judgment and order appealed from are therefore affirmed.

**DE WITT and HUNT, JJ., concur.**

**LAWSON v. GENESEE FARMERS' ALLIANCE JOINT-STOCK CO.**

(Supreme Court of Idaho. Dec. 26, 1895.)

**BREACH OF CONTRACT—COMPLAINT—DEMURRER.**

Action for damages under provisions of an act entitled "An act governing the storage of grain," etc. (1 Sess. Laws 1891, p. 12), to recover damages. *Held*, that complaint states a cause of action.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by M. E. Lawson against the Genesee Farmers' Alliance Joint-Stock Company. Demurrer to complaint sustained, and plaintiff appeals. Reversed.

James W. Reid and A. J. Green, for appellant. S. S. Denning, for respondent.

**SULLIVAN, J.** This is an action brought under the provisions of an act entitled "An act governing the storage of grain, flour, wool or other produce when received for storing, shipping, grinding or manufacturing," approved January 15, 1891 (see 1 Sess. Laws, p. 12), to recover damages for an alleged breach of contract contained in warehouse receipts issued by defendant on receipt of certain wheat delivered to it for storage by one James De Haven. The complaint alleges the corporate existence of defendant; that it was the owner of and operating a warehouse for the storage of grain at the town of Genesee, Idaho; that one De Haven delivered certain wheat to defendant for storage, and received from it receipts therefor, designating the grade or quality of the wheat, and containing the number of bushels so delivered, and other matter required by section 1 of said act, and guaranteeing the weight and grade of said wheat on board the cars at Genesee; that plaintiff became the owner of said receipts, and thereafter presented them to defendant, paid all charges due thereon, and demanded the possession of said wheat in accordance with the terms of said receipts, and avers

that defendant, disregarding its duty and obligations in the premises, and without plaintiff's knowledge or consent, and in fraud of plaintiff's rights, refused and neglected to deliver the wheat called for by said receipts, but in lieu thereof delivered a large amount of damaged wheat of inferior quality. And further, in substance, alleges that by reason of the premises plaintiff was damaged in the sum of \$765.86, and prays judgment for that amount. To the complaint defendant interposed a demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action, which was sustained by the court. The plaintiff electing to stand on his complaint, judgment of dismissal was entered, from which judgment this appeal is taken.

The order sustaining said demurrer and the entry of judgment of dismissal are complained of as error. Section 7 of said act contains, *inter alia*, the following provision, to wit: "And all and every person or persons aggrieved by a violation of this act may have and maintain an action at law against the person or persons corporation or corporations violating any of the provisions of this act to recover all damages immediate and consequential which he or they may have sustained by reason of such violation," etc. Section 6 of said act provides, among other things, that on the presentation of the receipts given by any person or corporation operating a place of storage for grain, and on payment of the charges due thereon, such person or corporation must deliver the commodity to the owner of such receipt. The complaint alleges, in substance, that the defendant, disregarding its duty and obligation in the premises, and without plaintiff's knowledge or consent, and in fraud of plaintiff's rights, refused and neglected to deliver the wheat called for by said receipts, to plaintiff's damage. While the complaint contains much surplusage and redundant matter, it nevertheless states a cause of action. It alleges the violation of the provisions of said act by the defendant, and also alleges damages resulting to plaintiff therefrom. The demurrer to the complaint states as a cause of demurrer that the complaint does not state facts sufficient to constitute a cause of action, and thereafter in said demurrer are stated five propositions called by the pleader "special demurrers," neither of which comes within the provisions of section 4174, Rev. St., as a cause of demurrer. Some of the matter therein stated might be proper in an answer, but it has no place in a demurrer. The allegations of the complaint in regard to shipping the wheat to Tacoma, and a part thereof to San Francisco, are surplusage; but it may become necessary, in proving damages, to prove the shipment of the wheat to Tacoma and San Francisco. These are at best but probative facts, and not necessary to the complaint. Incidentally the question is raised whether the measure of immediate damages is the difference in the market price

of the grade and quality of wheat called for by said receipts, and the market price of the grade and quality of wheat alleged to have been delivered to plaintiff and the market price of such grade at Genesee or Tacoma. I think the difference in the market price of such grades of wheat at Genesee would be the proper measure of such damages; that being the point where the wheat was to have been delivered to the owner of said receipts. The judgment of the court below is reversed, and the cause remanded, with instructions to overrule the demurrer, and to permit defendant to answer; costs of this appeal awarded to appellant.

MORGAN, C. J., and HUSTON, J., concur.

#### On Rehearing.

SULLIVAN, J. This is a petition for a rehearing, and it is urged that, as it is a case of great importance, a rehearing should be granted. In the opinion this court held that the complaint stated a cause of action. The question therein raised can be fully litigated and determined, and, if the defendant could convince the trial court that it delivered to the plaintiff the kind and quality of wheat called for by the receipts referred to, or that the plaintiff accepted wheat as of the kind and quality called for by said receipts, then he would be entitled to judgment. But if the allegations of the complaint be true that defendant, disregarding its obligations in the premises, and without his (plaintiff's) knowledge or consent, and in fraud of his rights, refused and neglected to deliver to plaintiff the wheat called for by said receipts, common honesty would require that defendant should pay the damages sustained by reason of such refusal, etc. No good reason appearing for granting a rehearing, the petition therefor is denied.

#### AULBACH v. DAHLER.

(Supreme Court of Idaho. Dec. 12, 1895.)

#### NOTICE OF APPEAL—SERVICE ON ADVERSE PARTY—DISMISSAL.

1. By the words "adverse party," as used in section 4808, Rev. St., is meant every party whose interest in the subject-matter of the appeal will be affected by a modification or reversal of the judgment or order appealed from, irrespective of whether he be a plaintiff or defendant or intervener.

2. The codefendants of appellant in this action are not adverse parties, on whom notice of appeal must be served, as the judgments rendered against them can in no wise be affected by a modification or reversal of the judgment against appellant.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; Alex Mayhew, Judge.

Action by Adam Aulbach against the Bank of Murray and others. Judgment for plaintiff, and Charles L. Dahler appeals. The appeal was dismissed, and appellant moves for rehearing of motion. Granted.

Charles W. O'Neill, for appellant. W. B. & E. M. Heyburn, for respondent.

SULLIVAN, J. This is an action brought by Adam Aulbach against the Bank of Murray, a corporation organized under the laws of this state, Charles L. Dahler, and Charles Hussey. The complaint shows that said Dahler was the president of said bank, and owned 250 shares of the capital stock of said bank, and that Charles Hussey was secretary of said corporation, and owned 247 shares of said stock; that the total capital stock of said corporation consisted of 500 shares, of the par value of \$100 each. Summons was served by publication, and defendant Dahler appeared and demurred and answered. Default was entered against the bank and Hussey for want of answer. The case was tried by the court with a jury, and a verdict was returned as follows, to wit: "We, the jury in the above-entitled case, find for the plaintiff, and against the defendant the Bank of Murray, for the sum of two thousand nine hundred and ninety-five dollars and 59 cents, and for costs of suit, and find that defendant Charles L. Dahler was the owner of two hundred and fifty shares, which was one-half of the capital stock of the Bank of Murray, and that Charles Hussey was the owner of two hundred and forty-nine shares of said stock, which was one share less than one-half thereof, and find against said defendants Dahler and Hussey for the proportion of said sum of \$2,995.59 which the number of shares held by each of them bears to the whole capital stock of the corporation, which we find to be five hundred shares. Geo. D. Potter, Foreman. Filed July 27, 1894." Thereupon the court entered a several judgment against the defendants as follows: Against the Bank of Murray for \$2,995.59; against Charles L. Dahler for \$1,497.79; against Charles Hussey for \$1,491.80. This appeal is from the judgment made and entered against appellant, Dahler, and order overruling his motion for a new trial. On motion of respondent, the appeal was dismissed, on the authority of Jones v. Quantrell, 2 Idaho, 141, 9 Pac. 418, and Coffin v. Edgington, 2 Idaho, 595, 23 Pac. 80, on the point of failure to serve notice of appeal on the defendants the bank and Hussey. This is a petition for rehearing of the motion to dismiss the appeal. The petition is based on two grounds: (1) The defendants the Bank of Murray and Hussey are not "adverse parties," within the meaning of those words as used in section 4808, Rev. St., and are not entitled to service of notice of appeal; (2) on the ground that his said codefendants did not appear in the court below, and judgment went against them by default.

The judgment being several, and for different amounts, against each defendant, defendants the Bank of Murray and Charles Hussey are not "adverse parties," within meaning of the words "adverse party" as used in section 4808, Rev. St., because they have no interest in conflict with the reversal of the judg-



ment against Dahler. Haynes, New Trials & App. § 210. As the modification or reversal of the judgment against the appellant could not affect the liability of his codefendants upon the judgment rendered against them, notice of appeal need not be served on them. *Randall v. Hunter* (Cal.) 10 Pac. 130; *Hinkle v. Donohue* (Cal.) 26 Pac. 374. A reversal of the judgment appealed from would leave appellant's codefendants in statu quo. Therefore, this appeal can in no way affect their rights, and for that reason they are not entitled to be served with the notice of appeal. See *Foley v. Bullard* (Cal.) 32 Pac. 574.

The defendants the Bank of Murray and Charles Hussey failed to appear and answer, and judgment was entered against them by default. As service of summons was made by publication, a personal judgment entered against them would be absolutely void. If that be true, they are not entitled to service of notice of appeal, as the reversal of the judgment against appellant could not affect them. If the judgments entered by default against the bank and Hussey be valid, said defendants are not entitled to service of the notice of appeal as adverse parties, or at all, for the reason that they have admitted, by their default, the allegations of the complaint. In *Boob v. Hall*, 40 Pac. 117, the supreme court of California, under a statute identical with ours, holds that it is not necessary, where one defendant appeals, to serve notice of appeal on other defendants, when, by default, they have admitted the averments of the complaint. See, also, *Randall v. Hunter* (Cal.) 10 Pac. 130; *Essency v. Essency* (Wash.) 38 Pac. 1130; *Railway Co. v. Johnson* (Wash.) 34 Pac. 567. A rehearing should be granted, and it is so ordered.

MORGAN, C. J., and HUSTON, J., concur.

#### STATE v. VAUGHAN. (No. 1,447.)

(Supreme Court of Nevada. Jan. 20, 1896.)

#### CRIMINAL LAW—ONCE IN JEOPARDY—EXCUSING JUROR AFTER ADMISSION OF EVIDENCE.

1. After a jury has been sworn, and evidence admitted, in a capital case, the court may excuse a juror against defendant's objection on proof that he is opposed to capital punishment, such fact having come to the knowledge of the prosecution during the trial.

2. Where, in a capital case, a juror is excused by the court against defendant's objection, after evidence has been admitted, it is error to retain the other jurors without giving defendant the privilege asked for of re-examining them as to their then state of mind before being re-sworn to try the case with the new juror. *Belknap, J.*, concurring, on the ground that the juror should have been discharged after the juror had been excused.

Appeal from district court, Lander county; Charles E. Mack, Judge.

Alfred Vaughan was convicted of murder, and appeals. Reversed.

v.43p.no.2—13

James F. Dennis and J. H. MacMillan, for appellant. Robt. M. Beatty, Atty. Gen., and W. D. Jones, Dist. Atty., for the State.

BELKNAP, J. Respondent was convicted of murder of the first degree. At the trial, after a jury had been impaneled and sworn, and witnesses examined, the district attorney called the attention of the court to the fact that one of the jurors was disqualified, and asked leave to present testimony in support of the charge. Upon permission given, witnesses were examined whose testimony tended to show that A. A. Flint, the juror against whom the investigation was directed, had said several months prior that the defendant was guilty; that he had conscientious scruples against capital punishment, and would never vote for a conviction of murder of the first degree were he one of the jury. The court excused him. Another was substituted. The witnesses were re-examined. A verdict of murder of the first degree returned, and judgment entered thereon.

Various exceptions were taken in behalf of the appellant to the rulings of the court in this particular:

1. As to the discharge of the juror Flint. Lord Coke lays down the rule that "a jury sworn and charged in case of life or member cannot be discharged by the court or any other, but they ought to give a verdict." 1 Inst. 227b. Following Coke, Hawkins, in his *Pleas of the Crown* (volume 2, p. 568), says that "no juror can be challenged either by the king or prisoner without consent after he hath been sworn, \* \* \* unless it be for some cause which happened since he was sworn." In *Wharton's Case*, Yel. 24, one of the jurors that had been accepted and sworn was challenged for a cause that was in esse when he was sworn, but unknown at the time to the queen's counsel. The challenge was denied. But in the *Case of Kinloch*, *Fost. Crown Law*, 22, the power of the court to discharge jurors underwent careful examination; and it was decided that the general rule as laid down by Lord Coke had no authority to warrant it, and could not be universally binding. In that case it was determined that the court had power to withdraw a juror at the request of the prisoners, for the purpose of imparting to them a defense which they could not otherwise have taken.

The decisions in this country sustain the position that a juror may be excused when his detention upon the jury would defeat the ends of public justice. In *U. S. v. Morris*, 1 Curt. 23, Fed. Cas. No. 15,815, it was decided that, after witnesses had been examined, the prosecuting officer could, in the discretion of the court, examine witnesses upon the question of the bias of a juror. In discussing the subject, after stating the common-law rule, Judge Curtis said: "But it by no means follows that it is not in the power of the court, at the suggestion of one of the

parties, or upon its own motion, to interpose and withdraw from the panel a juror utterly unfit, in the apprehension of every honest man, to remain there. Suppose a prisoner on trial for his life should inform the court that a juror had been bribed to convict him; that the fact was unknown to him when the juror was sworn; and that he had just obtained plenary evidence of it, which he was ready to lay before the court. Is the court compelled to go on with the trial? Suppose the judge, during the trial, obtains, by accident, personal knowledge that one of the jurors is determined to acquit or convict without any regard to the law or the evidence. Is he bound to hold his peace? In my judgment, such a doctrine would be as wide of the common law as it would be of common sense and common honesty. The truth is that this rule, like a great many other rules, is for the orderly conduct of business. There must be some prescribed order for the parties to make their challenges, as well as to do almost everything else in the course of a trial. As matter of right, neither party can deviate from this order. And it is the duty of the court to enforce these rules, which are for the general good, even if they occasion inconvenience and loss in particular cases. But there goes along with all of them the great principle that, being designed to promote the ends of justice, they shall not be used utterly to subvert and defeat it. Being intended as a fence against disorder, they shall not be turned into a snare. They do not tie the hands of the court, so that when, in the sound discretion of the court, the public justice plainly requires its interposition, it may not interpose; and it would be as inconsistent with authority as with the great interests of the community to hold the court restrained. A very eminent English judge has treated this rule concerning challenges just as I believe it should be treated. Chief Justice Abbot says: "I have no doubt that if, from inadvertence or any other cause, the prisoner or his counsel should have omitted to make the challenge at the proper moment, the strictness of the rule which confines him to make the challenge before the officer begins to administer the oath would not be insisted on by the attorney general, or, if insisted on by him, would not be allowed by the court" (the *Derby Case*, *Joy on Confessions*, 220); that is, like other rules of procedure in trials, it is in the power of the court to dispense with it when justice requires." In *U. S. v. Coolidge*, 2 Gall. 364, Fed. Cas. No. 14,858, Lee, an indispensable witness to the government, refused to be sworn. Judge Story said: "The question is simply this: A party is on trial before a jury, and a circumstance occurs which will occasion a total failure of justice if the trial proceed; have the court, in such an emergency, power to withdraw a juror? It has been stated from the bar that, in capital cases, the court have not this power; but in

a case in *Foster's Crown Law*, and in several other cases, it has been held that they have. In misdemeanors there is certainly a larger discretion, and, until the cases just mentioned, capital trials were generally supposed to be excepted. It is now held that the discretion exists in all cases, but is to be exercised only in very extraordinary and striking circumstances. Were it otherwise, the most unreasonable consequences would follow. Suppose that, in the course of the trial, the accused should be reduced to such a situation as to be totally incapable of vindicating himself; shall the trial proceed, and he be condemned? Suppose a juror taken suddenly ill, and incapable of attending to the cause; shall the prisoner be acquitted? Suppose that this were a capital case, and that, in the course of the investigation, it had clearly appeared that on Lee's testimony depended a conviction or an acquittal; would it be reasonable that the case should proceed? Lee may, perhaps, during the term, be willing to testify. Under these circumstances, I am of opinion that the government is not bound to proceed, but that the case be suspended until the close of the term, that we may see whether the witness will not consent to an examination." In *State v. Allen*, 46 Conn. 531, upon the trial, after witnesses had been examined, the court heard evidence touching the disqualification of a juror, who had, before being sworn, expressed the opinion that defendant was guilty. The disqualification was proven, the juror excused, and the jury discharged. In *State v. Bell*, 81 N. C. 591, it was held that the duty of courts to guard the administration of justice against fraudulent practices was an exception to the rule that a jury sworn in a capital case cannot be discharged without the prisoner's consent until they have given a verdict. So, when a juror had fraudulently procured himself to be selected for the purpose of acquitting the prisoner, the juror was properly excused. In *People v. Olcott*, 2 Johns. Cas. 301, Justice Kent stated his conclusions as follows: "I conclude, then, that as no general rule or decision that I have met with exists to the contrary in a case of misdemeanor, and, as the rule, even in capital cases, abounds with exceptions, and is even questioned, if not denied, by the most respectable authority,—that of nine of the judges of England,—it must, from the reason and necessity of the thing, belong to the court, on trials for misdemeanors, to discharge the jury whenever the circumstances of the case render such interference essential to the furtherance of justice. It is not for me here to say whether the same power exists in the same degree (for to a certain degree it must inevitably exist) on trials for capital crimes, because such a case is not the one before the court; and I choose to confine my opinion strictly to the facts before me. With respect to misdemeanors, we may, with perfect safety and

propriety, adopt the language of Sir M. Foster (page 29), which he, however, applies even to capital crimes, 'that it is impossible to fix upon any single rule which can be made to govern the infinite variety of cases that may come under the general question touching the power of the court to discharge juries sworn and charged in criminal cases.' If the court are satisfied that the jury have made long and unavailing efforts to agree, that they are so far exhausted as to be incapable of further discussion and deliberation, this becomes a case of necessity, and requires an interference. All the authorities admit that when any juror becomes mentally disabled, by sickness or intoxication, it is proper to discharge the jury; and, whether the mental inability be produced by sickness, fatigue, or incurable prejudice, the application of the principle must be the same. So it is admitted to be proper to discharge the jury when there is good reason to conclude the witnesses are kept away, or the jury tampered with, by means of the parties. Every question of this kind must rest with the court, under all the particular or peculiar circumstances of the case. There is no alternative; either the court must determine when it is requisite to discharge, or the rule must be inflexible that, after the jury are once sworn and charged, no other jury can, in any event, be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge of that necessity, and to determine what combination of circumstances will create one."

In the inquiry touching the disqualification of the juror, three witnesses were examined. Two of them, Kassell and Moss, swore, among other things, that Flint had said some months previous, in their presence, that he was opposed to capital punishment; and Dunham, the third witness, said that he had often heard Flint say that the defendant was guilty. The court excused the juror for two reasons: First, that he had formed and expressed an opinion that the defendant was guilty; and, second, that he was opposed to capital punishment. For either of these reasons the juror may have been excused. The subject was within the sound discretion of the district court, and we cannot interfere with its exercise except in cases of its abuse.

2. Whether it was correct to impanel another juror in the place of Flint, or to discharge the jury: In *People v. Damon*, 13 Wend. 351, after a juror had been sworn in chief, and taken his seat, it was discovered that he was incompetent to serve. He was excused, and another juror substituted. In the opinion of the court, Chief Justice Savage said: "I apprehend no authority can be necessary to sustain the proposition that the court may and should, in its discretion, set aside all persons who are incompetent jurors at any time before evidence is given." The

inference to be drawn from this language is that, after evidence is given, no substitution should be made. At the common law, if, during the trial, an incompetent juror was discovered, the whole jury was discharged. The rule has not been changed by the legislation of this state. It is as binding upon courts as statutes adopted by the legislature. Adhering to it, I conclude that a mistrial took place when Flint was excused. The substitution of another juror in his stead was contrary to all precedent. The case illustrates the evil of the course pursued. The jury had been occupied for upward of three days in hearing the testimony on the part of the prosecution when Flint was excused. Under these circumstances, it is not presumable that the jury was indifferent. Defendant was entitled to a legal and impartial jury, and all the substantial requirements of law should have been observed in its impanelment.

The judgment should be reversed, and a new trial granted; and it is so ordered.

BONNIFIELD, J. In view of the character of the charges preferred against Juror Flint, and of the examination and proceedings had thereon and in connection therewith, all being made and had in the presence of the jury, and against the objection of the defendant, the vital question, in my opinion, in this case, is: Was the court vested with legal discretion to retain the 11 jurors on the panel, against defendant's objection? Or, in other words, was not fatal error committed in impaneling Juror Savage in the place of Juror Flint, who had been discharged, instead of discharging the 11 jurors and impaneling a new jury?

In the first place, it was not necessary to have preferred said charges, or to have held said examination or proceedings in the presence of said 11 jurors, but I am of opinion that it was improper to have done so. It appears to me that it would have been proper and the right course to have pursued for the court to have put said jurors in charge of the sheriff to be retired from the court room, and the juror Flint retained during the examination of the charges made against him. Then it might have reasonably been said that the remaining jurors could not have been prejudiced by anything which had occurred in the matter of the impeachment of Flint; that, therefore, no error was committed to defendant's prejudice thereby; and upon the authority of the *Pritchard Case*, *infra*, the action of the court might be sustained, if at all. It is provided by statute, and is as binding on the courts as any other statutory provision, that "the common law of England, so far as it is not repugnant to or in conflict with the constitution and laws of the United States or the constitution and laws of this state, shall be the rule of decision in all courts of this state." Gen. St. § 3021. And it seems to be settled by the common-law writers, and by nearly,

If not quite, all of the decided cases on the subject, that under the common law, in all cases where a juror is discharged during the progress of the trial from any cause of necessity, the balance of the jurors must be discharged, or, rather, the discharge of the one by the court operates to the discharge of all the balance; but the balance may be immediately recalled into the jury box, and their examination be entered into as originally upon their *voir dire*, if either party so desires, and the respective parties may have their challenges over. By our statute, the common-law rule is abrogated to this extent, and no further, that is: "If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn, and the trial begun anew, or the jury may be discharged, and a new jury then or afterwards impaneled." Gen. St. § 4262. Only in the class of cases above named does our statute give the court discretion to either impanel a new juror, or to discharge the whole jury and impanel a new one, at its option. In the case at bar the juror was not discharged on account of sickness, and hence the above statute is not applicable to it, and we have no other statute on the subject, but we have the common law, with its mandate that in such cases the jury shall be discharged. At this point in the procedure, we come to the parting of the ways between the common law and the statute. The statute plainly points out the course to be pursued in impaneling a new jury, which, of course, must be followed, unless the parties consent to proceed under the common-law rule of immediately calling the remaining jurors back into the box for re-examination and challenges. So, if there be any authority for retaining the 11 jurors, as was done in this case, we must look elsewhere for it besides the statute or the common law.

No judicial authority has been cited in point, and, in my opinion, none can be found to sustain the respondent's contention on the question under consideration, except in those states where the statute authorizes such practice as was adopted by the trial court in this case. *State v. Pritchard*, 16 Nev. 101, and *Stone v. People*, 2 Scam. 326, have been cited, and seem to be relied on as such authority. But I am of opinion that they cannot be properly so considered. In the *Pritchard* Case, upon the question whether the court below erred in impaneling another juror in the place of the juror who had been discharged, instead of discharging the remaining 11 jurors and impaneling a new jury, the supreme court said: "In considering the facts of this case, in connection with the authorities to which our attention has been called, we have arrived at the conclusion that this action of the court was correct. The remaining eleven jurors were competent. No objection was urged against them. They

had been selected, agreed upon, and accepted in the mode provided by law. No testimony had been offered. It seems to us that the discharge of an incompetent juror creates no necessity for the discharge of the eleven remaining competent jurors." Now, the facts in that case were these: The jury were impaneled and sworn to try the case. Thereupon the court took a recess till next morning. Upon the reconvening of the court, counsel for the defendant was permitted by the court to ask the jurors the following question, to wit: "Since you were examined by me before, touching your qualifications to serve as jurors, has anything happened or occurred to your recollections to render you improper jurors to your knowledge?" Thereupon one of the jurors informed the court and counsel, in substance, that there had been some misapprehension or some mistake made in his examination as to his qualifications as a juror, and stated that he could not find a verdict of guilty on a charge of murder upon circumstantial evidence. Upon this statement and ground, he was discharged. It is apparent that in that proceeding nothing occurred so that it could reasonably be said that it might have prejudiced the balance of the jurors against the defendant. Indeed, it was admitted on the record by stipulation of the parties, and confirmed by the court, "that neither the plaintiff, the defendant, nor said juror had been guilty of any intentional fraud or deception in procuring the swearing of said juror to try the case, except in so far as the answers made by said juror on his *voir dire* may operate as such fraud."

But in the present case the record shows a materially different state of facts. Here the juror was charged, in effect, with deception, fraud, and the crime of perjury, with the view, on his part, of getting on the jury to favor and acquit the defendant, and the court found, in effect, that the charge was true. Here, also, by the strongest implication, the defendant and his family were charged with being accomplices in the crime of said juror, and this imputation was left resting on them by the district attorney and the court, instead of exonerating them therefrom. During the progress of the examination of witnesses in support of these charges, the district attorney put defendant's attorney on the stand as a witness, evidently for no other purpose than to connect the defense with the alleged fraud and perfidy of said juror. He was subjected to quite a lengthy examination, and all the questions put to him by the district attorney appear to have been put with said view. The witness having stated that he had received an intimation the evening before that there was one juror on the panel favorable to the defendant, Juror Flint asked him from whom he had received this intimation. The witness declined to answer, "on the ground that it was privileged." The district attorney then said to and asked the

witness as follows: "Let us find out whether it is so or not. Was it from your client, his father, or brother, or mother?" The witness declined to answer. The court, in passing upon the question of discharging Flint, expressed the opinion that the juror had deceived both the counsel and the court. This relieved defendant's attorney from all blame in the matter, so far as the opinion of the court was concerned, but it did not remove the imputation cast upon the defendant and his family of complicity. After Flint had been discharged, and in explanation of the grounds of his discharge, the court remarked in the presence of the 11 jurors, to wit: "I became convinced that he came upon the jury to aid and assist the defendant in this case, for what inducement I do not know." The remaining jurors might reasonably have inferred from that remark that, in the opinion of the court, the juror had inducement, and that such inducement moved from the defendant or from some one in his behalf.

Counsel for defendant asked that the remaining 11 jurors be discharged, on the ground, among others, "of the evidence adduced before them tending to disqualify them, and tending to bias and prejudice them against the defendant"; and he asked "to be allowed to examine them on their voir dire as to their qualifications," and asked to be allowed a peremptory challenge to the new juror, Savage. The court replied: "If I thought your challenge was taken in good faith, I should be induced to set aside them all." By counsel: "I assure your honor it is in good faith." By the court: "I will pass upon that. The law gives you eight. I am impressed with the fact that you simply desire to obtain from the court that [which] is erroneous. The challenge is not taken in good faith, and it will be denied. You may have the benefit of an exception." By counsel: "I will take it." It seems to me that the above remarks, impeaching the sincerity of counsel, cast discredit on the whole defense of the defendant, and would have a tendency to create fatal prejudice in the minds of said jurors against the defendant. The charges having been made, and the examination thereof had before the jury, against the defendant's objection, and the above remarks made in their presence, can it be reasonably said that the 11 jurors were not thereby prejudiced against the defendant and the theory of the defense, and hence remained competent jurors? Under these facts and circumstances, was the court clothed with a discretion to retain said 11 jurors on the panel against the objection of the defendant, and without giving him the privilege asked for of examining them as to the state of their minds? Certainly, the ruling in the Pritchard Case does not go so far as to sanction such practice or authorize such discretion as were adopted and exercised in this case under the state of facts existing here;

nor was it intended by the court that the rule adopted in that case should have such effect as is clearly manifested by the language used in the above quotation from the opinion of the court. It is equally clear to my mind that the case of *Stone v. People*, supra, does not support the action of the court in the present case. In that case a juror was discharged on the ground of alienage, and a new juror impaneled; and, like the Pritchard Case, there was nothing occurring in the proceedings relative to the juror discharged that could reasonably have tended to prejudice the remaining jurors against the defendant or his defense, so far as we can learn from the opinion there rendered. The court held in that case, as in the Pritchard Case, that the discharge of the one juror did not necessitate the discharge of the eleven, for the reason that no injustice had been done, that the rights of the prisoner had not been infringed, and no law violated. The court then says: "If a doubt could, however, remain on this point [that is, on the point of impaneling a new juror, instead of a new jury], it is definitely and conclusively settled by the statute relative to jurors." So it seems that the decision was finally based on the statutes of Illinois, which give the courts discretion to fill one or more vacancies on the jury, where one or more jurors are discharged from necessity, and to retain the other jurors on the panel. But we have no such statute. It seems to me, further, that if what the court said in that case can be construed as basing the decision "on general principles," and not solely on the statute, it was done on the ground of the peculiar facts of that case, and is not authority in any other case containing materially different facts. The court said: "The case is *sui generis*. \* \* \* We have been referred to authorities which are admitted to be the rule in the British courts, and if the facts in this case were of the nature which marked the cases that have been decided there, and in like cases in our own courts, we should have no difficulty in coming to the same results on the present occasion."

Can it be said no injustice was done in the present case, no law violated, no rights infringed, and that the 11 jurors were not prejudiced, on account of these proceedings had in their presence, on matters outside of the proper investigation of the charges contained in the indictment? I am of opinion that we are not warranted in entertaining such presumption. Can it be held with any reasonable plausibility that the action of the court, in the matters under consideration, should be sustained because it is not shown here that these proceedings prejudiced the 11 jurors against the defense when the only means by which defendant might or could have shown it was denied him in the court below? This question is susceptible of but one answer, and that in the negative. It is clear to my mind that

to so hold would be denying the accused in such cases the right to protect himself against such prejudice, however great in degree it might be, created by such procedure. It seems to me that it cannot reasonably be presumed that these charges against the defendant, and the proceedings had, and imputations made of complicity of the defendant and his family in procuring Flint to be placed on the jury through his alleged deception, fraud, and perjury, did not prejudice the 11 jurors against the defendant and the theory of his defense, so as to render them incompetent. I am of opinion that nothing scarcely is more potent to create such prejudice against a party than arousing suspicion that such party has packed, or attempted to pack, a jury by which he is to be tried, and that but few men are capable of resisting such prejudice, and to rise above its influence, in their deliberation as jurors. Further, it is evident to my mind that to affirm the judgment of the trial court, in consideration of the facts developed in this case, would be establishing a rule in this state without law and without precedent, and which would operate in many cases in the practical denial of the right of trial by jury,—such trial as is contemplated by the statute, the common law, and the constitution. It seems to me that such rule would be unwarrantable judicial legislation, instead of proper adjudication.

In what has been said above, it is not intended as a criticism of any matters occurring on the impeachment of said Juror Flint, or on the trial thereof, or of any remarks made by the court in connection therewith, except in so far as the same occurred in the presence of the 11 jurors. In consideration of the facts above given, I am of opinion that the court was not clothed with legal discretion to retain said 11 jurors on the panel without the consent of the defendant, and against his objection, and without giving him the privilege asked for of examining the said jurors as to the state of their minds before being sworn to try the case with the new juror. Upon this ground, and for the reasons hereinabove given, I concur in reversing the judgment and granting a new trial.

**BIGELOW, C. J.** I am of the opinion that the discharge of the juror Flint was a matter in the discretion of the court. He had sworn, upon voir dire, that he had not formed or expressed any opinion as to the defendant's guilt or innocence, and that he had no conscientious scruples against the infliction of capital punishment. But, upon the examination held after the district attorney moved to dismiss him from the panel, it appeared quite clearly that he had several times expressed the opinion that the defendant was guilty, but that, if he were on the jury, he would not vote to hang him, and, when pressed for a reason why he would not,

had said that he was opposed to capital punishment. It may be that these remarks were simply idle talk, and had been forgotten by the juror, but if such were not the case, and especially if he did have such conscientious scruples, then, certainly, he was not a fit juror. The trial judge was in a better position to determine this fact than we are, and his conclusion thereon is not unsupported by the evidence. It follows, the same as in any other case where a point has to be determined upon conflicting evidence, that the discretion of the trial court cannot be overruled upon appeal. As the juror was properly discharged, the evidence was insufficient to support the plea of former jeopardy, thereafter entered by defendant.

I am also of the opinion that while, perhaps, the court did not commit reversible error in refusing to discharge the entire jury, it should either have done so or have given the defendant this challenge over again, as demanded by him. This would have been substantially in accordance with the rule at common law, which, in the absence of a statute, must be our guide.

*State v. Pritchard*, 16 Nev. 101, relied upon as justifying the action taken below, does not cover these questions, because there no testimony had been taken, which is particularly referred to as one of the grounds upon which the decision is placed, and because no question was raised concerning the defendant's renewed right to his challenges, which were always given him at common law. If that rule is unsatisfactory,—and, doubtless, it can be improved upon,—it should be changed by statute, as has been done in many states.

I also agree with much that is said by Justice BONNIFIELD concerning the proceedings taken against Juror Flint, and which could not well have failed to have a prejudicial effect upon the minds of the jurors retained in the case.

For these reasons, I concur in the judgment.

**PEOPLE v. STERNBERG.** (Cr. 65.)<sup>1</sup>  
(Supreme Court of California. Jan. 13, 1896.)  
"PURITY OF ELECTIONS LAW"—PROCURING FALSE  
REGISTRATION—EVIDENCE—ACCOMPLICES—  
CORROBORATION—CHARGING ON FACTS.

1. On a prosecution for procuring a certain person to falsely register as a voter in a precinct, others may testify that defendant also procured them to falsely register.

2. Persons who falsely registered as voters in a precinct at defendant's procurement are not for that reason accomplices of his in the procurement of another to so register.

3. Testimony of one that defendant procured him to falsely register as a voter in a precinct is corroborated by evidence that defendant was present when such person made his false affidavit, afterwards stated that he anticipated trouble because of his connection with such registration, and tried to suppress such person's testimony, paying him money to go away.

<sup>1</sup> Rehearing granted.

4. The "Purity of Elections Law" (St. 1893, p. 24), making "every person who willfully causes, procures, or allows" false registration punishable, applies as well to a private citizen as an officer; and therefore the charge that defendant, "as deputy registrar," committed the offense, is surplusage, and need not be proved.

5. That in a civil case, under Pol. Code, § 1109, against the clerk, to procure cancellation of votes alleged to have been illegally placed on the voting register, one testified that he was deputy registrar, without testifying as to any offense, does not protect him from prosecution for procuring, "as deputy registrar," one to falsely register as a voter, in violation of "Purity of Elections Law" (St. 1893, p. 24, § 22), under section 32, declaring that one testifying against a person offending against section 22 shall not himself be prosecuted for the offense with reference to which his testimony was given.

6. Defendant cannot complain that an instruction declaring that a certain person was an accomplice, and that, therefore, there could not be a conviction on his uncorroborated testimony, was error, as charging on facts; it not only having been invited by him, but also being harmless.

7. Though a judge may not instruct on a matter of fact, he may declare to a jury that certain persons were not accomplices where there is no evidence that they were.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Louis Sternberg appeals from a conviction. Affirmed.

C. W. Cross, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. By information, defendant was charged with procuring and allowing A. Gutman to be registered as a voter in the precinct register of a precinct in which he was not entitled to be registered. The prosecution was had under and by virtue of the provisions of the "Purity of Elections Act" (St. 1893, p. 24). The offense charged comes within the purview of section 22 thereof. Gutman, called by the prosecution, testified that defendant requested him to register from the Baldwin Hotel, so that he could vote for Mahoney. At the time of the request he resided and was registered in another precinct, and these facts were known to defendant. Witness acceded to defendant's request, and together they went to the New City Hall. The witness there told a registrar clerk in attendance that he desired to change his residence to the Baldwin Hotel. Asked by the clerk what floor his room was on, he answered the fourth, when the defendant, standing by, corrected him, and said the fifth. The clerk then asked the number of his room, and, as the witness did not know, defendant again answered for him. Henry Burton was the registrar clerk. He identified the affidavit of registration as being in his handwriting; remembered the circumstances of defendant's presence with Gutman at the time it was made; did not remember defendant making answer to any of the questions propounded to Gutman; but would not accept the answers of any one

except the affiant under such circumstances. It was shown that Gutman did not reside at the hotel, and that he did reside at 172 Clara street, in San Francisco, and was registered in the precinct to which that number belonged. Gutman further testified that after the election he met defendant in a saloon, and defendant urged him, Samuel Lust, and David Newman, who were present, to leave town, and save him and themselves from getting into trouble. He offered the three of them \$20 for this purpose. Lust and Newman, after demurring to the amount, accepted the money, and witness was then given \$5, with which he was to come to Oakland, where he was to remain for a few days. The "trouble" which defendant anticipated was punishment for procuring the false registration of voters at the Baldwin Hotel. Lust and Newman were allowed to testify, over objection, that they too had falsely registered from the hotel at the instance and procurement of defendant. Defendant also informed these witnesses that warrants were issued for their arrest. The evidence was properly admitted.

1. Against the judgment it is first urged that the witness Gutman was defendant's accomplice in the alleged offense, and that as there is no corroborative evidence in the case which, independent of Gutman's testimony, tends to connect defendant with the commission of the offense, a new trial must be granted. This position is not tenable. There is first the fact testified to by Burton that defendant was present at the making of the false affidavit. While this fact isolated and considered alone is of small moment, since an innocent man might have occupied the same position, yet, when viewed in the light of later occurrences, it becomes a circumstance of serious significance. Those are the admissions of anticipated trouble by defendant because of his connection with the registration of Gutman, testified to by Lust and Newman, his effort to suppress or elude Gutman's evidence, and his payment of money for that purpose. One of the commonest forms of inculpatory evidence is testimony of just such acts by a defendant. It is always admissible, and affords distinct and independent corroboration of the accomplice's statements. *People v. Hong Tong*, 85 Cal. 173, 24 Pac. 726; *People v. Clough*, 73 Cal. 352, 15 Pac. 5; *People v. Grundell*, 75 Cal. 310, 17 Pac. 214; *People v. McLean*, 84 Cal. 482, 24 Pac. 32; *People v. Dixon*, 94 Cal. 258, 29 Pac. 504. Nor is this evidence open to the objection that Lust and Newman were themselves accomplices. It is true that a conviction may not be had upon the uncorroborated testimony of an accomplice; and a sufficient and independent corroboration is required, whether the principal evidence be that of one accomplice or of many. Three or thirty accomplices may not convict a man by their unsupported evidence more readily than may one; but the fact

that, by the evidence of Newman and Lust, it appeared that each was an accomplice of defendant in a similar crime against the registration laws, did not make them accomplices in the particular offense under investigation. In other words, conceding that the evidence showed that Newman had falsely registered from the Baldwin Hotel at the procurement of defendant, and that Lust had done the same, not the slightest evidence was offered to show that these acts were other than separate and distinct crimes, in no way connected with the false registration of Gutman. Neither Lust nor Newman is shown to have participated in, or even to have had foreknowledge of, the Gutman affair; and under such circumstances, while each was an accomplice with defendant in the crime attending his own false registration, neither was an accomplice with defendant and Gutman in the particular offense for which the former was under trial.

2. The information charged that defendant was a deputy registrar of voters, "and as such deputy registrar of voters, as aforesaid, did willfully, feloniously, and unlawfully procure and allow one A. Gutman to be registered," etc. Defendant offered in evidence the record in the case of *Stilwell v. Evans*, then still pending and partly tried in the superior court of San Francisco, to show thereby that in a civil action defendant was called as a witness, and without objection answered to questions put him that he was a deputy registrar of voters. *Stilwell v. Evans* was a civil action to procure the cancellation of several thousand names alleged to have been illegally and improperly placed upon the voting register. Pol. Code, § 1109. The contention here is that defendant is charged with having committed the offense in his official capacity, viz. as deputy registrar; that in the action of *Stilwell v. Evans* he had been called, and testified that he was, in fact, a deputy registrar; that, by section 32 of the purity of elections act (St. 1893, p. 26), proof of these facts constitutes a bar to this prosecution. It is as follows:

"Sec. 32. A person offending against any provision of sections nineteen, twenty, twenty-one, twenty-two, twenty-five, twenty-six, twenty-seven, twenty-eight, thirty and thirty-one of this act is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding or lawful investigation or judicial proceeding in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment, for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly, in bar of such indictment, information or prosecution."

This section was subjected to elaborate analysis, and a full exposition of its meaning was made, in *Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364. It affords to one testifying immunity from prosecution or punishment for the offense with reference to which his testimony was given. In *Stilwell v. Evans*, Sternberg does not appear to have been testifying concerning any offense, much less the one with which he is here charged; and the statement by him that he was a deputy registrar had no more significance than would his answer that his true name was Louis Sternberg. Moreover, the charge in the information that, "as deputy registrar," defendant committed the offense, is the merest surplusage. It was meaningless in averment, and unnecessary in proof. The statute is not directed against official misconduct, nor limited in its application to public officers. "Every person who willfully causes, procures or allows" false registration is punishable under it. Every act embraced within its terms may be done by a private citizen as well as by a public officer, and the official character of the offender under this law is of no possible importance.

3. In instructing the jury, the judge said: "I instruct you, gentlemen, that Gutman, the man whom it is charged here Sternberg procured to falsely register, is an accomplice in this case." Elsewhere he said: "Now, you are instructed further, as I have already stated, that Gutman is, according to his own testimony, an accomplice in the crime here charged against Sternberg." This language, it is claimed, is violative of defendant's constitutional right that the judge shall not charge the jury with respect to matters of fact, but may state the testimony and declare the law. Const. art. 6, § 17. In *People v. Sansome*, 98 Cal. 235, 33 Pac. 202, this court said, discussing an instruction, that "to have gone further, and have told them that Kelly was an accomplice, would have been clearly a charge with respect to matters of fact, which is not allowed." In the case at bar the language quoted is part of instructions given by the court declaring the law to the jury upon the propositions that the testimony of an accomplice is to be viewed by them with distrust, and that a conviction cannot be had upon such evidence alone. The instructions are full upon the question, and the language criticised, so far from being injurious to defendant, is more favorable than he was entitled to; for, if Gutman was not an accomplice, the jury could have convicted without corroborating evidence, and were not required to view his evidence with distrust. By stamping him as an accomplice, the court, to the advantage of defendant, put his evidence under all the disabilities which attach to testimony of that character. It is clear, then, that no injury could have resulted to defendant. We need not, however, uphold the language for this reason alone. So much has been said to show that injury



could not have resulted from the error claimed, but, in addition, the error was expressly invited by defendant himself. This was natural, since the declaration was entirely favorable to him. He asked the court to instruct, and at his request the court did instruct, the jury, that they could not find defendant guilty "unless there was evidence, other than the evidence of Gutman, which in itself, and without the aid of the testimony of said Gutman, tended to connect Sternberg with the commission of the offense charged." This is itself a declaration to the jury that Gutman was an accomplice; and, for error thus invited, defendant has no just ground of complaint. Nor does the imputation that a crime has been committed, contained in the use of the word "accomplice," afford, under the circumstances, a legal grievance.

4. The court further instructed the jury as follows: "I repeat to you, gentlemen, that neither Lust nor Newman is an accomplice; neither one of them is an accomplice; and their testimony is not subject to the rule which I have mentioned as applicable to the testimony of accomplices." This language is excepted to upon the same ground, that it is an invasion of the jury's exclusive province of determining facts. Were there evidence, even slight evidence, tending to show that Newman or Lust was in fact an accomplice, this objection would be well founded, and the error and injury would be manifest. That Newman and Lust were not accomplices has already been said, but, nevertheless, there is no evidence in the record which tends in any way to establish their complicity in the Gutman crime. Had the court been asked to give instructions upon the law of accomplices as affecting the testimony of Lust and Newman, it would have been its duty to refuse them. In saying to the jury that these men were not accomplices, it did no more than to declare that there was no evidence before them tending to show that they were accomplices. While a judge may not instruct upon a matter of fact, he is not forbidden, if the record justifies the assertion, in declaring to a jury that there is a total absence of evidence upon a given proposition. Such are the circumstances of this case.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

#### PEOPLE v. STERNBERG. (Cr. 66.)

(Supreme Court of California. Jan. 13, 1896.)

#### CRIMINAL LAW—ORAL ADMISSIONS—ACCOMPLICE TESTIMONY—CORROBORATIVE EVIDENCE—INSTRUCTIONS.

1. Under Code Civ. Proc. § 2061, subd. 4, declaring that evidence of the oral admissions of a party is to be viewed with "caution," it is not error to refuse an instruction that it be viewed with "distrust."

2. A requested instruction that the evidence of an accomplice is to be viewed with "caution and distrust" is not bad, though Code Civ. Proc. § 2061, subd. 4, declares only that it should be viewed with "distrust."

3. A requested instruction that "by corroborative evidence is meant additional evidence of a different character to the same point," following with precision the definition of "corroborative evidence" (Code Civ. Proc. § 1839), cannot be refused as being abstract.

4. A defendant is entitled to have a definition of corroborative evidence given the jury, though they are instructed in the language of Pen. Code, § 1111, that evidence of an accomplice is not sufficient to convict, unless he is corroborated by other evidence, which in itself, and without his testimony, tends to convict defendant of the commission of the crime.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Louis Sternberg appeals from a conviction. Reversed.

C. W. Cross, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. This case, while possessing many features in common with the case of *People v. Sternberg* (Cr. No. 65; this day decided) 43 Pac. 198, differs from it in certain essentials which demand consideration.

Sternberg is here prosecuted for procuring the false registration of David Newman. Newman testified to the circumstances of his false registration at the solicitation of defendant. Lust bore like testimony, he having been present at the time Sternberg induced Newman to commit the crime. Sternberg, when the three were together, asked them both to register from the Baldwin Hotel. They went to the registrar's office for that purpose, Sternberg accompanying them, and there did his bidding. They recounted the later occurrences and conversation at the saloon, when \$20 was given them by defendant with which to get out of town, and in this they are corroborated by Gutman.

The court instructed the jury that Newman and Lust were accomplices with Sternberg. This declaration was asked by defendant in an instruction proposed by him, and was a more favorable instruction than he was entitled to. For the reasons given in *People v. Sternberg*, the defendant cannot complain of it.

The court likewise instructed the jury that Gutman was not an accomplice. Not the slightest evidence in the case indicated that he was. This contention has also been passed upon in the other case.

Certain instructions proposed by defendant were refused by the court; but the substance of them was fairly embraced and expressed in those given, and no injury could have resulted to defendant.

The following instructions proposed by defendant were refused by the court: "(1) The jury is instructed that it is their duty to view with distrust evidence of the oral admissions of defendant. (2) The jury is instructed that the evidence of an accomplice is to be viewed

by a jury with caution and distrust. (3) By corroborative evidence is meant additional evidence of a different character to the same point." The principles of law which these instructions undertake to express are all found in the Code. The first is at variance with the Code provision which declares that evidence of the oral admissions of a party is to be viewed with caution. Code Civ. Proc. § 2061, subd. 4. The distinction between caution and distrust is broad enough to justify the court's refusal. The second tells the jury that the evidence of an accomplice is to be viewed with caution and distrust. The Code provision is that such evidence is to be viewed with distrust. *Id.* The proposed instruction is not vitiated by the use of the additional word. If the evidence is to be viewed with distrust, it is certainly to be received and viewed with caution, while the converse might not be equally true. To view with distrust, caution must or should be exercised; while to view with caution does not necessarily demand distrust. The third instruction, refused as being abstract, follows with precision the Code definition of "corroborative evidence." *Id.* § 1839. The language is necessarily in the abstract, since it defines a term of abstract meaning with the brevity and generality necessary to legal phraseology. The maxims, rules, and definitions of law in this sense are all abstract, but are none the less proper to be given to a jury for this reason. Members of a jury might be in excusable ignorance of the legal definition of "corroborative evidence," and yet possess (or, at least, they should) intelligence enough to comprehend what was meant when they were told that it was additional evidence of a different character to the same point. The second and third proposed instructions are correct in law. They were not covered by any that were given, and should have been declared, if applicable to the case. That they were applicable no doubt can be entertained. The evidence of accomplices was before the jury. It was defendant's right that his triors should know that it was a duty imposed upon them by law to receive this evidence with distrust. The question of the support of such testimony by corroborative evidence was a vital one for their determination. They were instructed in the language of the Code (Pen. Code, § 1111) that they could not convict unless there was corroborative evidence. Defendant was plainly within his right in asking that they be told what corroborative evidence is. That the jury was instructed, in the language of section 1111 of the Penal Code, that the evidence of an accomplice is not sufficient to convict unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to convict defendant with the commission of the crime, informed them of the amount and kind of corroborative evidence required; but they were

still left without enlightenment as to what in law constituted this character of evidence. The direct injury worked by the refusal to give the second proposed instruction is shown from the following: The court, in its instructions, said: "When you become satisfied that it is so corroborated, then you take up the testimony of the accomplices, and judge it as you do the testimony of all others; that is, remembering still who they are,—remembering who each of the witnesses is, because you will not forget, of course, that they are accomplices,—you will not forget that in weighing their testimony, even though you be satisfied that there is sufficient corroboration to enable you to look at it." Had the court informed the jury that the evidence of accomplices must be viewed by them with distrust, the direction that they were to judge it as they did the testimony of all others, taken with what follows, could have been construed as a declaration that it was to be viewed as the testimony of all others, subject to the lack of full credibility which attached to it, and subject to their duty of viewing it with distrust. Not having been so instructed, the foregoing is tantamount to informing them that, when they shall believe that the testimony of the accomplices has been corroborated, such testimony stands upon the same plane with that given by witnesses to whose statements full credibility attaches. It is therefore not easy to see why the instructions were refused, and it is made more difficult by the fact that they were given at defendant's request in the former case.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.

PARKE & LACY CO. v. WHITE RIVER LUMBER CO. et al. (No. 18,280.)

(Supreme Court of California. Jan. 10, 1896.)

#### SURETY—DISCHARGE OF MORTGAGE—ESTOPPEL.

1. Where a surety gives a mortgage to secure performance of a contract and also payment of a note in no wise connected with the contract, an alteration of the contract, discharging the mortgage as to it, will not discharge it as to the note.

2. Where a surety gives a mortgage to secure payment of a note and also payment of \$3,004, according to terms of an agreement attached to and made part of the mortgage, by which the mortgagee makes a sale to the principal, in the form of a lease, of certain enumerated articles, and the principal agrees to pay \$3,004 therefor, the mortgagor is not estopped by recitals of the mortgage that the principal is justly indebted in the sum of \$3,064, "agreed to be paid as rent \* \* \* for [certain enumerated articles] in accordance with the lease, \* \* \* of which a copy is attached hereto and made a part hereof," to assert that thereafter the lease was materially altered as to what was to be done by the mortgagee, and that, consequently, no indebtedness accrued "in accordance with the lease."

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Parke & Lacy Company, a corporation, against the White River Lumber Company, a corporation, and others. From a judgment for defendant Hilton, plaintiff appeals. Modified.

H. A. Powell, for appellant. Garber, Boalt & Bishop and L. M. Hoefler, for respondents.

VANCLIEF, C. On June 12, 1889, the respondent Hilton executed to appellant a mortgage on real estate to secure payment of a promissory note of the same date made jointly by the White River Lumber Company and W. D. Parson, for \$650 and interest, payable to the order of plaintiff nine months after date, and also to secure the further sum of \$3,064, payable to plaintiff according to the terms of a written agreement of same date, attached to and made a part of the mortgage, of which the following is a copy: "The Parke & Lacy Company of San Francisco, Cal., lessors, hereby lease unto the White River Lumber Company and Warren D. Parson, of Tulare county, Cal., lessees, the following property for the period of nine (9) months, from the 15th day of June, 1889, to wit: One (1) 54-inch x 16-foot horizontal stationary tubular boiler, No. 3,155, with fittings (T. M. Nagle's make). One (1) 16-inch x 20-inch Phoenix engine, No. 674, with a Gardner governor. One (1) 11-foot x 16 $\frac{1}{4}$ -inch pulley, made in halves of suitable weight. One (1) No. 3 Valley bucket pump, and merchandise described in the list attached hereto. Said property is to be used only at Arbor Vitae, Tulare county, state of California, and said lessees are to pay to said lessors, at San Francisco, for the use of said property, the sum of three thousand and sixty-four (\$3,064) dollars, payable as follows: All on the 15th day of March, A. D. 1890. Said lessees agree that they will pay the rent at the times and in the manner aforesaid; that they will not permit said property, nor any part thereof, to be affixed to real estate, nor removal from where it is to be used aforesaid, nor deliver the same to any one, nor suffer it to be taken away by any one except lessors, nor in any manner transfer or attempt to transfer this lease, or any interest therein or in said property, without the written consent of lessors; that they will keep said property in good condition and repair, and pay all expenses relating to said property hereafter incurred, including transportation and insurance thereof, in the name of lessors, and all damages to said property suffered by lessors. It is further agreed that time is of the essence of this agreement, and that upon the failure of the lessee strictly to keep and perform any of the covenants or provisions hereof, by them agreed to be performed, then and thereupon, without any notice, this instrument shall be deemed to be

canceled and of no further effect as against lessors, and all right and interest of lessee in or to said property shall cease, and all rent by lessee theretofore paid shall belong to lessors as full payment for the prior use of said property, and lessors shall be entitled to take into their possession all said property. Said lessors further agree that upon strict performance by lessee with all the foregoing covenants and provisions by them to be kept and performed, they shall then (but not otherwise) have the right to purchase said property by the prompt payment to the lessors of the sum of three thousand and sixty-four (\$3,064) dollars. Witness the hands and seals of the parties hereto, this 12th day of June, 1889. [Signed] Parke & Lacy Company. B. T. Lacy, Pres. [Seal.] White River Lumber Company, by W. D. Parson, Pres. [Seal.] W. D. Parson. Witness: Osgood Hilton, W. F. Aldrich." The conditions of the mortgage are that if default be made in the payment of said sums of money, or any part thereof, as provided in said note or agreement, the mortgagee may sell the mortgaged property and apply the proceeds, etc. The mortgagor, Hilton, was not interested in the transactions between plaintiff and the other defendants, but executed the mortgage merely for the accommodation of the White River Lumber Company and Parson, to whom he or his mortgaged property stands in the relation of mere surety, of which the mortgagee had notice at the time the mortgage was executed, and it is not disputed that he is entitled to all the rights and favor accorded by law to a surety; that is to say, "when property of any kind is mortgaged or pledged by the owner to answer for the default or miscarriage of another person, such property occupies the position of a surety or guarantor, and anything which would discharge an individual surety or guarantor who was personally liable will, under similar circumstances, discharge such property." Brandt, Sur. § 34 et seq.

This action was commenced February 7, 1891, to recover from the White River Lumber Company and W. D. Parson the sum of \$650 and interest, alleged to be due on said promissory note, and the further sum of \$3,064 and interest, alleged to be due on said written agreement, and also to foreclose the Hilton mortgage. The defendants White River Lumber Company and W. D. Parson, having failed to answer the complaint, a personal money judgment was rendered against them by default for the full amount demanded. The material substance of the very verbose separate answer of the defendant Hilton is that, without his consent, said written agreement was altered materially, after the execution of the mortgage, by a verbal agreement between plaintiff and the other defendants, at the instance and request of plaintiff, and that the agreement as written was never substantially performed on his part by the

plaintiff. The alleged alterations of the contract consisted in substituting for the "Gardner governor" and the "11-foot x 16 1/2-inch pulley, made in halves of suitable weight" an inferior, defective, unsafe governor known as a "Waters Governor," and an inferior, defective pulley, smaller in size than that described in the written contract, and of insufficient weight. Besides the above, Hilton's answer contained a denial of the alleged indebtedness of the White River Lumber Company and Parson to the plaintiff. The court below found in favor of the defendant Hilton on all the issues of fact, and, as conclusions of law, found that the defendant Hilton and the mortgaged property had been exonerated and discharged from all liability on the mortgage, and that the mortgage should be canceled of record; and thereupon judgment was rendered accordingly. From this judgment, and from an order denying his motion for a new trial, the plaintiff has appealed.

The identical written contract herein above set out was construed by this court in the case of Parke & Lacy Co. v. White River Lumber Co., 101 Cal. 37, 35 Pac. 442, and held not to be a lease, but a sale, either absolute or conditional. Although that decision is not the law in this case, the law announced therein is applicable to the construction of the contract, unless the construction may be aided and changed in this case by circumstances different from those appearing in that; but I perceive no difference affecting the construction of the contract. But the construction given in that case can be applied in this case only to the extent that the contract is not a lease, since that decision goes only to that extent. By whatever name the contract may be properly designated, or however classified, it was wholly executory by both parties thereto, the promise of each party being the only consideration for the promise of the other; and the first act to be performed, the delivery of the property described to the White River Lumber Company and Parson (miscalled lessees), was to be performed by the plaintiff. The defendant Hilton mortgaged his property to secure performance, on the part of the White River Lumber Company and Parson, of this contract, and not to secure their performance of any other or materially different contract. If, therefore, the contract was altered by the parties thereto in any material particular after the execution of Hilton's mortgage, without his consent, the mortgaged property was thereby exonerated from all liability as security. Civ. Code, §§ 2844, 2819; Brandt, Sur. §§ 397, 399, and cases there cited, especially Bragg v. Shain, 49 Cal. 131, Truckee Lodge v. Wood, 14 Nev. 293, and U. S. v. Corwine, 1 Bond, 339, Fed. Cas. No. 14,871. The court below found that the contract was materially altered, as alleged in Hilton's answer, and without his consent; and this finding is justified by the evidence. The only conflict of the evidence applicable to this finding is found in that part of it relating to the

question whether Hilton consented to the alteration; and, as to this, the conflict is substantial to a degree which precludes this court from disturbing the finding on the ground that it is not justified by the evidence, even though it should seem from the transcript of the evidence that a preponderance thereof is against the finding.

It is contended by appellant, however, that respondent is estopped from denying the recital in the mortgage that the lumber company and Parson "are justly indebted" to appellant in the sum of \$3,064 as rent on machinery. But such is not the recital. It is recited in the mortgage that the White River Lumber Company and Parson are justly indebted to the Parke & Lacy Company in the sum of \$650 on a certain promissory note (setting out a copy of the note) "and in the further sum of \$3,064, agreed to be paid as rent by said White River Lumber Company and Warren D. Parson to said Parke & Lacy Company for the boiler, engine, and other machinery, in accordance with the lease this day executed, of which a copy is attached hereto and made a part hereof." The whole lease, as well as the note, must be read as a part of the recitals, and when so read will not estop Hilton from alleging that the lease was altered by the parties thereto without his consent, after the execution of the mortgage, and that the covenants therein on the part of the plaintiff were never performed, and, consequently, that no indebtedness of the lumber company and Parson to plaintiff ever accrued "in accordance with the lease." The lease, being the principal part of the recitals, shows that the indebtedness referred to did not exist at the date of the recital, and could be only such as might thereafter accrue in accordance with its terms. Therefore the averments that the lease was afterwards altered, and that no indebtedness ever accrued in accordance with its original terms, are nowise inconsistent with the recitals in the mortgage.

I conclude that, as to the alleged indebtedness of \$3,064, founded upon the written agreement called a "lease," a foreclosure of the Hilton mortgage was properly denied by the trial court; but I think the court erred in denying a foreclosure of the mortgage as a valid security for the payment of the promissory note for the sum of \$650 and the conventional interest thereon. That note is entirely distinct from the so-called lease, and there is no pretense that it has been altered in any respect. It appears that the consideration for it was a loan by plaintiff of \$650, and that no part of the principal or interest had been paid when judgment was rendered against the other defendants. "Where a surety is bound by one bond for the performance by the principal of two distinct things, and the contract is varied as to one of the things to be performed, the surety is discharged as to the matter concerning which the contract has been changed, but is not discharged from that as to which it has not been changed." Brandt,

Sur. § 398, and cases there cited. I think the cause should be remanded, with instructions to modify the judgment according to this opinion.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons stated in the foregoing opinion, the cause is remanded, and the court below is instructed to modify the judgment in accordance with said opinion.

KIEFER v. LAVENTHAL et al. (L. A. 89.)  
(Supreme Court of California. Jan. 10, 1896.)

DEPOSIT—ACTION TO RECOVER—COMPLAINT.

Plaintiff's assignor sold all the goods in his saloon for \$60 in hand paid, the purchaser further agreeing to deposit with defendant \$300, to be paid the seller on the procurement of the right to carry on the business in such saloon. Held, that plaintiff's complaint, in action for the \$300, should allege that the purchaser had procured the right to carry on the business, or that he could carry it on without the procurement of a right, or that, by his own neglect or default, he had failed to secure the privilege.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by O. H. Kiefer against E. Laventhal and others. Judgment for defendants. Plaintiff appeals. Affirmed.

King & Harmon, for appellant. Graff & Latham and J. W. Mitchell, for respondents.

HENSHAW, J. Appeal from the judgment entered after demurrer sustained to plaintiff's second amended complaint, plaintiff refusing further to amend. The facts pleaded are that Brown and Beaslin entered into an agreement (set forth in full in the complaint) by which Brown sold to Beaslin, for the sum of \$60, to him paid, certain personal property. This property consisted of "all of the goods in, and owned by me in, my place of business in the town of Azusa," a retail liquor saloon. "As a further and separate agreement between the parties," Beaslin agreed to deposit with the firm of Laventhal & Sons (defendants herein) \$300, "to be paid to the party of the first part upon the procurement of the right to sell and carry on the business at the place above named; that is, the retail or liquor business within the same." Beaslin deposited the money with Laventhal & Sons, who hold it. Brown assigned his interest and rights "as per agreement" to Kiefer. Kiefer, after demand upon Laventhal & Sons, commenced this action to obtain the \$300, making Tappeiner, who claimed by assignment from Beaslin, one of the defendants. The complaint nowhere avers that Beaslin procured the right to carry on the business of retail liquor dealer, or that he could carry on the business without procurement of a right (presumably a license), or that by his own neglect or default he had failed to secure the

privilege. These averments lay at the foundation of plaintiff's right of action, and should have been alleged in one or another of the modes indicated. From the agreement alone, it may reasonably be inferred that Beaslin paid Brown \$60 for such personal property as Brown owned in the saloon, agreeing to pay him \$300 more when and if he obtained a license to conduct the business. If he succeeded, his liability to pay was complete. If he failed, then he owned the property for which he had paid \$60, and the transaction was at an end. Judgment affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

PIERCE et al. v. BIRKHOLM et al. (No. 15,464.)<sup>1</sup>  
(Supreme Court of California. Jan. 10, 1896.)

GRANT OF NEW TRIAL—APPEAL—EFFECT ON JUDGMENT.

1. Pending appeal from an order granting a new trial, an appeal will lie from the judgment.

2. An order granting a new trial does not vacate the judgment, until the order becomes final by failure to appeal, or its being sustained on appeal.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by one Pierce and others against one Birkholm and others. There was a judgment for defendants, and from an order granting a new trial they appeal, pending which plaintiffs appeal from the judgment. On motion to dismiss plaintiffs' appeal. Denied.

Morrison & Foerster, Constantine E. Foerster, Parker & Eells, and William H. Jordan, for appellants. W. S. Goodfellow, for respondents.

VAN FLEET, J. Judgment was entered in the action in the court below in favor of defendants on August 15, 1892, but subsequently, on August 26, 1892, the court, on motion of plaintiffs, made an order granting a new trial. From the order granting a new trial defendants, on October 24, 1892, appealed to this court. After the taking of the appeal from said order, the plaintiffs, on May 10, 1893, took an appeal from the judgment.

We are asked by the defendants to dismiss the appeal from the judgment, upon the ground, as contended, that the effect of the order granting defendants a new trial was to vacate and set aside the judgment, and that, consequently, when the appeal from the latter was taken, it had ceased to have any existence, and there was no judgment to appeal from. This view cannot, in our judgment, be sustained, for obvious reasons. The operation of an order granting a new trial is, unquestionably, expressing it in general terms, to ultimately vacate the judgment; that is, it

<sup>1</sup> Rehearing denied.

sets aside the findings upon which the judgment rests, and the latter necessarily falls. But this implies a valid and subsisting order, remaining in full force and effect. Here the order had been appealed from, and that appeal was pending and undisposed of at the date of the appeal from the judgment. The effect of the appeal from such order was to suspend the operation of the latter, and render it ineffectual until the determination of such appeal, either by a dismissal thereof, or by an affirmation of the order. Pending such appeal, the judgment remained subsisting, and, for the purposes of an appeal therefrom, stood as if no order for a new trial had ever been made. The position of defendants, in effect, is that an order granting a new trial becomes effectual immediately upon its entry, and that the judgment is thereby and at once absolutely wiped out of existence; that the effect of an appeal from such order is not to resurrect or restore the judgment for any purpose, whatever deterrent effect it may exert upon the operation of the order in other respects. Manifestly, this position cannot be maintained. If such was the effect intended for the order, it was idle for the legislature to provide an appeal therefrom, since, whatever the result of such appeal, the judgment would be gone, and there would be no method of reviving it except as a result of another trial. Being absolutely dead, it could not be otherwise restored to existence. Furthermore, if such were its effect, it would logically follow that the trial court could proceed, notwithstanding the pendency of an appeal therefrom, and try the case anew: but this, it has been held from a very early day in this state, cannot be done. *Ford v. Thompson*, 19 Cal. 120. But such is not the effect of the order. While its ultimate effect, if unappealed from, or if sustained upon the appeal, where one is taken, is to vacate the judgment, and require another trial of the action, such result does not follow until the finality of the order is determined in one or the other modes suggested. In this respect it is not distinguishable from any other order or judgment from which an appeal is given. Pending an appeal therefrom, it is suspended, and set at large, and the rights of the parties stand unaffected thereby, excepting in so far as their prosecution may be stayed by virtue of the provisions of the statute. That the effect of the order is not to destroy the judgment, *ipso facto*, upon its entry, is made clear when we regard the effect of a reversal of the order on appeal. In such case the law does not provide for entering a new judgment in the court below upon the going down of the remittitur as would be required had the judgment wholly ceased to exist, but the judgment as originally entered in that court stands as the judgment in the action, and has effect from the date of such original entry. "The reversal of an order denying a new trial reverses the judgment, but the reversal of an order granting a new trial leaves the verdict

and judgment standing." *Hayne*, *New Trials & App.* § 299. And see, also, *Brooks v. Railway Co.* (Cal.) 42 Pac. 570.

In support of the view contended for by them, defendants cite us to the following cases from this court: *Walden v. Murdock*, 23 Cal. 549; *Thompson v. Smith*, 28 Cal. 523, 530; *Kower v. Gluck*, 33 Cal. 401; *Wittenbrock v. Bellmer*, 62 Cal. 558; *Wheeler v. Kassabaum*, 76 Cal. 90, 18 Pac. 119. And it is claimed that those cases settle the law in accordance with the position now taken by them. An examination of those cases, however, shows that they fall very far short of sustaining any such view. They do sustain the general proposition, not questioned, that the effect of an order granting a new trial is to set aside the judgment; and that is the only question, so far as anything affecting a consideration of this case is concerned, that is involved in the determination of any of those cases. That proposition is found stated in a general way in various forms, and in one or two instances in language somewhat too broad and loose, and such as, perhaps, to lend some color to the position now taken by defendants. But, when the cases are read with reference to the questions before the court, they will be found, in each instance, we think, not inconsistent with the views we have expressed. In all those cases the court would seem to have used the expressions there found with reference to the effect of such an order, treated as a finality, and a consideration of the question as to when the order becomes final does not appear in any of them to have been involved. In none of them was the question here involved—the effect upon the order granting a new trial of an appeal therefrom, and, consequently, the status of the judgment pending such appeal—under consideration. It is true that, in the case of *Kower v. Gluck*, *supra*, most strongly relied upon by defendants, there was, as here, an order granting a new trial, from which an appeal had been taken, and subsequently an appeal from the judgment. The two appeals were considered together, and the court, determining that the appeal from the order must be affirmed, holds that the effect of the order granting a new trial being to set the judgment aside, the appeal from the judgment became inconsequential, and should be dismissed. This is all that is determined by the case, and to that extent it is obviously correct. If the language, which does not seem to have been carefully chosen to express the meaning of the court, implies anything further, it is not authoritative, because unnecessary to the determination of the question involved. The other cases cited need not be specially reviewed, as we regard them as sufficiently disposed of by what is generally said above. None of them, when properly considered, go to the length contended for by defendants, or necessary to sustain this motion. To sustain the doctrine urged by defendants would, not only in this, but in most

instances of the kind, deprive the party of an opportunity to take advantage of the right of appeal clearly afforded by the statute, and that upon grounds which to us seem wholly unsupported by either reason or authority. The motion is denied.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; HENSHAW, J.; TEMPLE, J.

HARRISON, J., being disqualified, did not participate in the foregoing decision.

EVERETT et al. v. LOS ANGELES CONSOL. ELECTRIC RY. CO.  
(L. A. 62.)

(Supreme Court of California. Jan. 9, 1896.)

ELECTRIC STREET RAILWAYS—LIABILITY FOR NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. It is contributory negligence per se to ride on a bicycle between the tracks of an electric street railway without watching for the approach of cars from behind.

2. Decedent was riding on a bicycle between the tracks of the defendant electric railroad company, at the rate of six miles an hour, without watching for the approach of cars from behind. As the car by which decedent was killed approached from behind, at the rate of ten miles an hour, the motorman sounded the gong when 20 to 40 feet from him, and cried out for him to get off the track, to which decedent paid no attention. Thereupon the motorman, when 10 or 20 feet from decedent, reversed the current, and attempted to stop the car, but was unable to do so in time. There was no evidence that the rails of the track were not on a level with the ground between the tracks, and decedent was seen when about a block and a half ahead of the car to pass from the north track, on which he had been riding, to the south track, to escape a north-bound car. *Held*, that a nonsuit should have been granted.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Amanda P. Everett and others against the Los Angeles Consolidated Electric Railway Company. There was a judgment for plaintiffs, and defendant appeals. Reversed.

John D. Pope, for appellant. W. J. Hunsaker, for respondents.

VAN FLEET, J. Verdict and judgment were for plaintiffs, and defendant appeals from the judgment and an order denying its motion for a new trial.

The action was by the widow and minor child of one Charles E. Everett, deceased, to recover damages for the death of the latter, caused by his being run over by an electric car operated by the defendant on its street railroad in the city of Los Angeles, and alleged to have been through defendant's negligence. At the conclusion of plaintiff's evidence in chief, defendant moved the court for a nonsuit, on the grounds, substantially, that the evidence wholly failed to show negligence on the part of the defendant, but did

establish affirmatively that deceased came to his death through his own negligence, contributing directly and proximately thereto. The court denied the motion, to which ruling defendant excepted, and this exception constitutes the only material question in the case.

The evidence in behalf of plaintiffs tended to show that the deceased, at the time of the accident resulting in his death, which was on October 17, 1894, was 40 years of age, in good health, and in full possession of his faculties, having good eyesight and unimpaired hearing.

He was an experienced rider of the bicycle, had owned one of those vehicles three or four years, and used it every day. On the date in question, about 1 o'clock in the afternoon, or a little thereafter, deceased was on his bicycle, riding along McClintock avenue, in a suburb of Los Angeles, known as "University," on a portion of the street where ran a double line or defendant's railway, one line used for south-bound and the other for north-bound cars. He was going south at the time, and traveling at the rate of about six miles an hour. Following him, and going in the same direction on the south-bound track, was a train of defendant's cars, consisting of an electric motor car and a trailer, heavily loaded with passengers going out to the race track. This train was running at its ordinary rate of about ten miles an hour. When deceased was first observed by those on the train, he was between a block and a half and two blocks ahead of the train, and was riding between the rails of the north-bound track.

He continued on this track for some distance, when he crossed over to the south-bound track, apparently to avoid an approaching car going north, and continued on his course, riding between the rails of the latter track. At this time he was something over half a block in advance of the south-bound train, but the latter was rapidly overtaking him; and when the north-bound car passed him, which was at a point a short distance south of where the south-bound train then was, passengers on the former, evidently noting the rapid approach of the train, called out a warning to deceased to apprise him of danger; and at about the same time, when the train was within from 20 to 40 feet from him (the estimates of the witnesses varying on this point), the motorman on the latter rang his gong, and, together with several of the passengers, cried out to deceased to "get off the track," "look out," and other words of like import. These warnings, although distinctly heard by a witness standing on the street some four or five times as far from the train as deceased then was, were either unheard by him, or totally unheeded, as he was not observed to look back or turn his head, or attempt to turn or increase the speed of his bicycle. Thereupon the motorman, when within about 10 to 20 feet of deceased, reversed the current, and applied the brakes,

and endeavored to stop the train, but did not succeed in time to avoid running deceased down; and he was struck by the motor, and killed. At no time from the time he was first seen riding ahead of the train was deceased observed to turn his head or look back, until just as the train was upon him, when he partly turned his head, and turned his wheel a little to the right, but not sufficient to get out of the way. University is a settled suburb of Los Angeles, laid out in blocks, crossed and intersected by public streets, and the point where deceased was killed was at the intersection of McClintock avenue with Thirty-Seventh street. Deceased was not a resident of Los Angeles, but had been there for about a week, more or less, before the accident, stopping at the house of a relative on Thirty-Ninth street, off McClintock avenue, south of Thirty-Seventh street and the point where he was killed. During his sojourn he had been in the habit of riding back and forth to and from the city on his bicycle, and, when on McClintock avenue, would ride on the railroad tracks, as it was smoother for travel between the rails than on the outside, where the space was narrow and rough and a poor road for the bicycle, by reason of the condition of the street. At points on McClintock avenue the soil was sandy, and had receded somewhat from the rails, so as to leave the latter in places standing a little above the surface of the street; but what the condition was in this respect at or in the immediate vicinity of the accident was not made to appear. At the date in question, races were in progress at the race track, situated south of the scene of the deceased's death; and, owing to the increased travel, extra cars were being run by defendant, and at shorter intervals than at other times, but whether the train which killed deceased was an extra or running on regular time was not shown. The motorman in charge of the train had been in the employment of defendant about two weeks. For the first ten or twelve days he was under instruction from an experienced motorman, and was then put in charge of a motor, and had been so employed some four or five days at the time of the accident. The statements of the witnesses vary considerably as to how far the train was from deceased when the motorman commenced ringing his alarm gong. A number of them show no recollection on the subject, but, taken as a whole, the evidence tends strongly to indicate that the gong was being sounded before the motorman and passengers commenced to call out to deceased to get out of the way. There is a like difference as to just when the brakes were applied, and whether the speed of the train was slackened any before the deceased was struck. The head end of the motor passed the point where deceased was struck between 20 and 30 feet before the train came to a full stop, and the evidence tended to show that it could have been stopped in a shorter distance. There was also some evi-

dence tending to show that the wind was coming from the southeast; at what velocity does not appear, but that it was calculated to deaden to some extent any sound in deceased's ear.

This is substantially the case made by the evidence in behalf of plaintiffs upon the points material for our consideration. It can scarcely be made a question in the case—indeed, we do not understand it to be seriously controverted—but that the conduct of the deceased under the circumstances narrated constituted negligence on his part in the highest degree, and such as, standing alone, would necessarily preclude a recovery for his death. In walking or riding along a line of railway where cars or trains are passing, or likely to pass, at short intervals, one, while in a position to be endangered by such vehicles must pay attention to his surroundings, and employ his natural faculties, and exert due diligence to avoid such danger. He must listen and look to ascertain whether danger is threatened by his situation, and a failure so to do constitutes negligence per se. This principle is settled by a practically unbroken line of decisions in this and other states. One or two of the latest expressions upon the subject by this court, in cases where the rule is fully discussed and authorities cited, may be given as aptly stating and applying the doctrine. In *Kenna v. Railroad Co.*, 101 Cal. 26, 35 Pac. 332, it is said: "It is a fixed rule that it is the duty of any one when attempting to cross a railroad track upon a highway to be vigilant, to look and to listen before attempting to cross, and a failure to do so is regarded as such negligence on his part as to preclude a recovery. *Glascok v. Railroad Co.*, 73 Cal. 137, 14 Pac. 518. With greater reason does the principle of this rule apply to one who is traveling laterally along the route of a railroad, and knows that engines will soon follow. It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field; and he who deliberately does so will be presumed to assume the risk of the perils he may encounter,"—citing a large number of cases. In *Holmes v. Railway Co.*, 97 Cal. 161, 31 Pac. 834, where the person for whose death it was sought to recover was killed while walking along the railroad track near a station, while waiting for the train which ran him down, and when it appeared that deceased did not look out for the approach of the train, which he could have seen in time to get out of the way, the court say: "A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the



failure of such a person so situated, with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses, in order to avoid the danger incident to such situation, is negligence per se. The following are a few of many cases which might be cited to sustain this proposition: *Harlan v. Railway Co.*, 64 Mo. 480; *Id.*, on rehearing, 65 Mo. 22; *Railroad Co. v. Depew*, 40 Ohio St. 121; *Kelley v. Railroad Co.*, 75 Mo. 138; *Glascok v. Railroad Co.*, 73 Cal. 137, 14 Pac. 518." Nor is there any distinction, in the application of this doctrine, between an electric or cable line operated upon the public streets of a city, and that of an ordinary steam railway operated upon the right of way of the corporation. While the deceased had the undoubted right to a reasonable use of the public street, notwithstanding its occupancy by defendant's tracks, he could not ignore or disregard the rights of the latter in the premises, nor neglect to take reasonable precautions for his own safety. If he chose to make use of the part of the street occupied by the tracks, it was his duty to look out for and endeavor to avoid the dangers incident to such use. In *Haight v. Railroad Co.*, 7 Lans. 11, speaking of this rule, the court say: "It is said by counsel for plaintiff that, while this may be the rule in regard to steam railways, it cannot be applied to street railways." In *Carson v. Railway Co.*, 147 Pa. St. 219, 23 Atl. 369, it was held that failure to look for approaching cars on the part of one about to drive across the tracks of an electric street railway company is such contributory negligence as will prevent his recovery for injuries received by colliding with a car. The court said: "If, by looking, the plaintiff could have seen and so avoided an approaching train, and this appears from his own evidence, he may be properly consulted." In *Ward v. Railway Co.* (Sup.) 17 N. Y. Supp. 427, it appeared that plaintiff's intestate was fatally injured while attempting to drive across a street-railway track. There was evidence that, at any time before reaching the track, deceased, by a glance, could have informed himself of the approach of the car, but that he drove onto the track without looking in either direction. It was held that he was guilty of contributory negligence. In *Creamer v. Railway Co.*, 156 Mass. 320, 31 N. E. 391, the supreme court of that state held that where a person stepped from a horse car at the junction of two streets, and immediately started to cross the track of an electric road, without looking or listening, and was run over by the electric car running at the rate of 15 miles an hour, there could be no recovery, because the deceased was not exercising due care. We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway than that one must look and listen before crossing a street-

car track upon which the motive power is electricity or the cable. See, also, *Bailey v. Railway Co.* (No. 16,004; decided by this court December 10, 1895) 42 Pac. 914. When the evidence discloses a failure to take such reasonable precautions for one's own safety, it constitutes negligence in law, and is not a question to be submitted to the jury.

This brings us to the only other consideration arising: Does the evidence tend to show such negligence on the part of defendant, contributing to the death of deceased, as would in law authorize a recovery, notwithstanding the negligence of the deceased? We find nothing in the evidence to sustain this view. The case is not like one where the injured party is discovered in time lying or standing upon a railroad track, under such circumstances as to make it doubtful whether he can or will get out of the way; or where one is seen attempting, either on foot or otherwise, to make a crossing, or passing along or on its track over a bridge or narrow causeway, or in a deep cut or tunnel, where to turn aside would be either dangerous or impossible; or under other circumstances of similar character. In such instances it may be conceded that the driver of the engine or motor would not be justified in law in proceeding without effort to stop his vehicle up to the point of collision. Persons cannot be recklessly or wantonly run down on a railroad track, however negligent themselves, where the circumstances are such as to convey to the mind of a reasonable man a question as to whether they will be able to get out of the way. But the evidence has no tendency to make such a case. Here the deceased was in full and open view of the approaching train for several blocks, and had perfect opportunity and ability to apprise himself of its coming. He was upon a swift and noiseless vehicle, which, as a matter of common knowledge, can be made with very little effort, under a rider of ordinary strength and experience, to attain a much higher rate of speed than that with which the cars were progressing, and which, furthermore, is susceptible, by a mere pressure of the hand, to turn aside instantly,—in much less time, indeed, than a pedestrian could step aside,—so as to completely avoid an object no wider than a street car. He was upon level ground, and, assuming that the surface was too rough or the space too narrow outside the railroad tracks for him to safely turn that way, there was nothing, so far as appears, to prevent his return to the other track or to the space between the tracks. In fact, he had but a few moments before crossed from one track to the other, to avoid a like danger, and had been seen to do so by the motorman on the train. Under these circumstances, we think it perfectly clear that the latter was justified, reasoning in the line we have suggested, in keeping on his course, and assuming that the deceased, obeying the most ordi-

nary dictates of prudence, had made himself aware of the approach of the train, and would either increase his speed or turn aside in time to avoid the danger which threatened him. In *Holmes v. Railway Co.*, supra, it is said: "As the deceased was a man of mature years, and nothing to indicate that he was not able to take care of himself,—as he was in fact,—the engineer might reasonably believe that he knew of its approach, and would, in obedience to the ordinary instinct of self-preservation, move away from the track before being overtaken by the engine. *Railroad Co. v. Miller*, 25 Mich. 279." See, also, *Campbell v. Railroad Co.* (Kan.) 40 Pac. 997. The motorman was not required to assume that the deceased would continue his negligent conduct to a point which would endanger his life or limb, and it was not negligence in the driver, under the circumstances, to indulge the presumption that the deceased would get out of the way, up to the last moment. There is nothing in the circumstances to indicate any wantonness or recklessness on the part of the engineer, or that he did not take all the precautions to warn the deceased and to stop his train that would have been suggested to one more experienced, or to any other reasonable mind.

✓ But, were it to be conceded that the evidence disclosed a case tending to show negligence on the part of defendant's servants, the plaintiffs could not recover under the circumstances of this case. The rule which renders a defendant liable for injuries, notwithstanding some negligence on the part of the plaintiff or the person injured, can only apply "in those cases where such negligence was the remote, and not the proximate, cause of the injury, that is, where the negligent acts of the parties are independent of each other, the act of the person injured preceding that of the defendant." *Holmes v. Railway Co.*, supra. In that case, quoting from *O'Brien v. McGlinchy*, 68 Me. 552, it is said: "But in cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his principal is in some position of danger from a threatened contact with some agent under the control of the defendant, when the plaintiff cannot and the defendant can prevent the injury. \* \* \* But this principle cannot govern where both parties are contemporaneously and actively in fault, and, by their mutual carelessness, an injury ensues to one or both of them." See, also, *Hager v. Southern Pac. Co.*, 98 Cal. 309, 33 Pac. 119; *Esrey v. Southern Pac. Co.*, 103

Cal. 541, 37 Pac. 500. The rule can never apply to a case where, as here, the negligence of the party injured continued up to the very moment of the injury, and was a contributing and efficient cause thereof; for it is apparent that, by the slightest care and effort on the part of the deceased, he could have put himself out of danger up to the last moment before he was struck.

Our conclusion is that the plaintiffs did not make out a case entitling them to recover, and that the refusal of the trial court to grant the motion for nonsuit was error. It may be added that an examination of the evidence on the part of the defendant serves only to strengthen the case as to the negligence of the deceased, and the absence of negligence on the part of the defendant, and makes it clear that the court should have granted defendant's request to instruct the jury to find for the latter. It follows that the judgment and order must be reversed, and it is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.

#### EVERETT et al. v. LOS ANGELES CONSOLIDATED ELECTRIC RY. CO.

(L. A. 62.)

(Supreme Court of California. Jan. 9, 1896.)

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Amanda P. Everett and others against the Los Angeles Consolidated Electric Railway Company. There was a judgment for plaintiffs, and defendant appeals. Heard on motion to strike out portions of respondents' brief. Denied.

John D. Pope, for appellant. W. J. Hunsaker, for respondents.

PER CURIAM. Motion to strike out a portion of respondents' brief, because not pertinent to anything contained in the record, and therefore improper. In view of the conclusion reached on the merits of the appeal, whereby the judgment and order denying a new trial are reversed (see opinion this day filed, 43 Pac. 207), the purpose of the motion becomes inconsequential; and for that reason the motion is denied.

#### DEEP MINING & DRAINAGE CO. v. FITZGERALD.

(Supreme Court of Colorado. Dec. 4, 1895.)

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—ERRONEOUS INSTRUCTIONS—NEGLECT OF VICE PRINCIPAL—EXCESSIVE DAMAGES.

1. An instruction that if plaintiff committed some act which proximately caused the injury, and but for which act the injury would not have occurred, he could not recover, was erroneous in limiting the contributory negligence to an act of commission, where it was in issue that plaintiff omitted to perform some act which, if performed, would have protected him from injury.

2. An instruction in an action by a servant for personal injuries, that if the master orders the servant into a situation of danger, and he obeys and is injured, he is entitled to recover

"unless the danger was so glaring that no prudent man would have entered into it; \* \* \* and where an employé is suddenly commanded by his employer to do a particular act, and exhorted to diligence therein, he cannot be required to exercise the same degree of care in guarding against accidents as when he has more abundant time for observation and reflection,"—was erroneous where there was no evidence which justified the giving thereof.

3. The master is liable for the acts of a vice principal done within the scope of his employment, and such as properly devolve upon the master in his general duty to his servants, while for all such acts as relate to the common employment, and are on a level with the acts of a fellow laborer, except such as are done by the vice principal against the reasonable objection of the injured servant, the master is not responsible.

4. A verdict for \$37,500, awarded to a miner for loss of eyesight, appearing to have been given by some motive other than the desire to make merely a reasonable compensation, is excessive.

Error to district court, Pitkin county.

Action by Edward Fitzgerald against the Deep Mining & Drainage Company for personal injuries. Plaintiff had judgment, and defendant brings error. Reversed.

This was an action brought by the defendant in error to recover damages for personal injuries sustained by reason of the alleged negligence of the plaintiff in error. In substance the complaint alleges that the defendant was a corporation engaged in the business of mining in the county of Pitkin, and state of Colorado, and the particular work in which it was engaged at the time of the accident was the sinking of what was known as the "deep shaft on the Homestake lode"; that the plaintiff was at the time employed by the defendant as a miner to work, with other miners, under the direction of defendant, at the bottom of the said shaft; that one James Thomas was at that time in charge of the work on behalf of the defendant, and was employed by it as its agent and representative to conduct and control the working and sinking of said shaft, and was acting in pursuance of said employment at the time of the injury; that Thomas was vested with full power over said work and over the miners employed thereat, with the right to direct and control the action of the miners and to discharge them for violation or disregard of his directions, and generally to hire and discharge men in the prosecution of said work; that while engaged in the sinking of the shaft Thomas commanded plaintiff to clean out a "missed hole," that is, a hole which had been drilled in the shaft, and in which had been placed a cartridge consisting of dynamite and other explosive material, connected with a cap and fuse, which had been lighted, but the fire of which had gone out, and failed to light the explosive; that in part plaintiff did this, but refused to clean it out beyond a certain depth, giving as his reason for disobeying that he thought the hole was deep enough; that thereupon Thomas himself, against the protest of the plaintiff, took up the unfinished

work, which he prosecuted in so negligent a manner and with such force and violence that he thereby caused an explosion, which resulted in the loss of plaintiff's eyesight, and deprived him of the power of earning a living. A further allegation as to negligence is "that said injuries were caused by the act and negligence of the defendant and its agent as principal and representative as aforesaid, without negligence on the part of the plaintiff." An answer was filed to this complaint, consisting of several defenses, one being a general denial; also that said Thomas was a fellow servant of the plaintiff, engaged in the same kind of employment; that plaintiff's own negligence was the cause of the injury; and that the plaintiff had equal means of knowledge with the defendant as to whether the act which it was alleged caused the injury was dangerous and unsafe, and yet, nevertheless, continued in the service of the defendant, and by his own act caused the injury. To this answer a replication was filed, and upon the issues thus joined trial was had before a court and jury, resulting in a verdict for the plaintiff in the sum of \$37,500. Upon this verdict, after the overruling of a motion for a new trial, interposed by defendant, the court entered judgment, and to reverse this judgment the defendant prosecutes its writ of error.

A large number of errors have been assigned by the plaintiff in error, but, in view of the conclusion which we have reached, it will not be necessary to consider all of them. The main errors relied upon are that the facts stated in the complaint are not sufficient to constitute a cause of action, and the evidence is insufficient to sustain the verdict; that the court should have granted a nonsuit at the close of plaintiff's testimony; that the court erred in its instructions to the jury upon various grounds (which grounds will be stated more specifically hereafter); and that the verdict of the jury is excessive, and appears to have been given under the influence of passion and prejudice.

A brief statement of the evidence, as well as the allegations of the complaint, will serve to elucidate the legal questions involved. That the testimony was contradictory as to nearly, if not quite, every material point, is conceded, but it tended generally to show the following: Thomas was a foreman of the defendant company, intrusted by it with the superintendence of the sinking of the deep shaft upon the Homestake lode. Of this work he had entire charge. To him the miners employed therein looked for directions; by him they were employed and discharged; and, in general, he represented his principal (the defendant company) in all things in this particular department of its general enterprise. It was one of the duties of plaintiff, whenever so ordered by Thomas, to clean out missed holes, and prepare them for recharging with dynamite. To the work of cleaning out this particular hole Thomas

had assigned plaintiff on the day in question. The latter had obeyed the order to the extent of cleaning it out as deep as he thought it should be made, and then ceased from the work. When Thomas descended into the shaft to ascertain if compliance had been had with his instructions, the plaintiff informed him that the hole was deep enough for the purpose in view. Thomas thereupon took the sand pump, and inserted it in the hole, and replied that it ought to be sunk deeper, and, handing the instrument to plaintiff, ordered him to finish the work. The plaintiff refused to obey, assigning as his sole reason therefor that the work, in his judgment, had been sufficiently performed, not that the further prosecution of it was attended with any greater danger than that incident to the antecedent work. Thomas then, as was his province, determining that for safe recharging the sinking should be further prosecuted, took from the plaintiff the sand pump, and proceeded with the work. While engaged thereat, he ordered plaintiff to throw water into the hole. The plaintiff scooped up from the bottom of the shaft with his shovel water that was standing therein, and threw it into the hole, when Thomas remarked that it was water, not dirt, that he wanted. Thereupon the plaintiff, evidently concluding that there was dirt mixed with the water standing in the shaft, reached for a bucket containing drinking water, and threw water from it into the hole. Almost immediately occurred the explosion which caused plaintiff's injuries. Up to the very last, plaintiff says that Thomas was working the sand pump gently, and it was only when he was about to throw water from the pail that, according to his statement, Thomas began churning the pump into the hole in a violent manner, which, he claims, caused the explosion. From this brief statement, as well as from the allegations of the complaint upon which plaintiff must rely for a recovery, it will be seen that, if there was any negligence, it was that Thomas improperly worked the sand pump, and not that the use of that instrument for the purpose was, of itself, negligence. This act by which the injury was occasioned was not the result of an act done by the plaintiff as a servant under the order of a superior. The throwing of the water is not even alleged or claimed to have contributed to the injury, and that act of the plaintiff was the only one connected with the accident done by him in obedience to orders. The act done by Thomas was necessitated by the refusal of Fitzgerald to do that which he admits was his duty, as a miner, to do whenever Thomas gave the order; and plaintiff, notwithstanding in his complaint he avers it, did not offer any objection to the assistance of his foreman. Although it is so contended by the plaintiff, there is no proper evidence that it was a part of the duty of Thomas to assist in the manual work of cleaning out missed holes; but, on the con-

trary, as asserted by the plaintiff himself, it was the duty of the plaintiff to do this, whenever Thomas so directed.

C. W. Franklin and Thomas, Bryant & Lee, for plaintiff in error. W. W. Cooley and W. O'Brien, for defendant in error.

CAMPBELL, J. (after stating the facts). One of the errors assigned is to the giving by the court of the fourth instruction, which purports to state the law of contributory negligence. In the third instruction the court had defined negligence to consist in "performing some act, or omitting to perform some act, which an ordinarily prudent and careful man would not perform or omit to perform, under all the circumstances of a particular case." In instruction No. 4 the jury were told that, if they found from the evidence that the injuries were caused through the negligence of Thomas, and that Thomas stood in such relation to the defendant as that his negligence was the negligence of the defendant, then their verdict should be in favor of the plaintiff, unless they also found that the plaintiff committed some act which proximately caused the injury, and but for which act the injury would not have occurred. This instruction did not go far enough. It conflicts, as to one element, with the preceding one, and we do not find that it was elsewhere in the charge clearly supplemented or corrected. The issue was squarely raised, and the jury should have been instructed that an omission by the plaintiff to perform some act which, if performed, would have protected him from injury, would defeat a recovery by the plaintiff just as much as if the latter had committed some act which proximately caused the injury, and but for which it would not have occurred. There was given to the jury an instruction, not numbered, wherein they were, in substance, told that if the master or boss orders the servant into a situation of danger, and commands him to do certain things, and he obeys, and is injured, the duty of the servant being obedience, the law will not deny a servant so acting in obedience to command a remedy against the master on the ground of contributory negligence; "unless the danger was so glaring that no prudent man would have entered into it; \* \* \* and where an employe is suddenly commanded by his employer to do a particular act, and exhorted to diligence therein, he cannot be required to exercise the same degree of care in guarding against accidents as when he has more abundant time for observation and reflection." There was no evidence before the jury which justified the giving of such an instruction. It is altogether inapplicable to the facts of this case, and, whether right or wrong, if given when the facts called for it, its only effect was probably to confuse the minds of the jury or mislead them. A somewhat similar instruction, where the same was inapplicable to the facts, was held by this court in *Railroad Co. v. Liehe*, 17 Colo. 280,

29 Pac. 175, prejudicial error; and equally grave was the error in giving the instruction in this case.

In his complaint, by alleging that he protested against Thomas' engaging in the work which it was a part of his own duty to perform, plaintiff seeks to bring his case within the rule announced in *Shearman & Redfield on Negligence* (4th Ed.) in the last sentence of section 233. This naturally brings us to an examination of the contention of the plaintiff in error that for the act of Thomas—assuming it was negligence that caused the injury—the defendant is not liable. The discussion of this point, and its determination, will dispose of many of the errors assigned, not only as to the ruling of the court upon the motion for nonsuit, but as to a number of the instructions, and as to the sufficiency of the evidence. While the complaint brings the case within the rule announced, the evidence does not support the allegations of the pleading. As has already been said, the plaintiff did not protest or object to the further sinking of the hole by Thomas, and it was conceded that Thomas was a competent miner. Plaintiff merely objected to doing so himself. He anticipated no danger therefrom, and was actuated by no fear of its result. The injury was caused, not as the result of an act done by plaintiff in obedience to orders, but by the negligent doing by Thomas of a proper act, admittedly within the line of duty of the plaintiff, and occasioned by the refusal of the latter to obey orders. To reconcile the conflicting decisions upon the liability of a master to a servant injured by the negligence of another servant would be a task, not only beyond the power of this court satisfactorily to perform, but one which, in the inextricable confusion resulting from the various authorities, it would be well-nigh impossible, as we think, and as has been often said by eminent authorities, for any court to accomplish. The so-called English rule, adopted in Massachusetts, New York, Maine, Pennsylvania, Indiana, Wisconsin, and some other states, if applied to the facts of this case, would exempt the defendant from liability, because, under such rule, Thomas would be merely a fellow servant of the plaintiff. Under the so-called American rule, which is the one adopted in this state, and declared in Ohio, Connecticut, Virginia, Kentucky, Missouri, Illinois, Nebraska, Kansas, California, and other states, Thomas would be considered a vice principal of the master, for whose negligence, within the scope of his employment, the master would be liable.

The authors of *Shearman & Redfield on Negligence*, who are strong advocates of the American rule, at section 233 of the fourth edition of their work, say: "There are certain principles affecting the liability of a master which are equally applicable whether the American or English rule is adopted, and whether the agent, for whose negligence he is responsible to servants, is called a man-

ager or a vice principal. In either case the master is responsible for all the acts or defaults of the agents in his capacity as a manager, or 'vice principal,' and for no others. On the one hand, the master is responsible, not only for the negligence of such an agent in selecting servants, selecting or inspecting materials, implements, etc., and giving orders which the servants are bound to obey, \* \* \* but in short for every act which he does that would naturally fall within the province of a master personally conducting the business, and for every omission of an act which it would have been the duty of the master, if personally present, to do. On the other hand, the master is not responsible for the negligence of such an agent in the performance of acts which are in no sense part of a master's work, and are precisely upon a level with the work of the other servants. When the manager or vice principal undertakes work in simple co-operation with other servants, and upon precisely the same footing with them, he becomes, for the time being, a mere fellow servant with them, acting as such. Thus, for example, a conductor, while acting as such, in starting or delaying the train, in warning or failing to warn the other train hands, or in any other respect performing the usual duties of a conductor, is not, under the American rule, a fellow servant with a brakeman on the same train. But when he offers to assist the brakeman in handling his brakes or in coupling cars, he acts only as a fellow servant; such work being no part of the duty of a conductor, as such. *If, in such a case, the inferior servant should distinctly object, however guardedly, to the risk involved in such assistance, the common master should be held liable, in case the superior servant insisted on taking part in the work, since his superior authority would enable him to overrule the objection, and the inferior servant could not be expected to persist in it.*"

It is upon that portion of the foregoing section italicized by us that plaintiff rests his case. We do not find that any of the authorities cited contain this statement, and evidently it is a principle formulated by the authors, which, in their judgment, is within the reasoning of the courts. With the further qualification, probably implied, that such objection of the servant shall be a reasonable one, we think the doctrine sound. Testing the case at bar by this rule, it clearly is outside its provisions, for there was no objection at all by the plaintiff to the participation in the work by Thomas; so, as to this phase of the case, the liability of the master depends upon whether or not he is to be held liable for acts of his vice principal on a level with the acts of a collaborer. Assuming that Thomas was a vice principal of the defendant, and that the jury were warranted in so finding under proper instructions of the court,—which, under the decisions in *Railroad Co. v. Discoll*, 12 Colo. 520, 21 Pac. 708, and *Railway Co. v. O'Brien*,

16 Colo. 219, 27 Pac. 701, and *Lantry v. Silberman*, 1 Colo. App. 404, 29 Pac. 180, would be justifiable,—and further assuming that his negligence caused the injury, the question again is, can the defendant be held liable? If the rule as laid down by *Shearman & Redfield*, supra, is to be followed, it exempts the master from liability. To the same effect, also, is *Railroad Co. v. May*, 106 Ill. 288, wherein the court uses this language: "If the negligence complained of [that is, the negligence of the vice principal] consists of some act done or omitted by one having such authority, which relates to his duties as a co-laborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable. For instance, if the section boss of a railway company, while working with his squad of men on the company's road, should negligently strike or otherwise injure one of them, causing his death, the company would not be liable; but when the negligent act complained of arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. In such case he is not the fellow servant of those under his charge, with respect to the exercise of such power, for no one but himself, in the case supposed, is clothed with authority to command the others." The court further said: "It is believed, moreover, that the test here suggested, and recognized in many of the cases, will reconcile many of the apparently conflicting decisions of the courts of this country which have declined to follow the English rule on this subject; and the principle, though not formally announced heretofore, is the logical result of our own adjudications." *Fanter v. Clark*, 15 Ill. App. 470; *Wood, Mast. & S.* (2d Ed.) § 438. See, also, *Crispin v. Babbitt*, 81 N. Y. 516, wherein the court says that the law as applicable to a case of this kind should be given to the effect that in any acts or duties performed by a vice principal other than those properly pertaining to the duty which the master owes to his servants in and about the defendant's work or business at said works, he is not to be regarded as the defendant's representative, but as an employé or servant of defendant's, and a fellow servant of the plaintiff. See, also, *McCosker v. Railroad Co.*, 84 N. Y. 77, in which the court says: "The yard master, through whose negligence the injury occurred, must be deemed to have been a fellow servant of the deceased as to all acts done within the range of the common employment, except such as were done in the performance of some duty which the master owed to his servants." *Hussey v. Cogger* (N. Y. App.) 20 N. E. 558.

There are, however, decisions to the contrary, and which would hold the master liable for any acts done by the vice principal, whether they were such as relate generally

to the duties which the master owes to his servants, or whether the acts be merely on a level with those of a fellow servant. These cases are: *Sweeney v. Railway Co.* (Tex. Sup.) 19 S. W. 555; *Stone Co. v. Kraft*, 31 Ohio St. 287; *Gormly v. Iron Works*, 61 Mo. 492. The better rule, as we extract it from the best-reasoned cases, is that for the acts of the vice principal, done within the scope of his employment, and such as properly devolve upon the master in his general duty to his servants, the master is liable; while for all such acts as relate to the common employment, and are on a level with the acts of the fellow laborer,—except such acts done by the vice principal against the reasonable objection of the injured servant,—the master is not responsible. In other words, the test of liability is the character of the act, rather than the relative rank of the servants. Tested by this rule, the instructions of the court Nos. 2, 5, and 6 are wrong, and, although in No. 18 was correctly given the test for determining the general relation of Thomas to defendant, yet, in so far as it may be considered as stating the true test for determining the liability of defendant for the particular act of Thomas that caused the injury, it conflicts with Nos. 2, 5, and 6 upon this phase of the case, and with the rule we herein lay down. The court should have given to the jury those instructions asked by defendant and refused, which embody this rule. This rule is not inconsistent with the doctrine of the *Discoli* and other Colorado cases, supra, but it is in harmony therewith, and the logical result of those adjudications.

The last point made, though not necessary to be decided, is that the verdict for \$37,500 was the result of passion and prejudice upon the part of the jury, which, in a degree, was the result of the rule for the measure of damages given them by the court. In a case of this kind, the true rule, however expressed, is that the jury should, in the exercise of a reasonable and sound judgment, give to the plaintiff reasonable compensation, and no more, for the consequences of the injuries; and necessarily the amount is largely discretionary with the jury. It is true, we do not find that the instruction seriously violates any well-established principle, but we think that, under the circumstances of the case, the court should more clearly have laid down the rule to the jury based on such compensation, and that no attempt should be made to ascertain and render a money equivalent for the priceless sense of eyesight, which the jury may have supposed they might do by the use of the words "pecuniarily compensate him for such injuries." While we would not be disposed to reverse this case because of any vice in this particular instruction,—especially as the defendant tendered no instruction upon this branch of the case,—still we think that, were there no other error in the case, we could not sustain the verdict here, because by comparison with

verdicts of juries in many other cases of like nature it is not only much larger than any that has been called to our attention, but the entire record satisfies us, considering the nature of the instructions given, that the jury were influenced by passion or prejudice, or by some motive other than the desire to give to the plaintiff merely a reasonable compensation. It is no answer to this to say that no man would be willing to lose his eyesight for the amount of the verdict rendered in this case, because that is no proper criterion for the measure of damages in a case of this sort, and all the money in the world, if offered, would be no inducement to a sane person to part voluntarily with this "priceless gift to man." An instructive case, in harmony with our view, wherein a large number of authorities are reviewed, is *Railroad Co. v. Fox*, 11 Bush, 495.

Distressing and painful as were the plaintiff's injuries, and attended by consequences so permanently disastrous to him, their simple recital before the jury unavoidably aroused the sentiment of pity that every man possesses, and strongly appealed to their kindly nature. It therefore behooves the trial court in such a case to keep within proper bounds the deliberations of the jury. However much we are compelled to sympathize with the plaintiff in his sore distress, we would be recreant to our sense of duty were we to shrink from expressing our disapproval of the excessive verdict returned in this case. For the foregoing reasons the judgment is reversed, and the cause remanded for further proceedings in conformity with this opinion. Reversed.

#### JEROME v. CARBONATE NAT. BANK OF LEADVILLE.

(Supreme Court of Colorado. Dec. 16, 1895.)  
UNRECORDED DEED—LIEN OF ATTACHMENT—NOTICE—PRIORITY OF RIGHTS.

1. Under Mills' Ann. St. § 446, providing that until a deed is recorded no rights can be acquired under it as against subsequent "bona fide" purchasers and "incumbrancers" without notice thereof by mortgage, judgment, or "otherwise," a grantee of land, who fails to record his deed till after the land has been duly attached by a creditor of the grantor, who has no notice of the deed, takes the land subject to the attachment lien.

2. Under Mills' Ann. St. § 446, providing that until recorded a grantee can acquire no rights under his deed as against subsequent purchasers without notice thereof, the assessment of taxes on land claimed under an unrecorded deed to and payment thereof by the grantee when not in actual possession, and occasional improvements to the land by him, will not charge a subsequent purchaser with notice of the deed, where, with consent of the grantee, the grantor has exercised concurrent acts of ownership.

Appeal from district court, Arapahoe county.

Action by John L. Jerome against the Carbonate National Bank of Leadville to quiet

title. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action brought by Jerome against the Carbonate National Bank to quiet title to real estate. On the 11th day of July, 1893, Richard Cline was the record owner of certain lots in Bohn's subdivision of the city of Denver, in Arapahoe county, Colo. Upon that day the appellee bank began suit in the district court of Lake county against said Richard Cline upon an overdue promissory note, and in aid thereof sued out a writ of attachment, which, on the same day, it caused to be levied upon these lots. On the 18th day of March, 1890, Cline had given to the appellant, Jerome, a warranty deed for the same property, which, for more than three years thereafter, was not recorded with the county clerk and recorder of Arapahoe county, and was not recorded until July 12, 1893,—one day after the levy of the writ of attachment. This deed from Cline to Jerome, it seems, was executed in pursuance of a contract entered into between them in the year 1889; and it is alleged in the complaint that Jerome at once entered upon the premises under such contract of sale, and thereafter has continuously been in possession up to and until after the levy of the writ of attachment. The acts of possession relied upon are as follows: In January, 1889, when the appellant contracted to buy the land, it was inclosed by a fence, was occupied by tenants of the former owner, and was used for market gardening. After the appellant got the option to purchase the property, he secured a relinquishment of the leases of the tenants, removed the fences from the land, and, with the owners of contiguous tracts, platted the same into lots and blocks, marking out the streets and alleys. Some parts of the land were hilly and rough, some low, and in September and October of 1889 Jerome employed a contractor, who, with 15 or 20 teams, graded and leveled the surface of the lands, in places cutting it down from 5 to 8 feet, and removed from 8,000 to 10,000 yards of earth from one portion of the premises to another; all at the cost of about \$1,600. Thereafter, and before the levy of the writ of attachment, the new streets and alleys were again marked out, rounding the surface, plowing out gutters, and marking out the alleys. Some of these things were done before, some after, Jerome secured his deed, but all after his option to buy. At various times appellant went upon the premises, alone and in company with others to whom he was attempting to sell the land. The property was assessed in his name from 1889 to the present time, and during such time he paid the taxes thereon. The appellant co-operated with owners of adjacent lands in constructing an electric road passing through the property, and in subscribing for a school-house on adjacent property, and the erection of a church on the same ground; and joined contiguous owners in grading Mississippi

street and University avenue, which adjoined the land in controversy. The land has remained vacant and unimproved since its conversion by the appellant from farm lands into suburban lots. It appears also from the evidence that whenever any of the lots were sold by the appellant—some being sold before, some after, Cline delivered his deed to appellant—deeds therefor were given by Richard Cline, the record owner; and when there were deferred payments on the purchase price, notes were given to Richard Cline, as payee, and trust deeds to secure the payment of the same were given to John L. Jerome, as trustee, for the use and benefit of Richard Cline, and the same duly recorded. Mr. Jerome testifies that these deeds by Cline to the purchasers were given at his request and for his (Jerome's) own convenience, the title meanwhile standing upon the records in the name of Cline. Other property, than that in controversy was levied upon under the writ of attachment. This attachment was sustained, and judgment rendered against Cline in favor of the bank for the amount of the claim, and special execution for the sale of the attached property ordered. At the time of the trial there was no testimony that the judgment recovered by the bank against Cline was unsatisfied. The bank had no actual knowledge of the existence of this unrecorded deed, or of plaintiff's claim of ownership, unless it was constructively charged with notice thereof by reason of the alleged acts of ownership asserted by Jerome, and such as the alleged acts of possession on his part might furnish. From the judgment of the lower court in favor of the bank Jerome has brought his appeal to this court.

Thomas H. Hood, for appellant. Charles Cavender, for appellee.

CAMPBELL, J. (after stating the facts). The contest here is between one who claims under the lien of an attachment levy and one who claims under a prior, but unrecorded, deed. The determination of these rights depends upon the meaning of the following section of our statute: "All deeds, conveyances, agreements in writing of, or affecting title to real estate or any interest therein, and powers of attorney for the conveyance of any real estate or any interest therein, may be recorded in the office of the recorder of the county wherein such real estate is situated, and from and after the filing thereof for record in such office and not before, such deeds, bonds, and agreements in writing shall take effect as to subsequent bona fide purchasers and incumbrancers by mortgage, judgment or otherwise not having notice thereof." 1 Mills' Ann. St. § 446. Whatever the law may be in other jurisdictions, it is settled in this state that one who takes property in payment or security of a pre-existing debt is to be regarded as a purchaser for a valuable consideration. *Knox v.*

*McFarran*, 4 Colo. 586. In the same case, in 5 Colo. 217, it was held that an unrecorded deed will not take effect against a subsequent purchaser without notice. It is also settled that one who takes a deed of land before a judgment is recovered against its owner, but fails to record his deed until after a sheriff's sale of the same land is made under such judgment, and until after the recording of the sheriff's certificate of sale, holds subject to the rights of the purchaser at the sale without notice of the prior deed,—such purchaser being the judgment creditor, the amount of whose bid is credited on the judgment,—although the sheriff's deed is recorded after the recording of the prior deed of the owner. *McMurtrie v. Riddell*, 9 Colo. 497, 13 Pac. 181. It is said, however, that the doctrine of these cases is against the weight of authority in this country, and for this reason we are asked not to extend such doctrine by logically applying it to the facts of a case the same in principle, but to restrict it to such cases only as are exactly similar in their facts. Applying this test, we are told that the case at bar presents a state of facts different from that of either of the cases above cited. There the statute was interpreted so as to protect bona fide purchasers, who were also judgment creditors; while in the case at bar the one invoking the aid of the statute is but an attaching creditor, whose rank is inferior to that of a judgment creditor. But we think the necessary and logical result of the doctrine announced makes the rights of the appellee here superior to those of the appellant for the following reason: An attaching creditor belongs to that class of lienors described in the statute as incumbrancers "otherwise" than by mortgage or judgment. If we agree with appellant that under the rule *noscitur a sociis* such incumbrancers must be of the same general class as those by judgment or mortgage, the application of this rule will not exclude an attaching creditor. The levy of the writ certainly constitutes some kind of an incumbrance upon the property, and by the statute the property so levied upon is to be preserved during the pendency of the suit to answer, and to be applied to the satisfaction of whatever judgment may be recovered, and can be destroyed only by dissolution of the attachment or failure to recover judgment. Code 1887, § 108; *Drake, Attachm.* (7th Ed.) § 224 et seq. This incumbrance is of the same general class as an incumbrance by judgment, and, while the inchoate rights of the former may not possess the same qualities, or be attended with the same results, as the latter, they are the same in kind, and differ, if at all, only in degree, and become exactly the same by the subsequent recovery of a judgment, when the lien of the attachment becomes merged in the judgment, saving to the latter the priority of the former. It follows that the rights of an attaching creditor, under this statute, stand



upon the same basis as those of a judgment creditor; and, the latter being clearly within the purview of the statute, so, also, are the former.

Unless, therefore, the appellee had notice of appellant's claim of ownership, or what was equivalent to notice, the rights of the bank are superior. With respect to the character of possession which operates as notice of the rights of one claiming thereunder, it is said that "neither actual occupation, cultivation, or residence are necessary to constitute actual possession, when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim." *Ewing v. Burnet*, 11 Pet. 41; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417-442, 12 Sup. Ct. 239. "It is a familiar principle of equity jurisprudence that, if one obtains a conveyance of property, with notice of an equity in relation thereto binding upon his grantor, he will also be bound." Only innocent purchasers without notice are protected. Actual notice, however, is not essential. If the subsequent purchaser "has knowledge of such facts as ought to put a prudent man upon inquiry as to the title, he is chargeable with notice of all facts pertaining thereto to which diligent inquiry and investigation would have led him." If reliance is had upon possession, it must be visible and exclusive and continuous, and not temporary or occasional. It may be evidenced, however, by any acts which clearly show an appropriation of the property to the use of a person claiming the same. *Mason v. Mullahy*, 145 Ill. 383, 34 N. E. 36. It has also been said that this possession must be inconsistent with the title of the apparent owner by the record. *Brown v. Volkening*, 64 N. Y. 76. The purchaser is also held affected with notice of all that is patent on an examination of the premises he is about to buy, and is charged with whatever facts are in existence as to possession, and cannot be excused if his lack of knowledge is due to the fact that he made no examination. *Hatch v. Bigelow*, 39 Ill. 547.

There is no claim that this property was in the actual possession of the appellant at the time of the levy of the writ of attachment. The assessment of the land to Jerome, his payment of taxes, and his improving the land from time to time, are strong evidences of his claim of right to the property, and if he had continued payment of taxes for the statutory length of time his absolute right to the property as against all persons might have accrued; and if these different things had been brought to the knowledge or attention of the appellee they would have been sufficient to put it upon inquiry, the result of which would probably have been the ascertainment by the bank of appellant's claim

of ownership. But they were not brought to its attention, and otherwise they do not constitute such acts as put a purchaser upon inquiry. *Ely v. Wilcox*, 20 Wis. 523. Besides, these acts were not inconsistent with the rights of the record owner, particularly as the latter, with Jerome's knowledge and consent, exercised concurrent acts of ownership when he executed deeds to those who purchased lots from Jerome. An examination of the premises by the bank, which it was its duty to make, would have disclosed nothing at all inconsistent with the ownership of the property by the one in whose name on the records the title stood; nor was there anything to lead the most careful person to suspect that Jerome, or any one else than Cline, asserted any claim to the ownership.

The point is made that, as the appellee failed, upon the trial, to show an unsatisfied judgment, there should be a reversal. But the allegation in the amended answer that the judgment against Cline was unsatisfied was not denied in the replication; hence no testimony of witnesses was necessary to establish the fact thus admitted. It follows that, the appellee not having notice of any rights to this property asserted by the appellant, the judgment of the court below should be affirmed for the reasons given. Affirmed.

#### AMERICAN NAT. BANK OF LEADVILLE v. JEROME.

(Supreme Court of Colorado. Dec. 16, 1895.)

Appeal from district court, Arapahoe county. Action by John L. Jerome against the American National Bank of Leadville. Judgment for plaintiff, and defendant appeals. Reversed.

John A. Ewing and F. L. Sherwin, for appellant. Thomas H. Hood, for appellee.

**PER CURIAM.** The legal question involved in this case is the same as in *Jerome v. Bank* (decided at this term) 43 Pac. 215, although the evidence as to the possession of Jerome is in some particulars even less complete than in that case. The judgment below in the Carbonate Bank Case was against Jerome, while in the case at bar, upon substantially the same facts, it was in his favor. Our ruling in the Carbonate Bank Case, *supra*, is decisive of the appeal here, and in accordance therewith the judgment of the district court in this case should be reversed, and the case remanded for further proceedings in conformity with this opinion. Reversed.

#### FIRST NAT. BANK OF PUEBLO v. KAVANAGH et al.<sup>1</sup>

(Court of Appeals of Colorado. Dec. 9, 1895.)

HUSBAND AND WIFE—FRAUDULENT CONVEYANCE.

A husband has the right to transfer property to his wife in payment of a debt due to her, in preference to paying the claims of his other creditors.

<sup>1</sup> Rehearing denied January 13, 1896.

Appeal from district court, Arapahoe county.

Action by the First National Bank of Pueblo against Roderick F. Kavanagh and another to set aside a transfer of property. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Jerome & Hood and Chas. E. Gast for appellant. Felker & Dayton, for appellees.

BISSELL, J. No matter of law about which there is any dispute is so presented by this record as to necessitate either analysis or discussion. According to our view of the record, a very brief statement of the general facts which form the history of the case will be enough to indicate the basis of our judgment, and render the decision intelligible.

The First National Bank of Pueblo filed its complaint in February, 1893, to set aside a certain transfer which had been made by Roderick F. Kavanagh to Ella T., his wife. The corporate character of the plaintiff was stated. The pleading recited the recovery of two judgments against Roderick for a little more than \$7,800, in September, 1892. The source of the bank's title is not stated, though probably this is wholly unimportant. In the summer of 1891, Roderick F. Kavanagh, Henri Vidal, and W. P. Lytle were the owners of a restaurant called the "Tortoni." It seems to have been run under that name without any formal copartnership sign, and to be owned by the parties according to the interests which they respectively purchased. In July, Roderick Kavanagh bought Lytle out, and gave him the two notes on which the bank subsequently recovered judgment. We are not advised as to how long Lytle held them, nor the circumstances which attended their transfer to the bank. It is charged Kavanagh remained in possession of his entire interest from that time forward until November, 1891, when he made a sale or transfer to his wife, Ella, without any consideration. It is charged the transaction lacked the elements of good faith, was colorable, and made with the intent to defraud creditors, and that thereby Ella T. acquired no interest in the property. The contents of the bill need not be further stated. The defendants answered, and asserted the good faith of the transaction. The answer was deemed insufficient, and the defendants amended by a statement in detail of the entire history of the transaction between Roderick and Ella. From this answer it is generally gathered that when the bill of sale was made by Roderick to his wife, in November, 1891, she had his note for \$8,500, due in three years, with 10 per cent. interest, which she surrendered in exchange for Roderick's interest in the property. The defendants likewise offered evidence tending to show that, long prior to this time, Mrs. Kavanagh's father and her husband had been interested in the ownership of certain lands in El Paso county, and

had certain government titles, or evidences of title, to quite a body of land, which was ultimately sold to a stranger, William Gaw, who paid about \$10,000 for it. These parties testified to the arrangement which was made between Turner, the father, Roderick, the husband, and Ella, whereby a portion of it was to be devoted to the procurement of a home for Mrs. Kavanagh in Denver. The evidence tended to show the purchase of the property on California street, the taking of the title in the husband's name for purposes of convenience, as was stated, and the ultimate transfer of that property to Elitch, who was the owner of the restaurant for another interest which Roderick held in it at the time he bought from Lytle. What has been stated will indicate very clearly the nature of the transaction, the character of the defense, and the real controversy between the parties.

In cases arising between creditors of the vendor and vendee of personal property, all agree on certain general principles of almost universal applicability, and there is seldom much disagreement respecting their statement or the circumstances which both permit and require their enforcement. To be unimpeachable, the transaction must be characterized by the utmost good faith. We are not concerned with the refined distinctions drawn in those cases which show good faith on the part of the vendee, and the want of it on the part of the vendor, wherein it is necessary to inquire about the actual or presumptive knowledge which the vendee may have had of the vendor's purposes. The necessity for the payment of a consideration is well settled. What that consideration must be varies in different jurisdictions. With us a past indebtedness is as good as the present payment of value. The decisions of our own state thus remove what in some forums is an element of exceeding difficulty. Nobody doubts that there must be a permanent change of possession unless there be something in the case to take it out of the operation of the rule. Possession by the vendee must not only attend the transfer, but must so continue as to manifest and substantiate an actual sale made in good faith, as contradistinguished from a colorable and temporary shifting of custody, to lend countenance to what would otherwise be manifestly fraudulent as against a complaining creditor. These various positions are defined by the appellant in a very capable and perspicacious brief. We do not understand the appellees to controvert any of them. To apply the word a little inaccurately, or at least to divert it from its customary use, the appellees demur to the argument because the record contains no case which it fits. Before we can make any legitimate use of these principles in the solution of the inquiry, is there error in the record? because the court erroneously applied the law or disregarded it in the decision, we must first ascertain what the facts are. The first error charged which must be

found with the appellant to entitle him to a hearing of the other matters is: "The court erred in finding the issues herein in favor of the defendants." Unless we accept this error as well laid, the appellant has no basis on which to rest his discussion. We do not feel the duty put on us to analyze, sift, and weigh the evidence, and state our own convictions concerning its sufficiency to support the judgment. The whole case rests on the proof which the defendants produced. It may very well be conceded there were many circumstances in the case which would excite inquiry, and raise some suspicion concerning the absolute good faith of the transaction, as testified to by the defendants. Wherever, as in this case, the dealings are between husband and wife, whose relations are most intimate and confidential, they are ordinarily bound, whenever a transaction between them is impeached or attacked, to show in the clearest and most favorable light an honesty of purpose, and an absence of all intent to hinder or defraud those who may be the creditors of the husband at the time of the transaction. This law is not disputed. It must be remembered, however, in this case the plaintiff offered no proof to impeach the transfer other than what appeared in the general history of the dealings between the husband and his wife, relying on these facts and the inferences which might be drawn from the statements of the defendants. As we understand it, parties whether they be husband and wife, or whether they be strangers, have a right to deal with their property as they please, and a cause of action will not arise in favor of a creditor unless there be something to show the thing was done to defraud him or a transferee. Of course, it is true Lytle was a creditor of Kavanagh at the time of this transaction. The notes which represented Lytle's claim ultimately passed into the hands of the bank. But the evidence undoubtedly tended to show an indebtedness existing as between Kavanagh and his wife, which was represented by the note which she held. Doubtless, as between Lytle, Mrs. Kavanagh, and Kavanagh, the husband, had the controversy been between those parties, the husband would have had an absolute right to pay his wife in preference to paying the other creditor, unless there was something to impeach the transaction other than what this record shows. The right of a debtor to pay one creditor in preference to another is always conceded. The only question is whether it was a payment, and whether or not the transaction was colorable or in good faith. If Kavanagh was indebted to his wife in the sum of \$8,500, and they had so settled the affairs between them, he had a right to pay that note to the exclusion of his other creditors. The only question is, did the transaction amount to a payment, or was it a colorable transfer? As we before intimated, we do not feel compelled to support the judgment of the court

below by an argument based on the evidence contained in the record, nor do we feel at all constrained to express our opinion concerning it. The case was tried to the court, who saw the witnesses, and heard the evidence, and he found the facts against the bank. Under these circumstances, we are quite at liberty to accept his judgment as conclusive on inquiry; and we find nothing in the present case which at all inclines us to depart from this well-settled practice and thoroughly established rule.

The judgment of the court was in favor of the defendants on the evidence, and, when we accept that conclusion as final, there is no error in the record which would justify a reversal of the judgment. For this reason, this judgment will be affirmed. Affirmed.

### PALMER v. BREED.

(Supreme Court of Arizona. Jan. 21, 1896.)

DEMURRER—EXCESSIVE LEVY OF ATTACHMENT—PLEADING.

1. A general demurrer to a complaint containing several counts on the ground that it fails to state a cause of action will be overruled if any count states a cause of action.

2. A complaint which alleges that defendant caused an attachment issued in his suit against plaintiff for \$702 to be levied on property of plaintiff worth \$6,500, and procured the sum of \$662, due plaintiff, to be garnished, and that the levies were made wantonly, and with a view to oppress and injure plaintiff, and did oppress and injure him, states a cause of action.

Appeal from district court, Apache county; before Justice John J. Hawkins.

Action by John Palmer against J. H. Breed for damages for the excessive levy of an attachment. A demurrer to the complaint was sustained, and defendant appeals. Reversed.

J. F. Wilson and Robt. B. Morrison, for appellant. T. W. Johnston, for appellee.

BAKER, C. J. The complaint in the case consisted of four several counts, purporting to set up as many causes of action. A general demurrer to the whole complaint was interposed upon the ground that a cause of action was not stated. It was sustained. The appellant declined to amend, and stands upon his complaint and brings this appeal.

The rule is well settled that, where a complaint contains several counts, a general demurrer thereto upon the ground that it fails to state facts sufficient to constitute a cause of action will be overruled if either one of the counts be sufficient. Maxw. Code Pl. 375. The proper procedure where there are several counts in the complaint and one or more be insufficient, is to demur to each of such counts separately. *Id.* In the first count it is charged that the defendant (the appellee here) sued the plaintiff (appellant here) for \$702.13, and caused a writ of attachment to issue in the suit; that he placed it in the

hands of the sheriff, and pointed out, directed, and caused him to levy such writ upon plaintiff's property to the amount and value of \$6,500, and furthermore procured the sum of \$862 to be garnished in the hands of one of plaintiff's debtors; that such levies were made at the instigation and in obedience to the commands of the defendant; and that they were excessive and unreasonable, and were made at the direction and command of the defendant, wantonly, and with a view to oppress and injure the plaintiff, and did damage, oppress, and injure him, etc. This charges the officer with acts that the writ did not justify, and from the consequences of which it could not shield him. It is not an ordinary suit for maliciously suing out a writ of attachment. The gravamen is the abuse of the writ in seizing more property than was required to satisfy it and costs, for the purpose and with the intent of oppressing and damaging the debtor. If an officer intentionally execute a writ in an oppressive and excessive manner in order to damage the debtor, and does damage him, he is as much a trespasser as if he was acting without any process whatever. He is, or should be, a minister of justice, not of oppression, and must execute every writ put into his hands in such a manner as to do as little mischief to the defendant as possible. *Handy v. Clipper*, 50 Mich. 355, 15 N. W. 507. It is charged that the defendant instigated, directed, and commanded the excessive and oppressive levy with the view to damage the plaintiff. He was therefore equally a trespasser with the officer. *Hilliard v. Wilson*, 65 Tex. 286. It is but fair to the usually cautious and painstaking judge who passed upon the pleading below to state that the complaint is scarcely to be treated as a model of perspicuity. The demurrer, however, should have been overruled. The judgment is reversed.

**BETHUNE and ROUSE, JJ., concur.**

#### **PEMBERTON v. DURYEA.**

(Supreme Court of Arizona. Jan. 18, 1896.)

##### **JUDGMENT BY DEFAULT—TIME TO PLEAD.**

Rev. St. par. 696, subd. 1, provides that, if defendant is served within the county in which the action is brought, the summons shall require him to answer in 10 days. Paragraph 2069 provides that the time within which any act provided by law is to be done is computed by excluding the first and including the last day, unless the last day is a holiday, when it also is excluded. Paragraph 2068 declares every Sunday to be a holiday. *Held*, that where a summons was served on April 11th, and April 21st was on Sunday, a judgment by default entered on April 22d was premature, as defendant had all of the 22d to file his answer.

Appeal from district court, Gila county; before Justice Owen T. Rouse.

Action by William H. Duryea against John Pemberton on a promissory note. Judgment

by default was entered in plaintiff's favor, and, from an order denying a motion to set the same aside, defendant appeals. Reversed.

P. M. Thurmond, for appellant. P. T. Robertson, for appellee.

**BAKER, C. J.** The action was brought upon a promissory note for \$350, with interest, executed by the appellant, payable to the order of L. K. Smith, and transferred by Smith to appellee. The note is alleged to be lost. Summons was served upon appellant on the 11th day of April, 1895, in Gila county, and on the 22d day of April, 1895, the default of appellant was entered; and on the same day (April 22d) final judgment was entered against him in the suit for the sum of \$494, the amount claimed to be then due on said lost note, principal, and interest. On the 27th day of April, 1895, being a day of the same term, the appellant moved the court to set aside the judgment against him, and that he be allowed to appear and defend against the note, for the reason that such judgment was entered before the time to answer or appear in the suit had expired. The motion was accompanied by an affidavit of merits. It was heard on April 29, 1895, and denied. This action of the court is assigned as error.

The judgment was unquestionably premature. "The time in which summons shall require the defendant to answer the complaint shall be as follows: (1) If the defendant is served within the county in which the action is brought, ten days." Rev. St. par. 696, subd. 1. "The time in which any act provided by law is to be done, is computed by excluding the first day and including the last, unless the last day is a holiday; and then it is also excluded." *Id.* par. 2069. Every Sunday is declared to be a legal holiday by paragraph 2068, Rev. St. Ariz. The tenth day, computed by excluding the first and including the last, and upon which the appellant was to answer in the suit, fell on Sunday, April 21st; but, as this was a legal holiday, it is also to be excluded. Thus, the appellant had all of the following day, April 22d, in which to file his answer. He therefore was not in default when the judgment was entered against him. He had nothing to excuse. The statutory time for answering had not yet expired. His right to have the default set aside, and be heard to defend, was absolute. No affidavit of merits was necessary. 1 Black, Judgm. § 347. The entering of the judgment was unseasonable, and it should have been vacated by the court upon its attention being called thereto, and the appellant allowed to defend, without requiring any affidavit of merits whatever. Judgment reversed, and case remanded for further proceedings.

**HAWKINS and BETHUNE, JJ., concur.**

**SROUFE et al. v. SOTO et al.**

(Supreme Court of Arizona. Jan. 20, 1896.)

**REAL PARTY IN INTEREST.**

Under Sess. Laws 1893 (17th Leg. Assm.) p. 26, par. 680, declaring that every action shall be prosecuted in the name of the real party in interest, provided that a trustee of an express trust may sue without joining with him the person for whose benefit the action is brought, and that the assignee of a chose in action is a trustee of an express trust, one to whom a claim is assigned for the purpose of collection only may sue thereon in his own name. Hawkins, J., dissenting.

Appeal from district court, Cochise county; before Justice J. D. Bethune.

Action by Soto Bros. & Co. against John Sroufe & Co. on several accounts. Judgment for plaintiffs, and defendants appeal. Affirmed.

Barnes & Martin, for appellants. Heney & Ford, for appellees.

ROUSE, J. This is an action on an account. Plaintiffs had sold and delivered merchandise to defendants, and on that account claimed a balance of \$1,399.05. They also claim \$1,058.80, balance due on an account due one Charles Noble, and \$1,240.78, balance due on an account due J. Leberman & Co. The last two claims mentioned had been assigned to plaintiffs. Defendants, in their answer, deny plaintiffs' right to maintain an action on the two assigned accounts, for the reason that said accounts had been transferred to plaintiffs for collection; that as to said accounts plaintiffs are not the real parties in interest, and cannot maintain the action on said accounts. The right of a party to maintain an action on an account which has been assigned to him for the purpose of collection, only, is the question presented by the record in this case. The Revised Statutes of Arizona of 1887 contain the following:

"Par. 680. Every action shall be prosecuted in the name of the real party in interest, except as otherwise prescribed.

"Par. 681. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off, or other defense existing, at the time of, or before notice of the assignment. \* \* \*

The statute is plain that every action shall be prosecuted in the name of the real party in interest, and we think that it is equally clear that by the provisions of paragraph 681, *supra*, in the case of an assignment of a thing in action (an account), the assignee is the real party in interest. Appellants contend that, in this case, as the assignments, though complete in form, were made only for the purpose of authorizing the appellees to sue thereon, by establishing that fact, the right of action, as to said assigned accounts, could not be maintained. It appears to us that there do not remain any grounds for that contention, since the amendment to

paragraph 680, enacted in 1893, and found on page 26, Sess. Laws 17th Leg. Assm. Said amendment is as follows: "Every action shall be prosecuted in the name of the real party in interest, provided, an executor or administrator, or a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is brought. A person with whom or in whose name a contract for the benefit of another is made, and the assignee of any chose in action is a trustee of an express trust, within the meaning of this section." Though it was in fact understood by the parties that the beneficial interests to pass by the assignments were limited, still the plaintiffs, as holders of the legal title of said accounts, could sue for and recover the whole amount thereof. *Gradwohl v. Harris*, 29 Cal. 150; *Allen v. Brown*, 44 N. Y. 228; *Meeker v. Claghorn*, Id. 349; *Sheridan v. Mayor, etc., of New York*, 68 N. Y. 80; *Eaton v. Alger*, 47 N. Y. 345; *Young v. Hudson*, 99 Mo. 102, 12 S. W. 632. The judgment of the district court is affirmed.

BAKER, C. J., concurs.

HAWKINS, J. (dissenting). I agree with my associates in the reasoning of the foregoing opinion, but do not think the evidence sufficiently proves the agency of De Long to bind Sroufe & Co., and thereupon think the cause should be reversed, and a new trial granted.

**STANFIELD v. ANDERSON.**

(Supreme Court of Arizona. Jan. 11, 1896.)

**NEGLIGENCE—INJURY TO TRAVELER ON HIGHWAY.**

Where, in an action for personal injuries, plaintiff's evidence was that, while he was on a highway, where it was covered with straw, which deadened the noise of an approaching horse, defendant came towards him from behind, riding at a furious gait, and, without any warning or attempt to turn to either side, rode over plaintiff, it was error to direct a verdict for defendant.

Appeal from district court, Gila county; before Justice Owen T. Rouse.

Action by W. T. Stanfield against Olof M. Anderson for personal injuries. Judgment for defendant, and plaintiff appeals. Reversed.

E. J. Edwards, W. H. Barnes, and J. F. Moriarity, for appellant. Cox & Street, for appellee.

BAKER, C. J. This is an action brought to recover for very serious injuries sustained by the appellant on February 9, 1894, in being run over in a public highway by a horse ridden by the appellee. The charge in the complaint is that, while the appellant was

walking along the public highway, the appellee approached him from the rear on horseback, going in the same direction as the appellant, and so carelessly and so negligently rode the horse that appellant was run over, and thrown to the ground, and his leg broken, etc. Upon the trial, and at the close of appellant's case, and without any testimony being offered in behalf of the appellee, the court, upon his motion, directed a verdict for him. This is assigned as error. In this jurisdiction, in a proper case, we think the court may direct a verdict; but, to authorize such action, the evidence and reasonable inferences to be drawn therefrom must be sufficient to support a verdict in favor of the party having the onus of proof, so that, if such a verdict is returned, the court would feel compelled to set it aside. And, in passing upon the whole question, the judge ought to inquire, not how he himself would vote as a juror, but, taking the jury as fair-minded men, with their different habits of reasoning and dispositions of judgment, could they reasonably differ upon the question? If they could, no matter how clear the judge is himself upon the question, nor how confident he may be that he could vigorously state and vindicate his impressions, he should send the case to the jury.

Now, the right of a pedestrian and a horseman to use the public highway is equal. They are both alike under reciprocal obligations to exercise ordinary care,—the one, to avoid doing injury; the other, to avoid being injured. Ordinary care is that degree of precaution which ordinary, prudent persons would exercise under like circumstances. The failure to exercise such care is negligence. Negligence is therefore never absolute or intrinsic, but is always relative to the existing circumstances. In this case the evidence is that appellant was walking in the highway; that, just prior to the accident, he had passed over ground where the road was soft, and covered with straw, which subdued or deadened the noise of a rapidly approaching horseman; that appellant approached him from behind, riding at a furious gait, and, without any shout of warning or attempt to turn to either side or to check the horse, rode over appellant. He offers no explanation of his conduct. If the horse had escaped his control, and was running away, which is not shown by the evidence, he did not offer to explain that it was without his fault. It is a case where a horseman rides a pedestrian down from behind, in the public highway, at a place where his approach was muffled by the condition of the road, and does not consider the circumstance of sufficient moment to require any explanation when called upon to respond in damages. The judge erred in directing a verdict. The judgment is reversed, and a new trial ordered.

HAWKINS and BETHUNE, JJ., concur.

UNITED STATES v. DRACHMAN et al.

(Supreme Court of Arizona. Jan. 20, 1896.)

DOCUMENTARY EVIDENCE—TRANSCRIPTS FROM WAR DEPARTMENT.

Under Rev. St. U. S. § 886, providing that when suit is brought in a case of the delinquency of any person accountable for public money, or when it involves the accounts of the war department, a transcript from the books of such department, certified by the auditor thereof, and duly authenticated, shall be admitted in evidence, and that all copies of papers connected with the settlement of any account between the United States and an individual, when so certified and authenticated, may be annexed to the transcript, and shall have the same force as the originals, where an action was brought by the United States against one who bid for a contract to supply hay to the war department, and the sureties on the bond accompanying the bid, for the bidder's refusal to comply with the bid, it was error to exclude a transcript so certified and authenticated, in which were included the notice to the bidder of the acceptance of his bid, and copies of the proposed contract, and the bond to secure its performance, which were sent him with the notice, and a letter from him declining to enter into the contract, and an itemized account of the purchases by the government because of the bidder's default.

Appeal from district court, Pima county; before Justice J. D. Bethune.

Action by the United States of America against Philip Drachman and others on a bond. Judgment for defendants, and plaintiff appeals. Reversed.

EL. E. ELLINWOOD, U. S. Atty., for the United States. BARNES & MARTIN, for appellees.

BAKER, C. J. This action was brought to recover \$5,988.16, damages accruing to the United States by reason of Philip Drachman's failing to comply with his bid to furnish certain supplies (hay) for the use of the government at its military post at Ft. Huachuca, in this territory. The appellee Dennis was a guarantor upon the bid of said Drachman. Drachman defaulted, and failed to comply with his bid and the government bought the supplies in open market; the difference between the bid and the price paid for the supplies in open market being the amount claimed as damages in this suit. On the trial of the cause, the appellant offered in evidence a United States treasury transcript, duly certified, under section 886, Rev. St. U. S., showing the following facts: April 1, 1886, Maj. A. J. McGonnigle, chief quartermaster of the department of Arizona, advertised, in accordance with the regulations of the war department, for proposals for military supplies to be furnished during the fiscal year 1886. Among the other supplies for which proposals were asked were 1,400,000 pounds of hay, to be delivered at Ft. Huachuca, Ariz.; the hay to be well and securely stacked, and in the post yard, and wild hay of the best quality in the vicinity of the place of delivery. The advertisement further stipulated that the bidder must state the kind and quality of hay to be furnished.

whether alfalfa, grama, barley, or bottom, and that none but machine or scythe cut hay would be received. In accordance with this advertisement, the defendant Philip Drachman duly submitted his proposal to furnish at Ft. Huachuca, Ariz., 1,400,000 pounds of grama hay, cut with a machine, at the rate of 93 cents per 100 pounds, which quantity, under the proposal, might, at the option of the government, be increased by 20 per cent. should the circumstances of the service require it. Accompanying this bid was the guaranty of defendants John T. Dennis and H. Goldberg binding themselves that, within 10 days after acceptance, the said Drachman would enter into a contract with appellant to furnish said hay, and give a good and sufficient bond, and, if the said bidder failed so to do, that the said guarantors would pay to the appellant the difference in money between the amount of the bid of said bidder and the amount for which the proper officer of the United States might contract with another party for said supplies. Included in this transcript is the notice to defendant of the acceptance of his bid inclosing contract and bond, and the letter of defendant Drachman declining to enter into the agreed contract and to furnish the required bond. Also included in the treasury transcript is the itemized statement and account showing the purchases by the government in consequence of the default of the defendant Drachman. The appellees objected to the introduction of the transcript mainly for the reason that such transcripts are admissible in suits against revenue officers or other persons accountable for public moneys only, and that, appellees being in no such relationship to the government, it is not admissible in the suit. The objection was sustained, and the transcript excluded. The question therefore is, did the court err in rejecting the treasury transcript?

Section 886, Rev. St. U. S., is as follows: "When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the treasury department, certified by the register and authenticated under the seal of the department, or when the suit involves the accounts of the war or navy departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the treasury department, shall be admitted as evidence and the court trying the case shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts or other papers relating to, or connected with the settlement of any account between the United States and an individual, when certified by the register, or such auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcript, and have equal

validity and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court." It appears from the statement of facts that an account of the war department is involved in the suit, and that is a sufficient answer to the objection of appellees. A similar ruling is made in the case of *U. S. v. Griffith*, 2 Cranch, C. C. 366, Fed. Cas. No. 15,263. We also have a precedent arising in this court. Upon a contract to deliver barley to the quartermaster at Ft. McDowell for the use of the government, the contractor defaulted, and suit was brought against him to recover the penalty of his bond. A treasury transcript was introduced in evidence by the government, showing the contract, bond, account, etc., as appearing in the records of the war department. The court said: "This disposes of all of the objections in the case that we should or can properly consider, but we have, notwithstanding this fact, looked into the record, and find that all of these documents and vouchers were properly authenticated by the proper auditor of the treasury having charge of the accounts of the war department, and are made evidence by virtue of section 886 of the Revised Statutes. These authenticated copies make out a prima facie case, and it devolves, then, upon the defendant to defeat the same by competent evidence." *U. S. v. Ellis* (Ariz.) 14 Pac. 300.

It follows that the lower court erred in sustaining the objection to the transcript, and the judgment is therefore reversed, and a new trial ordered.

ROUSE and HAWKINS, JJ., concur.

# PIERCE v. DOWNEY et al.

(Supreme Court of Kansas. Jan. 11, 1896.)

## WRIT OF ERROR—PARTIES.

During the pendency of an action in ejectment the defendants conveyed their interest to C., subject to a mortgage to P. After judgment against the defendants on a second trial, a new trial was granted. On application of C. and P., the court then made them parties defendant, and gave them time to answer. *Held*, that in a proceeding in error to reverse the order of the court granting a new trial C. and P. are necessary parties.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; William Thomson, Judge.

Action by J. B. Pierce against Thomas Downey and others. A. H. Clark and A. B. Pomeroy were made defendants. Judgment for plaintiff. New trial granted. From an order granting defendants a new trial, plaintiff brings error. Dismissed.

Codding & Challis, for plaintiff in error  
Hayden & Hayden, for defendants in error.

MARTIN, C. J. On January 9, 1891, on a second trial in ejectment, judgment was render-

ed in favor of the plaintiff for lot 15 of block 15 in Butler City. A motion for a new trial was filed January 12, 1891, and a subsequent motion was filed, two days later, including some causes not embraced in the former. On January 17th, upon hearing, a new trial was granted, and the plaintiff, being aggrieved by said order, was given time to make a case for the supreme court. It appears from the record that during the pendency of the action, and on November 23, 1890, the defendants Downey and Cox executed a deed to A. H. Clark for the premises in controversy, subject to a mortgage to A. B. Pomeroy for \$2,000. After the order was made granting a new trial, on application of A. H. Clark and A. B. Pomeroy, it was ordered by the court that they be made parties defendant to the action, and that they be allowed to answer within 20 days, to which order of the court the plaintiff excepted. The defendants Downey and Cox now move to dismiss, because Clark and Pomeroy are not made parties to this proceeding in error. It was proper for the district court to allow Clark and Pomeroy to be made parties defendant. Code Civ. Proc. §§ 40, 42. They are interested in sustaining the order of the court granting a new trial, and, having been made parties in the court below, they are necessary parties here. *Bassett v. Woodward*, 13 Kan. 341; *Richardson v. McKim*, 20 Kan. 346; *Paving Co. v. Botsford*, 50 Kan. 331, 332, 31 Pac. 1106, and cases cited; *Norton v. Wood*, 55 Kan. 559, 40 Pac. 911, and cases cited. The petition in error will therefore be dismissed. All the justices concurring.

#### SHEARER v. WILDER et al.

(Supreme Court of Kansas. Jan. 11, 1896.)

CONTRACT FOR PURCHASE OF LAND—AUTHORITY OF PURCHASER—MECHANICS' LIENS—VALIDITY AS AGAINST VENDOR.

The owner of city lots, desiring to secure the erection of houses on a part of the same, agreed with another for the erection of two houses according to certain plans and specifications, at a limited cost, and that upon the completion of the houses, and after they had been freed from all liens, the owner would convey the lots to the purchaser, and take back a mortgage upon the lots so improved for the price of the lots, and also for money furnished by the owner towards the cost of building the houses. The purchaser procured materials and labor, and the houses were built according to the plans and specifications prescribed by the owner; but the purchaser never paid the parties who furnished the materials and labor, and the owner of the lots has never paid any one for the buildings placed on his lots. The lots were never conveyed to the purchaser, and whatever rights he had under his purchase were relinquished to the owner about the time of the completion of the houses. *Held*, in an action to foreclose the liens claimed against the property, that under the contract of purchase the purchaser was authorized to contract for materials and labor with which to build the houses, and that the laborers and material men were entitled to a lien against the property, and all of the legal and equitable interest of the owner therein.

(Syllabus by the Court.)

Error from circuit court, Shawnee county; J. B. Johnson, Judge.

Action by John D. Shearer against Edward Wilder and others to enforce mechanics' liens. To the judgment rendered, all parties, except defendant Wilder (who brings cross error) and defendant McCann, bring error. Modified and affirmed.

John D. Shearer brought an action to recover for labor performed in the construction of two dwelling houses upon property, the title of which was in Edward Wilder. Wilder and several other persons, who were contractors and lien claimants, were made parties defendant, each of whom set forth his claim in appropriate pleadings. A trial was had before the circuit court of Shawnee county, without a jury, and upon the testimony produced the following findings of fact and conclusions of law were made:

"(1) On the 16th day of July, 1889, Edward Wilder, being the owner in fee simple of an addition to the city of Topeka, and of the lots described in plaintiff's petition, entered into a contract with one S. W. McCann, a copy of which said contract is attached to Wilder's answer in this case, which is made a part of this finding of fact, to wit: 'This contract, made in duplicate this sixteenth day of July, 1889, between S. W. McCann and E. Wilder, both of Topeka, Kansas, witnesseth, that, in consideration of the agreement of the said Wilder hereinafter specified, the said McCann hereby agrees to construct upon lots in Wilder's addition to the city of Topeka, to be selected by the parties hereto, two houses, to cost not less than \$2,500 nor more than \$3,000.00 each, of general design to be approved by said Wilder, and according to plans and elevations agreed upon and marked "E. W.," and upon completion of said houses, and upon payment of the amount hereinafter stipulated to be paid by said Wilder, said houses are to be clear and free from any mechanics' or other liens. The said Wilder agrees, for the sake of securing said erections of said houses in his addition, to furnish and pay towards the cost of said houses the proportion of \$1,000 for a house costing \$2,600, said payment to be made by him to said McCann upon the completion of said house or houses, and only upon condition that at the time of said payment said house or houses are free and clear of any mechanics' or other liens, or any liabilities whatever for labor or material; and upon completion of said houses, free and clear, as above, the said Wilder is to make a good and sufficient deed, general warranty, to said McCann or his assignee, and to take from said McCann or his assignee a mortgage for the amount of money advanced and paid by the said Wilder as above towards the cost of said house or houses, and for the listed value of said lots, at \$500 per lot, or \$1,000 on each house; said mortgage or mortgages to run for five (5) years at eight per cent. interest, payable semiannually, and, at the election of said Wilder, shall be made



either in one mortgage, to cover cash advanced and the price of the lots, or in a first mortgage for the cash and a second mortgage for the price of the lots. In witness whereof, we have hereunto set our hands the day and year above written. S. W. McCann, 1116 Tyler St. E. Wilder.' (2) On the said date, July 16, 1889, the said Wilder and McCann agreed upon the plans and elevations referred to in said contract, and marked the same 'E. W.', and at the same time agreed upon specifications in writing, in pursuance of which the houses agreed to be built in said contract were to be built. (3) About the same time the said Wilder and McCann selected, as the lots upon which said houses were to be built, lots numbered 481, 483, 485, 487, on Logan street, in Wilder's addition to the city of Topeka, Shawnee county, Kansas. (4) That thereafter, on about the 17th day of July, 1889, the said defendant Cyrus Goddard agreed with the said S. W. McCann to build said houses upon said lots, in accordance with the said plans, elevations, and specifications, at an estimated cost of about \$2,000, or about \$1,000 per house. (5) That thereafter, on or about the 18th day of July, 1889, the said Goddard, in pursuance of his agreement with said McCann, commenced the construction of said houses, and completed the same on the 28th day of September, 1889. (6) That said Goddard built said two houses in accordance with plans, elevations, and specifications therefor, as the same were agreed upon by Wilder and McCann. (7) That Goddard purchased materials to be used, and which were used, in the construction of said houses, and employed men to perform labor upon, in, and about the same, as appears from Exhibit A, attached to his lien statement herein, and as will more fully appear from the petition of the plaintiff and cross petitions of the other defendants herein. (8) That there is due and owing to said Goddard, under his agreement with said McCann for building said two houses upon said lots, the sum of \$2,154.27, with interest thereon from September 28, 1889, and that said two houses are of the value of \$2,154.27. (9) That there is due to the following named persons the sum set opposite the name of each, for work and material furnished by such persons in the erection of the buildings aforesaid as subcontractors with said Goddard, to wit: John D. Shearer, \$59.20; J. W. Stout & Co., \$105.15; Owen McKernan, J. T. Hampton, \$153.40; J. Thomas, \$927.35; Frank Hamm, \$148.18; John Billodeau, \$89.07; A. Boles, \$66.40; H. F. King, \$114.35; Cynthia Robbins, as administrator, \$36.90; John Speer, \$198.90; Cyrus Goddard, \$2,384.04, less \$1,898.80 due subcontractors and material men. (10) That on or about the said 29th day of September, 1889, the said Wilder and McCann entered into and executed the writing which is attached to the amended lien statement of the said Goddard, filed with his amended answer and cross petition herein, and is marked 'Ex-

hibit C'; and said writing is made a part of this finding of fact, to wit: 'This instrument, made this — day of September, 1889, between S. W. McCann, party of the first part, and Edward Wilder, party of the second part, both of Topeka, witnesseth, that whereas, heretofore, on the sixteenth day of July, 1889, a contract was entered into between said parties concerning certain lots therein mentioned, and a conveyance of the same; and whereas, the said S. W. McCann finds himself unable to fully comply with the terms and conditions of said contract, and to carry out the same; and whereas, the said S. W. McCann desires to be released from the obligations in said contract, and to release said Edward Wilder from the obligations therein to said S. W. McCann or assigns: Now, therefore, it is hereby agreed and understood by the parties that the said contract heretofore mentioned shall be annulled and abrogated, and that the said Edward Wilder shall wholly be released and discharged from the obligations contained in said contract towards said McCann or assigns, or from any liability therein, and from the obligations of making payments in said contract to the said S. W. McCann, or advancing any money as a loan specified therein, or from making any conveyance of any lands as specified in said contract, and the said S. W. McCann is discharged from the further performance of said contract. In witness whereof the said parties have hereunto set their hands the day and year above written. E. Wilder. S. W. McCann.' (11) That thereafter the said Goddard and the said plaintiff, John D. Shearer, and each and all of the other defendants herein, in the time prescribed by law, duly filed their lien statements, duly verified, and said statements were in accordance with all the statutory requirements, and notices in writing of the filing of the same at the time were duly served by the respective lien claimants upon the said defendants Wilder and McCann, except the claim of Goddard. A copy of the amended lien statement of Cyrus Goddard is made a part of this finding of fact, the same being attached to the amended cross petition of said Goddard filed herein. (12) That the said Wilder never has paid the said McCann anything for said houses so built on said lots, and that the only consideration of the contract of the said Wilder and McCann, referred to in finding numbered 10, was their mutual promises and releases, just as in said writing set forth. (13) That during the erection of said two houses on said lots the said Wilder visited the premises once, when the plastering was being put on the last one thereof which was built, and when they were completed he examined and went through both of said houses. (14) That the value of said lots described in plaintiff's petition, before said two houses were built thereon, was \$250 per lot, or the total sum of \$1,000; that said lots were enhanced in value

by the building of said two houses by said Goddard, and by the materials and labor put therein by the claimants herein, in the sum of \$2,154.27; and that said property, after said houses were erected thereon, was of the value of \$3,154.27. (15) At no time prior to the completion of the buildings did either Goddard or any subcontractor or material man, or any party to this suit, inquire of Wilder concerning the nature of McCann's contract, or Wilder's interest in the premises. (16) Wilder at no time supervised or directed the manner of the construction of the buildings, or inspected the materials used, or gave any directions concerning the buildings; but, after the buildings were alleged to be completed, Wilder refused to accept them as in accordance with the plans, but claimed that the dimensions were not proper, and therefore refused to make the loan of money to McCann as specified in his contract. (17) At no time after the completion of the buildings was McCann enabled to discharge the liabilities or liens attached upon the premises, nor was he able to give the bond required by the statute against mechanics' liens; and finding himself unable to comply with his contract in this respect, and that he was unable to procure the loan from Wilder as provided in their agreement, he voluntarily released Wilder, by the writing mentioned in finding No. 10. (18) Neither Goddard nor any of the subcontractors nor material men were willing to assume McCann's obligations under the contract, and discharge the liens. (19) About the time of the completion of the buildings, and shortly thereafter, the subcontractors and material men who are parties to this suit presented their claims, and threatened to file liens, and did in fact file liens, upon the premises. Goddard, however, gave no written notice to Wilder as required by law, but he served his notice upon S. W. McCann. (20) At the time of the alleged completion of the buildings, it was ascertained from Goddard and others, and also assented to by McCann, that the costs of both the houses amounted to only the sum of \$2,100, or \$1,050 for each house. (21) At no time was McCann authorized by Wilder to act as his (Wilder's) agent for the purpose of binding either himself, personally, or his title to the land in controversy, except as may appear in their contract of July 16, 1889. (22) Immediately after the execution of the contract between Wilder and McCann, on July 16, 1889, Wilder put McCann in possession of the lots in question; and he so remained in possession until the execution of the release, about the 20th day of September, 1889. (23) Wilder never paid anything on account of the construction of the houses, nor did he ever advance any money to McCann for that purpose, or by way of a loan, or on any account whatsoever."

The court also made the following conclusions of law:

"(1) By complying with the terms of the

contract of July 16, 1889, between himself and Wilder, McCann became the equitable owner of the lots in question, and such equitable title is subject to the liens aforesaid. (2) The contract executed on September 29, 1889, by which McCann and Wilder voluntarily released each other from the contract of July 16, 1889, had the effect to extinguish the equitable title which McCann held at that time; but such extinguishment was made after the buildings were commenced, and when they were substantially completed, but such extinguishment did not affect such liens as were then filed, or that were lawfully thereafter filed, for work and material used in the construction of said buildings. (3) The defendant Wilder has a first lien, prior, on said premises, for the contract price of his lots, to wit, \$2,000, with 6 per cent. interest from July 16, 1889. (4) The plaintiff and defendants Frank Hamm, J. W. Stout & Co., John Billodeau, Owen McKernan, J. T. Hampton, J. Thomas, A. Boies, H. F. King, Cynthia Robbins (as administratrix), and John Speer each have a lien on said properties second to that of Wilder. The said liens of the parties named in this finding are equal in priority to each other. (5) The defendant Goddard has a lien upon said premises, subsequent to the liens above described, to the extent of \$2,154.27, less the amount found due to the parties named in the finding last above. (6) Judgment should be rendered in this case for the sale of the property above described in the manner provided by law, the proceeds to be disposed of as here indicated; lots 481 and 483 to be sold together, and lots 485 and 487 to be sold together. Out of the proceeds, the costs due to the officers of the court and witnesses, taxed at \$——, to be first paid; second, the lien of Wilder; third, that the other lienholders, with their attorney fees taxed herein, be paid pro rata, and any balance be paid into court, subject to its future order. (7) That the plaintiff, J. D. Shearer, and the defendants Frank Hamm, J. W. Stout & Co., John Billodeau, Hampton & McKernan, J. Thomas, A. Boies, H. F. King, and John Speer have a personal judgment against the defendant Cyrus Goddard for the amount of their several claims hereinbefore found; that the defendant Cyrus Goddard have a personal judgment against the defendant S. W. McCann for the amount of his claim; and that the defendant Cynthia Robbins, as administratrix, should have personal judgment against the defendants J. T. Hampton and Owen McKernan for the amount of her claim. (8) That the attorney's fees which the said plaintiff Shearer and the said defendants Frank Hamm, John Billodeau, Hampton & McKernan, A. Boies, and John Speer ought, respectively, to recover, should be taxed as a part of the costs in this case, and, as such costs, recovered against McCann and Goddard's interest in the proceeds of the property sold."

Motions for judgment upon the findings, and for a new trial, were made by the plaintiffs and the defendants, and overruled, and the court thereupon rendered judgment in accordance with the foregoing conclusions of law. The plaintiff and all the defendants, except Wilder and McCann, brought this proceeding in error; and Wilder has filed a cross petition in error, in which he asks for a reversal or modification of the judgment.

Eugene Wolfe, Curtis & Safford, and C. A. Starbird, for plaintiffs in error. Robert Dunlap and Alfred A. Scott, for defendants in error.

JOHNSTON, J. (after stating the facts). The questions argued in this case must be determined from the findings of fact, as neither party has preserved the evidence upon which they are based. The facts stated by the trial court show that Wilder owned an addition to the city of Topeka, and was desirous of erecting houses in the same. He authorized the building of two houses upon his lots, and indicated the general design, elevations, and plans upon which to build, and also stipulated the approximate cost of the same. McCann, who was acting with and for him, agreed to purchase the lots upon which the houses were built, upon certain conditions, with which he never complied. Houses of the character specified by Wilder were built at about one-half of the estimated cost, but McCann never obtained any title to the lots; and, if he ever acquired any interest by reason of his proposed purchase, he formally surrendered and transferred it to Wilder. The houses were erected upon ground which then belonged to Wilder, and the title is in him now, and these houses have become a part of his real estate; but he has paid nothing to any one, and those who have contributed their labor and materials to enhance the value of his property have received nothing. In his behalf it is contended that McCann acquired no interest in the land to which the liens could attach, and that, if he ever possessed any interest in the property, it had never ripened into an equitable title, and that he had no authority to subject the property to a lien. Much reliance is placed on *Lumber Co. v. Schweiter*, 45 Kan. 207, 25 Pac. 592, but the rule of that case hardly applies to the facts in this one. There they sought to establish liens against the proposed purchaser of the property, while here they are seeking to establish liens against the owner. In that case the proposed purchaser had specifically stipulated that until a conveyance of the property was made, and a back mortgage given, the legal and equitable title should remain in the original owner, and until the conveyances were made the proposed purchaser could not subject the property to any liens. In that case the main purpose of the contract was the sale of lots, while here the principal purpose

appears to be to procure the building of houses upon the addition of Wilder. Instead of stipulating that the proposed purchaser should not subject the property to any liens, as in the *Schweiter Case*, Wilder appears to have contemplated that liens might be created against it, as he stipulates that no conveyance will be made by him to McCann, nor any money loaned thereon, until it is free and clear of any mechanics' or other liens, or any liabilities whatever for labor or material. He gave McCann possession of the lots, with authority to procure the erection of houses thereon, and he certainly foresaw that work and materials would be expended upon his lots; and, from the contract, it seems that, in carrying out his purpose, he supposed that liens would be created against the property. The authority which he conferred, in effect, made McCann his representative or agent in obtaining the erection of the houses. The authority did not go to the extent of creating a personal obligation against Wilder, but, under the circumstances, we think it did give McCann power to subject the property of Wilder to liens for the improvements which he arranged should be made upon the same. It will be observed that he selected the plans and elevations, agreed upon the specifications, which were reduced to writing, and fixed the limit of cost of the buildings. He agreed to pay money towards the cost of the houses, and, while they did not cost nearly as much as he contemplated they would, just such houses as he specified and agreed should be built were built. The trial court specifically finds that the houses were built in accordance with the plans, elevations, and written specifications agreed upon by Wilder. It is true, he expected the houses would cost from \$2,500 to \$3,000 each, while houses of the kind and quality designated by him were actually built for less than \$1,000 each. Wilder visited the premises once during the construction of the houses, and also after they were completed. He objected to them, claiming they were not built according to the plans, nor of proper dimensions; but the findings of the court clearly overrule his objections, where they state that the houses were built in pursuance of the written specifications, and in accordance with the plans and elevations. No objection was then made as to the quality of the houses, nor that the cost price had not been marked sufficiently high. We think a clear implication arises from the contract of the parties that McCann was authorized and empowered to procure the labor and materials necessary to the construction of the houses erected on Wilder's lots. Wilder was not to convey the lots until after the houses were built. To comply with his agreement, it was necessary for McCann to procure the erection of such houses as Wilder stipulated and specified should be built. The lienors furnished the material and labor which were used in carrying out Wilder's purpose. He never parted with the legal

or equitable title to the land upon which the houses were erected, and now, after they have been erected in accordance with the plans and specifications, and after McCann has surrendered all his rights under the contract to Wilder, it would be a great injustice to allow Wilder to hold the property, enhanced in value by the labor and material of the lienors, without paying for such labor and material. We think that, by his contract, Wilder has subjected the lots, in their improved condition, to the liens of the claimants. No reason is seen for allowing Wilder a lien for the purchase money of property which was never conveyed, and for which no consideration was paid. The conditions of the contract of purchase were never complied with, and, if McCann ever acquired any interest in the property, it is little more than a shadow. It is a question of grave doubt whether it amounted to such an interest as could be sold, or subjected to liens. However much it may have been, it was relinquished to Wilder, who has had, throughout, the full legal and equitable title to the lots. McCann has therefore no claim against Wilder for the lots; and Wilder, in turn, has no lien upon his own lots by reason of the unperformed contract and the relinquished rights of either party under it. As tending to sustain the views stated, we cite *Manufacturing Co. v. Kountze*, 30 Neb. 719, 48 N. W. 1123; *Henderson v. Connelly*, 123 Ill. 98, 14 N. E. 1; *Hill v. Gill*, 40 Minn. 441, 42 N. W. 294; *O'Leary v. Roe*, 45 Mo. App. 567; *Lumber Co. v. Mosher*, 88 Wis. 672, 60 N. W. 264; *Hickey v. Collom*, 47 Minn. 565, 50 N. W. 918. Under the facts, the judgment and decree of the court should be modified by denying Wilder any lien upon the premises, and the plaintiffs in error should be adjudged to have first liens upon the premises, all equal in point of priority. The judgment so modified will be affirmed. All the justices concurring.

**JOHNSTON v. ATCHISON, T. & S. F. R. CO.**

(Supreme Court of Kansas. Jan. 11, 1896.)

**INJURY TO INFANT ON TRACK—CONTRIBUTORY NEGLIGENCE.**

1. An infant two years old, which strays upon a railroad track, and is injured by a passing train, cannot be charged with contributory negligence; and, although it be a trespasser, it is yet the duty of the employes of the company to avoid injury to it if they see it in time to do so.

2. The fact that the engineer in charge of a train of cars saw a helpless infant standing on the track ahead of his train may be inferred, if the evidence proves it, from circumstances; and in this case it is *held* that there was some evidence to be submitted to the jury.

(Syllabus by the Court.)

Error from district court, Butler county; C. A. Leland, Judge.

Action by Cora E. Johnston, by her next friend, Calvin R. Johnston, against the Atchi-

son, Topeka & Santa Fé Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

G. P. Alkman, for plaintiff in error. A. A. Hurd, O. J. Wood, and W. Littlefield, for defendant in error.

ALLEN, J. The facts of this case, as presented by the evidence offered on behalf of the plaintiff in error in the trial court, are substantially as follows: The plaintiff, a child two years old, resided with her parents in Butler county, on a farm about  $3\frac{1}{2}$  miles northeast from Augusta. The track of the defendant's railroad passed through the lands on which Johnston lived, and within a short distance from the house. There were five children in the family, the oldest being nine years old at that time. Johnston's corral was situated across the track of the railroad, and he and the members of his family were accustomed to go to it by a path leading from the house across the railroad. On the evening of the 27th of October, 1889, which was a bright, clear day, some time between sundown and dark, the older children and an aunt of theirs were over at the corral feeding the stock. The plaintiff wandered away from the house, and went upon the track of the railroad at a little distance from the place where the path crossed it. She had on a dress of light brown and white checked gingham. A freight train, consisting of about nine cars, partly loaded, came from the northeast, running at the rate of about 25 miles an hour. Northeast from the house in which the Johnstons lived, and at a distance of about 315 feet from the point where the plaintiff was injured, there is a railroad crossing. When the train reached this crossing, the whistle was sounded. The mother of the child had started from the house in search of it, and saw it standing on the track. She ran to get it, but, before she could get to it, it was struck by the engine, and thrown into the ditch. Although it was severely bruised, and four of its teeth knocked out, no bones were broken. The father of the plaintiff testified that there was a whistling post about 1,000 feet northeast from the crossing, but that the first whistle that he heard was when the train reached the crossing, and again, after it had passed the crossing, three or four short blasts were given. He was in such a position that the house prevented him from seeing the accident, but he saw a man on the step of the engine before it reached the child. No effort appears to have been made to stop the train. There is no direct statement of any witness showing that the engineer or fireman saw the plaintiff before she was struck, but witnesses testified that she could have been seen for a distance of 1,600 or 1,700 feet from the track northeast of where she was. A demurrer to the plain-

tiff's evidence was sustained by the court, and judgment entered in favor of the defendant.

It is not contended in support of the ruling of the court that the plaintiff was of sufficient age to be chargeable with negligence contributing to her injury; but it is claimed that she was a trespasser, to whom the company owed no duty, unless her presence in a position of danger was known to some employé of the company on the train who could have prevented injury to her. Whether the engineer and fireman, in the discharge of their duties, could and ought to have kept such a lookout along the track ahead of the train as would necessarily have discovered the plaintiff in time to stop the train, and avoid injury to her, is a question we do not feel warranted in answering, as a matter of law. It does appear in this case that between the approaching train and the child there was a public crossing, where people passing along the public highway had a right to go across the track. In approaching such crossings, it is clearly the duty of the engineer to be on the alert, not merely for the purpose of avoiding injury to persons and property crossing the track, but also for the protection of his train and all that is upon it. The child was but a short distance from this crossing. We cannot say that there is absolutely no evidence tending to show that the engineer or fireman, or both of them, did actually see the plaintiff in her position of danger in time to have stopped the train, or, at least, to have slackened its speed to such a degree that the mother, running towards it, might have rescued it from danger. It was the duty of the engineer to be looking towards the crossing, and in the direction of the plaintiff. Did he look, and did he see her? These questions, we think, were for the jury, and that it was not imperatively required of the plaintiff to prove by the direct statement of a witness that the engineer or the fireman actually saw her. There were circumstances, possibly quite slight and unconvincing, tending to show that he did actually see her. If so, it is quite clear that it was his duty to avoid injuring her.

It is argued that the parents of the plaintiff were negligent, and that, while the plaintiff herself was too young to be guilty of contributory negligence, yet the negligence of the parents should be imputed to her. We do not think the facts disclosed by the testimony render it necessary to now pass on the question of imputed negligence. The child had escaped from the house but a very few minutes before it was injured, and the mother was already in search of it, and running to get it before it was injured. The testimony of both father and mother tended to show that they were very careful to keep their children away from the track. Though the proof of negligence was not strong, we think the case ought to have been submit-

ted to the jury. The judgment is reversed, and a new trial ordered. All the justices concurring.

GUARANTY SAV. BANK v. BUTLER et al.  
(Supreme Court of Kansas. Jan. 11, 1896.)

MORTGAGES — DECREE IN FORECLOSURE — WAIVER OF OBJECTIONS.

A party who accepts the principal benefits of a litigation cannot escape from its burdens or disadvantages by a review in a higher court. Accordingly, where the defendants in error were released by the judgment of the court below from personal liability for the mortgage debt, and the plaintiff in error caused the property mortgaged by them to be sold under the decree, and the proceeds to be applied towards the satisfaction of the judgment rendered against other parties to the transaction, *held*, that error will not lie to reverse the judgment releasing the defendants in error.

(Syllabus by the Court.)

Error from district court, Rice county; J. H. Bailey, Judge.

Action by the Guaranty Savings Bank against Thomas A. Butler and others to recover on notes, and to foreclose a mortgage. There was a decree of foreclosure, and, to that part thereof disaffirming the personal liability of the mortgagors for a deficiency, plaintiff brings error. Affirmed.

J. B. Larimer, for plaintiff in error. Samuel Jones, for defendants in error.

MARTIN, C. J. On December 1, 1884, the defendants in error and others executed and delivered their promissory note for the sum of \$8,000, payable to the order of the plaintiff in error five years after date, with interest at 8 per cent. per annum, payable semiannually, interest coupons of \$320 each being attached. This promissory note was secured by a mortgage on lots 2, 4, and 6 of block 6 in White's addition to the city of Lyons, the Occidental Hotel being built thereon. On January 25, 1885, the mortgagors conveyed the property to J. J. Maxey, who assumed the payment of the mortgage debt. On December 15, 1886, said J. J. Maxey and his wife conveyed the property to Mary C. Ross and Sarah A. Hardy, who also assumed the payment of the mortgage indebtedness. On October 20, 1890, the bank commenced its action against the makers of the note, the mortgagors, their grantee, and the grantees of Maxey, to recover judgment upon said note and the last two coupons, and also to foreclose the mortgage. The defendants in error set up several defenses in their answer, alleging, among other things, that the bank assented to said assumption of the debt by Maxey, and looked to him for payment, and thereby the said Maxey became the principal debtor, and the makers of the note sureties; and that, upon the sale of the property by Maxey to Mary C. Ross and Sarah A. Hardy, they assumed payment of the mortgage indebtedness, and the bank accepted them as principals; and that this was

without the knowledge or consent of the defendants in error; and that, by reason thereof, the latter became and were fully discharged from all personal liability on said note, and released from the payment thereof. The plaintiff did not demur, but replied by a general denial. At the trial, May 29, 1891, the burden of proof being upon the defendants, some evidence was introduced tending to support said allegations of the answer as to some of the defendants. No objection was made to the offer of testimony under the answer, and there was no demurrer to the evidence. The court rendered personal judgment against several of the defendants for \$10,391, and ordered the sale of the mortgaged premises for the payment of the debt, but no personal judgment was rendered against the defendants in error, and they were allowed their costs against the plaintiff in error; and this judgment for costs in their favor was excepted to by the plaintiff in error. The motion of the plaintiff in error for a new trial was overruled, but no exception was taken. The petition in error was filed in this court September 23, 1891; the plaintiff in error claiming that it was entitled to a personal judgment against the defendants in error. It is admitted in open court that the mortgaged property was sold under the decree, and that on February 27, 1892, the sum of \$6,638.75 was applied as a credit on said judgment, as the proceeds of such sale; and the plaintiff in error asks this court to direct the district court to render a personal judgment against the defendants in error for the residue.

Although we recognize the equitable principle that a grantee, assuming the payment of a mortgage indebtedness, with the assent of the mortgagee, becomes a principal, and the mortgagor a surety only (3 Pom. Eq. Jur. § 1206, and cases cited), yet it may be doubtful if the answer stated facts sufficient to absolve the defendants in error from their liability as sureties. We are relieved, however, from passing upon this question on account of the condition of the record, as hereinbefore sufficiently stated, together with the further circumstance that the bank has already received upon its judgment the amount of the net proceeds of the sale of the mortgaged property. When the sale was made, the defendants in error had been relieved by the judgment of the district court from all personal liability; and, as the record stood, they had no interest in procuring bidders at a higher amount than that realized. Had the judgment remained in its entirety with this proceeding in error pending, the defendants in error might have protected themselves at the sheriff's sale; but the property was appropriated when they had apparently no interest in the price at which it might sell. In *Albright v. Oyster*, 9 C. C. A. 173, 60 Fed. 644, it was said that "no rule is better settled than that a litigant who accepts the benefits, or any substantial part of the benefits, of a judgment or decree, is thereby estopped from re-

viewing and escaping from its burdens. He cannot avail himself of its advantages, and then question its disadvantages in a higher court." See *Babbitt v. Corby*, 13 Kan. 612; *Hoffmire v. Holcomb*, 17 Kan. 378; *Fenlon v. Goodwin*, 85 Kan. 123, 10 Pac. 553; *Price v. Allen*, 39 Kan. 476, 477, 18 Pac. 609; *Brown v. Vancleave*, 86 Ky. 381, 6 S. W. 25; *Watkins v. Martin*, 24 Ark. 14; *Cassell v. Fagin*, 11 Mo. 207. The judgment will be affirmed. All the justices concurring.

#### PERKINS et al. v. BUNN et al.

(Supreme Court of Kansas. Jan. 11, 1896.)

Error from district court, Franklin county; A. W. Benson, Judge.

Action by Martha M. Perkins and others against Elizabeth Bunn and D. M. Bunn. From the judgment, plaintiffs bring error. Dismissed.

O. A. Smart, for plaintiffs in error. Wm. H. Clark and John W. Deford, for defendants in error.

PER CURIAM. At April term, 1891, the plaintiffs recovered judgment against Elizabeth Bunn and D. M. Bunn for \$13,112.40, on a promissory note and six coupons; but the court refused to render judgment on three other coupons, of \$700 each, on the ground that the right of action thereon was barred by the statute of limitations. The plaintiffs excepted to this refusal of judgment on the three coupons; and on October 31, 1891, they instituted this proceeding in error. Before doing so, however, the defendants had paid, and the plaintiffs received, the full amount of the judgment rendered, together with interest and costs, and for this reason the defendants in error move to dismiss this proceeding; and the motion must be sustained, on the authority of *Bank v. Butler* (just decided) 43 Pac. 229, and the cases therein cited.

#### ATCHISON, T. & S. F. R. CO. v. CARRUTHERS.

(Supreme Court of Kansas. Jan. 11, 1896.)

INJURY TO RAILROAD EMPLOYE—EVIDENCE.

1. Upon the undisputed facts the acting yard master and the conductor, whether treated as fellow servants of the plaintiff below or as vice principals of the defendant below, are not justly chargeable with negligence proximately contributing to the injury complained of.

2. In the entire absence of testimony tending to show that any code of rules or system of signals for the giving of notice or warning of the approach of detached cars in railroad yards would be feasible or useful, a jury is not justified in finding that a railroad company is negligent in failing to prescribe the same.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

On October 28, 1890, the defendant in error was in the service of the plaintiff in error as head brakeman on a freight train on its line of railroad between Kansas City, Mo., and Ft. Madison, Iowa. Late in the afternoon of said day a freight train was made up in the yards at Marcelline, Mo., to be taken out by Lee Burgess as conductor, Carruthers as head brakeman, and a rear brakeman; and

Carruthers was directed by J. C. Hutchinson, acting yard master, and Lee Burgess, conductor, to have the engine brought out and coupled to the train, and told that there was a car to cut out, but the train would be ready by the time he got around with the engine. The conductor was busy taking the seals of some cars. Carruthers had the engine brought out and backed to the front end of the train, consisting of about 24 cars besides the caboose. The front car, to which the tender of the engine was to be attached, was a stock car, equipped with a Janney coupler. A straight link was held in this coupler by a pin, and when the engineer backed in response to the direction of Carruthers it was found that the link was too low to couple to the tender, and Carruthers directed the engineer to pull up, which he did, leaving about 18 inches space between the drawheads of the tender and the stock car. Carruthers went in between to take out the straight link, so that it might be replaced with a crooked one, which was necessary to make the coupling; but for some reason not explained the pin stuck fast, and he attempted to loosen it by shaking the link, and while he held the link with his right hand and the head of the pin with his left the stock car was jostled and propelled forward, and his right hand was caught between the Janney coupler and the drawhead of the tender, and it was so badly injured that it became necessary to amputate the same about two inches above the wrist joint. It further appears that after the conversation between the yard master, the conductor, and Carruthers about bringing out the engine, and after he had left to perform that duty, the conductor discovered that there were two coal cars destined for the same place that were not together in the train, and he asked the yard master to have them placed together, which could only be done by switching, and the yard master directed the switching crew to do this. It is probable that the car about which the yard master and the conductor spoke to Carruthers had been cut out before Carruthers attempted to make the coupling, and that the jostling of the stock car was caused by the switching necessary to place the two coal cars together. Carruthers testified that before going in to move the straight link he looked to the rear of the train, and did not see any switching going on, and he thought that the train was fully made up; but after he was hurt he noticed the switch engine some distance from the train, and going in the opposite direction. Neither the yard master, the conductor, nor any person connected with the switching had any knowledge that Carruthers was between the front car and the tender, and Carruthers had no warning, otherwise than above stated, that any switching was being done which might cause the jostling or propelling forward of the stock car in front of which he was working. The train was made

up in the usual way, but there is some conflict in the evidence whether it was or was not customary to couple the road engine to the train before it was completely made up. The printed rules and regulations for the government of employes on the road and in the yards were not offered in evidence; but, so far as appears, the company had no established rule, regulation, or custom whereby switchmen working in the yards were notified or warned that detached cars were moving upon any of the tracks that might collide with or jostle any standing car or train, except that a rule required that the engine bell should be kept ringing while the engine was in motion. It was admitted that the common law was and is in force in Missouri, and that an employe of a railway company cannot recover against it for an injury suffered by reason of the negligence of a coemploye. On a trial at May term, 1891, Carruthers recovered a judgment against the railroad company for \$10,960, and it prosecutes a petition in error to this court for the reversal of said judgment. Reversed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. A. Smith Devenney, for defendant in error.

MARTIN, C. J. (after stating the facts).

1. The court instructed the jury that the conductor, engineer, yard master, acting yard master, yard men, and yard switchmen were all coemployes of the plaintiff, and that, if they believed from the evidence that the injury complained of was caused by the negligence or want of ordinary care of any of the coemployes of the plaintiff, then it was their duty to find in favor of the defendant. Yet in answer to a particular question of fact the jury stated that the misinformation, orders, and instructions respectively given by the conductor and the acting yard master to plaintiff concurrently and proximately caused and materially contributed to the plaintiff's injury. The plaintiff below introduced in evidence the decision of the supreme court of Missouri in *Moore v. Railway Co.*, 85 Mo. 588, which defines with some particularity who are fellow servants and who is a vice principal in that state; but, in our view of the case, it is immaterial whether the foregoing instruction of the court was justifiable or not under said decision. The blame was laid by the petition and in the answer of the jury upon the acting yard master and the conductor, but we are unable to discover any negligence on their part. They told Carruthers that there was one car to cut out, and that the train would be ready by the time that he got around with the engine. This was doubtless their opinion of the time it would require to accomplish a certain result. After Carruthers had gone on his errand, they found it necessary to adjust two other cars, and place them together in the train. We cannot presume that it was improper or unnecessary to make such adjust-

ment, for this would be against the evidence. They did not know that Carruthers would have any difficulty in coupling the front car to the tender, nor, when the cars were being shifted, that he was in any place of danger. Under such circumstances it would be an extraordinary precaution for the yard master or the conductor to search for Carruthers, to inform him that further switching was necessary than had been contemplated at the time of the conversation with him. In any event, the judgment being against the railroad company, Carruthers has no reason to complain of the instructions upon the law as to coemployees or fellow servants.

2. It was claimed by the plaintiff below that the railroad company was guilty of negligence in failing to prescribe proper rules and regulations for notice or warning of the movement and approach of detached cars, and that the injury complained of was the result of such negligence; and the jury found that this failure and omission of the company materially contributed to and concurrently and proximately caused said injury. The plaintiff below introduced in evidence the decision in *Reagan v. Railway Co.*, 93 Mo. 348, 6 S. W. 371, to show that it may be the duty of a railway company to prescribe rules sufficient for the orderly and safe management of its business, and that whether the company was guilty of negligence in failing to prescribe suitable rules was a question for the jury. In that case, however, a demurrer to the petition was sustained. It is nowhere intimated that the jury could pass upon the question without any evidence upon the subject. In the present case no evidence was given tending to show that any notice of the approach of detached cars in railroad yards or in those at Marceline, Mo., would be useful or practicable. It appears to have been the custom to ring the bells of engines while in motion; and whether any warning of the approach of detached cars by any known method would have been of any avail for the protection of the plaintiff below under the circumstances we are left entirely to conjecture. No manual signal in the direction of the moving cars could have been seen by him while he was between the stock car and the engine, and the distance and the noise precluded any efficient use of the voice. Whether, in such a place, the danger to men working upon, about, or between cars would be lessened by the whistling of the locomotive, we are not advised. Possibly, where tracks are numerous, and several engines are at work in the same yards, such signals would be little or no protection to the men; and, in the entire absence of testimony as to the feasibility or usefulness of any code of rules or system of signals, the jury was not justified in finding that the railroad company was negligent in failing to prescribe the same. The judgment must be reversed, and the cause remanded for a new trial. All the justices concurring.

# SPRATLEY v. BOARD OF COUNTY COM'RS OF LEAVENWORTH COUNTY.

(Supreme Court of Kansas. Jan. 11, 1896.)

COUNTY TREASURER—COMPENSATION—INTEREST ON PUBLIC FUNDS.

1. A county treasurer cannot legally receive or retain any other or greater compensation for official responsibility and services than the salary expressly allowed by law.

2. Money deposited with the county treasurer by a railroad company, in proceedings for the condemnation and appropriation of land for a right of way for a railroad, is public money, within the meaning of that term as used in paragraph 1716 of the General Statutes of 1889, and the interest paid on such money by the public depository, under an agreement with the board of county commissioners, is the property of the county.

(Syllabus by the Court.)

Error from district court, Leavenworth county; Robert Crozier, Judge.

Action brought by the board of county commissioners of Leavenworth county against John W. Spratley, formerly treasurer of that county, to recover interest collected by him upon funds which he had theretofore placed in the public depositories, and which, it was alleged, he illegally retains and refuses to deliver to his successor. In his answer Spratley alleged that he had delivered to his successor all public moneys which came into his hands, other than such as had been duly paid out by him. He averred that certain railway companies deposited condemnation money with him, which he placed in certain depositories, and, under an agreement with them, interest to the amount of \$4,519.47 accrued thereon, which, with the consent of the railway companies, he has retained as and for compensation for his trouble and expense in keeping the condemnation money. A trial was had before the court, and the following findings of fact and conclusions of law were made:

"Findings of fact: First. That the defendant, John W. Spratley, was the county treasurer of Leavenworth county, Kan., from the second Tuesday of October, 1888, to the second Tuesday of October, 1890, duly elected, qualified, and acting as such. Second. That during the defendant's term of office there was deposited with him, in his official capacity, by certain railroad companies, certain amounts of money, commonly known as 'condemnation money,' such money having been deposited with him as county treasurer under article 9, c. 23, of the Compiled Laws of the State of Kansas of 1889. Third. That the defendant deposited such funds in the banks in the city of Leavenworth which had been duly designated as depositories of public money by the plaintiff; it having entered into contracts with such banks for the deposit of public money, and the payment by the banks of interest on such deposits. Fourth. From the commencement of the defendant's term of office and up to January



7, 1888, the interest upon the condemnation money so deposited, computed at the rate of interest specified in the contracts between the plaintiff and the depository banks, amounted to \$1,800, and prior to said last-mentioned date the condemnation money deposited by said county treasurer in said banks was not separated from other moneys deposited by him, so that it could be ascertained, either from the books of the bank, or from the books of the county treasurer's office, how much thereof was deposited with one bank and how much thereof with another; that prior to February 29, 1888, the interest earned by such deposit of condemnation money with the banks was not kept in any separate account in the county treasurer's books, but it was placed to the credit of the general interest account, which appears in the county treasurer's official records, which account was entitled 'Interest on Deposits in Bank'; all other interest received by the county pursuant to the contracts with the depository banks being mixed therewith, and placed to the credit of the same account. Fifth. On February 29, 1888, the defendant, as county treasurer, opened a new account upon his official records, entitling the same 'Interest on Condemnation Money Deposited in Banks,' debiting the old interest account with \$1,800, and crediting the new account with such amount. This last-mentioned account commenced with the said item of \$1,800, and subsequently accruing interest, received from the banks on condemnation money, increased the same, until, October 14, 1890, it amounted to \$4,519.47, at which time the defendant vacated his office, his term having expired. All of said amount was received by the defendant as county treasurer as aforesaid from interest paid by the bank upon condemnation money deposited with them; said bank at all such times having contracts with the plaintiff which constituted them public depositories. Sixth. On January 7, 1888, the defendant opened an account in each of the depository banks as 'J. W. Spratley, County Treasurer, Condemnation Money,' to which account he caused to be transferred the \$1,800 interest above mentioned, together with the condemnation money in his hands on said date, to which account from time to time interest on that account was credited by the depository banks until the expiration of the defendant's term of office. Seventh. The defendant's final semiannual report as county treasurer was filed with the county clerk October 22, 1890, and was for the six months ending October 13, 1890. In this report there is the following statement by the defendant: 'On the 13th day of October, 1890, I had on hand and turned over to C. J. Buckingham, now county treasurer of this said county, all money before that time deposited with me under article 9 of chapter 23 of the Compiled Laws of Kansas of 1889, in all a sum

of \$16,653.13, received from or for different railroad companies, and belonging thereto as follows, to wit: [Here follows a statement showing names of railroad companies and the amounts.] I then had and still retain the following amount of interest accrued on some of the last aforesaid and other similar moneys, which I retained and do not turn over because I claim the same is my own money for compensation for taking care of same at request of the railroad companies, to wit: \$4,519.47.' Eighth. The defendant has never repaid the above sum of \$4,519.47, but still keeps and retains the same. All thereof is interest on condemnation moneys deposited with the defendant in his official capacity, and such interest was paid by depository banks of the city of Leavenworth; that is, by banks with whom the plaintiff had contracts for the deposit of public money, contemplating the payment of interest. All other funds belonging to the defendant's office were turned over by him to his official successor. Ninth. The salary that was due to the defendant during his term of office as county treasurer has all been paid to him in full,—that is, the whole \$4,000 allowed him by law has been paid him, otherwise and independent of any of the aforesaid \$4,519.47,—but there was not anything allowed him specifically for any trouble in relation to the aforesaid condemnation, and he never asked for any from the county. Tenth. The railroad companies referred to in these findings, during defendant's term of office, assigned to the defendant what interest they had, if any, in the \$4,519.47 retained by him as interest on condemnation money. (To which findings of fact, and to each thereof, and to each and every part thereof, the plaintiff duly excepts.)

"Conclusions of law: First. The treasurer of Leavenworth county is not entitled to more compensation for the performance of official duties from any source than \$4,000 per annum to be paid by the county. (To which conclusion of law said defendant excepts.) Second. Condemnation money is 'public money' within the meaning of paragraph 1716, Gen. St. 1889, and interest accruing thereon from depositories designated by the board of county commissioners belongs to the county. (To which conclusion of law said defendant excepts.) Third. The plaintiff is entitled to a judgment against the defendant for \$4,519.47, and interest thereon at 6 per cent. per annum from October 14, 1890."

Spratley complains, and brings the case here for review. Affirmed.

L. B. & S. E. Wheat, Lucien Baker, and Waggener, Horton & Orr, for plaintiff in error. William C. Hook and John H. Atwood, for defendant in error.

JOHNSTON, J. The compensation of a county treasurer is determined by the number of inhabitants in the county for which

he is elected, and as Leavenworth county has a population of over 25,000, the treasurer of that county is entitled to a salary of \$4,000. This is the extreme limit of compensation that he can claim or retain for any official responsibility which he may assume and for every official duty which he may perform. It is, as the statute says, "in full for all services rendered by said treasurer or his deputies," and he is required to report to the board of county commissioners all fees which he may receive for official services performed at the request of others, and the amount of them is to be deducted from the salary allowed. Gen. St. 1889, pars. 1716, 1717. In another section it is made a felony for the treasurer to use or permit others to use "any public money coming into his possession or under his control from any source whatever by virtue of his official position." *Id.* par. 1715. It is within the power of the legislature to fix the compensation of public officers for official service, and to make it unlawful for county treasurers to receive or retain any other or greater reward from any source whatever for the performance of such services. The statutory provisions relating to such officers, in effect, preclude the treasurer from receiving any compensation, or from taking or retaining any reward, other than is expressly allowed as salary. The payment to and the retention by a public officer of any private reward, or any compensation other than as expressly provided by law, is contrary to public policy, subversive of good morals, and inconsistent with the pure administration of a public trust. The condemnation moneys were deposited with Spratley as county treasurer, and under the statute it was his official duty to hold and distribute them. We are very clear, therefore, that he is in no sense entitled to take or retain any additional compensation for the discharge of that duty.

Can the county recover the interest on the condemnation moneys that were placed by him in the public depositories? It is insisted on behalf of Spratley that no one, other than the owners of these moneys, can rightfully claim the interest which accrues on the same, and that they are not public moneys, within the meaning of the statute governing deposits. It provides that the "treasurer shall deposit daily all public money in some responsible bank, to be designated by the board of county commissioners, in the name of such treasurer as such officer, which bank shall pay such interest on average balances as may be agreed upon by the board of county commissioners, and such bank shall credit the same monthly to the account of said treasurer, and before making such deposits the said board shall take from such bank a good and sufficient bond, in a sum equal to the largest approximate amount that may be deposited at any one time, conditioned that such de-

posit shall be promptly paid on the check or draft of the treasurer of said county, and such bank shall, on the first Monday of each month, file with the county clerk a statement of the amount of money on hand during the previous month, and the amount of interest accrued thereon to said date." Gen. St. 1889, par. 1716. It is true, as contended, that the funds deposited do not belong to the public. If the condemnation proceedings are regular, the money deposited belongs to the railroad company until the right of way passes to the company. If no appeal is taken from the award of the condemnation commissioners, the right of way passes to the railroad company and the right to the money passes to the landowner. *Blackshire v. Railroad Co.*, 13 Kan. 514; *Central B. U. P. R. Co. v. Atchinson, T. & S. F. R. Co.*, 28 Kan. 453. It does not appear that appeals were taken by any of the landowners and, if none were taken until the time for appeals expired, the deposits became the property of the landowners. Although the condemnation money was not owned by the public. It nevertheless was public money, within the meaning of the statute requiring the placing of funds in the public depositories. It is money paid, as the law requires, in a public proceeding, to secure the accomplishment of a public purpose. It is placed in the custody of a public officer, who keeps the same at the public expense. It is obtained in the exercise of the sovereign power of eminent domain, which can only be used for public purposes. The sovereign power being delegated to the railroad company makes it a public agency to secure the building of a highway to carry out a public use. An important and essential step in this public proceeding is the payment or deposit of condemnation money, and the legislature, which has full power in the premises, has provided that the amounts awarded as compensation to landowners by the public tribunal provided for that purpose shall be deposited with the county treasurer. He holds it as a public officer, rather than as the agent of the railroad companies or the landowners. The awards deposited are not loaned to the county, nor does the county become responsible to the owners of those funds for either principal or interest. Neither the railroad companies nor the landowners are entitled to claim from the treasurer any more than the amounts deposited. There is no privity between those owning the fund and the county which would entitle them to anything for the use of the money, no more than the owners of redemption money could claim interest for the use of money paid to redeem land from a sale for taxes. If the treasurer should fail to pay the money upon demand to one entitled to it, a liability for interest might arise against him; but, so long as the money remains in the county treasury unclaimed, no interest can rightfully be de-

manded by the owner. His only concern is that the money deposited shall be safely kept and properly distributed. The facilities for the safe-keeping of the money are provided by the county, and at its expense. The county board designates the bank in which the money shall be placed, fixes the rate of interest which shall be paid on the average balances that may be deposited, and the bond of the depository is taken by and in the name of the county commissioners. The public depository is a part of the financial system of the county, the main purpose of which is the protection and safety of the funds placed in the hands of the county treasurer as the law provides. The payment of interest is only an incident to the transaction, and as the county bears all the burden and cost of providing the facilities for the safe-keeping of the money, it justified the legislature in authorizing the collection of interest upon the funds placed in the depository. Interest can only be collected where it is specifically authorized by law. There is no statutory provision authorizing the collection of the interest agreed to be paid by a public depository upon condemnation money, redemption money, nor of any other public money lawfully remaining in the county treasury. The statute does provide, however, that the county may arrange for the deposit of all such money in some responsible bank, and may agree with the bank upon the interest which shall be paid, and from the language employed we think the legislature clearly contemplated that the interest accruing on such funds should belong to the county. The judgment of the district court will be affirmed. All the justices concurring.

FRY et al. v. FRY et al.

(Supreme Court of Kansas. Jan. 11, 1896.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED.

The fact that one of the parties to an action cannot testify in regard to a conversation which he had with a deceased person does not preclude third persons who heard the conversation from giving testimony as to the same in behalf of the other party. Such witnesses may be required to give the entire conversation, or so much thereof as has a bearing upon the issue in the case.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by Daniel A. Fry, by his guardian, and others, against Samuel Fry and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

W. E. Stanley, for plaintiffs in error. Wall & Brooks, for defendants in error.

JOHNSTON, J. This action was brought by Daniel A. Fry, a minor, by his guardian, H. F. Rhodes, and his mother, Louisa

Schwerdfager, as heirs at law of Albert Fry, deceased, to recover from Samuel Fry, Aaron Fry, and William Weatherholt 80 acres of land in Sedgwick county, and also for damages for the wrongful detention of the same. The claim of the plaintiffs below was that Samuel Fry, the father of Albert, agreed that if Albert would take possession of the land, bring it under cultivation, and build good improvements thereon, then he, Samuel Fry, would execute to Albert a deed of conveyance for the land, and the same should become the property of Albert in fee simple; and that, in pursuance of this agreement and gift, Albert took possession of the land, brought the entire tract under cultivation, erected thereon houses, stables, corncribs and wagon sheds, planted and cultivated orchards and hedges, fenced and otherwise improved the land, at a cost of \$1,500. It is alleged that the gift was made, possession taken by Albert thereunder, and improvements begun in 1878, and in 1881 he was married to Louisa, and of this marriage Daniel A. Fry was born. They continued to occupy the premises until the death of Albert Fry on March 26, 1884. Soon after the death of Albert, Samuel Fry disputed the ownership of the land, and it is alleged that by subterfuge and force he removed and kept them from the possession of the premises. The case was tried with a jury, and a finding made in favor of the defendants in error, awarding them the land and \$450 as damages for the wrongful detention of the same.

The principal contention in this court is that the proof is not sufficiently strong and clear to warrant the conclusion that an effectual gift of the land had been made. We find, however, that this question is not open for our consideration. It does not appear from the record that we have all the testimony upon which the trial court acted. We might say, however, that the testimony which is included in the record appears to us to be sufficient to sustain the judgment that was given.

It is contended that error was committed in admitting testimony of a statement made by Samuel Fry to his son Albert. When Louisa, who was the wife of Albert, was upon the witness stand, an inquiry was made as to whether she had heard Samuel Fry make any statement relative to the land in controversy, and she answered, without objection, that she had. She was then asked to give the statement which he had made, when an objection was made that the statement was a part of a conversation with Albert, now deceased, and that, as communications between them would not be competent in favor of Samuel Fry, the giving of a part of the conversation would be improper. The statements of Samuel Fry with reference to the giving of the land to his son were certainly competent testimony, when given by one authorized to testify to them.

The fact that Samuel Fry could not testify in regard to a transaction or communication had personally with his deceased son does not preclude third persons, who heard the statements, from relating them as testimony. Neither can it be said that a part of the conversation upon that subject is incompetent, or that the plaintiffs in error were prevented from obtaining the entire conversation. Upon cross-examination they could have obtained from the witness all of the conversation had bearing upon the question at issue. An attempt was afterwards made to show, by Samuel Fry, what the transactions with his son were in respect to the land; but the court, upon objection, properly excluded the answer. It is said that, as the testimony of Louisa concerning the statements of Samuel Fry had been received in evidence, he should have been allowed to rebut or deny the conversation. It appears that there is no reason for complaint in this respect. The record shows, whether the testimony was admissible or not, that he was permitted to and actually did deny what was said by Louisa respecting the statements he had made. It thus appears that they had the privilege of cross-examining Louisa fully as to the statements, and that Samuel Fry was not only permitted to contradict her testimony, but was also allowed to state that he had never agreed to give Albert the land, nor ever said that he would make them a deed to the land. We think the plaintiffs in error have no cause to complain of the rulings upon the testimony. No other objection is presented by the record, nor do we find any error which warrants a reversal. Judgment affirmed. All the justices concurring.

#### CAWOOD et al. v. WOLFLEY.

(Supreme Court of Kansas. Jan. 11, 1896.)

#### CLAIMS AGAINST DECEDENT'S ESTATE—WAGES OF CLERK.

All wages due a clerk for services rendered, before as well as during the last illness of a deceased employer, fall within the second class of claims against his estate, and are included in the term "wages of servants," as used in section 80 of the "Act respecting executors and administrators and the settlement of the estates of deceased persons."

(Syllabus by the Court.)

Error from district court, Nemaha county; J. F. Thompson, Judge.

Proceedings by Cawood Bros. against Theodore Wolfley, administrator, to enforce a claim against defendant's estate. From the judgment, plaintiffs bring error. Modified.

Wells & Wells, for plaintiffs in error. Samuel K. Woodworth, for defendant in error.

ALLEN, J. The sole question presented by the record in this case is whether, in the classification of demands against the estate of a deceased person, the wages of a clerk

employed by the decedent in his store for a period prior to his last illness are to be included, under the provisions of section 80, c. 37, of the General Statutes of 1889, in the second class. The first part of the section reads as follows: "All demands against the estate of any deceased person shall be divided into the following classes: (1) Funeral expenses. (2) Expenses of the last sickness, wages of servants, and demands for medicines and medical attendance during the last sickness of the deceased, and the expenses of administration." Is a clerk a servant, within the meaning of this language, and, if so, are the wages confined to those accruing during the last illness of the deceased? No direct authority is cited or known to us on the question. The legislature, in more than one enactment, has manifested a purpose to secure to all wage earners their hire, and to prefer their claims to those of most other creditors. It is conceded that the term "servant," in its usual acceptance, especially in the law, is broad enough to include a clerk; but it is argued that the word is here used in a restricted sense, and means only menial or household servants. We are loath to recognize any such classification in Kansas as menial servants. The word is broad enough to include a clerk, and we think the legislature intended it should do so. Nor do we think the wages referred to are limited to those earned during the last illness of the deceased. In this particular case the amount of wages conceded to be due is unusually large, but that fact cannot affect the general rule. Though the language used might perhaps be held to restrict the time to the period of the last sickness, we think it as capable of the other construction, and that the legislature intended to classify all wages of servants ahead of debts due the state, judgments and demands of the fifth class. The judgment of the district court will be modified by classifying the demand allowed the plaintiff in the second class, instead of the fifth. Judgment will be entered in this court in favor of the plaintiffs in error for costs. All the justices concurring.

#### NIXON v. CYDON LODGE NO. 5, KNIGHTS OF PYTHIAS, OF SALINA, et al.

(Supreme Court of Kansas. Jan. 11, 1896.)

#### MCHANICS' LIENS—PRIORITY OVER MORTGAGES— ENFORCEMENT—STATEMENT—RIGHTS OF SUBCONTRACTORS.

1. Where a mortgage loan upon real estate was negotiated before the commencement of a building thereon, but the papers were not executed, delivered, or recorded, and the loan was not closed up, nor any money paid thereon, until after the excavation for the building was begun, the mechanics' liens for labor and material, duly preserved, are prior and paramount to the lien of the mortgage.

2. A contract was made for the erection of a large building at a stipulated price. The

contractors divided up and sublet to others the greater part of the work. Before the completion of the building the contract was abandoned, and the original contractors filed a statement for a lien, and only three items were given, viz. the contract price, the total value and amount of material furnished and labor performed, and the money paid. *Held*, that the claim was not itemized as nearly as practicable, and that their statement was fatally defective.

3. Where a subcontractor enters into a contract for the performance of certain work upon the building at a specified price, and the work is completed within the contract price, he need not, in filing a statement for a lien, separate and state the different elements which enter into his claim.

4. The provisions of the mechanic's lien law do not extend to persons so remote as subcontractors of a subcontractor.

5. The right to a mechanic's lien must be determined by the law in force at the time the right became vested, but the lien must be established or preserved and enforced by the law in force at the time the necessary proceedings are had for that purpose.

6. Subcontractors are bound to take notice of the original contract, and they cannot obtain liens in excess of the amount which the owner contracts to pay, but their rights will not be affected by any subsequent agreement between the owner and the original contractor to which they have not assented, or by any act of waiver of the original contractor.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by William G. Nixon against Cydon Lodge No. 5, Knights of Pythias, of Salina and others, to foreclose a mortgage. There was a judgment of foreclosure, and from that part thereof declaring the mortgage subject to mechanics' liens plaintiff brings error. Modified and affirmed.

Rossington, Smith & Dallas, and Clifford Histed, for plaintiff in error. Bond & Osborn, Owen A. Bassett, and Sam Kimble, for defendants in error.

JOHNSTON, J. Early in the year of 1888, Cydon Lodge No. 5, Knights of Pythias, of Salina, Kan., determined to erect a building upon real estate which it owned in Salina. To accomplish its purpose it was necessary to procure a loan upon the property. During the month of June, 1888, it applied to the Kansas Loan & Trust Company, of Topeka, for a loan of \$20,000. While the application was pending, and before any loan was secured, the lodge procured plans and specifications for the building. During the month of August, 1888, the Kansas Loan & Trust Company notified the lodge that it had a customer who would make a loan of \$20,000 to the lodge for the purpose of erecting the building. Immediately after this information was received the lodge advertised for bids for the construction of the building, and on August 27, 1888, the contract was let to Rutledge Bros., who entered into an agreement to furnish the material and construct the building for \$28,800. On September 28, 1888, the contract was slightly modified as to the time when payments were to be made, so as to correspond with the advanced payments

to be made to the lodge under the \$20,000 loan by Nixon, which appears to have been closed up and completed about that time. The papers pertaining to the loan were prepared some time in advance of the completion of the same. It appears that the Nixon mortgage as well as the commission mortgage of the Kansas Loan & Trust Company were filed for record in Saline county on September 14, 1888. Accompanying the mortgage was a written guaranty, signed by a number of individuals who were interested in the enterprise, including Rutledge Bros., promising prompt payment of the principal and interest of the loan, as well as the taxes and insurance upon the property. At the same time the lodge also executed an instrument designated as a guaranty against liens, in consideration that the loan negotiated for should be accepted. It guaranteed the party making the loan against any expense, cost, or loss by reason of any mechanics' liens which might be filed on the premises, and it also stipulated that the loan should be paid in certain installments as the work upon the building advanced. These papers, including the mortgages, appear to have been dated September 1, 1888, while as a matter of fact they were not executed until later, and the loan was not finally completed and closed up until September 28, 1888. At the last-mentioned date several material changes were made in respect to the times of payment, and all the papers connected with the loan were forwarded to Nixon, who lived near Philadelphia, Pa., and on October 4, 1888, he deposited with the Kansas Loan & Trust Company the sum of \$20,000, to be paid to the lodge in installments, as had been agreed upon. Rutledge Bros. began work upon the building, as the court has found, on August 31, 1888, and they sublet various parts of their contract to others. The work proceeded, and from time to time Nixon advanced various installments upon the loan, until they amounted to the sum of \$11,600. The lodge became insolvent, and was unable to complete the building or to pay the contractors, and no more than \$11,600 was ever advanced by Nixon upon the loan. A proceeding was begun by Nixon to foreclose his mortgage, in which a receiver was appointed, and on October 23, 1889, the receiver notified the contractors that they must do no more work upon the building, and the last work done thereon was upon that day. Soon afterwards the contractors, subcontractors, and others filed verified statements with a view of enforcing liens against the property, and they have been made defendants in the foreclosure proceedings. The trial court determined that the mortgage incumbrances were second, and subordinate to the liens of the claimants, and to review this ruling complaint is made.

The questions which divided the parties are whether the claims of those who furnished labor and materials for the building are

valid liens against the property, and, if so, whether they are prior and superior to the incumbrances of the mortgages. If the mechanics' liens of the claimants are valid, they relate back to the commencement of the building. It is contended that, as the negotiations for the mortgage had been made before the building was commenced, the lien of the mortgage is paramount to those claimed for the labor and materials. It will be observed that the building was not to be erected from the loan merely, as the contract price of the same greatly exceeded the amount of the loan. The mere negotiation for the loan did not create a lien, and certainly there was no incumbrance upon the property until the mortgage had been executed. As we have seen, the contract was entered into on August 27, 1888, and work was commenced on August 31, 1888, while the papers representing the loan were not executed until September 14, 1888, and appear not to have been delivered or accepted until September 28, 1888. Some controversy has arisen as to when the building was commenced. The first labor done upon the ground under the contract was the removal of an old building and the clearing of the ground for the excavation. This formed a part of the work under the contract, and was necessary for the construction of the building. Whether this was sufficient to constitute a commencement under the statute we need not determine, for it is conceded that the excavation was begun between the 5th and 10th of September, and that was prior to the time when the incumbrance of the mortgage attached to the property.

It is contended that the statement for a lien filed by Rutledge Bros. is fatally defective, because it is not itemized as the law required. It is as follows:

Items.

To contract price as per agreement..	<u>\$28,800 00</u>
Value and amount of material furnished and labor performed up to the abandonment of contract and building by the owner.....	\$23,523 60
By cash paid .....	<u>12,423 17</u>
Balance .....	\$11,100 43

As will be seen, this is no more than a lumping of the items included in the whole contract price, another including the estimated value and amount of material furnished and labor performed, and another giving a credit for the amount which had been paid. It can hardly be regarded as a compliance with the statute, which requires that the statement shall include the items of the amount claimed, as nearly as practicable. If the building had been completed according to contract, and within the contract price, the items might not have been so important; but, as has been seen, the building was incomplete, and no one can tell what proportion of the work has been done, or the amount or value of labor and material necessary to its

completion. That it was not itemized as nearly as practicable is readily seen, since they do not separate the labor from the materials, they do not give the amount of the subcontracts, nor do they separate the amounts expended for excavation, for stone, for brick, for iron, for terra cotta, and for wood, and the labor upon each, as might have been done. From the record it appears that the work was largely divided up and sublet to others, and a detailed statement to that extent was practicable, and might have been readily made. The filing of a statement is the initial, and one of the most important, steps in establishing a mechanic's lien. A substantial compliance with this provision has always been regarded as essential, and an observance of the same is necessary for the protection of owners, purchasers, and other lien creditors. From the record it appears that it was practicable to itemize the claim of Rutledge Bros., and it was absolutely necessary for the protection of others. They have in fact filed no itemized statement, and under the rule which obtains in this state they are not entitled to a lien upon the property. *Martin v. Burns*, 54 Kan. 641, 39 Pac. 177, and cases cited.

The same objection is made against the statement filed by August Nelson & Co. Their work was done under a contract, and was substantially completed before work upon the building was suspended. The materials which they furnished and the work which they did came within the contract price, and there was no necessity for them to separate, and state the different elements which entered into their claim.

Ulrich Bros. entered into a contract with one of the subcontractors to furnish certain stone to be used in the erection of the building, and they have filed a statement, and are attempting to enforce their lien for the unpaid balance due upon the contract. Do the provisions of the law extend to persons so remote as subcontractors of subcontractors, or are they limited to those who furnish material or perform labor under a subcontract with the original contractor? It is urged that under the rule of liberal construction subcontractors in the second or successive degree may be included. As mechanics' liens are purely statutory, their operation and extent must be found within the terms of the statute creating and defining them. As the statutes confer special privileges upon one class of persons over others, it must clearly appear that those claiming the benefits of the statute are within its provisions. The law is entitled to a liberal interpretation in its application to all persons or classes who are within the protection of the statute, but this rule cannot be invoked to confer the special privileges and preferences of the law upon those not definitely included by the statute. From a reference to the statute it will readily appear that the person intended to be described by the term "subcontractor" is the one

who directly contracts with the original contractor. So much of the provision as is pertinent to this question is as follows: "Any person who shall furnish any such material or perform such labor under a sub-contract with the contractor, or as an artisan or day laborer in the employ of such contractor, may obtain a lien upon such land," etc. Civ. Code, § 632. The legislature having expressly limited the lien of a subcontractor to those who contract with the original contractor, we cannot, by arbitrary interpretation, extend it so as to include subcontractors of the second, third, or fourth degree. If it may be extended beyond those who contract with the contractor, it would seem that it might be extended indefinitely to successive subcontractors. This rule would be hazardous to the owner, oppressive to the contractor, and impracticable in its operation. Such an interpretation should not be adopted except where the statute plainly and positively requires it. No such provision is found in our statute, and, however equitably it might operate in some cases, we cannot, by judicial interpretation, ingraft such a feature upon it. *Kirby v. McGarry*, 16 Wis. 70; *Harbeck v. Southwell*, 18 Wis. 418; *Rothgerber v. Dupuy*, 64 Ill. 454; *Smith Bridge Co. v. Louisville, N. A. & St. L. Air-Line Ry. Co.*, 72 Ill. 506; *Schaar v. Ice Co.* (Ill. Sup.) 37 N. E. 54; *Central Trust Co. v. Richmond, N. I. & B. R. Co.*, 54 Fed. 723; *Stone Co. v. Board of Publication*, 91 Tenn. 200, 18 S. W. 406; *Lowenstein v. Reynolds* (Tenn.) 22 S. W. 210; *Monroe v. Hannan*, 3 Lawy. Rep. Ann. 549; *Phil. Mech. Liens*, § 49.

It is contended that the claims of some of the subcontractors must fail because they did not serve a copy of their lien statements upon the owner. That was a requirement of the old law, but the later enactment provides that the service of a notice in writing of the filing of such lien upon the owner of the land is sufficient. Gen. St. 1889, par. 4735. The vesting of the lien is one thing and the manner of its enforcement is another. "The right to a mechanic's lien must be determined by the law in force at the time the right becomes vested, but the lien must be established or preserved and enforced by the law in force at the time the necessary proceedings are had for that purpose." *Groesbeck v. Barger*, 1 Kan. App. 61, 41 Pac. 204. In the cited case, *Garver, J.*, points out clearly that the proceedings for enforcing the lien are mere remedies which may be changed by statute, and are governed by the law in force when the proceedings are had. So, here, the right to the liens is governed by the law of 1872, and relates back to the commencement of the building, while the notices and other steps taken to preserve the liens are governed by the act of 1889.

It is contended that by guarantying the payment of the mortgage debt, and by their knowledge that a loan had been negotiated, *Rutledge Bros.* have waived their right to

claim the lien. In view of the fact that their lien was not properly preserved, this is no longer a matter of consequence to them. The claim is made, however, that it will operate to defeat the liens of the subcontractors. It is doubtful if anything done or known by *Rutledge Bros.* would have estopped them from claiming a lien prior and superior to that of the mortgage, but in no event could it have operated to the prejudice of the subcontractors. Their right rests upon the statute, rather than upon any privity between them and the owner. They are given a direct lien, and the only limit is that they cannot obtain liens in excess of the amount contracted to be paid for the work. The contract of *Rutledge Bros.* did not require them to construct and deliver the building to the owner free from liens, and no subsequent contract or action of the original contractors can affect the rights of the subcontractors. They were bound to take notice of the original contract, and could not secure liens in excess of the sum which the owner agreed to pay; but those who have in good faith furnished labor and material upon the faith of the original contract will not be affected by any subsequent agreement or act of waiver. For the reasons mentioned, the judgment must be modified so far as it awards liens to *Rutledge Bros.* and to *Ulrich Bros.*; but we find no prejudicial error in any other respect. When the judgment is so modified, it will stand affirmed. All the justices concurring.

#### WEST v. BADGER LUMBER CO. et al.

(Supreme Court of Kansas. Jan. 11, 1896.)

EQUITY—RESCISSON OF DEED—RIGHTS OF THIRD PARTIES—MECHANICS' LIENS—ATTORNEY'S FEES.

1. An owner of real estate, who was induced by fraud to convey the title thereto to another under a contract contemplating the construction of buildings thereon, cannot, in an action brought by him to set aside the conveyance and discharge the property from all liens, defeat the claims of persons who, in good faith, and relying on the apparent title of the fraudulent purchaser, have furnished materials and performed labor in the construction of the buildings contemplated, and complied with the statutory requirements in establishing their liens. But personal judgments against the plaintiff for the amounts due such lienholders are erroneous. The property only is liable for their payment.

2. Section 638 of the Code of Civil Procedure, which authorizes the recovery of attorney's fees in an action brought by an artisan or day laborer to foreclose a mechanic's lien, applies only to the trial court, and does not authorize an allowance for attorney's fees in this court.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; J. B. Scroggs, Judge pro tem.

The plaintiff in error brought suit in the court of common pleas of Wyandotte county against John Parker, John C. Snyder, L. D. Robertson, the Commercial Bank of Kansas.

City, Mo., and a number of other persons, and in his petition alleged: That the defendants Snyder and Robertson were partners in the real-estate business in Kansas City, Mo., and were indebted to defendants F. M. Darnall and the Commercial Bank, and that to secure and pay them these parties entered into a conspiracy to defraud plaintiff out of 10 lots in Argentine, Kan. That the defendant Parker was employed as a "straw man," for the stipulated sum of \$25, to contract with the plaintiff for the purchase of the property for \$3,500; \$150 cash on each lot; the purchaser to be permitted to place a first mortgage on each lot for \$600, to be used in paying for the erection of a four-room house on each lot, and the balance of \$200 a lot, with 8 per cent. interest, to be secured by second mortgages, payable in one and two years; the purchaser to give a satisfactory bond in the sum of \$6,000 for the erection and payment of said four-roomed houses. That the plaintiff deeded the property to said Parker in pursuance of this agreement, and Parker executed first mortgages, and second mortgages of \$200 on each lot, and gave the \$6,000 bond with Snyder and Robertson as sureties, but that they were worthless. That in lieu of the cash payment of \$1,500 the plaintiff was given three of said \$600 mortgages as security therefor. That the remaining seven \$600 mortgages were transferred to the defendant the Commercial Bank of Kansas City. That the houses were never paid for, and were never intended to be paid for. That the plaintiff had tendered back to John Parker the three \$600 mortgages and the ten \$200 mortgages, and demanded the reconveyance of the property. And also facts showing that all of these transactions were fraudulent as between the parties named; and further alleged that the other defendants claimed to have mechanics' liens on the property, but in fact had none. The Commercial Bank answered, setting up its seven \$600 mortgages, alleging that it was the bona fide holder thereof as security for a loan of \$4,000, and asking judgment declaring them a first lien on the lots. The Badger Lumber Company and numerous other defendants filed answers setting up mechanics' liens on the property for labor performed and materials furnished under contracts made by Snyder & Robertson. The case was tried with a jury, and answers were returned to numerous special questions submitted by the various parties to the case. These findings sustain the charge of fraud as against the defendants Parker, Snyder, Robertson, and the Commercial Bank. The court thereupon rendered a judgment canceling the deed to Parker and the mortgages executed by him, but rendered judgments in favor of the parties made defendants in error in this court, sustaining their claims to mechanics' liens on the property, and providing for their enforcement. To these judgments the plaintiff excepted, and asks a reversal thereof by this court. Modified.

C. C. Dail and L. F. Bird, for plaintiff in error. N. F. Heltman, Samuel Maher, and John W. Baldwin, for defendants in error.

ALLEN, J. (after stating the facts). The position of the plaintiff in error is that the title of Parker, having been obtained by fraud, was a nullity, and that no lien could attach to the lots based on any contract made by his authority, and that, in any event, the plaintiff was entitled to the purchase price of the property, \$3,500, as a prior claim. The plaintiff, in an action brought by him to cancel the deed to Parker and regain his title to the lots, cannot at the same time maintain the position of a lienholder, claiming a lien for the purchase price of the lots as having been sold and conveyed to Parker. Such claims are utterly incompatible. The plaintiff saw fit to invest Parker with the legal title to the lots. As security against incumbrances by mechanics' liens which might become prior to the \$200 mortgage on each lot he had agreed to take, he saw fit to take a \$6,000 indemnity bond, which he now alleges was worthless. Under this state of facts it would be grossly inequitable to allow him to recover the lots, with the houses on them, which had been constructed with the material and by the labor of the mechanics and material men, freed and cleared of all liens whatever. By his own act he had given Parker the full title to the property, and persons constructing the buildings contemplated by the bargain itself made between him and Parker had a right to rely on Parker's apparent title to the property. No question is presented by the record as to the validity of the liens, save that arising from the fraud, to which there is no pretense whatever that any of the lien claimants were parties.

It appears from the record that personal judgments against the plaintiff were rendered in favor of D. Cummings and J. W. Moad for the amounts of their liens. This was erroneous, and was doubtless an inadvertency on the part of the person who drew the decree. Their judgments should extend no further as against the plaintiff than to the enforcement of liens on the property. It is claimed that parts of the claim of Moad were also allowed to Enright and Baly, thus making double charges against the property. This claim seems to be supported by a recital in the record showing that Enright and Baly claimed under Moad. While Moad was entitled to a lien for the whole amount due him, and while his employees were entitled to liens for the respective amounts due them, the decree should contain a provision that on payment of the sums due Enright and Baly those parts of their claims which are also included in Moad's claim should be credited also on the judgment in favor of Moad.

We find no error in the allowances of attorney's fees as made by the court. Applications are made on behalf of certain mechanics' lien holders for this court to tax attor-



neys' fees in their favor for the services of their attorneys here. We do not think section 638 of the Code of Civil Procedure applies to this court, and this application will be denied. The judgment will be modified as above indicated, and by striking out so much of it as awards personal judgments against the plaintiff in favor of Cummings and Moad. In all other respects it will be affirmed. All the justices concurring.

### GURNEY v. STEFFENS.

(Supreme Court of Kansas. Jan. 11, 1896.)

#### PRACTICE—HEARING ON MOTION.

The order of procedure of the district court is largely within its discretion, which may be exercised, among other things, with a view to economy of its time; and where numerous motions are pending for executions against stockholders of a corporation, and a petition has been filed by them in the same court for the purpose of vacating and setting aside the judgment against the corporation as to them, and, in the absence of the district judge from the county, the probate judge has granted a temporary injunction against the proceeding on such motions, it cannot be held that the district court abused its discretion in making an order that the hearing upon the motions be postponed until such time as further orders should be made in said injunction proceeding.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by David E. Gurney against John Steffens. From an order postponing the hearing of a motion, plaintiff brings error. Affirmed.

Hutchings & Keplinger, for plaintiff in error. McGrew, Watson & Watson, for defendant in error.

MARTIN, C. J. The sole question in this case is whether or not the court erred in granting a postponement of the hearing of a motion. On April 11, 1891, the plaintiff recovered a judgment in said court against the Kansas City Radiator & Iron Foundry Company, a corporation, for \$37,770.77. Execution having been issued and returned unsatisfied, the plaintiff, on June 23, 1891, filed his motion for execution against the defendant, as a stockholder of said corporation. On July 25, 1891, the defendant filed an answer to said motion, alleging, among other things, that said judgment was fraudulent and void; and, upon his application, the hearing was postponed until September 21, 1891, being the first day of September term. On August 10, 1891, the defendant and 13 others filed a petition alleging that they had been proceeded against severally as stockholders by motion, and asking that said judgment be vacated and set aside as to them, and that further proceedings upon said several motions

be enjoined; and, the district judge being absent from the county, application was made to the probate judge for a temporary injunction, which was granted on the giving of an undertaking in the sum of \$1,000, conditioned as required by law. On September 21, 1891, the motion of the plaintiff for leave to issue execution against the defendant came on to be heard; but the defendant objected to further proceedings thereon, and asked a postponement until the dissolution of said temporary injunction; and, after the hearing of the evidence upon said objection, the court ordered that the hearing of said motion be postponed until such time as further orders should be made in said injunction proceedings, to which ruling the plaintiff excepted, and this proceeding in error is prosecuted to reverse said order of the trial court.

It is contended on the part of the plaintiff that this order of postponement was an unwarrantable interference with his right to proceed upon motion as authorized by the statute; that the petition in the injunction case did not state a cause of action; that said injunction order was void; that no service had been obtained upon him; and that all matters between the plaintiff and the defendant could be litigated as well upon said motion as in an independent action. We deem it unnecessary to discuss the merits of these claims further than to say that the order of procedure of the district court is largely within its discretion, which may be exercised, among other things, with a view to economy of its time. Civ. Code, §§ 314, 316; Green v. Bulkley, 23 Kan. 130, 134. Fourteen separate motions were pending for execution against stockholders of this corporation. The action to vacate the judgment, and to restrain further proceedings on the motions, was well adapted to test the rights of all parties at once, and this might save much time. It could not be presumed that the court intended an unreasonable postponement, with a view to embarrass the plaintiff in obtaining his rights. The record does not even show that it was the purpose of the court to continue the motion over the term. It has been often decided that the granting of a continuance or postponement is much within the discretion of the trial court, and, unless it is apparent that such discretion has been abused, this court will not reverse the ruling. Davis v. Wilson, 11 Kan. 74, 81; Bliss v. Carlson, 17 Kan. 325; Harlow v. Warren, 38 Kan. 480, 17 Pac. 159; Westheimer v. Cooper, 40 Kan. 370, 19 Pac. 852; Clouston v. Gray, 48 Kan. 31, 36, 28 Pac. 983. The record does not show an abuse of discretion by the district court, and its judgment must be affirmed. All the justices concurring.

**MUDGE v. HULL, Sheriff, et al.**

(Supreme Court of Kansas. Jan. 11, 1896.)

**MORTGAGES—ACTION TO FORECLOSE—PARTIES—SERVICE ON NONRESIDENT OF COUNTY—INDORSEMENT OF SUMMONS—ORDER CHANGING VENUE—VACATION.**

1. A person who has purchased and acquired title to mortgaged premises and assumed the payment of a portion of the mortgage debt is a proper and necessary party in an action to foreclose the mortgage, and a personal judgment for the liability assumed may be rendered against him therein.

2. Service of summons having been obtained upon his codefendants in the county in which the action was brought, a summons could be properly issued and served upon him in another county; and in such an action no indorsement upon the summons as to the amount for which judgment would be taken in case of a default was required.

3. After allowing an application for a change of venue, the trial court, at the same term, and before the papers or any transcript of them are transmitted, may vacate the order granting the change for the purpose of allowing the case to be tried before a judge pro tem.

4. The averments of the petition attacking the validity of a judgment examined, and held to be insufficient to constitute a cause of action in favor of the plaintiff and against the defendants.

(Syllabus by the Court.)

Error from district court, Douglas county; A. W. Benson, Judge.

Action by M. R. Mudge against S. E. Hull, sheriff, and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

J. J. Mitchell and F. L. Irish, for plaintiff in error. J. D. McFarland and R. O. Helzer, for defendants in error.

**JOHNSTON, J.** This was an action brought by M. R. Mudge against S. E. Hull, as sheriff, and the Kansas National Bank of Topeka, to enjoin the enforcement of a judgment. On May 2, 1889, the bank recovered a personal judgment in the district court of Osage county against Mudge and other parties, and at the same time a decree foreclosing a certain mortgage which had been given to secure the payment of the debt. In his petition Mudge attacked the validity of the judgment upon several grounds, and when the action came on for trial objection was made by the defendants to the introduction of any testimony under the petition, for the reason that it did not state a cause of action in favor of the plaintiff and against the defendants. The motion was sustained, and judgment rendered for the defendants, and of this ruling the plaintiff complains.

The first ground of attack upon the judgment is that the district court of Osage county had no jurisdiction of the subject-matter or of the person of Mudge at the time the judgment was rendered against him. It is contended that Mudge was improperly joined with the other defendants, and that jurisdiction could not be acquired over him by the service of a summons in a county other than

where the action was brought. Mudge had not signed the mortgage, and did not reside in Osage county. He was brought into the case because he had acquired a title to the mortgaged land, and it was alleged that he had assumed a portion of the mortgage debt. The foreclosure action appears to have been properly brought in Osage county, where service was obtained upon codefendants of Mudge. Having been legally instituted in that county, a summons could be properly issued and served upon Mudge in another county. The summons served upon him did not have indorsed thereon the amount for which judgment would be taken against him in case of a default, but instead there was an indorsement that the action was brought "for foreclosure of mortgage." This, however, could not avoid the judgment, as the action was not one for the recovery of money only, and no indorsement was required. *Beverly v. Fairchild*, 47 Kan. 289, 27 Pac. 985. If Mudge had not been properly joined in the case, it would have been only an error, and one which would be waived by a failure to demur or answer. The record shows that he failed to appear in the case or to file any pleading therein. It appears, however, that Mudge was a proper and necessary party. He held the legal title to the mortgaged premises, and it is alleged that he had agreed to pay a portion of the mortgaged indebtedness upon which the action was based. As he was properly brought into the case, he was in court for every purpose connected with the action, and was bound to take notice of every step in the proceedings. *Kimball v. Connor*, 3 Kan. 414; *Curry v. Janicke*, 48 Kan. 168, 29 Pac. 319.

It is claimed that the district court of Osage county lost jurisdiction of the case by granting an application for a change of venue. On account of the disqualification of the judge, one of the defendants made formal application for a change of venue, which was granted. A few days later, at the same term of court, and before the papers or any transcript of them had been transmitted to another county, the defendant who had applied for the change asked leave to withdraw his application for a change of venue, and to have the order granting such change set aside. The plaintiff and the defendants afterwards in the case consented to such order being made, and the court then vacated and set aside its former order, and allowed the application to be withdrawn. On the same day, all of the parties except those in default appearing, a pro tem. judge was elected upon the order of the regular judge, who, after being duly qualified, proceeded to hear the case and to enter judgment. As the case was never in fact transferred, nor any of the papers nor a transcript of the proceedings ever sent to another county, we think that during the term it was within the power of the court to vacate its former order. "It

must be remembered that a trial court, for the purpose of administering justice, has a very wide and extended discretion in setting aside or modifying proceedings had in its own court, if it does so at the same term at which such proceedings were had." *Hemme v. School Dist.*, 30 Kan. 377, 1 Pac. 104; *State v. Hughes*, 35 Kan. 628, 12 Pac. 23; *State v. Sowders*, 42 Kan. 312, 22 Pac. 425; *In re Black*, 52 Kan. 64, 34 Pac. 414; 1 Black, Judgm. § 305. Under the rule of these cases the trial court has complete control over its orders and judgments during the term at which they are rendered, and if they have not been executed they may, during such term, be vacated or modified, as the court may deem best. The district court of Osage county did not entirely lose jurisdiction of the case until the papers were transmitted, and the change of venue perfected. We think it was within the power of the court at the same term, and before the papers were transmitted, to vacate its order, and allow the defendant to withdraw his application. Mudge was not present when the order was first allowed, nor does it appear that he had any knowledge of the same until after it was vacated. There is no ground, therefore, to claim that he was misled by the action taken; and of the power of the court to vacate the order we have no doubt. *Servatius v. Pickle*, 30 Wis. 507; *People v. Zane*, 105 Ill. 662; *Seth v. Chamberlaine*, 41 Md. 186; *Atlantic & G. C. C. Coal Co. v. Maryland Coal Co.*, 64 Md. 302, 1 Atl. 878; *Sanford v. Sanford*, 28 Conn. 6; *State v. Webb*, 74 Mo. 333; *Colvin v. Six*, 79 Mo. 200; *Leise v. Mitchell*, 53 Mo. App. 563. Under the facts disclosed by the record a pro tem. judge was properly elected, and the allegations of the petition were abundantly sufficient to sustain the jurisdiction and the judgment.

Much is said in the written argument as to the facts in the case, and it is insisted that the debt which formed the basis of the judgment was not due when the action was brought, nor even at the time the judgment was rendered against Mudge. These are matters which might have been made the subject of review, but cannot destroy the judgment, nor sustain this attack upon the same. There was jurisdiction in the court, as the averments of the petition showed an existing liability which had accrued at the time the action was begun and judgment taken. The judgment of the district court will be affirmed. All the justices concurring.

#### TAGGART v. BUNDICK.

(Supreme Court of Kansas. Jan. 11, 1896.)

PARTNERSHIP—ACCOUNTING—EVIDENCE—BRIEFS.

1. In an action for an accounting between partners, where there was no showing as to the amount of sales, or as to prices obtained for goods sold, evidence of the amount of yearly

purchases was not admissible to show whether there was a gain or a loss in the business.

2. Charges incorporated in a brief, that counsel for the adverse party was guilty of tampering with the record, will be expunged.

Error from district court, Butler county; O. A. Leland, Judge.

Action by P. W. Bundick against J. B. Taggart for an accounting. There was a judgment rendered, and defendant brings error. Modified and affirmed.

F. L. Jones and Redden & Schumacher, for plaintiff in error. Shinn & Knowles, for defendant in error.

PER CURIAM. This was an action between partners for an accounting. No accurate accounts of the dealings between the partners appear to have been kept, and the evidence, it is conceded by the plaintiff in error, is very conflicting. It is claimed that the court committed material error in excluding the bill books of bills bought and paid for prior to January 1, 1886. Counsel for plaintiff in error has made very elaborate figures in his brief, in which he incorporates footings of the amounts of goods purchased in each year. We find, however, that he really accomplishes nothing whatever by the use of these amounts. The items showing the amounts of the yearly general invoices and the liabilities are the only ones which really have any effect, under his computations, in determining the question whether there was a gain or loss in the business. Evidence of the amount of the purchases where there was no showing as to the amount of sales, or as to the prices obtained, or of other elements necessarily involved in the question whether the business was conducted at a profit or loss, could not possibly aid in determining the questions in the case, and the court committed no error in striking out the bill books.

The admission of the testimony of the witnesses Yeager and Shinn is also assigned as error. These were not confidential communications between attorney and client, for the witnesses were never employed by the defendant, nor did they testify to any propositions of settlement. They narrated statements and admissions made by the defendant as to matters of fact, wholly disconnected from any offer of compromise, and we find nothing objectionable in the testimony. Although the brief on behalf of the plaintiff in error is very long, and contains evidence of very great earnestness and diligence on the part of counsel, it yet is mainly devoted to proving that the defendant's testimony was right and the plaintiff's wrong. Of course, we cannot weigh testimony, but must accept as true that which upholds the judgment of the court.

A motion is made to strike out those portions of the brief of the defendant in error which contain charges against F. L. Jones, one of the counsel for the plaintiff in error.

The practice of making such charges in the brief is altogether reprehensible, and ought never to be indulged in. If counsel have been, in fact, guilty of tampering with the record, as charged in the brief, direct charges in the proper court can be made, and proper action taken. The objectionable portion will be expunged from the brief.

It is conceded on all hands that it was not intended to give the defendant in error one-half of the invoiced accounts, but only one-half of those accounts which were of such doubtful value that they were not invoiced. The judgment of the court below will be modified accordingly; otherwise it will be affirmed. The costs in this court will be charged against the plaintiff in error.

### UNION PAC. RY. CO. v. MITCHELL.

(Supreme Court of Kansas. Jan. 11, 1896.)

**CARRIERS—EJECTION OF TRESPASSER—GROSS NEGLIGENCE—ACTION FOR INJURIES—REMIS-  
SION OF DAMAGES—NEW TRIAL.**

1. Care must be taken, in removing a trespasser from a moving railway train, not to expose him to serious injury, and whether such train is running too fast, under the circumstances, to admit of the exercise of the right of ejection, is a question of fact, to be submitted to the jury under proper instructions.

2. In a suit brought by a trespasser to recover damages for personal injuries sustained by being pulled from a moving train, the court instructed the jury that if the defendant was guilty of willful, wanton, malicious, or reckless conduct in removing the plaintiff, and that he sustained the injuries complained of in consequence thereof, a recovery might be had against the defendant, and the court defined the meaning of reckless conduct as "an indifference to the rights of others; an indifference whether wrong is done or not," and again stated that the defendant could be held liable only "for injuries inflicted which were willful, wanton, or malicious, or which were so grossly negligent as to amount to wantonness." *Held*, there was no material error in the instruction.

3. In personal injury and other damage cases, where the plaintiff obtains a verdict, and there is nothing tending to show passion or prejudice of the jury, but the amount is larger than the trial court thinks properly allowable, the plaintiff may be required to elect to take judgment for a reduced sum, suggested by the court, or accept a new trial.

(Syllabus by the Court.)

Error from district court, Douglas county; A. W. Benson, Judge.

Action by Eddie Mitchell by John C. Mitchell, as his next friend, against the Union Pacific Railway Company, to recover damages for ejection from a train. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The following facts are either undisputed or found by the jury: The plaintiff below was a boy 14 years old. He had started from Olathe to go to Colorado Springs, where his father was. He had made his way over other railroads to Junction City, from which point he had gone over the defendant's railroad as far as Wallace, which place he reached, July 26, 1890, on the first section of

freight train No. 211, in company with some other boys, who were beating their way west as he was doing. He got off the train at Wallace, and prepared to board the second section, which pulled into Wallace about as the first section pulled out. Several tramps had attempted to board the first section, and they tried to get upon the second section as soon as it started up. Among those who were waiting to board the second section were young Mitchell and his companions. They knew they were not permitted to steal a ride upon the train, and that efforts would be made to prevent them from doing so. They did not attempt to get upon the train while it was standing still, but waited until it had started. Plaintiff below and his companions went upon the south side of the track, which was the side opposite the depot and buildings at Wallace, and after the train started he attempted to board a box car, but failed. He allowed two or three cars to pass him, and then jumped upon a coal car having high sideboards. The train was going about as fast as he could run. He caught hold of the ladder with his right hand. His left hand held to an iron socket attached to the side of the car. His right foot was in the stirrup, and his left upon an axle box. As he got upon the car he saw a boy, or young man, Roy Wilson (a stranger to him), standing alongside the track, about 25 feet ahead of him, and also saw the conductor and head brakeman upon a box car ahead, and heard the conductor halloo to Roy Wilson to jerk him off or pull him off. Wilson then took hold of him and attempted to pull him off the train. Mitchell succeeded in holding on until he had got a few feet beyond Wilson, and then fell off, his hold having been loosened by the encounter. As he came to the ground his right arm fell under the wheels and was cut off. The train did not slow up after he got upon it, but continued on its way, the trainmen not knowing that he was injured. The arm was necessarily amputated at the junction of the middle and upper third of the humerus. Roy Wilson was not an employé of the railway company, but was learning telegraphy in its office by the favor of the station agent at Wallace.

The essential instructions given by the court below, after a succinct statement of the issues, were as follows:

"Upon these issues, the burden of proof is upon the plaintiff; and before he can recover he must prove, by a preponderance of the evidence, by which is meant the greater weight of proof, (1) that the defendant's line of railway extended into and was operated in the counties of Wallace and Douglas, in this state, at the time complained of; (2) that the plaintiff, while attempting to ride upon defendant's train, at Wallace, at the time charged, was pulled therefrom by said Roy Wilson, and injured in the manner substantially as alleged in the petition; (3) that said

Roy Wilson was either an employé of said railway company, or was acting under the order or direction of the conductor or brakeman upon said train, in trying to eject the plaintiff therefrom; (4) that in removing or attempting to remove said plaintiff from the train the conductor or brakeman of the defendant, or said Roy Wilson, so acting by their direction or authority, was guilty of willful, wanton, malicious, or reckless conduct, and that he sustained the injuries complained of in consequence of such willful, wanton, malicious, or reckless conduct. Eddie Mitchell, being a trespasser upon the grounds and train of the defendant, had no right on said train, and the defendant, by and through its agents, servants, and employes, had a right to remove him therefrom. They were not bound to consult his convenience in the matter, and can only be held liable in the matter for injuries inflicted which were willful, wanton, or malicious, or which were so grossly negligent as to amount to wantonness. If, however, in ejecting him, they did so in a reckless, willful, wanton, or malicious manner, whereby he was injured, he may recover. In determining whether willful, wanton, or malicious injuries were inflicted, you are to consider all the circumstances of time and place, the speed of the train, and the entire situation. 'Wanton,' as here used, is reckless sport. 'Willful,' unrestrained action, running immoderately to excess. By 'recklessly' is meant an indifference to the rights of others; an indifference whether wrong is done or not. I charge you that it is within the general authority of the conductor or a brakeman of a railway train to keep trespassers off of their trains, and to put them off after they have gotten on; and if they recklessly, or in a willful, wanton, or malicious manner, eject a trespasser, so that he is likely to suffer great bodily harm, the railroad company becomes liable for the damages. Nor is it necessary, in order to render the company liable, that the conductor or brakeman should actually lay hands on the trespasser, and if the trespasser is so ejected by a third person, at their instance, all are equally guilty of an assault, and the railroad company is liable. I charge you that if you find, from the evidence in this case, that Eddie Mitchell, on or about the 26th day of July, 1890, at the city of Wallace, in Wallace county, Kan., climbed upon a car of one of the defendant's west-bound freight trains, with the intention of stealing a ride, and that while attempting to get thereon, or while clinging thereto, the conductor or a brakeman of said train called to one Roy Wilson, while said train was in motion, to 'keep him off,' to 'jerk him off,' or 'pull him off,' and that said Roy Wilson, in obedience to said call or command, caught hold of said Eddie Mitchell, and, while said train was in motion, pulled and dragged the said Eddie Mitchell, and caused him to lose his hand hold and footing, and to fall under

the wheels of said running train, whereby his right arm was cut off; and if you further believe that under all the circumstances of this case, the brakeman, conductor, and Roy Wilson did not exercise proper care and prudence in the exercise of the right to remove Eddie Mitchell from the train, but without having regard to time, place, or surrounding danger, recklessly, in a willful, wanton, or malicious manner ejected him, in a manner liable to do him great bodily harm, you will find for the plaintiff. If you find for the plaintiff, your next inquiry will be as to damages. Here no certain rule can be given. You should consider his age, health, and physical condition before the injury, the inconvenience and incapacity to labor resulting therefrom, the physical pain and suffering, if any, and award such sum as in your sound judgment is just and reasonable for the injury suffered."

A. L. Williams, N. H. Loomis, and R. W. Blair, for plaintiff in error. S. T. Seaton, J. W. Parker, and Byron Sherry, for defendant in error.

MARTIN, C. J. (after stating the facts).  
1. The railway company contends that the evidence is not sufficient upon which to base a judgment against it. Some of the facts were contested. The conductor and the head brakeman testified that they gave no order to Roy Wilson or any one else to jerk off or pull off young Mitchell from the train, but the jury found, upon evidence which we must hold sufficient, that such order was given by the conductor. We must therefore accept the finding of the jury touching this important fact in the case. Our attention is called to *Railway Co. v. Gants*, 38 Kan. 608, 625, 17 Pac. 54, where this court, treating of the ejection of a trespasser from a passenger train, said: "By resisting to the utmost of his power and ability, Gants invited force, and he ought not to complain of the force used, if there was no intention upon the part of the conductor or his assistants to commit unnecessary injury." But in that case the principle was expressly recognized that care must be taken not to expose the person of the trespasser to serious injury or danger; and it was a question of fact, to be determined by the jury in this case, whether or not the pulling or jerking of the boy from the train by order of the conductor while it was running at the rate of speed shown by the evidence, which was 9 or 10 miles an hour, was such an act as to expose the boy to serious injury or danger. We do not deny the right of those in control of railway trains to eject a trespasser therefrom, even when moving; but when the speed is so great that removal from the train is necessarily attended with great danger of serious injury to the person of the trespasser, such right does not exist, and whether the circumstances are such as to justify the ejection of

a trespasser from a moving train is a question of fact that must be submitted to the jury under proper instructions of the court. *Railroad Co. v. Kelly*, 36 Kan. 655, 657, 658, 14 Pac. 172.

2. The plaintiff in error complains of the instructions given by the court, and says that under them a recovery might be had for mere negligence in removing young Mitchell from the train; the term "reckless conduct" meaning nothing more, and being coupled disjunctively with the words "willful," "wanton," and "malicious." It is contended that a trespasser in such case has no remedy, unless the act of the defendant resulting in the injury was either willful, wanton, or malicious, and the cases of *Railway Co. v. Adams*, 33 Kan. 427, 429, 6 Pac. 529, *Railway Co. v. Gants*, supra, and *Tennis v. Railway Co.*, 45 Kan. 503, 507, 25 Pac. 876, are cited in support of this position; but they are not inconsistent with *Railway Co. v. Whipple*, 39 Kan. 531, 540, 18 Pac. 730, where it was said that "the fact that one has carelessly put himself in a place of danger is never an excuse for another recklessly or wantonly injuring him," and the definitions of recklessness and wantonness given by the court below were taken from the opinion in that case, where it is further stated that, "in popular use, and by our decisions, recklessness and wantonness are stronger terms than mere ordinary negligence, and therefore, if a person recklessly or wantonly injures another, such person may be subject to damages, even if the other party has been guilty of some negligence or is a trespasser." As the court carefully used and fairly defined the term "reckless conduct," and "recklessly," in connection with the facts in the case, the plaintiff in error has no substantial ground of complaint in this regard.

3. The jury returned a verdict in favor of the plaintiff below for \$9,000. On the hearing of a motion for a new trial, the court permitted the plaintiff to reduce the damages in the sum of \$2,500, and stated that, on failure to do so, a new trial would be ordered, and, the reduction being accepted, judgment was rendered for the sum of \$6,500. The railway company contends that the court had no right to make this order, but should have awarded a new trial by reason of the allowance of excessive damages, given under the influence of passion and prejudice. The court filed a written opinion on the decision of the motion, and in this there is no suggestion of passion or prejudice on the part of the jury. But the court, after reviewing the decisions of this court in personal injury cases, held that \$6,500 was a reasonable sum, and that all above that amount was excessive. In *Railway Co. v. Dwyer*, 36 Kan. 58, 74, 12 Pac. 352, it was held that this court had the right in such cases to suggest the reduction of damages to a reasonable sum, and to permit the plaintiff to elect to take judgment for the reduced

amount, or compel him to accept a new trial, and, this being permissible, we are aware of no reason for the denial of the exercise of like power by the trial court, which is often better able than the appellate court to act intelligently in the premises; and the right of the trial court to compel a remission of part of the verdict in damage cases was upheld in *Broquet v. Tripp*, 36 Kan. 701, 704, 14 Pac. 227. There is no conflict between these cases and *Railroad Co. v. Montgomery*, 46 Kan. 120, 26 Pac. 403, which was an award of damages in a condemnation proceeding, depending upon estimates given by witnesses respecting values, forming a basis for the verdict, and it was evident from the record that the jury had gone to the extreme limit of the highest estimates on each item, and the court compelled a large gross reduction, not explainable from the record on any other hypothesis than that the verdict was unfair and indicative of passion and prejudice of the jury; and wherever this is apparent, a new trial must be granted. But in personal injury cases, as stated by the court below, no certain rule of damages can be given, and the jury was properly instructed that, in the event of a verdict in favor of the plaintiff, they should award such sum as in their sound judgment was just and reasonable for the injury suffered. The mere fact that the trial court, on a review of our Kansas decisions, came to the conclusion that the award was larger than had been generally sustained by the precedents in this state, was no evidence that he considered that the jury was actuated by passion or prejudice in fixing the amount. The case seems to have been fairly tried by the court and jury, and the judgment must be affirmed. All the justices concurring.

#### CHICAGO, R. I. & P. RY. CO. v. WILLIAMS.

(Supreme Court of Kansas. Jan. 11, 1896.)

**RAILROAD COMPANIES—CROSSING ACCIDENTS—DUTY OF TRAVELER—OBSTRUCTION OF VIEW.**

1. Where the view of a traveler on a highway approaching a railroad crossing is so obstructed that he cannot see an approaching train until within a few feet of the track, greater care should be exercised by him than if no such obstruction existed; and in such a case he should make a vigilant use of his senses to determine whether there is a present danger in crossing; and the question of whether he should also stop before attempting to cross is a matter for the determination of the jury. An instruction, under those circumstances, that he is not bound to stop when he approaches a railroad, is error.

2. A railroad company should not allow any unnecessary obstructions upon its right of way near a public crossing which would obstruct the view of an approaching traveler nor of those in charge of an approaching train. In the conduct of the business of the company, however, it is necessary to place buildings and other structures and things upon the right of way, and therefore the trial court cannot arbitrarily instruct the jury that it is the duty of the company to keep its right of way at the public cross-

ing open and free from any obstruction which would obscure the vision of a traveler, and prevent him from seeing an approaching train. Whether or not a duty rests upon the railroad company to keep its right of way free from such an obstruction is a question for the determination of the jury.

(Syllabus by the Court.)

Error from district court, Doniphan county; J. F. Thompson, Judge.

Action by Hester A. Williams, administratrix of John S. Williams, deceased, against the Chicago, Rock Island & Pacific Railway Company to recover for death by wrongful act. There was a judgment for plaintiff, and defendant brings error. Reversed.

M. A. Low and W. F. Evans, for plaintiff in error. F. W. Raymond and Grant W. Herrington, for defendant in error.

JOHNSTON, J. As John S. Williams was driving along a highway and over a public crossing of the railway, he was struck by an engine of an approaching freight train of the plaintiff in error, and killed. At the point of collision the railway extended east and west and across the public highway on which the deceased was traveling, at right angles. At the time of the collision a hedge fence extended from some distance north of the railway along the west side of the highway and within from 15 to 26 feet of the railway track. West of this hedge was a large, dense orchard, covering several acres, which extended down to and upon the right of way of the railway. The hedge was thick with foliage, and 10 feet high, and this, with the orchard, rendered it difficult for a person driving on the highway to see a train approaching from the west until he had passed the point to which the hedge and orchard extended. At the time of the accident Williams was driving in a wagon, and driving south on the highway, while the train with which he collided was coming from the west; and it appears that he was not seen by those in charge of the engine until they were within from 100 to 150 feet of the crossing. This action was brought by the administratrix of the estate of the deceased to recover damages alleged to have resulted from his death, and the jury awarded a verdict for the plaintiff below for \$4,000.

The principal questions presented for our consideration arise upon the rulings of the court in charging the jury. In one of the instructions the jury was told that "the traveler on the highway is not bound to stop when he approaches a railroad, but is bound to use his senses of sight and hearing, and must exercise that degree of diligence in ascertaining the approach of the engine that a man of ordinary prudence would have exercised under like circumstances." This ruling cannot be sustained. In effect, the jury were told that, dangerous as the crossing was, the deceased was not required to stop before attempting to cross. It appears that the view of the traveler was greatly obstructed

at the crossing in question, and that it was an especially dangerous one to a person approaching from the north; and it further appears that the deceased was familiar with the conditions surrounding this crossing. How, then, can the court say as a matter of law that the traveler was not required to stop? The degree of care to be used by a traveler approaching a crossing depends upon its location and surroundings. If, by reason of obstructions or other causes, it is difficult to see or hear the approach of a train, greater care should be exercised than if no such difficulties existed. It was ruled in *Railway Co. v. Hague*, 54 Kan. 284, 88 Pac. 257, that: "Ordinarily, it is not the duty of a traveler, on approaching a railroad track, to stop; but there are cases where, by reason of obstructions or noises in the vicinity, he would be required not only to look and listen, but to stop and listen, before crossing the track. Whether the surroundings of the crossing and the existing circumstances and conditions are such as to require him to stop is, ordinarily, a matter for the determination of the jury." The supreme court of Wisconsin announced the rule as follows: "If the view of a traveler on the highway approaching a railroad crossing is so obstructed that he cannot see an approaching train in time to stop his team before colliding with it, if he knows a train is due at such crossing at or about such time, and if he is unable to hear the approaching train when his team is in motion, whether by reason of the force or direction of the wind or of noises in the vicinity, whether made by his own wagon or by other causes, ordinary care requires him to stop his team while he may do so, and listen for the train." See *Seefeld v. Railway Co.*, 70 Wis. 216, 35 N. W. 278. In *Patterson on Railway Accident Law* (section 177) the rule as to the degree of care which a traveler should use at a crossing is stated as follows: "Where the view of the line from the highway is obstructed, or the crossing is in other respects specially dangerous, it is the duty of the traveler to exercise a higher degree of care; and if he cannot, by looking and listening, satisfy himself that it is prudent to cross the line, he must stop, or he must adopt such other precautions as ought to be taken under the particular circumstances of the case." See, also, *Railway Co. v. Stommel* (Ind. Sup.) 25 N. E. 863; *Railroad Co. v. Crisman* (Colo. Sup.) 34 Pac. 286. In view of the conditions surrounding this crossing, it was error for the court to declare as a matter of law that the traveler was not required to stop. Under the circumstances of the case it was a proper matter for the consideration of the jury.

The court also trenched upon the province of the jury in declaring that it was the duty of the railway company to keep its right of way at the crossing in question free from obstructions, and open to the vision of travelers on a public, traveled road. The duties

of the company and the traveler at a public crossing are to some extent reciprocal. Both must take such precautions to avoid accidents as the circumstances of the case require. The railroad company should not allow any unnecessary obstructions upon its right of way near a public crossing which would obstruct the view of an approaching traveler, nor of those in charge of the approaching engine and train. If it unnecessarily and negligently permits brush, trees, or other obstructions to grow or stand upon its right of way near a public crossing, it must be held responsible for injuries resulting to others from such negligence, providing such others are free from fault. In the conduct of the business of the company, however, it is necessary to place buildings and other structures and things upon the right of way, and therefore it cannot be arbitrarily said by the trial court that it is the duty of the company to keep its right of way at the crossing in question open and free from any obstruction which would obscure the vision of a traveler, and prevent him from seeing an approaching train. Whether it is necessary or negligent to place an obstruction upon the right of way is another matter to be left with the jury. For these reasons the judgment cannot be allowed to stand. It is insisted by the company that it is entitled to judgment upon the findings and evidence, but a reading of the same satisfies us that we would not be warranted in directing a judgment in its favor. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

**McDERMOTT v. ATCHISON, T. & S. F. R. CO.**

(Supreme Court of Kansas. Jan. 11, 1896.)

**TRIAL—SPECIAL AND GENERAL VERDICT—ASSUMPTION OF RISK.**

1. In an action against a railroad company to recover damages on account of the death of a brakeman killed while making a flying switch, where the only negligence charged is that the engineer ran at an unnecessary, unusual, and dangerous rate of speed, and the jury find specially that the engineer at the time of the accident was under the control of the deceased as to slacking up and going ahead, and that he obeyed the signals given him by the brakeman, *held*, that such special findings conflict with and overturn a general verdict in favor of the plaintiff.

2. A person who solicits and obtains employment in a particular line of duty, even though he makes known the fact that he is wholly inexperienced in that particular occupation, yet holds himself out as competent to perform the duties he undertakes, and cannot charge his employer with the consequences of his own want of knowledge respecting the duties of his employment.

(Syllabus by the Court.)

Error from district court, Lyon county; C. B. Graves, Judge.

The plaintiff in error brought this action as the widow of Charles McDermott, de-

ceased, alleging that he was employed as a brakeman by the defendant company, and that he was killed on the 22d of July, 1890, through the negligence of the defendant's servants. It is alleged that the deceased had been employed as brakeman for about two weeks, and that prior to that time he had had no experience as a brakeman, and knew nothing about the dangers incident to such employment, and especially the dangers connected with making a flying or drop switch. It is alleged that on said day the deceased, acting as head brakeman, was required to go between the engine and a freight car and uncouple the same in order to make such switch; that in making the same the engine and car passed over a crossing of the Chicago, Kansas & Nebraska Railroad, thereby rendering his duty extrahazardous; that he was ignorant of the dangers connected with his duty; and the particular negligence relied on and charged against the company is that the engineer, without notice to McDermott, ran with great, unusual, unnecessary, and dangerous speed over the crossing of said Chicago, Kansas & Nebraska Railroad for the purpose of making the switch. McDermott was jostled, as the car went over the crossing, from his position on the car, fell in front of it, was run over and killed. The jury trying the case brought in a general verdict in favor of the plaintiff for \$5,000, and also answered special questions submitted by both parties. From the answers to questions submitted by the plaintiff it appears that the only railroad experience McDermott ever had was three days in June and ten days in July; that the car on which he was standing when it struck the Rock Island (i. e. Chicago, Kansas & Nebraska) crossing was going at the rate of 12 to 15 miles per hour; that the officer who employed McDermott was informed that he had had no railroad experience; that it was McDermott's duty as front brakeman to make the flying switch ordered by the conductor; that the speed at which the car he was on went across the Rock Island track was greater than was necessary in order to make the drop switch; that he was jostled off the brake beam, where he was standing, and thus killed, by reason of the fact that the car was going at a high and unnecessary rate of speed; that the engineer controlled the rate of speed; that neither the officers who employed McDermott, nor any of their agents, ever informed him of the dangers incident to making such a switch. From the answers to questions submitted by the defendant, it appears that McDermott voluntarily, on his own application, was employed by the defendant as a brakeman on the 26th of June, 1890; that the accident which caused his death occurred in the daytime; that he understood and knew the duties of a freight brakeman; that he had passed over the Rock Island crossing twice on the day of the accident, and knew where the crossing



was; that he knew what his duties would be in making a flying switch; that the conductor had no knowledge of his inexperience; that McDermott did not fully understand the danger attendant on making a flying switch; that when the train dropped back below the Rock Island crossing from 250 to 300 feet, he cut off the car next to the engine from the balance of the train, and then took his position between the car and the engine for the purpose of pulling the pin at the proper time; that prior to pulling the pin he signaled to the engineer with his hand to slacken the speed of the engine, to enable him to pull it, and that the engineer did slacken the movement of the engine in obedience to the signal; that McDermott, after pulling the pin, gave the signal to the engineer to pull ahead, away from the car, and that he obeyed the signal; that McDermott then attempted to swing himself around to the ladder on the side of the car in order to get on top of it; that at the time he pulled the pin he did not know, or have a reasonable opportunity to know, the rate of speed at which the car and engine were moving; that prior to the accident he did not attempt to lessen the speed of the engine except to slacken it for the purpose of enabling him to pull the pin, and that the jolting of the car he was riding on as it went over the crossing caused him to fall. The twenty-eighth question and answer are as follows: "Q. Is it not a fact that at the time of the accident the engineer was under the control of McDermott as to slacking up and going ahead while the flying switch was attempted to be made, and immediately prior to McDermott's injury? A. Yes." A motion was made by the defendant for judgment in its favor on the special findings of fact, notwithstanding the general verdict. This motion was sustained, and judgment entered accordingly. The plaintiff brings the case here for review. Affirmed.

J. Jay Buck and E. W. Cunningham, for plaintiff in error. A. A. Hurd and O. N. Sterry, for defendant in error.

ALLEN, J. (after stating the facts). The only negligence relied on by the plaintiff for a recovery is that of the engineer in running at an unusual, unnecessary, and dangerous rate of speed. It is not claimed that the conductor was negligent in attempting to make a flying switch at a place where it was necessary to cross another railroad. Much stress is put on the fact of McDermott's inexperience and want of knowledge of the dangers attending the performance of the particular duty devolving on him in making a flying switch, and on the fact that the officer who employed him knew his want of experience. It certainly cannot be held that the company is guilty of greater negligence in employing an inexperienced brakeman than he is in soliciting and accepting such

employment. Experience in any line of business cannot possibly be gained in any other way than through actual employment in it. By entering the employment of the company as a brakeman, McDermott held himself out as competent to perform his duties as such. Although the jury have found that the rate of speed at which the engine and car were driven was greater than was necessary, and that this caused his death, they also find the rate to have been 12 to 15 miles per hour. While this rate does not impress us as remarkably high, or indicative of carelessness on the part of the engineer, we cannot declare as a matter of law that it conflicts with the finding that it was unusual and unnecessary. The serious obstacle in the way of sustaining the general verdict is the twenty-eighth finding, from which it appears that the movements of the engineer were under McDermott's own control. This being so, it is exceedingly difficult to understand how he can be exonerated from negligence while charging it on the engineer. If the engineer was bound to follow his directions, and did follow them, as the findings seem to indicate, the unnecessary speed was chargeable to McDermott rather than the engineer, and his widow, claiming through him, cannot recover on the ground of negligence on the part of the engineer. This view seems controlling to my brethren, and while the writer entertains great doubt whether the twenty-eighth finding ought to be construed as meaning more than that it was the duty of McDermott to signal the engineer to slack up at the proper time for him to pull the pin and pull ahead after it was pulled, and of the engineer to obey these signals, he yet is not clear that its meaning is misapprehended by the other members of the court. The judgment is therefore affirmed. All the justices concurring.

ROUSE v. LEDBETTER.

(Supreme Court of Kansas. Jan. 11, 1896.)

INJURIES TO RAILROAD EMPLOYE—PLEADING—CONTRIBUTORY NEGLIGENCE.

1. In an action brought by a yard switchman against the receivers of a railway company to recover damages for personal injuries sustained in their service while attempting to make a coupling, by reason of slipping on an incline, negligently constructed and maintained by the receivers, adjoining a new track, as part of a street sidewalk in a city, it was unnecessary for the plaintiff to allege the violation of any ordinance in the construction and maintenance of such incline.

2. That a yard switchman has failed to notice a small incline, forming a connection between an outside track and a sidewalk, and which he might have often seen if his attention had been directed to it, is not conclusive evidence of contributory negligence on his part, or a waiver of negligence of the master, in an action brought by the yard switchman against the master to recover damages for personal injuries sustained by reason of slipping on such incline, the same being covered with snow.

(Syllabus by the Court.)

Error from district court, Labette county; J. D. McCue, Judge.

At May term, 1891, the defendant in error recovered a judgment against the receivers of the Missouri, Kansas & Texas Railway Company for \$4,500 on account of personal injuries sustained in the yards at Parsons on January 8, 1891, resulting in the loss of his left hand, which was amputated above the wrist joint. He was on that day engaged as a helper, following a switch engine at work at and near Johnson avenue. While attempting to make a coupling between a standing box car on the north side of said avenue and a moving one which he had been riding, and from which he alighted at or near the sidewalk, he slipped on an incline forming the connection between the east rail and the end of the sidewalk, and in struggling to avoid being run over by the moving car he threw up his left hand, which was caught between the drawheads of the standing and the moving car. The surface of the ground, the sidewalk, and the incline were covered by a recent fall of snow, which was melting, and this made the incline slippery. The only negligence charged against the receivers is that this incline, as constructed and maintained by them, was dangerous to the yardmen in making couplings or doing other work upon the ground at that point, and that the plaintiff below was unaware of its existence at and before the time of sustaining said injury. Johnson avenue, at that point, crossed a tract known as the "Railroad Reserve," owned by the company, and several tracks crossed the avenue. In 1887, while the Missouri, Kansas & Texas Railway was being operated under a lease by the Missouri Pacific Railway Company, the latter company was by ordinance required to construct a wood sidewalk of the third class along the north side of Johnson avenue across the railroad reserve, the ordinance containing no direction as to the grade of the sidewalk, nor how it should be constructed, except as above stated. The sidewalk was put down, and it remained there until the summer of 1890, when the receivers put in a side track principally for the accommodation of a new elevator owned by Steele & Busby. In order to do this, the receivers took up part of the sidewalk and laid the new track upon a somewhat lower level. This side track did not cross the sidewalk at right angles, but the old sidewalk was so cut off at a distance from the east rail about 30 inches on the north side and 18 inches on the south side of the sidewalk. The top of the rail was about 6 inches lower than the top of the sidewalk, and boards were placed across the end of the sidewalk and alongside of the rail, the top of the plank being an inch or two lower than the top of the rail. This connection between the end of the walk and the east rail is the incline upon which Ledbetter slipped and fell. It does not appear

that the receivers made any application to the mayor and council for leave to take up this sidewalk, and there is some conflict in the testimony as to whether or not the work was done under the direction and to the approval of the street commissioner; but the jury found that it was not, and the evidence shows that the work was done and the incline put in by the servants of the receivers, and it does not show that any grade had ever been established by the city. Some other facts appear in the opinion. Affirmed.

T. N. Sedgwick, for plaintiff in error. W. D. Atkinson, for defendant in error.

MARTIN, C. J. 1. It is alleged in the petition, among other things, in substance, that the sidewalk on the north side of Johnson avenue was constructed and maintained as required by an ordinance of the city, and it is contended by the plaintiff in error that the manner of making the connection from the level of the sidewalk to the level of the new track is presumed to have been conformable to the requirements of the city ordinance, and there is no allegation that the receivers had in any manner ignored any such ordinance, and therefore the petition was insufficient to state a cause of action. It was alleged, however, that the defendants below "wrongfully and negligently made an abrupt connection between the said two levels by inclining boards at an angle of about 80 degrees \* \* \* from the level of said sidewalk to the upper surface of the east rail of said newly-constructed track," and no presumption obtains that the city had established any grade, nor that it exercised any supervision over the construction of the new side track, nor in making the connection between it and the end of the old sidewalk. It was unnecessary for the plaintiff below to allege the violation of any city ordinance in adjusting the connection between the new side track and the old sidewalk.

2. It appears that Ledbetter had been working in the yards about a year, but nearly all the time in the west yards and remote from Johnson avenue. Yet he worked in the east yards for 8 or 10 days next prior to his injury, though most of the time he was doing field work, and not following the engine. It was in evidence, however, that he had crossed Johnson avenue many times during those days, either upon the footboard of the engine, on cars, or afoot; but he testified, and the jury found, that he never noticed this incline connecting the Steele & Busby switch with the end of the old sidewalk. He further testified that he had never made any coupling or performed any work at that particular place. The plaintiff in error contends, however, that he was bound to take notice of it and cannot be heard to say that he did not, and that the

case comes within *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582, and others of like import. In the *Rush* case, however, the yardman got his foot caught between a main rail and the guard rail, and was run over and killed, and the negligence charged against the company was in failing to block between the rails, but there were about 20 such places in the yards, and none of them were blocked, and it was held that the yardman must have had knowledge of the want of blocking, and that he waived any negligence that might otherwise be imputable to the railway company on that account. In the present case there was no such apparent danger. The incline was east of all the tracks, and extended along the east rail of the new track only the width of the sidewalk; and while the jury found that, by the reasonable use of his eyesight, Ledbetter might have seen it while crossing Johnson avenue, yet they say it was not plainly visible from all the tracks there. Besides, it should be remembered that it was covered to a considerable depth with snow at the time of the casualty, and that, if he had known of the incline being at or about the place where he alighted from the car, he might not have noticed that he was stepping onto it. We do not think that the failure of Ledbetter to notice this incline during the several days that he might have seen it, had his attention been called to it, nor the fact that he stepped upon it to make the coupling, is conclusive evidence of contributory negligence on his part, nor that he waived the risks attendant upon stepping thereon for the purpose of making the coupling. The faculty of close observation of objects is largely a gift. Some persons may walk once along a street and be able, without any special effort, to describe every prominent object upon and every projection into the street, while others might go up and down the same street for a year, who could not describe such objects and projections. If Ledbetter had ever walked upon this incline, doubtless he would have noticed it; but we cannot judicially say that his failure to observe it as he crossed Johnson avenue from time to time in doing his work was conclusive evidence of negligence on his part which ought to preclude a recovery for injuries sustained by reason of the negligence of the receivers. The master is in duty bound to provide a reasonably safe place for his servant to work. Many dangers necessarily attend the performance of the duties of a yard switchman, but the master is not allowed to increase the hazards of his servant by placing pitfalls, obstructions, traps, or inclines in his path, whereby he may lose his footing, and be mangled or killed; and in such case, where there is no contributory negligence on the part of the servant, and his conduct has not been such that the court or jury must say that he has waived the negligence and assumed the risks,

a recovery may be had on account of an injury resulting therefrom. *Railroad Co. v. Kler*, 41 Kan. 661, 21 Pac. 770. No complaint is made because of instructions given or refused, nor on account of the admission or rejection of testimony, and, finding no material error in the case, the judgment must be affirmed. All the justices concurring.

ATCHISON, T. & S. F. R. CO. v. VINCENT.  
(Supreme Court of Kansas. Jan. 11, 1896.)

INJURY TO RAILROAD EMPLOYE — NEGLIGENCE OF FELLOW EMPLOYEE — CONTRIBUTORY NEGLIGENCE.

1. A crew of sectionmen, consisting of a foreman and two others, were carrying a rail which weighed about 243 pounds, for the purpose of substituting it for a defective one in the railroad track. The foreman and one of the men supported it on their left shoulders, and the other, who was at the rear end of the rail, supported it upon his right shoulder. When they reached the place where it was to be used, the foreman, who had been in the center, came back, and took a position in front of the rear man, for the purpose of relieving him, so that he might step aside before the rail was thrown down; and, before he had stepped to a place of safety, the foreman gave the word to throw, when the rail was thrown against the leg of the rear man, breaking and otherwise seriously injuring it. *Held*, in an action to recover for the injury, that the foreman was guilty of negligence, and that the character of service in which the injured sectionman was engaged brings him within the provisions of the statute which makes railroad companies liable to their employees for damages resulting from the negligent acts of other employees.

2. The fact that the rail, which was a light one, was carried upon the shoulders of the men, instead of upon a hand car, which was the usual method of transporting rails, does not constitute contributory negligence on the part of the injured sectionman.

(Syllabus by the Court.)

Error from district court, Rice county; J. H. Bailey, Judge.

Action by Fayette Vincent against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. A. Hurd and J. W. Brinckerhoff, for plaintiff in error. Fred P. Green, for defendant in error.

JOHNSTON, J. On January 14, 1890, Fayette Vincent, who was a sectionhand in the service of the Atchison, Topeka & Santa Fé Railroad Company, had his leg broken while repairing a railroad track. He claimed that the injury was the result of the negligence of McCandless, the foreman of the crew, and he brought this action against the company, in which he recovered \$3,000 as damages for the injury which he sustained. The only substantial question presented for review is whether there is sufficient testimony to support the recovery.

It appears that there were but three men in the crew, McCandless, the foreman, Oswald, and Vincent. The foreman had received di-

rections to remove a defective rail in the track at Alden, and replace it with a sound one. There was a pile of rails of varying lengths near the track, resting on ties, to which some of the rails had been spiked. The ends of the rails were under and against the toolhouse. Two rails had been taken from the pile to the point where the new rail was needed on a hand car, neither of which was found to be suitable; and then the men returned to the pile of rails, and found one determined to be suitable, which was 14 feet long and weighed about 243 pounds. There is testimony that McCandless proposed to carry it on their shoulders. The rail was shoved out, and one end of it was placed on the left shoulder of Oswald; the other end was placed on Vincent's right shoulder; and McCandless then passed to the center of the rail, and supported it with his left shoulder. The pile of rails being upon the right of Vincent, he was unable to take a position upon the right side of the rail, and thus place it upon his left shoulder. They carried the rail about 200 yards, to the place where it was needed, and upon the way Vincent warned them that he was upon the opposite side of the rail; and, when they reached the place where it was to be used, McCandless told Oswald to wait until he went back and relieved Vincent, as Vincent had the rail on the right shoulder. McCandless then went back to the end of the rail, stepped in front of Vincent, and placed his left shoulder under the rail, for the purpose of relieving Vincent. Vincent was the taller of the two, and had to stoop to allow the rail to rest on the shoulder of McCandless; and as he did so, and before he had time to get out of the way, McCandless gave the word "Throw!" and it was thrown, and struck Vincent upon the leg, causing a serious injury. The backs of both McCandless and Oswald were towards Vincent, and hence they did not see him at the time the rail was thrown. It is evident that McCandless supposed that Vincent had stepped back to a point of safety before the rail was thrown, and in his testimony he stated that he thought there had been sufficient time for him to get 10 feet away before the word to throw was given; but that he did not give him time to step back is shown by the testimony.

It is contended that Vincent was guilty of contributory negligence, because the rail was carried upon their shoulders, instead of upon the hand car, which was the usual method of transporting rails. The testimony is, however, that the rail was carried in that way by the direction of the foreman; and, in view of the fact that the rail was a short and a light one, it can hardly be regarded as a specially hazardous or negligent method to carry it upon their shoulders. The jury found that the carrying of the rail in that manner was not hazardous nor dangerous.

It is said that if Vincent had carried the rail upon his left shoulder, instead of upon

his right, the accident would not have occurred; but the peculiar situation of the pile of rails from which the one carried was taken sufficiently accounts for placing it upon Vincent's right shoulder. The injury resulted from the precipitate action of the foreman, rather than from the manner in which Vincent happened to carry the rail. The foreman was in charge of the work, and authorized to give directions as to the method of doing it. He assisted in placing the rail on Vincent's shoulder, and he gave the word to throw before Vincent had reached a place of safety. The dispute in the testimony as to whether there was sufficient time for Vincent to step aside and out of danger after he was relieved from the weight of the rail has been settled by the jury, and, as before stated, there is sufficient testimony to sustain the finding. The service in which Vincent was engaged was performed on the company's road, and, being necessary to its use and operation, places him within the provisions of the act which makes railroad companies liable to their employes for damages resulting from the negligence of a coemployé. *Railway Co. v. Harris*, 33 Kan. 416, 6 Pac. 571; *Railroad Co. v. Koehler*, 37 Kan. 463, 15 Pac. 567.

Objections are made to some of the special findings returned by the jury, but we find nothing in them that betrays partiality or prejudice, nor anything which would justify a reversal. The judgment will be affirmed. All the justices concurring.

#### COLLINGSWORTH v. BELL.

(Supreme Court of Kansas. Jan. 11, 1896.)

CHattel Mortgage—Fraudulent Sale by Mortgagee—Rights of Purchaser—Res JUDICATA.

1. A sale by a mortgagee of chattels worth much more than the mortgage debt, fraudulently made, to a vendee participating in the fraud, for the purpose of defeating creditors of the mortgagor, and depriving them of any benefit from the surplus over the mortgage debt, conveys no title, and such fraudulent vendee has no standing in court to assert a claim against a sheriff who has attached the goods at the suit of creditors of the mortgagor.

2. An adjudication of the validity of the plaintiff's mortgage is not an adjudication of the validity of the title of his vendee to whom he afterwards conveys the property for the purpose of defrauding creditors of the mortgagor.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. Benson, Judge.

The plaintiff in error brought this action to recover the value of a stock of merchandise, which he alleges belonged to him, and was taken by the defendant from his possession. The defendant answered, denying the allegations of the petition, and alleging that he was the sheriff of Franklin county, and that as such he took possession of the goods mentioned in the plaintiff's petition under four several orders of attachment duly issued against the property of Rankin Bros.;

that the goods so taken were the property of said Rankin Bros.; that the claim of title thereto by the plaintiff was fraudulent, and made for the purpose of assisting Rankin Bros. to defraud their creditors; that Rankin Bros. were insolvent; that whatever claim the plaintiff had to the goods he obtained from one J. W. Rankin, a member of the firm of Rankin Bros., who was in collusion with the plaintiff and his copartners in their attempts to cheat and defraud their creditors; that J. W. Rankin was jointly liable with the other members of the firm of Rankin Bros. to the plaintiffs in the attachment suits for the full amount of their claims; that, notwithstanding his liability, said J. W. Rankin took from the firm of Rankin Bros. a pretended chattel mortgage upon the stock of goods for \$3,000; that on or about the 5th day of July, 1889, he pretended to convey to the plaintiff his claim to the goods, and that the plaintiff took no other or greater rights to the goods than J. W. Rankin had; that the pretended chattel mortgage was wholly void, and that the plaintiff took nothing by the pretended conveyance of the goods to him. To this answer an unverified reply containing a general denial was filed. On the trial the plaintiff obtained leave, after the introduction of certain records, to amend his reply. In this amendment it is alleged that the merchandise described in the petition was a part of the identical stock of goods described in the petition filed by J. W. Rankin in a certain cause commenced by him in that court against the defendant herein; that the cause of action set forth in that petition was the same as the cause of action set out in this, and that the same defense was alleged in the answer in that case as in this, and the issues therein in all respects the same; that the plaintiff herein claims title to the goods under a conveyance thereof by J. W. Rankin to him under the mortgage; that said action was duly tried on the 31st day of October, 1889, before said court, and a judgment rendered therein in his favor. On the trial the plaintiff offered evidence tending to show that he was in possession of the goods under a sale to him by S. W. Rankin, acting as the agent of the mortgagee, J. W. Rankin. A note for \$3,000, dated June 24, 1889, due January 1, 1890, executed by Rankin Bros. to J. W. Rankin, and a chattel mortgage on the goods in question, of the same date, were also read in evidence. There was also evidence tending to show that the firm of Rankin Bros. consisted of J. E. and J. H. Rankin, who were sons of the mortgagee. The plaintiff claims title to the goods under a bill of sale, which reads as follows: "Wellsville, Kansas, July 6, 1889. Know all men by these presents: That I, the undersigned, have this day sold and delivered to T. W. Collingsworth the goods, wares, and merchandise now remaining in the store room lately occupied by Rankin

Brothers, in Wellsville, Kansas, held by me under a chattel mortgage, in consideration of certain lands in Finney and Kearney counties, Kansas, this day conveyed to me by said T. W. Collingsworth and wife. In case said T. W. Collingsworth should not be able to hold said goods, I am to reconvey to him said lands, and make good to him any expenses he may be put to in defending said goods. An estimate and invoice of the above-mentioned merchandise is hereto attached. John W. Rankin, by Wallace Rankin, for Mortgagee. Witness: T. J. Gregory." The principal part of the testimony introduced by the defendant was for the purpose of showing that the sale to Collingsworth was a sham, and that the whole transaction between him and S. W. Rankin was for the purpose of aiding Rankin Bros. in defrauding their creditors. The court instructed the jury that if they found from the evidence that the sale was made for the purpose of hindering or defrauding the creditors of Rankin Bros., and Collingsworth knew it, then the sale was wholly void as against the creditors, and their verdict should be for the defendant. The jury rendered a verdict in favor of the defendant. Affirmed.

John W. Deford and J. F. Frankey, for plaintiff in error. O. A. Smart and H. P. Welsh, for defendant in error.

ALLEN, J. (after stating the facts). The position taken by counsel for plaintiff in error is that the validity of the mortgage to J. W. Rankin was fully established, and was assumed by the court in the instructions to the jury, and, this being so, the right of the mortgagee to hold possession of the goods himself, or to transfer them to whomsoever he pleased, and for whatsoever consideration, was absolute, and could not be challenged on the ground of fraud by the creditors of Rankin Bros.; that, as against the mortgagee, Rankin Bros. had no attachable interest in the property, and that their creditors had no standing for an attack on the validity of any transfer of the property the mortgagee might see fit to make. In support of this position authorities are cited to the effect that the mortgagee of chattels has the legal title thereto, and, after condition broken, may maintain an action to recover the possession thereof against an officer holding writs of attachment or execution against the mortgagor. *Ament v. Greer*, 37 Kan. 648, 16 Pac. 102; *Jones, Chat. Mortg.* § 1. It is insisted that under any view of the evidence in this case the plaintiff had succeeded to all the rights of the mortgagee, that he was in possession of the property, and that the defendant therefore could not acquire any right to the possession of the property by virtue of writs against Rankin Bros., the mortgagors. It is also contended that the judgment in the former case between J. W. Rankin and the de-

tendant Bell was an adjudication between the parties affirming the validity of Rankin's mortgage; that the plaintiff is a privy of Rankin, and that the defendant cannot, in this action, question the validity of the mortgage; that, the validity of the mortgage being established, the law does not permit an inquiry into the good faith of the mortgagee in dealing with the mortgaged property. There is much plausibility in the argument, but it is not sound. Although the legal title to mortgaged chattels, and the right of possession after condition broken, vest in the mortgagee, that title is not a full and absolute title, but is still subject to the equitable rights of the mortgagors; and whatever surplus remains of the mortgaged chattels after satisfaction of the debt is an asset of the mortgagor, to which his creditors have a right to look for the satisfaction of their claims. A fraud may be committed by the parties to the mortgage and a purchaser buying from the mortgagee, as against creditors of the mortgagor. If it were not so, a mortgage for a trifling sum on a large stock of goods might be used as a means for perpetrating the grossest kind of a fraud on creditors. Although the precise question now presented has not been heretofore decided by this court, we think the principle has been clearly recognized in several cases. In *Wygall v. Bigelow*, 42 Kan. 477, 22 Pac. 612, it was held that a mortgagee of chattels might become a purchaser at a sale under the mortgage; but that in making the sale he must act fairly and in good faith, and that a fraudulent sale would not extinguish the mortgagor's right, but would render the mortgagee, if he afterwards converted the property to his own use, liable to account to the mortgagor for the full value of the mortgaged property. It was said in the opinion: "The mortgagee has no right by any unfairness to sacrifice the property, and deprive the mortgagor of the surplus over the debt which by a fair and honestly conducted sale might arise. \* \* \* The defendants were entitled to have a fair and bona fide sale." See, also, *Jones v. Franks*, 33 Kan. 497, 6 Pac. 789; *Denny v. Van Dusen*, 27 Kan. 437. The stock of goods claimed by the plaintiff consisted of a great many articles, and might have been sold either piece by piece or in separate lots. The value as claimed by the plaintiff largely exceeds the amount of the mortgage debt. Under such circumstances the mortgagee might have realized enough to pay his claim out of a portion only of the goods. In such case the remainder of the stock would have been liable to attachment for the debts of the mortgagors. We are very clear that a legal fraud can be committed by the mortgagee and participated in by the purchaser from him against the rights of creditors of the mortgagor. Assuming, then, that the judgment in the prior action between Rankin and Bell is an adjudication of the validity of Rankin's mortgage, we still think that

such a fraud might be committed in the disposition of the mortgaged goods as would absolutely defeat the plaintiff's claim. In this action it is not enough for the plaintiff to show that the property was not subject to attachment. He asks affirmative relief, and he bases his right to that relief on a transaction which the jury has found to be fraudulent. However weak the defendant's title may be, the plaintiff's fraud defeats his claim. The judgment is affirmed. All the justices concurring.

#### SCHUYLER COUNTY BANK OF LANCASTER, MO., v. BRADBURY.

(Supreme Court of Kansas. Jan. 11, 1896.)

##### LIMITATIONS—ACTION ON DOMESTIC JUDGMENT.

A right of action upon a domestic judgment, whereon no execution has issued, is barred by the five-years statute of limitations, unless the case falls within some exception.

(Syllabus by the Court.)

Error from district court, Decatur county; G. Webb Bertram, Judge.

Action by the Schuyler County Bank of Lancaster, Mo., against Moses T. Bradbury. Judgment for defendant. Plaintiff brings error. Affirmed.

A. J. King and E. E. Gibbons, for plaintiff in error. Bertram & McElroy, for defendant in error.

MARTIN, C. J. On September 10, 1884, the plaintiff recovered a judgment against Moses T. Bradbury in the district court of Jewell county, Kan., for \$3,161.53, together with interest and costs. No execution was issued thereon. The plaintiff, on August 25, 1890, commenced an action in the district court of Decatur county against Bradbury and others in the nature of a creditors' bill, and for the revivor of said judgment. Demurrers having been sustained to the petition and the first amended petition, respectively, the plaintiff filed its second amended petition March 31, 1891, dropping out all the parties except Bradbury, pleading said judgment of the district court of Jewell county, and praying a judgment thereon. The defendant pleaded, among other things, the bar of the five-years statute of limitations. Whether a dormant judgment rendered in one county may be revived by action in another is a question suggested, but not raised, by the record. The plaintiff's right of action was barred by the provisions of section 18 of the Code of Civil Procedure, it not being claimed that either party was under any disability, nor that the defendant was a nonresident of or absent from the state at any time between September 10, 1884, and August 25, 1890. *Mawhinney v. Doane*, 40 Kan. 676, 17 Pac. 44. The plaintiff relies upon *Baker v. Hummer*, 31 Kan. 325, 2 Pac. 808, which holds that an action may be maintained on a dormant domestic judgment in this state if com-

menced within one year after dormancy; but in that case the action was not barred by the statute of limitations, for the judgment was rendered March 25, 1876, and in the following autumn the defendants removed from Kansas to Illinois, and were continuously absent from this state from that time forth to the commencement of the action. The only difficulty about that judgment was that it had become dormant, but the Jewell county judgment, upon which the plaintiff sued, besides being dormant, was barred by the statute of limitations, for a right of action accrued on it as soon as it was rendered. *Burns v. Simpson*, 9 Kan. 658, 664, 667; *Hummer v. Lamphear*, 32 Kan. 439, 444, 4 Pac. 865; *Hale v. Angel*, 20 Johns. 342; 2 Freem. Judgm. (4th Ed.) § 432. Dormancy is curable within one year, but what shall restore to life a right of action barred by the statute of limitations other than the act or default of the defendant? The judgment of the district court must be affirmed. All the justices concurring.

**MUDGE v. KANSAS NAT. BANK OF TOPEKA et al.**

(Supreme Court of Kansas. Jan. 11, 1896.)

APPEAL—CASE MADE—SUFFICIENCY OF CERTIFICATE.

In a certificate appended to a case made it was stated that the case made was presented to the judge for settlement, and that it was considered by him, but it failed to affirmatively state or show that he had settled it. *Held*, that the certificate is insufficient, and the case made invalid.

(Syllabus by the Court.)

Error from district court, Lyon county; Charles B. Graves, Judge.

Action by the Kansas National Bank of Topeka and others against M. R. Mudge. Judgment for plaintiffs, and defendant brings error. Dismissed.

J. J. Mitchell and F. L. Irish, for plaintiff in error. J. D. McFarland and J. Jay Buck, for defendants in error.

**JOHNSTON, J.** This proceeding in error is founded on a case made, the validity of which is challenged upon the ground that it does not appear to have been settled by the trial court. Appended to the case is a certificate, which recites: "And now, on this 28th day of June, 1892, come the parties by their attorneys, and present this made case to me for final settlement; and, having considered said made case, and the amendments suggested thereto, I do hereby certify that the foregoing is a full, complete, and correct record of all the pleadings, process, evidence, and proceedings in the case. Witness my hand," etc. The certificate, although signed by the judge, lacks the essential statement that the case made was settled, and is, therefore, fatally defective. "The certificate of the judge to a case made should show affirm-

atively that he has settled it." *Allen v. Krueger*, 25 Kan. 74; *Bank v. Becannon*, 51 Kan. 716, 33 Pac. 595. It is not absolutely essential that the words of the statute should be employed, but the expressions used should clearly indicate that the judge has determined that what he has considered and signed is a true case made; but probably no briefer or better terms can be employed than those found in the statute. As the word "allowed," as well as "settle," is found in the statute, it may be safely used in the certificate. *Railroad Co. v. Cone*, 37 Kan. 567, 15 Pac. 499. The statements in the certificate as to what is contained in the case made are without force, and must be ignored. Stripped of these statements, nothing remains except a certificate that the case was presented to the judge for settlement and that he considered the same. Within the case of *Bank v. Becannon*, supra, the certificate is insufficient, and the proceeding must be dismissed. All the justices concurring.

**CITY OF SALINA v. WAIT.**

(Supreme Court of Kansas. Jan. 11, 1896.)

VIOLATION OF CITY ORDINANCE—APPEAL BY CITY.

In a prosecution by a city of the second class for the violation of a mere municipal regulation, the defendant was convicted in the police court, and from the sentence and judgment he appealed to the district court, where a motion to quash the complaint and discharge the defendant was sustained. *Held*, that an appeal by the city from that ruling to the supreme court will not lie.

(Syllabus by the Court.)

Appeal from district court, Saline county; R. F. Thompson, Judge.

A. C. Wait, on trial for violation of a city ordinance, was discharged, and the city appeals. Dismissed.

J. B. Hutchinson and David Ritchie, for appellant. Burch & Burch, for appellee.

**JOHNSTON, J.** A. C. Wait was prosecuted in the police court of the city of Salina for the violation of an ordinance regulating the use of hacks and other vehicles drawn by animals. He was convicted in that court, and from the judgment he appealed to the district court. In that court he challenged the validity of the ordinance, and upon his motion the district court quashed the complaint, and discharged him from custody. The city has attempted to take an appeal to this court.

Does an appeal lie, and has this court jurisdiction to review the ruling of the district court? A negative answer must be given to both of these questions. The defendant is entitled to take an appeal to the district court from the judgment of the police court (Gen. St. 1889, par. 854); but we find no provision authorizing the city to appeal from the judgment of the police court. In prosecutions by the city for an act of a criminal

nature, and which is an offense against the laws of the state, the defendant may appeal to the supreme court from any judgment rendered against him in the district court. Cr. Code, § 281. We have no statutory provision, however, expressly giving the right of appeal to a city in any prosecution brought in its name. Appeals to the supreme court can only be taken by the state in three cases: "First, upon a judgment for the defendant on quashing or setting aside an indictment or information; second, upon an order of the court arresting judgment; third, upon a question reserved by the state." *Id.* § 283. Without this provision no appeal could be taken by the state, and we find no such provision authorizing an appeal by the city. It has been assumed that the city might appeal in cases where the act sought to be punished was an offense against the public at large, criminal in its nature, and such as might be or is punishable under the criminal laws of the state. Whether such right exists in the city without express legislation to that effect it is unnecessary to determine at this time. The prosecution in this instance is for the violation of a mere municipal regulation. There is no provision which expressly or impliedly gives the city a right to an appeal in such cases, and, without a statutory authority, no right of appeal exists. This court is therefore without jurisdiction to review the ruling of the district court, and therefore the appeal will be dismissed. All the justices concurring.

#### STATE v. ROGERS.

(Supreme Court of Kansas. Jan. 11, 1896.)

CRIMINAL LAW—CONTINUANCE—EVIDENCE ON FORMER TRIAL—INSTRUCTIONS—DISAGREEMENT OF JURY—ADJOURNMENT OF COURT—PRESUMPTIONS ON APPEAL.

1. In a prosecution for a felony, the defendant applied for a continuance on the ground of his sickness and disability. The good faith of the application was challenged by the prosecution, and on its request a committee of physicians was appointed by the court to visit the defendant, and report upon his condition, which they did; and they were examined on the subject orally, in open court. Afterwards another committee of physicians was appointed to treat the defendant until ready for trial, and to see that nothing was given him except under their direction, and they took charge of the defendant accordingly for some days, when, the case being again called, another application for continuance was made, which, upon hearing evidence, the court overruled, finding that the defendant was able to be placed upon trial, and was in a fit and suitable condition physically to be present. *Held*, that there was no abuse of discretion in overruling the application for a continuance.

2. On a second trial of the defendant upon an information for a felony, the state offered to read, from a writing purporting to be a bill of exceptions taken on the first trial, the testimony given by the defendant in his own behalf. It was admitted that the document was such bill of exceptions, and it is stated in the record that counsel "reads to the jury the following testimony of G. W. Rogers, which is in words and

figures as follows, to wit." *Held*, that the evidence was sufficiently identified, and was admissible.

3. The following instruction was not erroneous, viz.: "You are instructed that before you are warranted in finding the defendant guilty, each of you must be able to truthfully and conscientiously say that his guilt has been established by the evidence in the case beyond reasonable doubt; and if, after a consideration of the whole case, and consulting with your fellow jurymen, any one of the jurors entertains a reasonable doubt as to whether defendant's guilt has been established, you cannot convict the defendant; but you cannot acquit the defendant unless all the jurors entertain a reasonable doubt."

4. The practice of calling in a jury, and lecturing them upon the desirability of an agreement, is not to be commended; but the oral remarks of the court to the jury in this case were not so objectionable as to warrant a reversal on that ground.

5. The district court may adjourn to a time beyond the commencement of the regular term in another county of the same district; and this, in the absence of any showing that the court was held in both counties at the same time, does not invalidate the proceedings at such adjourned term.

6. The presumption, in the absence of anything in the record, is that the court discharged its duty in admonishing the jury as required by the statute, upon each separation.

(Syllabus by the Court.)

Error from district court, Reno county; *F. L. Martin*, Judge.

George W. Rogers was convicted of burglary, and appeals. Affirmed.

The defendant was convicted in the district court of Harvey county of burglary in the second degree, the crime being committed on the night of March 23, 1893, by breaking into a building occupied as the courthouse of said county, with intent to set fire to, burn, and destroy the books and records of said county. After sentence he appealed to this court, where the judgment was reversed, because of the admission of incompetent testimony. The report of the case contains a summary of the evidence. 54 Kan. 683-698, 39 Pac. 219. A change of venue was afterwards granted, and the case was sent to Reno county for trial. It was called for trial May 13, 1895. The defendant applied for a continuance, on the ground of the absence of witnesses; and the court held that the showing was sufficient. Thereupon the state consented to the reading of the evidence contained in the application as the depositions of the absent witnesses, and a jury was impaneled and sworn to try the cause, a plea of not guilty having been entered. No further proceedings were had until the next day, when, the case being called, it was announced that the defendant was sick, and unable to attend the trial. His home was at Newton, where he went with Willard Kline, one of his attorneys, on the evening of May 13th. The state requested the court to appoint three physicians to go to Newton, and examine the defendant, and report his condition; and thereupon the court appointed Drs. Klippel and Colladay, of Hutchinson, and Dr. Boyd, of Newton, to



perform that service, and the court adjourned until May 15th. On that day the physicians and Willard Kline were called and examined as witnesses respecting the physical and mental condition of the defendant; and the court found therefrom that the defendant was able to be present in court, and that his physical condition was not such as to prevent or excuse him from attending, and the sheriff was ordered to bring him into court on May 16th, at 9 o'clock a. m. When that time arrived, counsel for defendant again applied for a continuance on the showing already made and the affidavit of Stella E. Rogers, wife of the defendant, which was read. Thereupon the sheriff was ordered to take charge of the defendant with such deputies as he might choose, and Drs. Sidlinger, Shearer, and Wilson were appointed to treat him until ready for trial, and to see that nothing was given him except under their direction. The court adjourned to May 17th, and then again to May 20th, which was the last day of the regular term, as the law fixed May 21st as the beginning of the regular term in Harvey county, in the same judicial district. On May 20th the court again adjourned to May 22d, when the case was called, but it was objected on behalf of the defendant that the term had expired by law, and another term had commenced in Harvey county; but the objection was overruled, for the reason stated orally by the judge, and not otherwise appearing, that he opened the court in Harvey county on May 21st, and adjourned the same until June 3, 1895. The defendant and his attorneys again applied for a continuance, on the ground of the inability of the defendant to be present and advise with his counsel and direct the management of the case, and, in support thereof, offered another affidavit of said Stella E. Rogers, and the state presented the affidavits of Drs. Wilson, Klippel, Colladay, and Sidlinger in opposition thereto; and thereupon the court found that the defendant was able to be placed on trial, and was in a fit and suitable condition physically to be present; and the application for a continuance was overruled, and the case proceeded to trial. It appears that the defendant occupied a cot during the trial, and spoke to his counsel only in whispers, and that, while testifying as a witness, his answers were repeated to the jury by his counsel; but it was claimed by the state, and the evidence heard on the application for a continuance strongly tended to show, that the sickness of the defendant was feigned, and not real, and that his disability was simulated, although he was really weak, and not in good health. The trial proceeded until May 25th, when the court instructed the jury, and the case was then argued by counsel and submitted. On May 28th, after the jury had deliberated 24 hours, they were brought into court, and the judge made remarks orally, which were afterwards reduced to writing by him, as follows: "Gentlemen of the jury,

the duties of a juror in every case are very arduous, and you have been out in this case for 24 hours; and I suppose that I need not remind you that it is a matter of great public importance that this case be decided. You, of course, know yourselves that it has been a great expense to the public to try this case; and if you should disagree, and another trial should be had,—all the expense of this trial being lost, and another trial being had at the same expense,—after the trial was through, and the jury impaneled to try the case again would probably have no more evidence than has been presented to this jury; and there is no reason why this jury should not decide this case with the same fairness and correctness that any other jury should decide it. I feel, therefore, that I could not discharge you as jurors in this case without requiring you to a much greater effort to agree upon your part upon a verdict than you have made up to date. I suppose, as you stated this morning, there are no questions of law about which the jury disagree. If there are any such questions, you can make them known to the court. The court grants the defendant an exception to all the remarks made by the court to the jury. Of course, gentlemen of the jury, as stated in the written instructions, you are the sole and exclusive judges of all the facts in the case and the credibility of the witnesses, and I have no desire now in anything I have said to invade the province of the jury." On May 29th the jury returned a verdict of guilty of burglary in the second degree; and on May 31st the defendant filed a motion for a new trial, which was heard and overruled on June 1st; and the defendant was sentenced to imprisonment at hard labor in the penitentiary for the term of five years, and from this judgment he appeals.

Wall & Brooks and Willard Kline, for appellant. F. B. Dawes, Atty. Gen., C. E. Brannine, and Bowman & Bucher, for the State.

MARTIN, C. J. (after stating the facts). 1. It is strongly urged by counsel for defendant that the court erred in refusing to grant a continuance on account of his sickness and disability. The embarrassing and delicate duty of passing upon the defendant's physical and mental condition was devolved upon the court. The proceedings were very unusual, but we cannot say that they were not justified by the situation, the good faith of the application for a continuance being challenged by the state. In *State v. Rhea*, 25 Kan. 576, 579, it was declared that "continuances are largely within the discretion of the trial court; and, before error can be affirmed, it must be shown that such discretion has been abused. It is not enough that conditions and circumstances are shown which would justify a postponement; there must be those which compel such postponement. Any uncertainty or doubt in this respect must be

resolved in favor of the ruling below. Abuse of discretion is never presumed; it must be proved." See, also, *Cushenberry v. McMurray*, 27 Kan. 328, *Krapp v. Hauer*, 38 Kan. 430, 16 Pac. 702, and *Harlow v. Warren*, 38 Kan. 480, 17 Pac. 159, where applications were made for continuances on the ground of the sickness of a party. In *Hottenstein v. Conrad*, 9 Kan. 435, 440, 441, it was held that whatever fact a court may inquire into on a motion it can also determine, and its determination establishes the fact for all the purposes of the motion. Upon the record, we cannot say that the court erred in its conclusion, nor that it abused its discretion in refusing to grant a continuance.

2. It is insisted that the court erred in admitting testimony over the defendant's objections. The prosecution offered to introduce in evidence some statements made by the defendant on the first trial by selecting and reading portions only of what was claimed to be his testimony, as shown on certain designated pages of the bill of exceptions. To this his counsel objected that a part of such former testimony could not be introduced against him, but that it must all go to the jury, and the court took this view of the case; and counsel for the state then proceeded, under protest, to read it all from the bill of exceptions transcribed from the stenographer's notes. The defendant then interposed the general objection that the testimony was incompetent, irrelevant, and immaterial. The attorney for the state thereupon inquired of counsel for the defendant if he would admit that he was reading from the bill of exceptions filed by the defendant in the former trial, and counsel responded in the affirmative, but said that he still objected to the evidence as incompetent, irrelevant, and immaterial, which objection was overruled. And it is then stated in the record that counsel "reads to the jury the following testimony of G. W. Rogers, which is in words and figures as follows, to wit." And apparently all the testimony of the defendant on the former trial was here read to the jury. Doubtless, the testimony of a defendant in a criminal case in his own behalf on a former trial or examination may be offered in evidence against him, and the state is not required to read the whole of his testimony; but, if that which is offered relates to any particular subject or fact, then all bearing on that subject or fact should be placed before the jury. *State v. Sorter*, 52 Kan. 531, 540, 34 Pac. 1036. But the defendant had the benefit of the objection against the reading of a part only. The general objection made, however, by the defendant, was not obviated by that circumstance. The regular method of introduction of such evidence is to call the stenographer who transcribed the testimony from his notes, or some other person who heard the witness testify and knows that the bill of exceptions contains a correct state-

ment of what he said from the witness stand, as in *Railroad Co. v. Jones*, 34 Kan. 443, 460, 8 Pac. 730. But where it is admitted, as in this case, that the document produced is the bill of exceptions filed by the defendant in the former trial, and the record shows that counsel for the state reads to the jury the testimony of the defendant, any further identification of the testimony is unnecessary.

It was the theory of the prosecution that the crime was conceived by the defendant, and that he induced George H. Shirley to manage the destruction of the records, and that Shirley employed Harris, English, and Riffle, three professional burglars, to do the work. G. O. Smith was working in Matthews' restaurant, which kept open day and night, and which Shirley often frequented in the night season; and Smith was called as a witness to testify to Shirley's conduct at the restaurant early in the morning that the offense was committed. The objection made to this testimony is that the crime had already been committed, and that evidence of Shirley's conduct thereafter was inadmissible against his codefendant, who was being tried separately; but the record shows that the peculiar conduct of Shirley testified to by the witness was about 4 o'clock in the morning, and this is just about the time that the professional house workers were engaged in their desperate business. The defendant also complains of the admission of the testimony of Thomas Carroll, who had been solicited by Shirley to assist him in destroying the records. It is said that there was no proof that any conspiracy had been formed at that time to which Rogers was a party. He testified that Shirley said he would see his partner, and it is claimed that this was inadmissible for the purpose of showing that a conspiracy then existed. It is true that such testimony would not be admissible for that purpose, but evidence was given on the trial tending to show that the conspiracy between the defendant and Shirley was formed before that time. The testimony of the witness H. W. Black, as to a conversation with Shirley at Wichita, wherein Shirley inquired if he knew where he could "get a man to do some dirty work," is complained of, but it was admissible, for the reasons above indicated. And these objections to the testimony of Smith, Carroll, and Black were substantially disposed of when the case was here before.

3. The next complaint respects the giving and refusal of instructions. No. 24, as given, reads as follows: "You are instructed that before you are warranted in finding the defendant guilty each of you must be able to truthfully and conscientiously say that his guilt has been established by the evidence in the case beyond reasonable doubt; and if, after a consideration of the whole case, and consulting with your fellow jurymen, any one of the jurors entertains a reasonable doubt as

to whether defendant's guilt has been established, you cannot convict the defendant; but you cannot acquit the defendant unless all the jurors entertain a reasonable doubt." The last clause is severely criticised, counsel saying that this would compel a person charged with the commission of an offense, in order to secure an acquittal, to establish a reasonable doubt of his guilt in the minds of each juror; and they asked an instruction to the effect that, if a single juror entertained a reasonable doubt, then the defendant must be acquitted. That the instruction asked was erroneous is settled by the case of *State v. Witt*, 34 Kan. 488, 8 Pac. 769; and we can conceive of no valid objection to the instruction as given, and this notwithstanding the case of *Stitz v. State*, 104 Ind. 359, 362, 4 N. E. 145. In that case the court below instructed the jury that, "while each juror must be satisfied of the defendant's guilt beyond a reasonable doubt to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal." And the Indiana supreme court concludes, from a process of reasoning incomprehensible to us, that "this must have induced the jurors to think that, unless all concurred in entertaining a reasonable doubt, the verdict should be against the defendant." We cannot see that it meant anything more than that the verdict either of conviction or acquittal in a criminal case must be the result of the concurrence or running together of the minds of all the jurors. If the minds of the jurors do not so concur, there must be a disagreement. But it is hardly necessary to instruct an American jury touching their right to disagree, for this is universally understood. Some of the other instructions given are criticised, it being said that the court assumed the guilt of Shirley, which was a step necessary to establish the guilt of the defendant; but we do not think that the language of the court is subject to this construction. And there was no error in the instruction that, in determining the weight and credibility of the evidence of the defendant, they should consider his motives and his testimony the same as the other witnesses. If the instruction had singled out his motives alone, perhaps the word "may" ought to have been used rather than "should"; but when the defendant was referred to only as one of the witnesses, and his motives were spoken of in the same connection, we cannot say that the language used was erroneous or prejudicial. The defendant asked certain instructions to the effect that, if the facts and circumstances relied upon by the state to establish guilt could be reasonably explained upon the theory of the guilt of some person other than the defendant, then he must be acquitted. This would have been error prejudicial to the state, for the proof of the guilt of Harris, English, Rifle, and Shirley was much more direct and positive than the evidence of the guilt of the defendant; and it was necessary to prove

their guilt before that of the defendant could be established. This, however, would constitute no good reason for the defendant's acquittal. Another instruction asked was upon the force of circumstantial evidence, and embodied the proposition that, in order to authorize a conviction, all the circumstances must be consistent with each other. Minor circumstances may be in evidence which are inconsistent with each other, and yet if the jury can say upon the evidence that all the circumstances are consistent with the defendant's guilt, and inconsistent with any other rational conclusion, a jury may be warranted in returning a verdict of guilty. There was no material error in the giving or refusing of instructions, which seem to have been drawn carefully, with a view to the protection of all the rights of the defendant.

4. The practice of calling in a jury, and lecturing them upon the desirability of an agreement, although obtaining to a considerable extent in this state, is not to be commended. Jurors very generally understand the importance of agreement, and the inconvenience and expense of another trial. It is presumable that, in their arguments pro and con for many hours together, they chide each other sufficiently; and they ought not to be visited with a scolding by the court because differences of opinion still remain. In this case, however, the oral remarks of the court seem to have had no immediate or early effect, for there was no verdict until the next day; and, upon considering the language of the court, we cannot see enough in the remarks to induce us to believe that they were efficacious in producing an agreement. The language is compared with that used in *State v. Bybee*, 17 Kan. 462, 464, 465, but there is little resemblance; and, under the circumstances of this case, we would not feel warranted in ordering a reversal, as the remarks contain nothing in the nature of instructions, unless at the close, and this was, at most, but a harmless repetition.

5. It is argued that the conviction was erroneous and illegal, because the term at which the trial commenced ended by operation of law, and another term commenced in Harvey county on May 21, 1896. It was held in *Re Millington*, 24 Kan. 214, that courts cannot be legally held at the same time in two counties of the same judicial district. But the district court of one county is not prohibited from adjourning to a time beyond the regular term in another county of the same district. *State v. Montgomery*, 8 Kan. 351, 356. And in *State v. Palmer*, 40 Kan. 474, 478, 20 Pac. 270, the court in one county was adjourned to a time one day subsequent to the commencement of the term in another county of the same district, which latter term was on the first day adjourned to a time beyond the adjourned term of the former county; and this practice was held proper. This case would be exactly in point here if the oral statement of the trial judge should

be taken as evidence, but this is objected to. We hold, however, that, in the absence of any showing that the court was held in Harvey county on May 22d and the following days of the trial of this case, the defendant's objection to the regularity of the term cannot be sustained.

6. It is said that the court erred in failing to admonish the jury on the adjournment of Saturday, May 25th, as required by statute. The record does not affirmatively show whether the admonition was given or not; and the presumption, in the absence of anything in the record, is that the court discharged its duty in admonishing the jury before they were allowed to separate. *Linton v. Housh*, 4 Kan. 535, 539; *State v. Palmer*, supra.

We find no substantial error in the record prejudicial to the defendant, and the judgment of the court below must be affirmed. All the justices concurring.

#### SNOW v. HUDSON.

SAME v. EDWARDS et al.

(Supreme Court of Kansas. Jan. 11, 1896.)

QUO WARRANTO—LEGISLATURE—JOINT SESSION—  
STATE PRINTER—ELECTION.

1. An action brought by the person in possession of the office of state printer prior to the commencement of the next regular term, for the purpose of enjoining a person claiming to be his successor from taking possession of the office, and the secretary of state from recognizing such person as state printer, does not abate an action of quo warranto brought against such person after he has taken possession of the office, and been recognized as state printer by the secretary of state, where it appears that such prior action has been dismissed before the trial of the quo warranto case.

2. The provisions of chapter 17 of the Laws of 1861 with reference to the manner of convening the legislature in joint session are directory only, and strict compliance therewith is not absolutely essential to the validity of the proceeding of a joint convention where a quorum of each house is actually present, and notice of the intention to hold a joint convention has been duly given.

3. The provision contained in section 98 of chapter 166 of the Laws of 1879 requiring the concurrence of a majority of the members elected to each house of the legislature in the election of a state printer conflicts with the provisions of section 4 of article 15 of the constitution of this state, and is invalid. *Martin, C. J.*, dissenting.

4. Other matters necessary to the disposition of the case are discussed in the opinion; but, owing to the diversity of views of the members of the court, no syllabus thereof is written. (Syllabus by the Court.)

Separate original proceedings by E. H. Snow against J. K. Hudson for a writ of quo warranto, and against W. C. Edwards and others for a writ of mandamus. Judgment for defendants.

These two cases were tried and submitted together. The first is an action in the nature of quo warranto, brought by E. H. Snow against J. K. Hudson, to try the title to and recover possession of the office of

state printer. The second is an action also brought by Snow against W. C. Edwards, as secretary of state, to compel him to recognize Snow as state printer, and deal with him accordingly. The defendant denies the plaintiff's title to the office, and this is the main question in both cases. Although quite a number of depositions and quite an amount of documentary evidence have been introduced on both sides, there is no controversy upon any material question of fact. On the third Tuesday in January, 1889, Clifford C. Baker was duly elected to the office of state printer, having received the votes of 37 senators and 121 representatives, being all the votes cast by members of each house. He thereafter qualified, took possession of the office, and discharged its duties for the ensuing regular term, commencing on the 1st of July after his election. On the third Tuesday in January, 1891, a joint session of the legislature was held, at which there were present 39 senators and 125 members of the house. The plaintiff, E. H. Snow, received the vote of 1 senator and of 100 representatives. He was declared elected for the term beginning July 1, 1891. The only record of any joint convention for the election of a state printer in 1893 is of a meeting by 24 senators with what is known as the "Dunsmore House," on Friday, the 27th of January, 1893. Mr. Snow received all the votes cast by this convention, but it is not now claimed on his behalf that the proceedings were of any validity. On December 12, 1894, the plaintiff tendered his resignation of the office of state printer to the governor, giving as his reason for so doing that his title to the office was questioned. Gov. Lewelling thereupon issued a commission, reciting that a vacancy existed in the office of state printer, and appointing the plaintiff to fill such vacancy for the unexpired term, and until his successor should be elected and qualified. Snow thereupon executed a bond in due form, and took the oath of office, and continued to act as state printer, as he had done before. On Tuesday, January 15, 1895, a resolution in the following form was passed by the house of representatives, as House Concurrent Resolution No. 3: "Resolved by the house of representatives, the senate concurring therein, that the senate and house of representatives meet in Representative Hall in joint session at 12 o'clock m. this day, Tuesday, January 15, 1895, for the purpose of electing a state printer." This resolution having been sent to the senate, a substitute therefor was offered and adopted, in the following form: "Resolved, that the senate and house of representatives meet at 12 o'clock m. in representative Hall, for the purpose of electing a state printer for the term beginning July 1, 1895, and ending July 1, 1897, and that we continue to so meet from day to day until some person shall have been elected by a concurrence of a majority of the members

elected to each body; and the president of the senate and the speaker of the house of representatives are each hereby instructed not to issue a certificate of election to any person until he shall have received the affirmative vote of at least 21 senators and 63 representatives." This substitute was not acted on in the house, nor was any further action taken on the resolution by either body. At 12 o'clock the president of the senate announced that, the hour having arrived for the election of state printer, the senate would take a recess until 2 o'clock p. m. The president of the senate and a number of the senators then left the senate chamber, and proceeded to Representative Hall. The journal of the senate shows that Senator Denison appealed from the decision of the chair; that the president pro tem. then took the chair; that the question was put, "Shall the decision of the chair be sustained? and that, a majority having not voted to sustain the chair, the chair was not sustained." The journal of the house shows that a joint convention was held, over which the lieutenant governor presided; that there were present 16 senators and 122 members of the house; that J. K. Hudson received the votes of 13 senators and 91 representatives; that he was thereupon declared by the president of the joint convention duly elected state printer, and thereafter received a certificate of his election, signed by the president of the senate and the speaker of the house of representatives, as provided by law. He afterwards executed an official bond, which was duly approved, and took the prescribed oath of office. On the 20th of June, 1895, an action was brought by the plaintiff against the defendants Hudson and Edwards, to enjoin Hudson from taking possession and exercising the duties of the office of state printer, and Edwards, as secretary of state, from recognizing him as such. The ground upon which this injunction was asked was that the plaintiff was in the possession of the office, and entitled to discharge its duties and receive its emoluments; and that the defendant Hudson claimed to have been elected to the office, and threatened to take possession thereof on the ensuing 1st day of July; and that the defendant Edwards intended to officially recognize him as such officer. A hearing was had before the district court of Shawnee county on an application for a temporary injunction, which was refused. The defendant thereafter answered, setting up his title to the office. The action last named was pending at the time these cases were brought in this court, but was dismissed by the plaintiff on the 6th of September. On the 1st of July, 1895, the defendant Hudson assumed the duties of the office of state printer, was recognized by the defendant Edwards as such officer, and has ever since acted as such. The exact date on which the plaintiff first took possession of the office of state printer is

not shown, nor is there any evidence as to the particular manner of Baker's leaving the office.

G. C. Clemens and David Overmyer, for plaintiff. F. B. Dawes, Waggener, Horton & Orr, and Troutman, McKeever & Stone, for defendants.

ALLEN, J. (after stating the facts). The questions involved in these cases are of a delicate character, involving, as they do, the validity of the proceedings of the legislative department of the state government. On consultation, a quite unusual diversity of opinion is found to exist among the members of the court, and, in order to make known the conclusions reached on the various branches of the case, it will be necessary to depart somewhat from the usual custom in writing an opinion.

An objection is made on behalf of the defendant to any consideration of the merits of these cases, on the ground that the prior action, commenced in the district court of Shawnee county, to enjoin the defendant Hudson from taking possession of the office, and the defendant Edwards from recognizing him as state printer, abates the present actions. The relief sought in that case was quite different from that asked in these cases. That action, having failed, was dismissed before the trial of these cases. The objection is untenable. The rights of the respective parties to the possession of the office of state printer could not be fully determined and settled in an action for injunction. The office of state printer was established by an amendment to the state constitution, adopted in 1863, which appears as section 4, of article 15, and reads as follows: "All public printing shall be done by a state printer, who shall be elected by the legislature in joint session, and shall hold his office for two years and until his successor shall be elected and qualified. The joint session of the legislature for the election of a state printer shall be on the third Tuesday of January, A. D. 1869, and every two years thereafter. All public printing shall be done at the capital, and the prices for the same shall be regulated by law." In 1861 an act was passed with reference to holding joint conventions of the two houses of the legislature, which now appears as chapter 57 of the General Statutes of 1889. By section 6 of that act it is provided "that to elect any person in said joint convention a majority voting in the affirmative of all the members elected to the two houses shall be necessary." In 1879 another act was passed, which now appears as paragraph 6074 of the General Statutes of 1889, which reads as follows: "A state printer shall be elected by the legislature every second year as provided in the constitution. For the purpose of such election the legislature shall meet in joint session on the third Tuesday in January, and shall continue in such session from day to day until some person is elected state prin-

ter by the concurrence of a majority of the members elected to each house. Immediately after such election the president of the senate and speaker of the house of representatives shall furnish to the state printer elect a certificate of his election."

The main questions for our consideration are (1) whether the plaintiff, Snow, has shown that he ever had any valid title to the office; (2) whether the defendant Hudson was duly elected to the office. In arriving at a decision of these main questions, various others of much doubt and difficulty must be considered. It is contended on the part of the plaintiff that, to constitute a joint session of the legislature, there must be a concurrent resolution passed by both the senate and house of representatives fixing the hour and place of meeting, and specifying the business to be transacted; that there must be then a meeting at the time and place agreed upon of a quorum of the senate and a quorum of the house of representatives; and that no election can be held without the presence of a majority of the members of each body. It is further contended that the act of 1879, which in terms requires the concurrence of a majority of the members elected to each house, is valid; and that, inasmuch as he himself never received the votes of a majority of the members elected to each house, he was never elected state printer; but that he first obtained a valid title to the office by virtue of an appointment by the governor on the 12th day of December, 1894, although he had exercised the duties of the office and received his compensation therefor from the 1st of July, 1891, until that date. On the part of the defendants it is contended that there was an agreement on the part of both the senate and the house of representatives to meet in joint convention in Representative Hall on the 15th day of January, 1895, at 12 o'clock noon, and that all that is contained in the senate resolution beyond that fixing the time and place of meeting is mere surplusage, and counts for nothing; that there was a meeting held in accordance with the substance of the resolutions passed by both houses; that Hudson received the votes of a majority of the members of the joint convention, and of all of the members elected to both houses; and that he was therefore duly elected.

We are all agreed upon the proposition that a concurrent resolution fixing the time and place of meeting is not absolutely indispensable to the validity of the joint convention; that, if due notice is given and a quorum of each house is present, it will be sufficient to constitute a valid convention for the election of a state printer. The constitution requires the legislature to meet in joint session on the third Tuesday in January of each odd-numbered year for the election of a state printer, and, while the usual and orderly method of fixing the time and place is that pointed out by the statute of 1861, we do not think full

compliance with its provisions absolutely essential to an election otherwise valid.

Was either of the parties to this action ever lawfully elected state printer? This depends on the validity of the statute of 1879, which requires the concurrence of a majority of the members elected to each house. C. C. Baker received the votes of a majority of all the members elected to each house. But the plaintiff did not receive such a majority either in 1891 or in 1893, nor did the defendant receive such a majority in 1895. *Prouty v. Stovers*, 11 Kan. 235, is cited, and relied on largely by both parties. It was there held that "chapter 17 of the Acts of 1861, providing for joint conventions of the two houses of the legislature, is applicable to the election of a state printer, is not repealed by the constitutional amendment of 1868, and is constitutional"; and that, under the sixth section of the act, an affirmative vote of a majority of all the members elected to both houses was necessary; and that the plaintiff was not elected to the office, though on the first ballot he received a majority of all the votes of the joint convention, at which a quorum was present. The act of 1879 is valid, unless it conflicts with the constitutional provision with reference to the election of a state printer. In the case of *Prouty v. Stovers* it was held that the legislature might determine what majority should be required in order to elect; that, in the absence of any constitutional inhibition, the legislative power in that respect was unrestricted. The act under consideration, however, presents a further question: Can the legislature not only prescribe what proportion of the votes of all of the members of the joint convention shall be required to elect, but also require a severance of the votes of the two bodies, and that the candidate shall receive the votes of a majority of the members of each house? The chief justice is of the opinion that the legislature has this power; that it may require a majority only of a quorum, or of all of the members-elect, in joint convention, or that it may require a majority of a quorum of the members elected to each house, or of all of the members elected to each house; that there is neither an express nor implied constitutional restriction on the power of the legislature in this respect; and that this view is sustained by the opinion of the court in the case of *Prouty v. Stovers*. Mr. Justice JOHNSTON and the writer, however, concur in holding the act of 1879 invalid and inconsistent with the provisions of the constitutional amendment of 1868. The term "joint session," in our view, has a well-recognized meaning, and implies the meeting together and commingling of the two houses, which, when so met and commingled, act as one body. Each member of that body, when it has been once properly and lawfully convened, has equal rights, and his vote has equal weight with that of any other mem-

ber; and it is beyond the power of the legislature to say that in a session, which the constitution says shall be joint, the vote of a senator shall have greater weight than the vote of a member of the house. The framers of the constitutional provision, and the people who voted for its adoption, are presumed, not only to have understood the meaning of the words they selected, but also the customs of joint conventions which meet in all the states for the election of United States senators, and in many of them for other purposes. Our understanding of the very purpose of making a session joint is to remove the check which each house holds on the other, and to permit the two houses combined to vote and act as a single body. If the act of 1879 is valid, 21 senators may defeat the election of a state printer, although 125 representatives and 19 senators vote for the same person. No duty would rest on the senators to yield because their right to vote for the person of their choice would be equal to that of the other members.

Was a valid joint convention held in 1895? The journal of the senate contains no record of the proceedings of a joint convention, but it is admitted that the journal of the house shows the principal facts with reference to what actually took place. On Tuesday, January 15, 1895, the day fixed by the constitution for the election of the state printer, a resolution providing for a joint convention to be held on that day, at 12 o'clock m., in Representative Hall, for the purpose of electing a state printer, was passed by the house, and sent to the senate. On its receipt in the senate, a substitute was passed, fixing the same hour and place of meeting, but providing that the election should be for the ensuing regular term, and that no person should be declared elected unless he had received the affirmative vote of 21 senators and 63 representatives. This substitute was never acted on in the house, nor was there any further action in either body on the concurrent resolution. At 12 o'clock the president of the senate announced that, the hour having arrived for the election of a state printer, the senate would take a recess till 2 o'clock p. m. He and a number of the senators then left the Senate Chamber, and proceeded to Representative Hall. The other senators remained. The president pro tem. of the senate took the chair, and the senators who remained in the Senate Chamber refused to recognize the right of the president of the senate to declare a recess, and refused to attend the joint session. The lieutenant governor took the chair in Representative Hall, as president of the joint convention. The secretary of the senate being absent, Senator Scott was selected as secretary pro tem. On roll call, 14 senators only answered to their names, but 2 others came in before the voting was concluded.

The CHIEF JUSTICE is of the opinion that the separate proceedings of the two

houses were sufficient as preliminaries to a joint session, but is in doubt whether a joint session can be constituted without the presence of a quorum of each house, and on this point he expresses no opinion. Mr. Justice JOHNSTON holds these proceedings sufficient to constitute a valid joint session; that there was an agreement on the time, place, and purpose of the joint session; that all that was contained in the senate resolution beyond this was mere surplusage, and should be disregarded. It appears that 122 members of the house were present, and voted; and the announcement of the president of the senate notified the senators that he and the senators who accompanied him intended to then hold a joint session with the house. These proceedings, though somewhat irregular, are considered by him sufficient to constitute a valid joint convention. The writer is of the opinion that, if a quorum of the senators had actually attended, the mere irregularities in the manner of getting together would not have invalidated the proceedings, but that the attendance of a quorum of each house is absolutely essential to the power to act as a joint convention. The constitution vests the power to elect in the legislature in joint session. The legislature consists of a senate and a house of representatives. While all of the members need not be in attendance in order to constitute a valid house and a valid senate, a quorum, which the constitution fixes at a majority, must be present. Although the house of representatives contains a large majority of the members of the joint convention, certain it seems to me that there can be no joint convention until the senate attends. The constitution nowhere, in express terms, or by any fair implication, confers on the house of representatives alone, even though every member should vote for the same person, power to elect a state printer. The senate must attend, and the word "senate" can never mean less than a quorum of the senate. There is no force in the suggestion that 21 senators, by refusing to enter a joint convention, can prevent the election of a state printer, just as effectually as by refusing to vote for any particular person when the joint convention has been formed. The law makes it the clear duty of the senate and of the senators, under their oaths of office, to attend a joint convention, and it is to be presumed that they will do so; but, when voting in that joint session, no duty rests on them to vote for any one other than the person of their own selection. Officials do sometimes fail to perform the duties the law imposes on them, but, unless we can safely presume that they will perform their duties, the very idea of government must be abandoned. It is unnecessary to consider whether the attendance of the absent senators could have been compelled, under the circumstances of this case, because the facts present no such question.

It follows from these conclusions that, in the opinion of the majority of the court, Mr. Snow was duly elected state printer in 1891; that, as no other person was elected as his successor in 1893, he held over under the provisions of the constitution, and was the state printer de jure at the time of his resignation, on December 12, 1894; that his resignation and reappointment gave him no greater and no less title to the office than he had before; and that he was entitled to hold the office until a successor was duly elected and qualified. Chief Justice MARTIN holds that the plaintiff was never duly elected state printer, having never received a majority of all of the members elected to each house; that his resignation was a mere nullity, because he had no title to give up, and there was no actual vacancy to be filled, for he was occupying the office every moment of the day and night of December 12, 1894, and thereafter until July 1, 1895, just as he had been ever since July 1, 1891. He held two full terms as a de facto officer, and on the expiration of the last, the defendant having a certificate of election in due form, signed by the lieutenant governor and the speaker of the house of representatives, as officers of the joint session actually held at the proper time, the secretary of state was justified in recognizing him as state printer, for he could not decide that such certificate was either void or voidable; and the defendant, having obtained peaceable possession of the office, at least under color of proper authority, is entitled to hold it as against one having no better title under the maxim, "Potior est conditio defendentis."

It is shown that C. C. Baker was duly elected state printer in 1889, and there is no definite showing that he abandoned the office, or how the plaintiff came into possession of it. Although it appears that Mr. Snow was actually in the possession of the office, and recognized as state printer by the other state officials, yet, in his view, these facts alone are insufficient to show that Baker had voluntarily abandoned an office to which, under the law, he was entitled, and which he could have recovered unless estopped from so doing by his own act. Was Mr. Hudson elected, then, in 1895? The view of the CHIEF JUSTICE is that he was not elected, because he failed to receive the votes of a majority of all the members elected to the senate, as required by the act of 1879. The view of Mr. Justice JOHNSTON is that he was elected; that the joint convention was duly held; that he received a majority of all of the votes cast in that joint convention; and that such vote was sufficient. The view of the writer is that he was not elected because no joint convention was held, no quorum of the senate having attended. What, then, must be the judgment? Though a majority of the court are of the opinion that Mr. Snow was elected, a different majority are of the opin-

ion that Mr. Hudson was not elected. The CHIEF JUSTICE holds that Mr. Snow cannot recover in either of these actions, because he has failed to establish his own title to the office. Mr. Justice JOHNSTON holds that he cannot recover because Mr. Hudson was duly and legally elected as his successor. The writer alone is of the opinion that the plaintiff ought to recover; that he has shown a valid title to the office; and that the defendant has no title to it. Judgment will be entered in favor of the defendants for costs in both cases.

#### In re CHIPCHASE.

(Supreme Court of Kansas. Jan. 11, 1896.)

HABEAS CORPUS—SUFFICIENCY OF RETURN—LICENSE TAX.

1. It is not necessary that the return to the writ of habeas corpus shall contain a denial of the averments of the application for the writ, nor anything more than is prescribed by section 668 of the Civil Code; and where a return is made in compliance with the Code, and the petitioner desires to controvert the return, or allege any new matter showing the restraint to be illegal, he may do so by an appropriate pleading, and thereby an issue as to the facts may be raised.

2. Without proof of the privileges enjoyed and the burdens borne by a telephone company in a city of the first class, or of the expenditures, indebtedness, and necessities of the city, it cannot be said, as a matter of law, that a license tax against the company of \$12 per annum for each business 'phone, and of \$10 per annum for each residence 'phone, used by the company within the city, is excessive, prohibitive, or oppressive.

(Syllabus by the Court.)

Application by H. G. Chipchase for writ of habeas corpus. Petitioner remanded.

Bentley & Ferguson and Gleed, Ware & Gleed, for petitioner. Geo. W. Adams and John W. Adams, for respondent.

JOHNSTON, J. On September 13, 1895, H. G. Chipchase, the manager of the Missouri & Kansas Telephone Company at Wichita, was arrested for the violation of an ordinance of the city of Wichita imposing a license tax on telephones, and prescribing penalties for using them without complying with its requirements. The first section of the ordinance provides that any company, corporation, or person engaged in the telephone business in the city of Wichita shall pay a license tax of \$12 per annum upon each business 'phone, and a tax of \$10 per annum for each residence 'phone, used in carrying on such business, and making it unlawful to carry on the business without having obtained from the city clerk a license therefor. The second section provides that, if any company, corporation, or person carries on the business without procuring a license, they will forfeit the sum of \$25 for each day that each 'phone is used or operated. The third section makes it an offense to carry on



the business without paying the tax and procuring a license, and provides that any manager, agent, servant, or employé of a company, corporation, or person who shall violate the ordinance shall, upon conviction, be fined in any sum not exceeding \$100. The telephone company of which Chipchase was the manager was engaged in the telephone business in Wichita, and it is alleged that the company had about 290 telephones in use within the corporate limits of the city. The company refused to pay the license tax or otherwise comply with the provisions of the ordinance, and, upon a complaint made, Chipchase was arrested, under a warrant issued by the police judge of the city of Wichita. Upon the application of Chipchase, the writ of habeas corpus was issued. In the return of the city marshal, he sets forth the fact that Chipchase is in his custody by virtue of a warrant duly issued as aforesaid, and also setting out a copy of the city ordinance under which the petitioner was prosecuted. Chipchase excepts to the sufficiency of the return, and asks to be discharged from custody. It is insisted by the petitioner that the ordinance is void—First, because the license tax is unreasonable and excessive; second, because it obstructs and places a burden upon interstate commerce; third, because the instruments upon which the license taxes are assessed are covered by letters patent.

In the application for the writ are found allegations to the effect that the license tax imposed is grossly excessive, and that, as the business of the company extends beyond the limits of the state, the license tax amounts to a tax on interstate commerce. These and other averments of the application, however, are not admitted in the return to the writ, and they were denied by counsel for respondent at the hearing. The questions so well argued by counsel are therefore not ripe for decision, nor do any of the objections made afford grounds for the discharge of the petitioner. No issue was joined nor proof offered in the case. The averments of the application are not to be taken as true because they are not denied in the return. The return is not treated as an answer to the application, but rather as a response to the writ. The averments in the application are made for the purpose of obtaining the allowance of the writ, and it is not necessary that they should be answered or denied by the officer in his return to the writ. The statute prescribes what the return shall state, and in this instance it sets forth the cause of restraint, together with a written copy of the authority under which the petitioner is held, and appears to comply with the statutory requirement. Civ. Code, § 668. If the petitioner desires to controvert the return or any part thereof, or allege any new matter showing the restraint to be illegal, he may do so after the return is made. Civ. Code, § 669. In this

way an issue may be formed, and, upon a hearing, the disputed questions of fact may be settled. As the ordinance is included in the return, we may inquire and determine whether upon its face it is valid. Express authority has been given by the legislature to levy and collect license taxes upon all callings, trades, professions, and occupations, including telephone companies, within the limits of cities of the first class. Gen. St. 1889, pars. 555, 804. In such cases it has been held that the municipality is not limited to the mere expense of regulation, but that they may be imposed for the purpose of obtaining revenue to meet the general expenses of the city. *Fretwell v. City of Troy*, 18 Kan. 271; *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288; *Tulloss v. City of Sedan*, 31 Kan. 165, 1 Pac. 285; *City of Cherokee v. Fox*, 34 Kan. 16, 7 Pac. 625; *City of Wyandotte v. Corrigan*, 35 Kan. 21, 10 Pac. 99; *City of Girard v. Bissell*, 45 Kan. 66, 25 Pac. 232. While the tax levied appears to be very large, we cannot say as a matter of law that it is excessive, nor can we without proof hold that it is oppressive or prohibitive. In *Fretwell v. City of Troy*, supra, it was said that "the mere amount of the tax does not prove its invalidity." The city cannot impose a license tax beyond the necessities of the city, nor can it impose one so excessive as to prohibit or destroy the occupation or business. *City of Lyons v. Cooper*, 30 Kan. 324, 18 Pac. 296. Many things, however, enter into the determination of what constitutes a just and reasonable license tax, but as to the conditions existing in Wichita we are not advised. There is the nature of the franchise or privileges enjoyed by the company within the city, the prices which they charge for the service given by it to its patrons, the amount of property tax, if any, paid by the company, the current expenses of the municipality, and the amount of its indebtedness. Without information upon these questions, the court cannot determine that a license tax of \$12 per annum upon a business 'phone and \$10 upon a residence 'phone is prohibitive, excessive, or oppressive. Habeas corpus may not be the most appropriate proceeding in which to determine the questions presented and discussed by counsel, but, before we can decide them in this proceeding, an issue must be joined, and the facts must be either established by proof or agreed upon by the parties. The petitioner will be remanded. All the justices concurring.

#### STATE v. LEWIS.

(Supreme Court of Kansas. Jan. 11, 1896.)

CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESS—INSTRUCTIONS—DEFENDANT AS WITNESS.

1. The failure to obtain the testimony of an absent witness, however material, does not require the continuance of a cause, unless the par-

ty asking the continuance has used due diligence to procure the attendance or obtain the testimony of the witness.

2. In charging the jury, it is error for the court to assume the existence of an important fact, which is not conceded or established by uncontradicted proof.

3. Where a defendant in a criminal prosecution has offered himself as a witness in his own behalf, he may be cross-examined to the same extent as any other witness, and he may also be recalled by the state for further cross-examination, but he cannot be recalled as a witness for the state, and compelled to testify in its favor.

(Syllabus by the Court.)

Appeal from district court, Graham county; Charles W. Smith, Judge.

J. A. Lewis was convicted of larceny, and appeals. Reversed.

G. W. Jones, H. J. Harwi, and Z. C. Tritt, for appellant. F. B. Dawes, Atty. Gen., and F. D. Turck, for the State.

**JOHNSTON, J.** J. A. Lewis appeals from a conviction upon a charge of stealing six hogs, and the punishment imposed was imprisonment in the penitentiary for a term of two years. A number of errors are assigned upon rulings made at the trial, but some of them are not of sufficient importance to require notice or comment.

The refusal of a continuance because of an absent witness is strongly urged as a ground of reversal. The testimony which it is said the witness would give was undoubtedly material, but we are not convinced that sufficient diligence to obtain it was shown. For several months after his arrest, and before the trial, the defendant knew that the witness intended to remove to another state, to which her husband had preceded her, but no effort was made to take her deposition. He states that she had promised to postpone going until after the trial, but she left the state some time before the trial, and the defendant knew that she went away, as well as the place to which she went, but no steps were taken by him to procure her testimony.

Complaint is also made of the production before the jury of meat found by the sheriff, with the aid of a search warrant, in the possession of the defendant. There was testimony tending to show that the hogs alleged to have been stolen were driven a short distance from the place where they were kept, when some of them were killed and loaded into a wagon, and that those in search found tracks of the wagon as well as drops of blood on the grass and the ground. The tracks were found to continue until they came to the premises of the defendant, and near his granary and stable blood and other traces of their presence were found. The tracks were followed beyond the defendant's place for a distance of about two miles. One witness testified that on that day he was at the granary, and found it locked, but in looking through a crack he discovered a pile of meat partly covered over in the granary,

and that, shortly after the searching party went past the defendant's place, the defendant and another loaded the meat into a wagon and drove away with it. About a month after the commission of the alleged offense, a search warrant was procured authorizing a search of the defendant's premises, and at that time the sheriff found some meat which was produced and admitted in evidence. The testimony was not strong, nor very important; but in view of the other testimony it was competent to give to the jury for what it was worth.

Complaint is made of the following instruction: "Evidence has been offered for the purpose of showing that meat was seen, on the morning after the loss of the hogs, as claimed, at the place of the defendant, J. A. Lewis, and that the same was soon thereafter removed therefrom, and after Joseph Mahurin and others are claimed to have been there. This evidence you may take into consideration for the purpose of determining whether or not the pork so seen was probably a part of the hogs claimed to have been lost from the premises of the witness Manurin, as charged." There was no testimony to show that the meat alleged to have been seen in the granary of the defendant was pork, and the only witness who testified that he saw the meat in the granary was unable to state, from the view he had, whether it was beef, pork, or mutton. By this instruction the court, against the evidence of the defendant, assumes that meat was actually seen in the granary, and the error is emphasized by the assumption that that which was seen was pork. The testimony referred to was the most important offered in behalf of the prosecution, and the unwarranted assumption by the court may have had great influence with the jury in determining that the defendant was guilty. At any rate, we are unable to say that no prejudice resulted from the error.

There is also cause to complain of the ruling of the court in compelling Lewis to take the witness stand and testify in behalf of the state. He had previously testified in his own behalf, and it is contended that the matter on which he was recalled was only a continuation of the evidence given by him when he first took the witness stand. The state was entitled to recall him for the purpose of a further cross-examination, but the record does not show this to have been the purpose. The statement is that he was recalled in behalf of the state in rebuttal, and examined in chief by the attorney representing the state. The examination appears to have been extended, too, beyond what would have been a legitimate cross-examination, if he had been called for that purpose.

Objections were made to other rulings, but none of them are deemed to be material. For the errors pointed out the judgment must be reversed, and the cause remanded for a new trial. All the justices concurring.

**In re SHARP.**

(Supreme Court of Kansas. Jan. 11, 1896.)

Error to and appeal from court of appeals.

Application by A. A. Sharp for discharge of habeas corpus. Petitioner discharged, and the state brings error and appeals. Dismissed.

F. B. Dawes, Atty. Gen., and F. Dumont Smith, for the State. W. H. Vernon, and G. Polk Cline, for petitioner.

**PER CURIAM.** This is an attempt to review an order of Hon. Elrick C. Cole, judge of the court of appeals of the Western division of the Southern department, discharging A. A. Sharp from the custody of the sheriff of Pawnee county under habeas corpus proceedings. A petition in error, with a transcript of the proceedings certified by the clerk of the court of appeals, and also notices of appeal as in a criminal case, are attached to the record. On an examination of the journal entry discharging the petitioner, we find that he waived the question of probable cause, and also that it was admitted that copies of two informations, two complaints, and two warrants attached to the petition for the writ were true copies of the originals, but it further appears that the testimony of one witness was offered at the hearing. The informations attached to the petition appear to be, in form, eight separate informations, although they are numbered from first to seventh counts. There is no bill of exceptions, nor case made in the record before us, and as evidence was in fact introduced, and the record fails to show the grounds of the discharge, there is nothing we can act on. We intimate no opinion as to whether an appeal lies in any habeas corpus case from the court of appeals, a judge thereof, or from any other court or judge, to this court, nor whether the action in this case, if appealable at all, should come here by petition in error, or appeal, as in criminal cases. The case is dismissed because of the want of a record challenging our attention.

**CITY OF LYONS v. WELLMAN.**

(Supreme Court of Kansas. Jan. 11, 1896.)

**VIOLATION OF CITY ORDINANCE—APPEAL BY CITY.**

In a city prosecution, appealed to the district court, where the defendant is discharged, an appeal does not lie in behalf of the city or in the name of the state.

(Syllabus by the Court.)

Appeal from district court, Rice county; Ansel R. Clark, Judge.

A. E. Wellman was discharged on a complaint for drunkenness, and the city appeals. Dismissed.

J. W. Brinckerhoff, for appellant. C. F. Foley and Samuel Jones, for appellee.

**MARTIN, C. J.** The defendant, a resident of Topeka, Kan., was in the city of Lyons November 4, 1894, and for two or three days thereafter, when he returned to Topeka. About two weeks afterwards a subpoena, in a criminal case pending before a justice of the peace at Lyons, was served upon him at Topeka and in obedience thereto he went to Lyons to testify as a witness. Soon after his arrival there he was arrested on a warrant from the police judge charging him with being drunk in a street of the city of

Lyons on November 4, 1894, such being an offense under an ordinance of the city. The complaint was filed and the warrant issued while the defendant was in the city as a witness in said criminal case. He was found guilty, and was fined in the police court, but he appealed to the district court, where his plea to the jurisdiction was sustained, and he was discharged, the court holding that he was privileged from arrest on said charge while in attendance as a witness in the criminal case in obedience to subpoena. The city excepted to the ruling of the court, and thereupon the city attorney stated to the court that "the state would reserve the question," and the case is now here for disposition by this court. A motion is made to dismiss the appeal for want of jurisdiction. Drunkenness in a street or highway is a public offense (Gen. St. 1889, par. 2519), and when prosecuted in the police court of the city the proceeding is in its nature criminal; but even the right of the state to appeal in criminal cases is quite limited, as was observed in *City of Salina v. Wait* (just decided) 41 Pac. 677. See, also, *State v. Crosby*, 17 Kan. 396, 401. In *Junction City v. Keefe*, 40 Kan. 275, 19 Pac. 735, a decision of the commission, it appears to have been assumed that the city was identical with the state in such prosecutions, and the court seems to have overlooked the distinction. We have no disposition to question the authority of that case as applied to prosecutions instituted and carried on by the state, but to say that, without any statutory provision authorizing the city to appeal, it may do so in the name of the state, under sections 283, 288, of the Criminal Code, is much in the nature of judicial legislation. An appeal may be taken by a defendant in a criminal case "from any judgment against him." Cr. Code, § 281. But the state has a right of appeal only under section 283 of the Criminal Code, and no legislative provision whatever is made for an appeal by a city in any prosecution under its ordinances. The motion to dismiss must be sustained. All the justices concurring.

**STATE v. ARNOLD.**

(Supreme Court of Kansas. Jan. 11, 1896.)

**CRIMINAL LAW—APPEAL—JUDGMENT FOR COSTS.**

No appeal lies from an order of the district court, made in a proceeding to prevent the commission of an offense under article 2 of the Code of Criminal Procedure, adjudging the costs of the proceeding against the defendant. (Syllabus by the Court.)

Appeal from district court, Ellis county; Lee Monroe, Judge.

B. C. Arnold appeals from an order requiring him to pay the costs in a proceeding against him to keep the peace. Dismissed.

Chas. A. Hiller, for appellant. F. B. Dawes, Atty. Gen., M. H. Mulroy, and Wm. L. Aaron, for the State.

ALLEN, J. B. C. Arnold gave bond for his appearance at the district court of Ellis county, and in the meantime to keep the peace. He appeared as required by the terms of his bond, and the court thereupon entered an order discharging him, and requiring him to pay the costs of the proceeding, taxed at \$4.60. From this order he seeks to appeal. The papers were first filed in the court of appeals, Western division of the Northern department, and were afterwards certified to this court. The state challenges the right of the defendant to appeal. In Mitchell's Case, 39 Kan. 762, 19 Pac. 1, it was held that the payment of costs in a proceeding of this kind could not be enforced by imprisonment of the defendant. In *Re Boyd*, 84 Kan. 570, 9 Pac. 240, it was held that a judgment for costs in a criminal case is no part of the punishment of the offense. This proceeding was not a criminal prosecution for the purpose of punishing the defendant for the commission of a crime, but was a proceeding to prevent the commission of an offense, under article 2 of the Code of Criminal Procedure. The extent of the judgment which the court could render against the defendant was to require him to give a new recognizance, and to pay the costs of the proceeding. The judgment in this case is for costs only, which amount to but a trifling sum. But whether much or little, this is not such a judgment as a defendant may appeal from, under section 281 of the Code of Criminal Procedure. That section has reference only to judgments inflicting some punishment on the defendant. No appeal lies either to the court of appeals or to this court, and the case is dismissed. All the justices concurring.

**DYKES, Sheriff, et al. v. LOCKWOOD MORTG. CO.**

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

**TAXATION—PLACING ADDITIONAL PROPERTY ON ROLL—NOTICE—JUDGMENT—SITUS FOR TAXATION.**

1. The notice required by paragraph 6918, Gen. St. 1889, is jurisdictional in its nature, and the county clerk or board of county commissioners have no authority under such section either to add to the valuation of property listed for taxation or place additional property upon the tax roll for taxation without giving the notice required by said paragraph.

2. Under our statutes a judgment has no situs for the purpose of taxation distinct and apart from the domicile of the owner.

(Syllabus by the Court.)

Error from district court, Stafford county; Ansel R. Clark, Judge.

Action by the Lockwood Mortgage Company against B. T. Dykes, sheriff of Stafford county, and others. Demurrer by defendants overruled, and they bring error. Affirmed.

O. C. Jennings and G. L. Garrigues, for plaintiffs in error. Moseley & Dixon, for defendant in error.

COLE, J. On February 20, 1893, Hannah L. Whiteside obtained a personal judgment in the district court of Stafford county against Mary and Frederick Schulz in the sum of \$327, and in the same action and at the same time also obtained a decree of foreclosure directing a sale of certain real estate situated in the city of St. John, Stafford county, Kan. On September 25, 1893, said real estate was sold at sheriff's sale pursuant to said decree, and Hannah L. Whiteside became the purchaser of the same, holding the same until some time in 1894, when, for a valuable consideration, she conveyed the said real estate to the Lockwood Mortgage Company, who at the time of the commencement of this action were the legal owners thereof. On the 3d of August the board of county commissioners of Stafford county made an order, and caused the same to be entered of record on their journal in the office of the county clerk of said county, which order directed the clerk of the district court to list all judgments shown by the records of his office, and certify the same to the county clerk, and directed the county clerk to place said list of judgments on the 1893 tax rolls, to be taxed as other personal property of that year. In October of 1893 the said board made a further order to the effect that whoever filed an affidavit with the county clerk that the judgments in their favor were of no personal value should be exempt from having such judgment placed upon the tax roll. Some time between the making of the first and second orders the clerk of the district court of Stafford county furnished the required list to the county clerk, and upon such list was the judgment of Hannah L. Whiteside, above referred to. Said judgment was not entered upon the personal property tax rolls of any township, city, or school district of said county, but was entered upon the real-estate tax rolls of said county, and there was levied and assessed against said judgment a tax in the sum of \$7.96. In March, 1894, the county treasurer of Stafford county issued to the sheriff a personal property warrant for the amount above specified, being the unpaid taxes on such judgment as shown on the tax roll, and the sheriff returned said tax warrant unsatisfied, and the tax warrant, with the indorsements thereof, was filed with the clerk of the district court on May 23, 1894, and by that officer entered upon the judgment docket of said court against Hannah L. Whiteside in the sum of \$7.96. On December 20, 1894, the clerk of the district court of Stafford county issued to the sheriff of said county a real-estate tax warrant commanding said sheriff to make said sum of \$7.96 out of the lands and tenements of Hannah L. Whiteside, and under such warrant the sheriff advertised the real estate above

referred to for sale. Prior to the issuance of the real-estate tax warrant, defendant in error had purchased said real estate from Hannah L. Whiteside without any personal knowledge of any lien or claim of the board of county commissioners of Stafford county. During all the times above mentioned Hannah L. Whiteside was a nonresident of the state of Kansas, and had no business located within said state. No assessor of Stafford county assessed or attempted to assess the judgment in her favor, and no notice was either given or attempted to be given by the county clerk or the board of county commissioners of Stafford county to Hannah L. Whiteside or defendant in error of the listing or assessment of said judgment, nor had either of said parties any notice of either of the orders made by the board of county commissioners until after the real estate had been advertised for sale, and no attempt was made either by the county clerk or board of county commissioners of Stafford county to give any notice to such parties of either of said orders. This action was commenced by the defendant in error in the district court of Stafford county for the purpose of enjoining the sale of said lands, and on January 23d the probate judge of Stafford county, in the absence of the Honorable Ansel R. Clark, judge of the district court, granted a temporary restraining order. The petition filed in this case recited the facts as above set forth, and plaintiffs in error filed their demurrer to the same upon the following grounds, to wit: First, that the petition did not state facts sufficient to constitute a cause of action; second, that several causes of action were improperly joined; and, third, that there was a defect of parties defendant. The demurrer was overruled, and, plaintiffs in error not desiring to further plead, the district court granted a permanent injunction, from which ruling and judgment of the court the plaintiffs in error bring the cause here for review, the judge of said court having certified that this is one of the excepted cases referred to in chapter 245 of the Laws of 1889, as it involved the tax and revenue laws of the state of Kansas.

Several important questions are presented in this case, the most important of which, as is conceded by both plaintiffs and defendant, is the right of the state or county to levy a tax upon a judgment rendered in this state and belonging to a nonresident. We shall endeavor to answer each of the questions presented.

The defendant in error contends, first, that, as the assessment of this judgment was not placed upon the personal property tax roll of any city, school district, or township of Stafford county, the tax was therefore void. Our opinion is that in this regard the contention of defendant in error is not correct, and that in such a case the tax would be at most only voidable; and, before an injunction could be allowed to restrain the collection

thereof for that reason, there must be a tender made upon some reasonable valuation of the property attempted to be taxed. Commissioners of Leavenworth Co. v. Lang, 8 Kan. 284; City of Lawrence v. Killam, 11 Kan. 509. The defendant in error further contends that where no assessment has been made by the assessor of any city or township of any personal property within a given county, and the county clerk or board of county commissioners of said county proceed under paragraph 6918, Gen. St. 1889, as was done in this case, to place the omitted personal property upon the tax roll, the first step necessary to be taken in order to make a tax levy upon such property valid must be the giving of the notice required by said paragraph. Such paragraph, so far as it is here applicable, reads as follows: "The county clerk, or board of county commissioners if he or they shall have reason to believe that \* \* \* the assessor has not returned the full amount required to be listed in his city or township, or has omitted any personal property moneys, credits, \* \* \* which are by law subject to taxation, shall proceed at any time before the final settlement with the county treasurer to correct the returns of the assessor, and to charge such person, company or corporation on the tax roll with the proper amount of taxes; to enable him to do which, he is hereby authorized and empowered to issue compulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the value of such articles of personal property, moneys, credits, \* \* \* and examine such person or persons on oath or affirmation in relation to the statement or returns. And it shall be the duty of the said clerk, in all such cases to give at least 5 days' notice to such person, company or corporation by the sheriff leaving a copy of the notice with the person, if he resides in the county; and if the person does not reside in the county, then by putting a copy of said notice in the P. O., properly directed to said person, and if a company or corporation, by leaving a copy of the notice at the nearest and usual place of business of said company or corporation before entering the said increased valuation on the tax roll, that the said person, company or corporation may have an opportunity of showing that the statement or return to the assessor was correct." In the case of Coal Co. v. Emlen, 44 Kan. 117, 24 Pac. 340, in referring to this section (Gen. St. 1889, c. 107, § 70, par. 6918), the court says: "To enable the county clerk or board of county commissioners to successfully correct such returns, the county clerk is authorized to issue compulsory process, and bring before him any persons who he may suppose have any knowledge upon the subject; \* \* \* but before the county clerk or board of county commissioners shall proceed to correct any return of the assessors they must give the property owners five days' notice, to be

served as required by section 70." The notice prescribed in the paragraph above quoted is therefore jurisdictional in its character, and, in order for the board of county commissioners or the county clerk to enter upon the assessment rolls personal property which has been omitted by the assessor, whether such omission be intentional or by mistake, and assess a legal tax thereon, there must first be served in the manner prescribed by the statute the five-days notice therein referred to.

Two other questions presented may be considered together. It is contended upon the part of the defendant in error that no valid levy was made upon the land in question, and upon the part of the plaintiffs in error it is contended that the defendant in error is in no position to challenge the tax in question, for the reason that this proceeding is a collateral attack upon the judgment of a competent court. Neither position is correct. The statute provides what may be termed a special proceeding, which is summary in its nature, for the purpose of collecting the revenues needed for conducting the business of the different political divisions of the state, and providing for the protection of her citizens; and, if the provisions of the statute are fulfilled by the proper authorities, that is all that is necessary. Besides, in this case, if the tax was a valid one, defendant in error took the land with constructive notice of the tax lien. For the same reason, viz. that the proceeding is a summary one, special in its nature, the record made in the office of the clerk of the district court upon the judgment docket does not rise to the dignity of a judgment rendered by the court which has had all the parties properly before it. And in a case like this one, where no attempt has been made to serve the notice required by statute, the proceeding would be void, and subject to collateral attack. *McNeill v. Edie*, 24 Kan. 108.

We come now to the most important question in this case, which is one that has been the subject of litigation for many years in this country. The writer of this opinion has approached its decision with considerable reluctance, and yet with a clear personal view as to the law as established by the great weight of authority. The taxing power of the state is one which should be zealously guarded within a reasonable construction of the constitutional and statutory provisions affecting the same. Our statute provides that "all property in this state \* \* \* shall be subject to taxation." Gen. St. 1889, par. 6846. "The term 'personal property' shall include every tangible thing which is the subject of ownership; \* \* \* also all tax sale certificates, judgments, notes, bonds, and mortgages and evidences of debt secured by lien on real estate." Id. par. 6847. The decision of this whole question of course depends upon the answer to the question, where is the situs of a judgment rendered in a court

of this state in favor of a nonresident? A judgment is a property of an intangible character, and can hardly be said to have any actual situs anywhere. It cannot be seized by any kind of process, and whatever situs it has must be fixed either by the residence of the owner thereof, or by a location given to it from the place of its rendition or the character of the judgment rendered. It is contended on the part of the plaintiffs in error that the situs of the judgment in question is fixed in Stafford county because the same was there rendered and appears of record, and also because it is a lien upon real estate situate in that county. Under our statutes, after the rendition of a judgment, a transcript thereof may be taken from the office of the clerk of the district court of the county in which it is rendered, and filed in the district clerk's office in any other county or counties of the state, having from the time of such filing the same force and effect as it possessed in the county where such judgment was rendered. As personal property must be taxed either at the place of residence of the owner or the place of its situs if the same is separate and apart from the residence of the owner, the question would then arise in which county the situs of a judgment was where one or more transcripts had been filed in one or more counties of the state, and the owner of such judgment was a nonresident of the state. In that case the judgment would have as much of an abiding place in a county in which a transcript was filed as in the county in which it was originally rendered. There must be some reason, then, stronger than that a judgment was rendered in a certain county, to tax the same when it is the property of a nonresident, because the situs must be definitely determined and fixed at the point of taxation in order to give the proper officials control over the same for that purpose. Is the power to tax a judgment gained by reason of the fact that it is rendered upon the foreclosure of a mortgage upon lands within any given county? We are of the opinion that it is not. In this state a mortgage of real property is in no sense a conveyance of any interest in land, but is merely a security; and reducing the debt secured by mortgage to judgment does not alter that condition, which remains the same until sale and confirmation under the decree of the court. There is, therefore, no interest in lands reached by taxing such a judgment. Besides, the mortgage securing a single debt is frequently given upon real estate situated in several counties, and the action to foreclose the same may be brought and judgment obtained in any one of the counties in which the land described in the mortgage is situated. Such being the case, if the power to tax was gained by reason of the fact that the judgment was a lien upon the real estate described in the mortgage, the question would naturally arise, in which county would a judgment rendered upon foreclosure of a

mortgage upon lands in several distinct counties be taxable? If the reason is a sound one, then such a judgment would be liable for taxation in either or all of the counties where the lien was created thereby, and that would be contrary to all the true doctrines of taxation. The supreme court of this state has never passed upon this question, and we are relegated to the decisions of courts of last resort in other states and text writers upon the subject to determine what is the correct doctrine. One of the principal cases bearing upon this point is, *Case of the State Tax on Foreign-Held Bonds*, reported in 15 Wall., at page 300, and cited in nearly all the subsequent authorities on this subject. The opinion in that case was delivered by Field, J., and is exhaustive in its citations and reasoning. In that case, after referring to the law of Pennsylvania, which, like our own state, prescribes that a mortgage, though in form a conveyance, is merely a security for the debt, the court say: "Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by counsel, that the nonresident holder and owner of a bond secured by mortgage in that state owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state when held by a resident therein, but when held by a nonresident it is as much beyond the jurisdiction of the state as the person of the owner." In that case, also, the court cite approvingly the case of *People v. Eastman*, 25 Cal. 602, where the same question was discussed as presented here. Sawyer, J., in delivering the opinion of the court in the case of *People v. Eastman*, supra, says: "The money at interest, debt or obligation, is the principal thing, and the mortgage is only a security; a mere incident to the debt or obligation. The mortgage has no existence independent of the thing secured by it. A payment of the debt discharges the mortgage. The thing secured is intangible, and has no situs distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may at the same time be secured by a mortgage upon land in every county in the state; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a situs subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the state, and the mortgage in one county may be a different one from that in another, although the debt secured is the same. The fact that a mortgage has been foreclosed, and the lien carried

into a judgment, does not, in our opinion, change the character of the property with reference to the question under discussion. The principal thing is still a debt secured by a judgment lien, instead of a mere mortgage lien." In the case of *City of Davenport v. Mississippi & M. R. Co.*, reported in 12 Iowa, 539, this same question was under discussion. The statute of that state with reference to the taxation of property within the state was similar to our own. In that case the court says: "We cannot concede, however, that it was the intention of the legislature to tax mortgages when owned by nonresidents of the state. Section 3 of said act [Laws 1858, p. 306] provides that all other property, real and personal, within this state is subject to taxation, etc., and mortgages and other security are within the classes of property named. Is a mortgage owned by a nonresident property within this state, within the meaning of this section? A mortgage, so long as the right of redemption continues, is real estate. Both in law and equity the mortgagee has only a chattel interest. See 1 Hill, Mort. p. 163. It is true that the situs of the property mortgaged is within the jurisdiction of the state, but, the mortgage itself being personal property, a chose in action, attaches to the person of the owner. See Story, Conf. Law, § 879. It is agreed by the parties that the owners and holders of the mortgages are nonresidents of the state. If so, and the property in the mortgage attaches to the person of the owner, it follows that these mortgages are not properly within the state, and, if not, they are not subject to taxation." A similar doctrine is laid down in the case of *Worthington v. Sebastian*, 25 Ohio St. 1, in the following language: "Intangible property has no actual situs. If, for purposes of taxation, we assign it a legal situs, surely that situs should be the place where it is owned, and not the place where it is owed. It is incapable of a separate situs, and must follow the situs either of the creditor or the debtor. To make it follow the residence of the latter is to tax the debtor, and not the creditor; to tax poverty instead of wealth." We might add to the cases above cited a long list of similar authorities, but will only cite a few of them: 1 *Desty*, Tax'n, p. 326; *Cooley*, Tax'n (2d Ed.) 15, 21, 22; *Herriman v. Stowers*, 43 Me. 497; *City of St. Paul v. Merritt*, 7 Minn. 258 (Gil. 198); *Catlin v. Hull*, 21 Vt. 152; *Kirtland v. Hotchkiss*, 100 U. S. 496.

It is true that cases have been cited from the states of Michigan and Oregon holding apparently a contrary doctrine, but an examination of those authorities shows that they are founded upon special statutes, which expressly provide that a mortgage by which a debt is secured upon land within those states shall, for the purpose of taxation, be deemed and treated as an interest in the land so pledged. The force of those authorities, then, is simply that the courts of those two states have determined that

the legislature, in their opinion, have the power to fix the situs for the purpose of taxation at the place of the location of the property mortgaged, and that for such purposes real-estate mortgages may be treated as an interest in lands. Upon the other hand, the cases above cited in support of the doctrine here announced, together with the numerous decisions along the same line, are all upon the basis that personal property, consisting of mortgages and debts generally, have no situs independent of the domicile of the owner; and such decisions are founded upon statutes similar to our own. The question as to whether the legislature may provide that for the purpose of taxation real-estate mortgages and judgments of foreclosure thereon may be treated as an interest in land, as held by the courts of Michigan and Oregon, is not presented by this case for decision; and until the legislature of this state shall so provide it is not necessary for a reviewing court to determine the validity of such a statute.

Plaintiffs in error cite the cases of *Wilcox v. Ellis*, 14 Kan. 588; *Fisher v. Commissioners of Rush Co.*, 19 Kan. 414; *Blain v. Irby*, 25 Kan. 499,—as tending to support the position that the judgment in question is taxable in this state. The first of these cases holds that certain notes given in the state of Illinois, belonging to one who resided in the state of Kansas, and which notes had never been in the state of Kansas, but had been by the owner left for collection in the state of Illinois, were not properly taxable in this state. The second case cited holds that certain notes which were made and left in the state of Iowa, and which had never been in Kansas, were not properly taxable in this state, although the owner resided here. But in each of these cases the property in question was tangible property, and the owner thereof had by a distinct act fixed a situs therefor separate and apart from his own domicile. This cannot be said to apply where one procures a judgment to be rendered within the limits of this state, for the reason that in itself the judgment is intangible in its nature, and is simply a portion of the procedure for the enforcement of a right, the situs of which right can only be, from its very nature, at the domicile of the owner. The case of *Blain v. Irby*, supra, simply holds that promissory notes and mortgages are goods and chattels within the meaning of section 92 of the tax law, and may be levied upon and sold by a sheriff holding a tax warrant, provided the sheriff can obtain possession of them without committing any wrong. A distinction between that case and this one is obvious, for the judgment is not subject to levy or execution, and in that case the court draws this distinction in the following language: "Promissory notes are different from almost all other kinds of choses in action. They may be transferred from one person to another

by assignment, or by indorsement, or by mere delivery. They may be transferred about as easily, and almost in the same manner, as a horse or a cow; and, like a horse or a cow, they have a personal and independent situs of their own. *Wilcox v. Ellis*, 14 Kan. 588; *Fisher v. Commissioners of Rush Co.*, 19 Kan. 414; *State Tax on Foreign-Held Bonds Case*, 15 W. 1. 300. They have such an independent situs that they may be taxed where they are situated. Of course, ordinary choses in action cannot be levied upon by an officer in the ordinary manner, because an officer cannot seize them, or take them into his possession." It is also urged by the plaintiffs in error that the levy of the tax in this case should be supported upon the principle that protection and taxation are correlative terms, that the judgment in question was procured in this state by the assistance of the law and the officials thereof, and that a nonresident could not enforce his rights except through the laws of Kansas. It is true that in general the principle above stated applies, but not to the extent claimed by the counsel for the plaintiffs in error. For illustration, suppose a resident of Kansas held notes against a person in the state of Illinois, and that such notes were in the possession of the resident of Kansas at his domicile. Clearly, such notes would be subject to taxation in the state of Kansas, and yet the holder of such notes would be compelled to look for protection to the laws of the state of Illinois, where the debtor resided, and his property was located. We are clearly of the opinion that the judgment in question was not subject to assessment and taxation in Stafford county, and that, therefore, the proceedings by which the property of the defendant in error was sought to be subjected to the payment thereof were void, and that the district court properly enjoined the sale of the real estate in question for the tax upon such judgment. The judgment of the district court will be affirmed. All the justices concurring.

#### HOLDERMAN et al. v. SMITH.

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 11, 1896.)

#### FARMING LEASE—CONSTRUCTION—INSTRUCTIONS.

1. Where R. leased certain farming lands of S., upon which to raise a crop of corn, and as a part of the consideration in said lease it was stipulated that R. was to raise corn for 14 cents per bushel, and it was to be put in shock or crib as S. should direct, the corn to be averaged and paid for on the 1st day of December, *held*, that R. was the owner of the corn, and it was at his risk of loss or damage until such time as the same should be averaged and paid for by S.

2. It was error for the court, in charging the jury, to state to them that certain facts are conceded, when the pleadings and evidence are directly contrary to the facts stated as conceded. The instructions of the court should state the issues between the parties clearly, as



they are set out in the pleadings, and the claims of the parties, as disclosed by the evidence.

(Syllabus by the Court.)

Error from district court, Lyon county; C. B. Graves, Judge.

Action by A. S. Smith against D. W. Holderman and Carl Nation. Judgment for plaintiff. Defendants bring error. Reversed.

This suit was commenced in the district court of Lyon county to recover for certain corn alleged to have been sold by A. S. Smith to Holderman and Nation at 15 cents per bushel. The corn was raised by William Reed on lands leased by him of Smith. It was claimed by Holderman and Nation that they purchased the corn of Smith and Reed together, agreeing to pay Reed 14 cents per bushel and Smith 1 cent per bushel, and that they paid Reed 14 cents per bushel and were willing and ready to pay Smith his 1 cent per bushel, but that he would not accept it, claiming that he was entitled to the entire purchase price of 15 cents per bushel. The case was tried by the court and jury. Verdict and judgment for the plaintiff below for the sum of \$215. Motion for new trial overruled, and excepted to, and case brought to this court for review.

T. N. Sedgwick and L. B. Kellogg, for plaintiffs in error. I. E. Lambert and Graves & Dickson, for defendant in error.

JOHNSON, P. J. (after stating the facts). A. S. Smith brought suit in the district court of Lyon county against D. W. Holderman and Carl Nation to recover the sum of \$372.50 on account of the sale by Smith to Holderman and Nation of a certain amount of corn. The corn was raised by William Reed on the lands of Smith under the following lease: "This lease, made this 8th day of March, 1889, by A. S. Smith, of the first part, to William Reed, of the second part, witnesseth: That the said party of the first part, in consideration of the rents, covenants, and agreements of the said party of the second part, hereinafter set forth, do and by these presents grant, lease, and rent to the said party of the second part the following described property, situated in the county of Lyon and state of Kansas, to wit, S. W.  $\frac{1}{4}$  of section 15, township 19, range 12; to have and to hold the same unto the said party of the second part, from the 1st day of March, 1889, to the 1st day of March, 1890. And the said party of the second part, in consideration of the leasing the premises as above set forth, covenants and agrees with the said party of the first part to pay the said party of the first part, his heirs and assigns, as rent for the same: Second party is to raise corn for fourteen (14) cents per bushel, and is to put said corn in shock or in crib as first party may designate (corn shall be well cultivated, at least four times over, and put up in good condi-

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tion and at the proper time, and, if cut, shall be tied with twine furnished by first party) and is to keep said farm free from weeds or grass to the injury of the crop; and if second party fails to do this, first party shall have the right to put in a force and clean the corn, or cultivate it, as the case may be, and the corn shall be liable for the expense incurred; and in case first party has to do this, and if we cannot agree in regard to the necessity of the expenses, each party shall choose one disinterested person, and if the two chosen cannot agree they shall choose the third, to decide the matter, and the way they decide shall be binding to both. Second party is to put all the cultivated land in corn, and is not to have any corn to feed or otherwise, excepting the orchard field. That is to be divided in shock, first party getting one-half the corn and pays 8 cents per shock for cutting one-half. Second party agrees to keep orchard and hedge trimmed, and keep fences and buildings in good repair, and is to carefully pick and deliver to first party one-half of all the apples at Emporia. Second party is to have down wood sufficient for use of family to burn, but shall not cut or allow cut any standing timber without consent of first party. First party keeps control of all feed lots excepting the one at the barn. Corn to be averaged 1st of December, 1889, in shock, to be paid for when averaged. Hereby waiving the benefit of exemption, valuation, and appraisement laws of the state of Kansas, to secure the payment thereof. The said party of the second part further agrees to farm said land in due season and in a good and husbandlike manner, and protect the same from prairie fires by burning of sufficient fire guards, and to trim and cultivate all fruit and ornamental trees, and see that they are not injured by animals, and, in case he fails to do so, agrees to pay the sum of \$—— per acre for the said land, at the election of the said party of the first part. The said party of the second part further covenants with the said party of the first part, at the expiration of the time mentioned in this lease, to give peaceable possession of the said premises to said party of the first part, and in as good condition as they are now, the usual wear, inevitable accidents, and loss by fire excepted, and will not make or suffer any waste thereof, nor lease, nor underlet, nor permit any other person or persons to occupy the same, or make or suffer to be made any alterations therein, without the consent of said party of the first part in writing having been first obtained, and not use or occupy said premises for any business or thing deemed extra hazardous on account of fire. Provided, however, and this lease is upon this express condition: That if the said rents shall not be paid within —— days after they become due, without demand, or in case of a failure on the part of the lessee to keep or perform

any of his covenants and agreements herein, then and in either case it shall be lawful for the lessor, without any notice or demand of any kind whatever, to treat this lease at an end and void, and to re-enter and take possession of said premises, by an action for forcible detainer or otherwise. The covenants herein shall extend to and be binding upon the heirs, executors, and administrators of the parties to this lease. In witness whereof, the said parties have hereunto set their hands the day and year first above written. A. S. Smith. William Reed." Holderman and Nation claim to have purchased the corn of Smith and Reed jointly; that in the purchase of the corn they agreed to pay 14 cents per bushel to Reed and 1 cent per bushel to Smith; that the corn was purchased at 15 cents per bushel; that Reed, under the lease, was to receive 14 cents per bushel for his part of the corn; and that they purchased the interest of Reed as well as that of Smith. The case was tried before the court with a jury. Verdict for plaintiff for the sum of \$215. Holderman and Nation excepted, made case, and bring the same to this court for its determination.

The court instructed the jury, on the trial of the case, as follows: "It appears from the evidence that the plaintiff owned the land where the crop in question was raised, and that he hired Reed to raise the crop, and was to pay 14 cents per bushel therefor. The crop raised belonged to Smith, and he owed Reed 14 cents per bushel for raising. Reed had no right to sell the corn unless authorized to do so by Smith." This was not the correct construction of the lease under which the crop was raised. Reed leased the land of Smith to raise a crop on during the crop season of 1889, which lease expired March 1, 1890; and as a part of the consideration for such letting Smith agreed to pay Reed 14 cents per bushel for all corn raised on certain portions of the leased premises, the corn to be cut up and put in shocks or in the crib, as Smith might direct. The corn was to be averaged on the 1st day of December, 1889, and to be paid for when averaged. The corn raised on the leased premises was the property of Reed, and was at his risk until such time as it might be averaged and paid for by Smith. If by any means the corn should be lost or destroyed by fire or otherwise, it would be Reed's loss, and Smith would not be liable for the same. In case Reed refused to deliver the corn, Smith could not obtain possession of it by replevin. It was Reed's property, in his possession and at his risk of loss, subject only to a lien of Smith as landlord. Reed had, by the terms of the lease, agreed to sell it to Smith, and Smith had agreed to purchase the same. If Smith had refused to comply with the terms of the lease in paying Reed for the corn at the rate of 14 cents per bushel, Reed could not have maintained an action against Smith to recover

the 14 cents per bushel for the corn. He would have to sell the corn to other parties, and if he was damaged by reason of Smith's failure to comply with his contract, his measure of damages would be the actual loss he sustained by the failure to realize the 14 cents per bushel for the corn and the trouble and expense attending the sale and delivery of the corn elsewhere. If Reed refused to cut up the corn or deliver it to Smith, and accept the 14 cents per bushel, Smith's damages would have been the difference between the 14 cents per bushel and the market price of the corn at the time and place at which the corn should have been averaged, and Smith might have enforced his claim for damages by attachment under his landlord lien.

The plaintiffs in error complain of the following instruction of the court to the jury: "It is conceded that defendants were to pay plaintiff 15 cents per bushel for the corn, but they disagree how the number of bushels were to be ascertained. The defendants claim that they were to pay 15 cents per bushel for the number of bushels which the tenant, Reed, and Smith agreed upon as his pay at 14 cents per bushel; while the plaintiff claims that they were to pay 15 cents per bushel for all that was raised on this place, without regard to any agreement between plaintiff and Reed, except that Reed was to be paid \$600." This instruction was misleading, and did not state the claim of the parties correctly. The defendants below, in their answer, alleged: "(2) And for a second defense and further answer herein these defendants allege and say to the court: That they purchased of the plaintiff, A. S. Smith, and a tenant on his farm, the corn raised by the tenant, amounting to the sum of — bushels of corn, for which said corn they were to pay the tenant the sum of 14 cents per bushel, and the plaintiff in this action, A. S. Smith, the sum of 1 cent per bushel for said corn, which they promised and agreed to pay; that afterwards and before this action was commenced, these defendants paid said tenant the sum of 14 cents per bushel for said corn, and thereafter paid the plaintiff, A. S. Smith, the sum of \$10, being a portion of the amount of the purchase price of said corn that he was entitled to receive, and thereafter, and prior to this action, and since the commencement of this action, these defendants have tendered to the plaintiff, A. S. Smith, the sum of \$55, being more than the balance due him upon the said corn at the price of 1 cent per bushel, which said tender the said plaintiff, A. S. Smith, refused to accept; that since this action was commenced these defendants again tendered said Smith the sum of \$55, which said Smith refused to accept, and these defendants now here tender said Smith said \$55, and hereby bring the money into court and deposit the same with the clerk, in order that said tender of the sum of \$55 may be kept good." Holderman was a witness on the trial of this case, and in his testimony says: "We

finally agreed on paying the colored man (Reed) 14 cents per bushel and Smith 1 cent per bushel. Q. Did Smith say anything to you to the effect that he had settled with Mr. Reed for \$600, and that \$600 would go to Reed and the balance to him? A. No; there was nothing said about it, except that Reed was to have 14 cents per bushel and he was to have 1 cent per bushel. Q. Was there anything said about your going out and settling with Reed? A. I had to settle with Reed and pay Reed for his corn. That was the arrangement in the first place." On the cross-examination the witness testified as follows: "Q. Didn't you understand that the corn was Smith's, and he had hired Reed to tend to it,—to raise it? A. No; I understood it as Smith said,—that Reed had 14 cents a bushel in the corn. Q. He couldn't have taken you if you had not bought the corn? A. No; he could not take me if I had not bought the corn. I did buy the corn. I bought it of Reed and Smith right there on the walk." Carl Nation was sworn and examined as a witness on the trial of the case, and, after stating some preliminary of his and Smith's going to the place where the corn was, and on their return, he said: "I came back with Mr. Smith, and Reed and Holderman was talking on the sidewalk. Q. Was that after you had been down with the cattle? A. Yes; the cattle were on the road right then. Q. What took place at that time between Reed, Holderman, and Smith? A. He bought the corn of them there." William Reed was sworn and examined on the trial of the case, and testified as follows: "Q. Did you ever sell your interest in that corn? A. Yes, sir. Q. Who to? A. I sold my interest to Mr. Holderman." And he afterwards, in his testimony, gave a detailed account of his transaction with the corn.

The defendants below requested the court to give the following instruction to the jury: "If the jury believe, from all the evidence in this case, that the contract and agreement between Smith, Holderman, and Reed was that Holderman and Nation should pay 15 cents per bushel for the corn, 14 cents of which should be paid to Reed and 1 cent to Smith, then your verdict will be for plaintiff, Smith, for the amount of 1 cent per bushel for the actual number of bushels of corn, not exceeding 6,500 bushels, and without regard to the amount Holderman and Nation paid Reed." This instruction should have been given as requested. If Holderman and Nation contracted with Smith and Reed for the purchase of the corn on the leased premises, and it was by the terms of their purchase agreed that they were to pay Reed 14 cents per bushel, then if, in pursuance of such agreement, they settled with Reed and paid him according to such settlement in full for his part of the corn, Smith could only recover 1 cent per bushel for the corn on the farm, irrespective of what defendants below paid Reed. The whole matter of the agreement and set-

tlement between the parties were questions of fact to be determined by the jury under the evidence and proper instruction of the court. If Smith had no settlement with Reed, and the corn was not averaged and paid for as provided in the lease, then Reed was not divested of his interest in the corn, and he had such property rights therein as were the subject of contract; and if he and Smith, together with Holderman and Nation, made such agreement as claimed by defendants below, it would be a valid agreement, and Smith would only be entitled to collect the amount agreed to be paid to him. He could not claim 15 cents per bushel for the whole number of bushels of corn grown on the farm. The judgment is reversed, and the case remanded to the district court, with direction to set aside the verdict and judgment, and grant a new trial. All the judges concurring.

# BATTERTON et al. v. SMITH.

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 11, 1896.)

COVENANTS—BREACH OF WARRANTY—NOTE—FAILURE OF CONSIDERATION.

1. A grantor in a warranty deed is bound by his covenant of warranty, and his grantee can rely upon it, even though he knew the title to the premises conveyed was defective.

2. The equities of the land trade which furnish the consideration for the note sued upon, if in the case, must be settled by the jury and the trial court.

(Syllabus by the Court.)

Error from district court, Greenwood county; C. A. Leland, Judge.

Action by G. W. Smith against A. J. and Alonzo L. Batterton. Judgment for plaintiff. Defendants bring error. Affirmed.

R. P. Kelley, for plaintiffs in error. S. S. Kirkpatrick and Jones & Shultz, for defendant in error.

DENNISON, J. This is an action brought in the district court of Greenwood county, Kan., by G. W. Smith, as plaintiff, against the plaintiffs in error, A. J. and Alonzo Batterton, as defendants, to recover upon a promissory note of \$2,948, drawing 8 per cent. interest from date, executed by said Battertons on March 1, 1886, in favor of said Smith. The facts, briefly stated, are as follows: About September, 1885, Smith traded to the Battertons a farm in Greenwood county for a farm in Arkansas. The Greenwood county farm had a mortgage of \$7,000 and one of \$700 on it, and the Battertons gave to Smith their promissory note for \$3,448 as the amount they had agreed upon as the difference in the value of the two farms. On March 1, 1886, at the request of Smith and his son-in-law Fancher, this note was canceled, and two others were given in its stead,—the one sued upon, and one of \$500, payable to Mary G. Fancher, wife of said Fancher. Said Smith and his wife con-

veyed the farm in Greenwood county to the Battertons by a deed of general warranty, subject to the \$7,700 above mentioned. The title to the land was in William Zimmerman, but Smith was in possession, and delivered to the Battertons his possession. The Battertons paid said Zimmerman \$450 for a deed from him to perfect the title, and paid out various other sums as attorneys' fees and expenses in perfecting said title, and had made several small payments to Smith which were to have been credited on said note. The jury returned a verdict of \$1,930.30, and judgment was rendered for that amount. The defendants Batterton except, and bring the case here for review.

The first error complained of by plaintiffs in error is in the court's sustaining an objection to the following question, asked Mr. Batterton: "Ques. What recommendation had Mr. Smith made with reference to the title at that time? (Objected to as incompetent, irrelevant, and immaterial, and not proper rebuttal.)" The court says: "The objection is sustained, on the ground that the court will instruct the jury that the testimony offered by the plaintiff of the knowledge on the part of the defendants of the defects of the title, for the purposes of this case, are immaterial and incompetent, and shall have no weight with the jury; and with that view of the case, the testimony now offered not being rebuttal, the objection is sustained." The instruction was given, and the ruling is correct. Smith was bound by his covenant of warranty, and the Battertons could rely upon it whether they did or did not know of the defect in title. The plaintiffs in error contend that as Smith, Fancher, and Jewett had testified to the Battertons' having knowledge of the condition of the title, it must have had great weight with the jury in determining whether interest should be paid on the notes prior to perfecting the title. The error, then, was in admitting the evidence of said Smith, Fancher, and Jewett, which was not excepted to.

The second assignment of error relates to the consideration for the note. There is no evidence by which an entire failure of consideration can be sustained. On the contrary, the Battertons received all the consideration they were to receive by the terms of the trade, except the expenses and costs of perfecting the title. The question as to the equities of the trade was not in issue, and, if it had been, it must have been settled by the jury and the trial court. In this case the plaintiffs in error seem to have received even more than they were to have had by the terms of the contract at the time the notes were given. The note sued upon was for \$2,948, and had run over 4½ years before judgment was rendered, and called for 8 per cent. interest from date, or a total of over \$4,000. The judgment was for \$1,930.30, or nearly \$2,100 less than the

note called for. The expense of perfecting the title was \$450, paid to Zimmerman for the deed and coupon. The highest attorney's fee testified to was \$440, including attorney's expenses. And the other payments and expenses could not, by the evidence, have amounted to the \$1.100 difference. The jury must have believed the claim of the Battertons that no interest was to be charged upon the note until the title was perfected. Taking this view of the case, the jury deducted at least \$1,200 or \$1,300 from the note for the costs and expenses in perfecting the title and the small payments that had been made.

The instruction specially complained of reads as follows: "(6) You will therefore first determine the amount due on the note to this date, and then determine how much it cost the defendants to perfect the title, and the difference will be the amount of your verdict." The jury are first instructed as to the claim that the note was not to draw interest until the title is perfected. The instruction complained of plainly tells the jury that they are to first determine the amount due on the note. In order to do this, they must determine how much interest they allow. Then the jury are told to deduct the amount it cost to perfect the title. This is certainly the proper thing for them to do, and the instruction is correct. The record shows no exceptions to the instructions given, and we could not reverse the case if they were erroneous. The jury and the court were very liberal towards the plaintiffs in error, and we fail to discover why they come to this court.

The remaining assignments of error are argued largely upon the equities of the former land trade, and not as to errors committed upon the trial of the case in the court below. The defendant in error calls our attention to several irregularities in the record, but it is unnecessary to pass upon them. No error prejudicial to the substantial rights of the plaintiffs in error appearing in the record, the judgment of the district court is affirmed. All the judges concurring.

#### FAULKENSTEIN TP. OF STANTON COUNTY v. FITCH et al.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

TOWNSHIP BONDS—CANCELLATION—REISSUE—RATIFICATION—BONA FIDE PURCHASER—BOND—ELECTION—CANVASS.

1. Where township warrants are held by a person, and he makes an offer to compromise the same for funding bonds, and the bonds are issued under sections 1-3 of chapter 50 of the Laws of 1879, and the warrants are destroyed, and the bonds are delivered to the person holding the warrants, the transaction is completed so far as the authority to issue the bonds is concerned. Each condition precedent has been performed and spent its force. If the township afterwards procures the bonds and destroys

them, with the assent of the holder of the original warrants, before the rights of any other person attach thereto, the transaction is then entirely completed, and all persons are in the same condition as they were before the compromise was made.

2. If the township officers are afterwards induced to execute purported funding bonds, and exchange them for an agreement to build a sugar mill, such bonds are void, for want of authority by said township officers to issue them.

3. Bonds issued by virtue of and in accordance with the provisions of sections 1-3 of chapter 50 of the Laws of 1879 do not come within the doctrine laid down in *Knox Co. v. Aspinwall*, 21 How. 544; *Coloma v. Eaves*, 92 U. S. 484; *State v. Commissioners of Kiowa Co.*, 19 Pac. 925, 39 Kan. 657,—for the reason that the township officers whose duty it is to sign the bonds are not, by said enactment, made the tribunal to decide whether the precedent conditions have been complied with.

4. In an election to authorize the township officers to compromise an outstanding indebtedness, the board of county commissioners is the tribunal selected by the legislature to canvass the votes cast at such election, and to determine the result, and it is then the duty of the county clerk to notify the township officers of their determination.

5. A purchaser of township bonds issued under the provisions of sections 1-3 of chapter 50 of the Laws of 1879 is bound to take notice of the township records.

6. Section 3, *supra*, contains a sufficient notice to an intending purchaser of the bonds that an elector must be held to authorize the action of the township officers in issuing said bonds, and such purchaser is bound to examine into its legality.

7. The opinion written by Mr. Justice Brewer in *Lewis v. Commissioners of Bourbon Co.*, 12 Kan. 186, quoted, referred to, and followed.

8. Where the township officers who issue illegal bonds also make a tax levy for the purpose of paying the interest thereon, and where the voters and taxpayers at the first opportunity repudiate the officers, and repudiate the bonds, and refuse to pay the interest to the bond holder or to levy any more taxes to pay such interest, *held*, that they have not ratified the issue of bonds.

(Syllabus by the Court.)

Error from district court, Stanton county; William Easton Hutchison, Judge.

Action by Thomas G. Fitch and others, partners as Fitch Bros., against Faulkenstein township of Stanton county, Kan., to recover on interest coupons attached to funding bonds issued by defendant. There was a judgment for plaintiffs, and defendant brings error. Reversed.

The following is one of the bonds to which the coupons were attached, and also one of the coupons sued on.

"No. 1. \$1,000.00. United States of America. Faulkenstein Township Funding Bond. Faulkenstein Township, County of Stanton, State of Kansas. Know all men by these presents, that the township of Faulkenstein, in the county of Stanton, state of Kansas, acknowledges itself indebted to the bearer in the sum of one thousand dollars, lawful money of the United States of America, to be paid in thirty years from the first day of July, A. D. 1889, with interest thereon at the rate of six per cent. per annum, payable semi-annually on the first days of January and

July in each year, upon the presentations of the coupons hereto attached as they become due. Both principal and interest payable at the fiscal agency of the state of Kansas in the city of New York. This bond is one of a series of fifteen bonds of one thousand dollars each, and issued by virtue of and in accordance with the provisions of sections one, two, and three of chapter fifty of the Laws of 1879, being an act of the legislature of the state of Kansas, entitled 'An act to enable counties, municipal corporations, the boards of education of any city, and school districts to refund their indebtedness,' which said act took effect March 10, 1879. And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been done, happened, and performed in regular and due form as required by law. In testimony whereof, this bond has been issued and signed by the township trustee, attested and registered by the township clerk, and countersigned by the township treasurer of said township of Faulkenstein, in the county of Stanton, and state of Kansas, this 7th day of February, A. D. 1890. [Signed] J. E. Tucker, Township Trustee. Attested and registered: W. B. Ward, Township Clerk. Countersigned: L. C. Manson, Township Treasurer."

"Coupon: No. —. \$30.00. On the first day of July, 18—, the township of Falkenstein, in the county of Stanton, and state of Kansas, will pay to the bearer, at the fiscal agency of the state of Kansas in the city of New York, thirty dollars, for six months' interest on refunding bond number —. J. E. Tucker, Township Trustee. Attest: W. B. Ward, Township Clerk. L. C. Manson, Township Treasurer."

Attached thereto were the following certificates:

"State of Kansas, County of Stanton—ss.: I, Wallace Gibbs, clerk of the county of Stanton, in the state of Kansas, do hereby certify that the within bond No. 1 of the township of Faulkenstein, county of Stanton, state of Kansas, has been duly registered in my office according to law. Done at Johnson City, Kansas, this 8th day of February, 1890. Wallace Gibbs, County Clerk. [Seal.]"

"State of Kansas—ss.: I, Chas. M. Hovey, auditor of the state of Kansas, do hereby certify that this bond has been regularly and legally issued, that the signatures thereto are genuine, and that the same has been duly registered in my office according to law. In witness whereof, I have hereunto set my hand and affixed my seal of office at the city of Topeka this 22d day of January, 1891. Chas. M. Hovey, Auditor of State of Kansas. [Seal.]"

The case was tried by the court without a jury, and separate findings of fact and conclusions of law were made. Judgment for the plaintiff below, and the defendant below brings the case to this court for review. It

is useless to attempt to discuss separately the 18 assignments of error filed in this case and the 47 subdivisions thereof contained in the brief. Many of them are merely technical. We will at once proceed to consider the merits of the case, and by so doing will reach the same conclusion that we must if we were to separately examine the numerous questions raised by plaintiff in error in its brief. The evidence in the record and the findings of fact of the court fairly establish the following state of facts: Some of the people of the township conceived the idea of voting aid to the American Sugar Company to assist in the construction of a sugar mill in the township. Being informed that the law authorizing the issue of bonds to a private enterprise was unconstitutional, the township officers sought to bind the township by issuing the warrants of the township to one John Rambo, a citizen of said township. Sixteen warrants, of \$1,000 each, were issued and delivered to said Rambo. Afterwards said Rambo made a proposition to said township, that he would compromise his 16 warrants for 16 bonds of \$1,000 each, due in 30 years, and drawing 6 per cent. interest, payable semiannually. An election was called, and a majority of the votes were cast in favor of issuing such refunding bonds. The township officers were proceeding to execute the bonds, but before the final completion thereof the people repented of their action, and the warrants were destroyed about the 4th day of December, 1890, and the uncompleted bonds were destroyed on the 21st day of December, because, as testified to by John Rambo himself, "it was generally rumored that the sugar company, to whom they were intended to go for the erection of a sugar plant, was a fraud, and became disorganized." About the 7th day of February, 1890, the township trustee and treasurer, and G. S. Stein and John H. Pitzer, met at the house of the clerk of said township, and proceeded to write up the bonds mentioned in this action and 13 others, being, in all, 16 bonds, of \$1,000 each, and the coupons thereto attached. Said bonds were numbered from 1 to 16, inclusive, and were signed and executed by said township officers as and for the act of said township. The bonds were afterwards taken to the office of the county clerk, and registered, as per the certificate above set forth. They were also registered in the office of the auditor, and were accompanied by the following certificates:

"State of Kansas, Stanton County, Township of Falkenstein—ss.: I, W. B. Ward, township clerk, of the township and state aforesaid, do hereby certify that the total amount of taxable property in Falkenstein township for the year 1889 amounted to \$128,942.00; that the bonded indebtedness of said township, this date, is \$16,000.00; the total floating indebtedness is nothing. I further certify that the bonds of said township, from

the number one to number sixteen, inclusive, issued on the 7th day of February, 1890, of the denomination of one thousand dollars each, signed by J. E. Tucker as twp. trustee, attested by W. B. Ward as twp. clerk, and countersigned by L. C. Manson as twp. treasurer, were issued in strict compliance with law, and that the following signatures of J. E. Tucker, W. B. Ward, and L. C. Manson were executed in my presence by the same persons who signed the above enumerated bonds. In testimony whereof, I have hereunto set my hand and official seal this 8th day of February, 1890. W. B. Ward, Township Clerk. [Seal.]"

"Statement of bonds of Stanton county, Falkenstein township, canceled by the issuance of refunding bonds:

No.	Date.	To Whom Issued.	Amt. of.	When Due.	When Canc'd.
23	Nov. 21, '89.	John Rambo.	1,000	Nov. 21.	Dec. 4, '89.
24	"	"	1,000	"	"
25	"	"	1,000	"	"
26	"	"	1,000	"	"
27	"	"	1,000	"	"
28	"	"	1,000	"	"
29	"	"	1,000	"	"
30	"	"	1,000	"	"
31	"	"	1,000	"	"
32	"	"	1,000	"	"
33	"	"	1,000	"	"
34	"	"	1,000	"	"
35	"	"	1,000	"	"
36	"	"	1,000	"	"
37	"	"	1,000	"	"
38	"	"	1,000	"	"

"State of Kansas, County of Stanton—ss.: I, J. E. Tucker, trustee of Falkenstein township, do hereby certify that the above and foregoing is a true statement of the warrants of said township that have been refunded, and canceled by the issuance of new bonds. Witness my hand this 8th day of February, 1890. J. E. Tucker, Trustee."

"State of Kansas, County of Stanton—ss.: I, Wallace Gibbs, county clerk in and for the county and state aforesaid, do hereby certify that the within named J. E. Tucker, trustee, W. B. Ward, township clerk, and L. C. Manson, treasurer, are the legally constituted officers of Falkenstein township, Stanton county, Kansas, and full faith and credit may be attached to their official acts, and that their signatures on first page of this instrument are official and genuine. Witness my hand and official seal this 8th day of February, 1890. Wallace Gibbs, County Clerk. [Seal of Stanton County.]"

The taxpayers of the township were endeavoring to prevent the recording and delivery of the bonds, and through the county attorney of Stanton county had notified the state auditor to not register them. Application was made to have them registered in 1890, but the auditor refused to register them. After the inauguration of the new auditor, in 1891, and on January 22d, these three bonds were again presented, and, during the absence of Mr. Hovey, one of the employes in the office registered them. Soon after, the auditor made a notation on his

record to not register any more. The bonds were turned over to Stein on or about the 12th day of February, 1890, and he gave his receipt for the same to the township trustee, and shortly afterwards delivered to said trustee a receipt, agreement, and bond of the American Sugar Company, and took up his receipt. The taxpayers were attempting to prevent the execution and delivery of the bonds, and were afterwards endeavoring to recover them. In August, 1890, the township trustee and clerk were attempting to recover the bonds, and on pages 76, 77, and 78 of the township records the following contracts and stipulation are entered of record:

"Copy of Contract. State of Kansas, Seward County—ss.: Arkalon, Kansas, August 6, 1890. Know all men by these presents that we, John E. Tucker, trustee of Falkenstein township, Stanton county, Kansas, and C. A. Soper, township clerk of said township, county, and state, of the first part, and John H. Pitzer, party of the second part, have this day entered into the following contract: That for and in consideration of legal service rendered, to be rendered for, to, and upon the delivery of this contract, we, the aforesaid officers of said township, county, and state, do hereby sell and transfer and assign unto the said John H. Pitzer three certain refunding bonds and public securities of and against this said Falkenstein township, numbered one (1), two (2), and three (3), of the denomination of one thousand dollars each, and bearing interest at the rate of six per cent. per annum, and said bonds shall be his compensation in full for said legal services. J. E. Tucker, Township Trustee. C. A. Soper, Township Clerk."

"State of Kansas, Seward County—ss.: Know all men by these presents, that John E. Tucker, trustee of Falkenstein township, Stanton county, Kansas, and C. A. Soper, clerk of township, parties of the first part, for and in consideration of John H. Pitzer securing and delivering unto them their certain refunding bonds, as public securities, of the denomination of one thousand dollars each, and numbered 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, against said Falkenstein township, hereby assign and deliver and convey to said John H. Pitzer number 1, 2, 3, 4, 5, 6, of said bonds as public securities. John E. Tucker, Township Trustee. C. A. Soper, Township Clerk. Dated at Arkalon, Kansas, this 6th day of August, 1890."

Stipulation (copy): "Know all men by these presents, that it is hereby agreed that W. H. Green shall hold in escrow two certain contracts entered into this day between John E. Tucker, trustee, and C. A. Soper, clerk, and John H. Pitzer. Said W. H. Green to deliver said contracts to John H. Pitzer upon his receipt of the receipt from said C. A. Soper, clerk, that he has received certain refunding bonds against Falkenstein township, said bonds numbered 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16. Said negotiations to be closed

up within thirty days from this date, or said contracts held by said Green shall be returned to said township officers, unless, for reason, an extension of time is granted by said township officers. Dated at Arkalon, Kansas, this 6th day of August, 1890. John E. Tucker, Trustee. C. A. Soper, Clerk."

They failed to obtain the bonds under these contracts, and afterwards employed one R. B. Soper to procure the bonds. He was partially successful, and procured a portion of them, and they were disposed of by the township in the following manner, as is shown by the township record, at page 75: "Falkenstein Township, Stanton County, Kansas. April 30th, 1891. Township meeting, special session, pursuant to call of J. E. Tucker, trustee of said township, for the purpose of receiving certain outstanding refunding bonds against said township, full board being present. R. B. Soper appeared before said board and delivered to said J. E. Tucker ten refunding bonds against said township, of the denomination of one thousand dollars (\$1,000) each, numbered 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16. Upon motion of L. C. Manson, the said J. E. Tucker, in the presence of the township board, D. P. Morrison, and R. B. Soper, proceeded to destroy, and did destroy, the above-described bonds by tearing and burning the same. Being no further business, the board adjourned. C. A. Soper, Clerk. J. E. Tucker, Trustee." For these services Mr. Soper was paid \$100 by the township. In the month of September, 1891, the defendants in error obtained the bonds in controversy in a trade with G. S. Stein, and were bona fide holders thereof.

Milton Brown and A. B. Reeves, for plaintiff in error. Samuel Lawrence and C. W. Knapp, for defendants in error.

DENNISON, J. (after stating the facts). In the determination of this case there seem to us to be two questions that present themselves for our consideration: (1) Do the records disclose such a state of facts as entitle a bona fide holder of the bonds to recover thereon? (2) Is the township estopped from defending against the bonds by reason of the recitals contained in the bonds?

The defendants in error introduced in evidence the contents of pages 81, 82, and 83 of the record, which were copied from a typewritten paper brought to the meeting held at the clerk's house on the 7th of February, 1890, by Pitzer and Stein, and which purport to be signed by the township clerk. The contents of said pages 81, 82, and 83 are as follows: "That afterwards, on the 3d day of December, 1889, an election was held in Falkenstein township, in pursuance with the above notice, and such election being conducted in all things according to law; and, after the polls were closed, said officers of said Falkenstein township did meet at the office of said township clerk in the township of Falkenstein, county of Stanton, and state

of Kansas, for the purpose of and did then and there canvass the votes cast at said election held on the 3d day of December, 1889, as the law requires, and said officers did then and there find that there had been 24 votes cast at said election, and that 21 votes were cast for said proposition, and that 3 votes were cast against said proposition; and whereupon it was duly ordered and declared by the honorable trustee, the clerk, and the treasurer of said township of Falkenstein, in the county of Stanton, and state of Kansas, that said proposition to refund the said outstanding indebtedness by issuing sixteen bonds of said township of Falkenstein, of the denomination of one thousand dollars (\$1,000) each, due thirty years after July 1, 1889, with interest at the rate of six per cent. per annum, payable semiannually, on July and January 1st of each year, was duly declared carried. That afterwards, on the 4th day of December, 1889, all and each of said officers of said Falkenstein township being present, and duly assembled, John Rambo appeared before said township officers, and then and there surrendered to said township officers of the said township of Falkenstein, in the county of Stanton, and state of Kansas, all and each of the outstanding indebtedness indicated by certain scrip which he was the holder and owner of, amounting to sixteen thousand (\$16,000) dollars, and the said township treasurer of the said township of Falkenstein, in the presence of the other members of the township board, accepted from the said John Rambo the said township scrip, aggregating sixteen thousand (\$16,000) dollars, and then and there destroyed said scrip by burning the same; and the said J. E. Tucker, trustee, W. B. Ward, clerk, and L. C. Manson, treasurer, of said township of Falkenstein, in the county of Stanton, and state of Kansas, did then and there make, execute, and deliver unto the said John Rambo, in lieu of the said sixteen thousand (\$16,000) dollars of the township scrip that had been destroyed, sixteen (16) bonds of said township, of the denomination of one thousand dollars (1,000) each, due in thirty years from July 1, 1889, dated on February 7, 1890, and bearing interest at the rate of six per cent. per annum, payable semiannually, and both principal and interest made payable at the fiscal agency of the state of Kansas in the city of New York, and said interest being evidenced by sixty (60) coupons attached to each of said bonds, fifty-nine of said coupons each being for the sum of thirty (30) dollars each, and one of said coupons being for the sum of eight dollars and fifty cents (\$8.50), and each of said bonds, together with the coupons thereto attached, having been duly signed by J. E. Tucker, trustee, attested by W. B. Ward, clerk, and countersigned by L. C. Manson, treasurer, of said township of Falkenstein, in the county of Stanton, and state of Kansas. No further business appearing, the board adjourned. [Signed] W. B. Ward,

Township Clerk of the Township of Falkenstein, in the County of Stanton, and State of Kansas."

This entry upon the record is claimed by the defendants in error to show the regularity of the action of the township officers, and, being a part of the records of the township, and made by its officers, it is claimed that the township is estopped from denying it. This recites, in effect, that on December 4, 1889, John Rambo surrendered his scrip or warrants, which were destroyed in his presence, and that the officers did then and there execute and deliver unto the said John Rambo, in lieu thereof, 16 bonds of \$1,000 each, due in 30 years from July 1, 1889, dated February 7, 1890, etc. The court, in its findings of fact, finds that the signature of the clerk to this record is genuine. Therefore the township is bound by it. The evidence seems clear that the typewritten paper of which this is a copy was never seen by any of the township officers until the meeting at Ward's house on February 7, 1890, and that it was brought there by Pitzer. However, it seemed to Pitzer and Stein that these things should appear in the records to have occurred on December 4, 1889, in order to successfully rob the taxpayers of the township out of the \$16,000; and as the township officers have seen fit to adopt it as their record, the township is estopped from denying its contents, and for the purposes of this case the statements therein contained will be taken as true. Fortunately, however, the records of the township made on December 21, 1889, on page 70 thereof, had apparently escaped their notice. The bonds had been executed and delivered to John Rambo, the alleged township creditor, on December 4, 1889. So says the record introduced by the defendant in error. What was next done with the bonds? The record, at page 70, tells us. The portion thereof which relates to the bonds reads as follows: "December 21st, 1889. J. E. Tucker and W. B. Ward met at Mr. Haas' bank, being the Stanton County Bank, and, receiving the sugar bonds there on deposit, then and there did destroy by burning in the presence of Lewis Haas and N. R. Lyons. W. B. Ward, Clerk. J. E. Tucker, Trustee."

Now, let us stop and recapitulate, and see the condition of things on December 21, 1889. Warrants had been issued to Rambo. Rambo had agreed to compromise for refunding bonds. An election had been held, and a majority had voted in favor of issuing the refunding bonds. The warrants had been surrendered by Rambo and destroyed. The refunding bonds had been executed and delivered to Rambo. The bonds had been destroyed by burning, and Rambo ratified their destruction. This is a complete transaction. The township now owes nothing to Rambo, and, so far as the records are in evidence, it has no outstanding indebtedness. The defendants in error, in their petition, allege



that the bonds in this suit were executed on or about February 7, 1890, and have proven that they were executed at that time at Ward's house. On February 7, 1890, the township had no indebtedness to fund. There was no offer to compromise, no election, and no record of any, by which any bonds could have been issued, other than those which had been issued on December 4, 1889. Of course, if there had been valid proceedings for the issuance of bonds on December 4, 1889, and for any reason the issue thereof had been postponed until February 7, 1890, and even if some error had been made in those they had attempted to issue, the officers could have destroyed them and issued others, and the record could have shown the facts as they occurred. But in this case the record recites the fact to be that the bonds were executed and delivered to John Rambo on December 4, 1889. This certainly ends this transaction, so far as the issue of the bonds was concerned. The warrants had spent their force, and been canceled. The election had granted authority to the officers to issue the bonds, and it had therefore spent its force. The authority conferred by the election had been exercised, and the bonds were issued and delivered to John Rambo, and the authority granted by the election had ended. Nothing now remained for the township to do but to procure the bonds from John Rambo, with his assent, and destroy them. After that was done, the transaction was completed, and in order to charge the township with any other indebtedness it must be thereafter created. After that was done, no other bonds could be issued which would bind the township, unless the prerequisites required by law had been again performed. The bonds were procured with the assent of Rambo, and were destroyed. The whole transaction was, therefore, completed. Everything had been wiped off the slate, and all parties were at liberty to begin again, or to refuse to do so, at their pleasure. The bonds which Pitzer and Stein induced the township board to issue on February 7, 1890, and which purport to be refunding bonds, were issued when there was no debt to fund, and no offer to compromise any such indebtedness had been made. There was no election held authorizing any issue of such bonds. The action of the board in pretending to issue the bonds and then exchange them for a worthless contract to build a sugar mill was absolutely without authority and void. An inspection of the township records would have disclosed the contracts with Pitzer and the transaction with Soper to any one who might have examined them prior to the purchase of the bonds. This would have been an additional circumstance to have put an intending purchaser upon his guard. An inspection of the records in the office of the auditor of state would have shown a notation not to register any more bonds, and also that these bonds had been registered after the time for their

registry had expired. So far, therefore, as the records of the township are concerned, they show conclusively that the bonds were issued without any authority whatever, and, if those records impart notice to a bona fide holder thereof, the bonds are absolutely void.

We come now to a consideration of the second question, viz.: Is the township estopped from defending against the bonds by reason of the recitals therein contained? It has been uniformly held by the supreme court of the United States that where, by legislative enactment, authority is given to a municipality, or to its officers, to issue municipal bonds, but only on some precedent condition, such as a popular vote, or in an amount limited by the amount of taxable property, and where it may be gathered from the enactment that the officers of the municipality were invested with power to decide whether those conditions have been complied with, their recital that they have been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality, for the reason that the recital itself is a decision of the fact by the tribunal selected by the legislature to decide those questions. This doctrine is announced in *Knox Co. v. Aspinwall*, 21 How. 544, *Coloma v. Eaves*, 92 U. S. 484, and many others. The dissenting opinion of Justice Miller, concurred in by Justices Davis and Field, in *Humboldt Tp. v. Long*, Id. 646, is a strong one. However, the doctrine announced in the majority opinion has been adopted by our supreme court in *State v. Commissioners of Kiowa Co.*, 39 Kan. 657, 19 Pac. 925, and cases therein cited. The bonds in this case recite that they are "issued by virtue and in accordance with the provisions of sections 1-3 of chapter 50 of the Laws of 1879," being a portion of the refunding law, and they also contain the following: "And it is further certified and recited that all facts, conditions, and things required to be done precedent to and in the issuance of said bonds have been done, happened, and performed in regular and due form as required by law." Sections 1-3 of chapter 50 of the Laws of 1879 read as follows:

"Funding Bonds. That every county, every city of the first, second or third class, the board of education of any city, every township and every school district, is hereby authorized and empowered to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever, upon such terms as can be agreed upon, and to issue new bonds, with semiannual interest coupons attached, in payment for any sums so compromised; which bonds shall be issued at not less than par, shall not be for a longer period than thirty years, shall not exceed in amount the actual amount of outstanding indebtedness, and shall not draw a greater interest than six per cent. per annum."

"Issuance of. Bonds issued under this act by any county shall be signed by the chairman of the board of county commissioners and attested by the county clerk, under the seal of the county. Bonds issued by any city shall be signed by the mayor, and attested by the city clerk, under the seal of the city. Bonds issued by any township shall be signed by the trustee, attested by the township clerk, and countersigned by the township treasurer. Bonds issued by the board of education of any city shall be signed by the president, and attested by the clerk of the board, under the seal of such board. Bonds issued by any school district shall be signed by the director, attested by the clerk, and countersigned by the treasurer of the school district board, and the coupons shall be signed by the mayor, president, director, trustee or chairman of the board of county commissioners, and the clerks respectively. Such bonds may be in any denominations, from one hundred to one thousand dollars, and made payable at such place as may be designated upon the face thereof, and they shall contain a recital that they are issued under this act."

"Exchange, etc. When a compromise has been agreed upon, it shall be the duty of the proper officers to issue bonds at the rate agreed upon to the holder of such indebtedness, in the manner prescribed in this act; but no bonds shall be issued under this act until the proper evidence of the indebtedness for which the same are to be issued, shall be delivered up for cancellation: provided, that no compromise by any township or school district shall be of any validity unless assented to by the legal voters of such township or school district, at an election or school meeting called for such purpose, of which election or school meeting at least ten days' notice shall be given."

This is the legislative enactment recited in the bonds by which authority is given the township officers to issue them. The conditions precedent, as gathered from the act, are an indebtedness, an agreement to compromise, an election after 10 days' notice, the canvass of the vote, the finding that a majority favor the compromise, and declaring such to be the result. After these things are done, the township trustee, clerk, and treasurer are authorized to execute and deliver the bonds. If these officers are invested with the power to decide whether these conditions have been complied with, and such power is vested by the legislative enactment recited in the bonds, then this decision is binding upon the township. A critical examination of these three sections discloses the fact that the township officers are by them invested with the power to compromise and refund its matured and maturing indebtedness, to issue refunding bonds therefor, and to sign the bonds. They are prohibited from issuing them until the proper evidences of indebtedness are delivered up for cancella-

tion, and it is provided that the compromise shall be of no validity until an election has been called, upon 10 days' notice, and the voters have assented to the compromise. Who is to determine whether there is a valid indebtedness against the township? Evidently, the township officers. But, in order to determine that this is so, we must rely upon other laws than the three sections mentioned. They are to call an election and give 10 days' notice thereof. Who is to canvass the votes and declare the result? Or, in other words, who is to determine whether the legal voters have assented to the compromise? It must be conceded that the three sections recited in the bonds do not inform us. In order to be informed upon this question, we must look to other sections of the statutes. Turning to paragraph 442 of the General Statutes of 1889, we find that it reads as follows:

"Election. Before the issuing of any such bonds, the proper officers of such county, city or township shall cause an election to be held by the legal voters thereof, at the usual place or places of holding elections in such county, city or township, and to be conducted and the returns thereof ascertained in the manner provided by law for holding general elections."

In order to ascertain how general elections are conducted and the returns thereof are ascertained, we must look to paragraphs 7071 and 7072, Gen. St. 1889, being sections 9 and 10 of "An act relating to townships and township officers" (Gen. St. 1868, p. 1084), a portion of which reads as follows:

"Canvassers. The board of county commissioners shall constitute a board of canvassers. They shall assemble at the office of the county clerk in their respective counties on the Friday following the election provided for in this act, and shall proceed to canvass the votes of the several townships of their counties for township officers voted for, in the same manner as the votes for other officers are canvassed. \* \* \*

"Certificates. They shall determine who have been elected to the several offices in each township in their respective counties, which determination they shall reduce to writing and cause a certified copy thereof to be filed in the office of the county clerk; and it shall be the duty of the said county clerk to issue certificates of election to the persons so determined to be elected, and deliver or forward the same to the persons entitled thereto."

We find, by these sections (and not by the three sections mentioned in the bond), what tribunal has been selected by the legislature to decide these questions, and we also find that the township officers do not compose the tribunal so selected, but, instead of them, the board of canvassers, consisting of the board of county commissioners, is the tribunal selected to decide these questions, and the county clerk is to notify the township

officers of the result. It must, therefore, clearly appear that the bonds to which the coupons sued upon were attached do not come within the rule laid down in *Knox Co. v. Aspinwall*, supra. We shall therefore proceed to consider the bonds freed from any statement contained therein which relates to the result of an election. The language of said section 3, recited in the bonds, is of itself sufficient to require a person intending to purchase the bonds to inquire into the sufficiency of the election. It says: "No compromise by any township or school district shall be of any validity unless assented to by the legal voters, \* \* \* at an election or school meeting called for that purpose, of which election \* \* \* 10 days' notice shall be given." This is a direct notice that such an election shall be held, and the purchaser is bound thereby.

It has now been sufficiently shown, in this opinion, (1) that the records do not disclose such a state of facts as entitle a bona fide holder of the bonds to recover; (2) that the township is not estopped from defending against the bonds by reason of the recitals contained in the bonds. The only remaining question to be considered by us may be stated as follows: Is the defense, as shown by the records, sufficient to defeat a recovery? This question must be answered in the affirmative. The bona fide holders had no right to presume they were issued under the circumstances which gave the requisite authority. They were bound to take notice of the township records. The township records show no authority whatever for the issuance of these bonds. No authority being shown by the records, the presumption is that none existed. Surely, the authority to contract must exist before any protection as an innocent purchaser can be claimed by the holders of the bonds. The United States supreme court has said: "In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power within which the agent acts; and this applies to every person who takes the paper afterwards, for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued." *Floyd Acceptances Cases*, 7 Wall. 676. Also, in another place: "The supervisors possessed no authority to make the subscription or issue the bonds, in the first instance, without the previous sanction of the qualified voters of the county. The supervisors, in that particular, were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization." Judge Cooley, in his work on Constitutional Limitations, says that, whenever a want of power exists, a

purchaser of securities is chargeable with notice of it, if the defect is disclosed by the corporate records, or, in that case, by other records, where the power is required to be shown.

We have not treated this last question as fully as we would have done but for the fact that it has been exhaustively discussed by Mr. Justice Brewer in *Lewis v. Bourbon Co.*, 12 Kan. 186. We have only endeavored to make enough comments to render this opinion intelligible, and these comments have been largely taken from that case. For a full discussion of the principles upon which this decision is made, reference is made to that case, and especially to pages 216-222 thereof. We must hold, in this case, that the township officers had no authority to issue the bonds which they issued on February 7, 1890, being the bonds set forth in this suit, and others; and the records of the township show that they had no such power, but that what power they ever had was exercised in the issuance of the bonds which were destroyed on December 21, 1889.

In 1891 a tax was levied by the township to pay the interest on the bonds, which was paid to the county treasurer, but was never paid to the bondholders, because the township board protested against its payment. The defendants in error contend that the township ratified the acts of the township officers, in issuing the bonds, by levying this tax to pay interest thereon. This contention is not good. The tax was levied by the same officers who issued the bonds. The taxpayers could not hinder the township officers from issuing the bonds nor levying the tax. *Craft v. Commissioners*, 5 Kan. 518. Their enforced silence can hardly be construed as an acquiescence. *Lewis v. Bourbon Co.*, supra. The taxpayers, at their first opportunity, elected another township board, and the new board protested against the payment of the interest, and refused to levy any tax for such payment.

After the findings of fact by the court had been announced, both the plaintiffs and defendant filed motions for judgment upon said findings of fact. The court reserved its ruling upon both of said motions until after its announcement and reading of its conclusions of law. The conclusions of law are as follows: "Conclusions of law: The court concludes, as a matter of law, that the bonds, the coupons of which have been sued upon in this action, are legal and valid, and binding upon the said Falkenstein township, and the coupons herein sued upon, evidencing the interest on said bonds, are also valid and binding upon said township. That the bonds are refunding bonds, issued by the township to refund outstanding indebtedness, evidenced by township warrants to the same amount. That the issuance of the same was completed by the delivery of said bonds to the American Sugar Company, who receipted therefor, and contracted for their

consideration. That the plaintiff is the owner and holder of said bonds and coupons, being the purchaser thereof for a valuable consideration. That the plaintiff is the bona fide holder and purchaser of said bonds, without notice of any defect. That the statement of Stein to one of the plaintiffs was not notice. That the records of the township clerk, county clerk, and state auditor, of matters concerning the issuance of the same, required by law to be kept by such officers, and in their offices, are not such as import notice to a bona fide holder for a valuable consideration. The court therefore concludes that said plaintiffs are the legal and bona fide holders and owners of said coupons sued upon, and are such without such legal notice of any defect, irregularity, or illegality in the same as would deprive them of their right to enforcement of its claim and collection of the same against the township, and that there is no such defect as would entitle the defendant to an effective defense against said obligation of the township." The court erred in the above conclusions of law. The plaintiff in error is clearly entitled to judgment for costs. The judgment of the district court is reversed, and this case is remanded to the court below with instructions to render judgment in favor of the plaintiff in error against the defendants in error for costs. All the judges concurring.

#### WEBBER v. CAREY.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

##### RECORD ON APPEAL—JURISDICTION—DISMISSAL.

Under section 1, c. 245, Laws 1889, the record brought to this court must affirmatively show that this court has jurisdiction, or the case will be dismissed; and, when the record discloses that the amount in controversy does not exceed \$100, there must be incorporated therein a certificate of the trial judge showing that the case is within the exception of the statute, before this court has the power to hear and determine the same. *Clark v. City of Ottawa*, 40 Pac. 1071, 1 Kan. App. 304.

(Syllabus by the Court.)

Error from district court, Barton county; Ansel R. Clark, Judge.

Action by Samuel Carey against H. J. Webber. Judgment for plaintiff. Defendant brings error. Dismissed.

J. P. Francis (G. W. Nimocks, of counsel), for plaintiff in error. Clark & Russell and J. B. Prose, for defendant in error.

COLE, J. This action is before us upon a motion to dismiss, for the reason that the record discloses that the amount in controversy does not exceed \$100, and for the further reason that the record discloses that no proper appeal bond was filed with the justice of the peace from whose judgment the plaintiff in error attempted to appeal to the district court. This court cannot at this

time pass upon the second question raised, for that is the sole question practically involved in the case as it comes to this court for review; but the first point raised has already been passed upon by this court in favor of the position contended for by defendant in error. In this case the record discloses that the amount involved in this controversy does not exceed \$100; and unless it affirmatively appears that the amount in controversy exceeds that sum, inclusive of costs, or the district judge shall certify that the case is one coming within the exceptions named in the statute, this court has no jurisdiction to hear and determine the same. No certificate appears in this record to take the case out of the rule laid down in *Clark v. City of Ottawa*, 1 Kan. App. 304, 40 Pac. 1071, and the case is therefore dismissed. All the justices concurring.

#### ATCHISON, T. & S. F. R. CO. v. BARTLETT.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

##### RAILROAD COMPANIES—ACTION FOR STOCK KILLED—DEMAND—EVIDENCE—COMPETENCY AND SUFFICIENCY—BILL OF PARTICULARS—EXPERT TESTIMONY.

1. A person who has dealt in horses, more or less, for a number of years, has bought and sold horses, owned horses, and has been handling horses, more or less, all of his life, although he has not sold yearling or two year old colts for several years, and has not bought this class of horses for some years, and does not know any person that has sold or bought within the last year, and says he does not know the market price at D. City of colts of the age of the ones in controversy, but says he does know the value of these colts, is competent to give in evidence the value of the colts killed.

2. Where a demand has been made in writing to the ticket agent of the railroad company, under chapter 94 of the Laws of 1874, for the value of stock killed by the company in the operation of its road, such demand can only be proven by the written demand itself. Secondary evidence is not competent to prove the same, unless the written demand has been lost, or it is beyond the power of the party desiring to use the same to procure it.

3. Where a bill of particulars before a justice of the peace alleges that the railroad company, with a train of cars on its road, with a locomotive engine attached thereto for the purpose of propelling the same, which engine and cars were then in charge of, and under the control of, defendant's engineer, fireman, and servants, who did at the place described, upon said defendant's road, carelessly, wantonly, maliciously, unlawfully, and with gross negligence, run its said locomotive engine and cars, which were operated as aforesaid, against and over, and killed, two colts of the plaintiff (giving their value), although it is awkwardly worded, it is sufficient, in a bill of particulars before a justice, to charge the railroad company with a common-law action for the value of the colts killed.

4. Where there is sufficient proof before the jury to make out a prima facie case, it is not error for the court to overrule a demurrer to the evidence.

5. Where the jury have returned a verdict upon conflicting evidence, and there was evidence upon which to base the verdict, the court

cannot disturb such verdict, although it may think the preponderance of evidence is against such verdict.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action by George V. Bartlett against the Atchison, Topeka & Santa Fé Railroad Company to recover the value of stock killed. There was a judgment for plaintiff, and defendant brings error. Affirmed.

On the 23d day of May, 1889, this suit was commenced before a justice of the peace of Ford county, Kan., to recover the value of two colts belonging to the plaintiff below, that were killed by the engine and train of cars on the Atchison, Topeka & Santa Fé Railroad. The case was tried before the justice, and resulted in a judgment for the plaintiff below. Defendant took the case to the district court by appeal, where the case was tried before the court and jury. Verdict for plaintiff below; special findings of fact returned; motion for judgment on findings of fact, notwithstanding the general verdict; motion overruled and excepted to; case made and filed in the supreme court, and duly certified to this court for its determination.

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error. Ed H. Madison, for defendant in error.

JOHNSON, P. J. (after stating the facts). This suit was commenced before a justice of the peace of Ford county, Kan., by George V. Bartlett against the Atchison, Topeka & Santa Fé Railway Company, to recover the value of two certain colts alleged to have been killed by the engine and cars of said railway company. Plaintiff sets out two causes of action in his bill of particulars, the first alleging the cause of action under chapter 94, Laws 1874, commonly known as the "Stock-Killing Law," and alleges that where the colts entered upon the railroad track, and where they were killed, the track was unfenced, and that they did not enter upon the track at or near a public crossing, and were not killed at or near a public crossing, and that the plaintiff made demand of defendant for the value of said colts, of the defendant's ticket agent at its depot in Dodge City, Ford county, Kan., more than 30 days before the commencement of said action; that the same was not paid,—and alleges that he had been compelled to employ an attorney to prosecute said action for the recovery of the value of said colts, and that a reasonable fee for his attorney is \$75. As a second cause of action, he alleges that on or about the 9th day of March, 1889, the defendant's railway train and cars, with a locomotive engine attached thereto for the purpose of propelling the same, which said engine and cars were then in charge of, and under the control of, said defendant's engineer, fireman, and servants, who did at

the place above described, upon said defendant's road, in said county of Ford, carelessly, wantonly, maliciously, unlawfully, and with gross negligence, run said locomotive engine and cars, which it was operating as aforesaid, against and over, and killed, the two colts of said plaintiff, and alleges the value of said animals, with an allegation that the road was unfenced at the point where the animals were killed. Both counts are intended to include the killing of two colts of the plaintiff by the railway company. The case was tried before a justice of the peace, and judgment rendered for the plaintiff, and defendant appealed to the district court, where the case was tried before the court and a jury. The jury returned a general verdict for the plaintiff below, and made and returned special findings of facts. Defendant below filed motion for judgment against the plaintiff below for costs, on the special findings of facts, notwithstanding the general verdict, which motion was by the court overruled, and defendant below excepted. Defendant filed a motion for a new trial, which was overruled, and defendant excepted. Judgment was rendered for plaintiff below on the verdict of the jury, to which judgment the defendant below duly excepted, and made case, and brings the matter to this court for review.

The first error complained of by plaintiff in error is that the court erred in permitting the plaintiff below, while a witness in his own behalf, to testify as to the value of the colts killed. Counsel contends that the plaintiff did not show that he was possessed of sufficient knowledge of values of horses and colts to make him competent to give in evidence the value of the colts; that because he did not know the market price of colts of that age in Dodge City, and had not sold or purchased colts of that age for several years, he should not be permitted to testify as to the value of these colts. The witness gave a description of the colts,—age, size, health, and color,—and was asked the question: "Q. Do you know the value of those horses?" The witness answered: "I do, I think." "Q. Do you know the value of the yearling colt? A. I think I do. Q. State what it was, to the jury." Before the witness answered the question, counsel for the defendant below cross-examined the witness as to his means of knowledge of the value of such colts, and in the cross-examination the witness said that he did not sell any yearling colts that year; did not know anybody that did; did not know what the market price was at Dodge City for yearling colts; did not know the market price of two year old colts at Dodge City. The witness, after giving the value of the colts, shows that he had considerable experience with horses; had handled horses for a number of years; bought and sold horses; that he was 52 years old; had dealt in horses a great part of his life; had dealt in horses occasionally ever since

he was 16 years old; bought and sold in Ohio, Illinois, Iowa, and Kansas; had resided in Kansas for 21 years. The evidence shows that the witness had such general knowledge of horses and of their value that he was competent to testify as to the value of the colts killed. There was another witness who testified to the value of these colts, whose competency was not questioned, who gave substantially the same value of the colts that this witness did.

It is contended by counsel for plaintiff in error that the court erred in permitting plaintiff below to introduce secondary evidence to prove a demand on the railway company for payment of the damages occasioned by the killing of the colts. From a careful examination of the record, it appears that the court excluded the evidence offered by plaintiff below of the demand, and ruled the same out; and, in the instructions of the court to the jury, the court limits the right of the plaintiff below to recover, if at all, on the negligence of the railway company in the management of the train at the time of the killing of the colts. The court says to the jury: "I instruct you in this case that it is necessary, in order that the plaintiff should recover, that it shall appear to the jury from the evidence, and by a preponderance of the testimony, that the killing was the result of the negligent, careless management on the part of the employees of the company. If you should find that the animals were killed by the engine in the operation of the company's road, you will then inquire whether the killing could have been avoided by reasonable care and prudence on the part of the employees of the train. One other matter concerning the law, before I pass these general instructions. Plaintiff has sued for an attorney's fee. I instruct you in this case that under the theory of the counsel, and the theory pursued in the trial of this case, plaintiff cannot recover an attorney's fee. All there is for you to do is to examine this evidence, and ascertain whether or not, under the instruction I have given you, and the evidence you have already had before you, the plaintiff is entitled to recover the value of the animals. The attorney's fee provision of our statute is a statute which is not applicable where the action is brought to recover because of the negligence or carelessness of the company in the killing or injury of the stock,—only that kind where the recovery may be had regardless of that. You will therefore disregard anything that may have been said, and pay no attention to what has been introduced before you in evidence, as to attorney's fee, should your verdict be in favor of the plaintiff." The court did not regard this action as one under the statute of 1874, which provides for recovery of damages for the killing or injury of stock, without regard to the question of negligence, where the railroad is unfenced, but treated it as an ac-

tion under the common law. We do not think the question of demand, or the want of fence along the line of the railroad, had anything to do with the final result of this case; and whatever error there may have been in the admission of evidence in relation to demand was immaterial, and could not prejudice the defendant below, as all injurious influence that such evidence could possibly have had was taken away by the charge of the court.

The plaintiff in error contends that this action was brought under chapter 94 of the Laws of 1874, and could not be maintained in the absence of proof of demand in accordance with section 2 of said act. There is no question but that the first cause of action stated in the bill of particulars of the plaintiff below was intended to be laid under the statute, and, so far as that cause of action is concerned, the plaintiff below could not recover without proof of demand, and such demand could only be proven by competent evidence; and, there being no competent evidence introduced or given on the trial of this case to prove a demand, hence the court treated the case, in his charge to the jury, as an action under the common law. The plaintiff below attempted in the second cause of action to set out in his bill of particulars such facts as would bring his action under the common law, and based his right of recovery on the fact that the killing of his colts was caused by the careless, wanton, and malicious acts of the railway company, through its employees, in the management of its engine and train of cars in the operation of its road. In this attempt, the language employed in framing the bill of particulars is very peculiar and ambiguous, and so connected that it would seem to convey the construction that instead of the railway company, its agents or employees, being guilty of negligence, the railroad train did carelessly, wantonly, maliciously, unlawfully, and with gross negligence, run its locomotive and cars against and over, and killed, the colts. It is contended by counsel for plaintiff in error that, under the peculiar phraseology of the second count of the bill of particulars, it must be held that the charge of carelessness, wantonness, and maliciousness was against the railroad train, and cannot be held to be a charge of negligence against the defendant. Section 140 of chapter 80 the General Statutes of 1889 reads: "The court in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or vacated by reason of such error or defect." Section 115 of the Code of Civil Procedure reads: "In the construction of any pleading for the purpose of determining its effect, its allegations shall be liberally construed, with the view of substantial justice between the parties." It is evident that the attorney who drew the

bill of particulars was somewhat unfortunate in the wording of this cause of action; but the intention of the pleader is evident from other portions of the cause of action, and we must construe this cause of action as a whole, for the purpose of determining the real meaning and sense of the words employed. It was certainly not the intention of the counsel, in framing this cause of action, to allege that the railroad train ran its engine and cars over the colts of the plaintiff. It is apparent, upon the reading of the entire cause of action, that the counsel intended to allege that the colts were killed by the railroad train belonging to defendant below, and that the railroad train was in charge of, and under the control of, the defendant's servants and employes, and that it was negligently operated by the employes and servants of the company. This mistake could have been cured, if the attention of the court or counsel had been called to it, at any time, by the proper amendment thereto. In the case of *Crowther v. Elliott*, 7 Kan. 238, Kingman, C. J., speaking for the court, says: "Does the petition state a cause of action? We think it does,—very awkwardly and inartistically, certainly; but we cannot be mistaken in the fact that the defendant was made aware of just what the plaintiff complained of, and the relief he sought. The court must tolerate modes of statement unsuited to orderly arrangement; the use of words inaptly applied; involved sentences, lacking simplicity and logical accuracy,—if, from the whole petition, the nature of the charge can be ascertained. We find no difficulty in doing so in this case. The contract is made a part of the petition, and is not difficult of construction. The plaintiff says he has duly performed all the conditions imposed upon him by the contract, and specifies wherein the defendant has broken his. In the construction of any pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties." There was no objection, by demurrer or otherwise, taken to the second count in the bill of particulars. The case was tried in every respect as though each count in the bill of particulars stated a good cause of action, and the objection to this count of the bill of particulars is raised for the first time in this court; and we do not think that the plaintiff in error suffered any prejudice by reason of the defective statements in the second cause of action; that it was not misled in any particular; that it was sufficient to apprise the defendant below of the nature of the claim against it; and it must be held good in this court. In the case of *The Railway Co. v. Yanz*, 16 Kan. 583, Valentine, J., speaking for the court, says: "The case was tried, from beginning to end, as though the plaintiff's bill of particulars was sufficient in every respect, except, possibly, as to attorney's fees.

But, even as to attorney's fees, it does not appear from the record that the objection to said evidence and said finding concerning attorney's fees was made because of any supposed defect in the plaintiff's bill of particulars. The objection to the sufficiency of the bill of particulars is really made for the first time in this court, and then it is made by brief, and not by petition in error, except, possibly, by remote inference. We are inclined to think that the bill of particulars, as a bill of particulars in a justice court, is not quite so bad as plaintiff in error claims. But, even if it is as defective as plaintiff in error claims, still we think the proceeding to trial without any objection thereto, the introduction of evidence under it as though it was sufficient, and the finding and judgment of the court under it, waived and cured all the supposed defects."

The remaining error complained of consists in the overruling of the demurrer of the defendant below to the evidence, the overruling of motion for judgment on the special findings of fact notwithstanding the general verdict, and overruling the motion for a new trial. We will consider all these objections together. We do not think the court erred in overruling the demurrer to the evidence, for the reason that the evidence for the plaintiff, standing alone as it did, was sufficient for the consideration of the jury, and proved a *prima facie* case for the plaintiff below. Was the evidence such as to sustain the verdict of the jury? The evidence shows that the colts of the plaintiff below escaped from his inclosure a short time before they went upon the railroad track and were killed; that the defendant below was operating its road at that time and place with a train of cars consisting of an engine and from 25 to 30 freight cars; that it was going up a grade of about 25 feet to the mile; that it was running at about 5 to 6 miles per hour; that the engineer discovered the colts on the right of way before they came upon the track; upon seeing the colts, he blew the whistle of his engine to frighten them away; the colts ran upon the track, in front of the train, about 100 feet from where they went upon the track to the point where they were killed; that they continued to run along on the track, in front of the train, until they came upon a high embankment, and to an open bridge; that they ran into the bridge, and became fastened by reason of their legs passing down between the railroad ties, and the train overtook them on the bridge, and they were killed. The jury find that the engineer discovered the colts on the right of way before they came upon the track; that, on discovering them, he sounded the whistle; that he applied the brakes on the engine before he struck them; that he shut off steam and reversed his engine before the colts were struck. The evidence nowhere shows, nor do the findings

of the jury, that, after the engineer discovered the colts fast in the bridge, he could, with safety to his train, have avoided striking them. The jury find that he reversed his engine and shut off steam before the colts were struck, but they do not find that he did so as soon as he discovered they were fast in the bridge. The evidence and findings of the jury show that he stopped the engine and train about 150 feet after he passed the point where the colts were struck. An engineer, on seeing stock grazing quietly along the road, is not required to stop his train, or slack the speed thereof, in anticipation that they will come upon the track; but upon seeing stock upon the track, ahead of him, and running along the track, he should bring his engine under such control that, if the stock runs in the cattle guards or upon bridges, he could avoid destroying them. Upon all this evidence, the jury have found for the plaintiff below, and we are unable to say that the verdict is not sustained by the evidence. The jury heard all the evidence,—had the witnesses before them,—and it was their duty and right to say what the evidence proved. There was evidence upon which the jury could properly find the verdict which they did, and, having done so, we cannot disturb it. The judgment of the district court is affirmed. All the judges concurring.

#### LA CROSSE MILLING CO. v. WILLIAMS.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

##### REPLEVIN—SUFFICIENCY OF COMPLAINT—DEMAND.

1. Where the petition alleges that the plaintiff is the owner and entitled to the immediate possession of personal property, describing it, and that the defendant wrongfully detains the same from her, to her damage, and where there is some evidence tending to prove each of the above allegations, *held*, it is not error for the court to overrule demurrers to the petition and to the evidence.

2. Where the petition alleges that the "La Crosse Milling Company" is composed of three persons, naming them, and the allegation is not denied by affidavit, the persons so named must be considered as composing the firm; and a demand made upon one of them for property in the possession of the firm is a sufficient demand upon the firm for the return of the property.

(Syllabus by the Court.)

Error from district court, Rush county; V. H. Grinstead, Judge.

Action by Carrie Williams against the La Crosse Milling Company. Judgment for plaintiff, and defendant brings error. Affirmed.

S. I. Hale, for plaintiff in error. H. L. Anderson, for defendant in error.

DENNISON, J. This is an action in replevin, brought by Carrie Williams, as plaintiff, against the La Crosse Milling Company, as defendant, to recover the possession of a quantity of wheat of which she claimed to

be the owner and entitled to the immediate possession, and which she alleges was wrongfully detained from her possession by the defendant below. The case was tried with a jury, and they rendered a verdict in favor of the plaintiff below. Judgment was rendered thereon against the defendant below, and it brings the case here for review.

The first assignment of error is upon the overruling of the demurrer to plaintiff's petition. The petition alleges that the plaintiff below is the owner of, and entitled to the immediate possession of, the wheat, and that the defendants below wrongfully detain the same from her. The petition also alleges the facts and circumstances which have caused her to be damaged by reason of such detention. The grounds for the demurrer are that several causes of action are improperly joined, to wit, an action of replevin and an action for damages and trespass. We may say in the outset that the attorney for the plaintiff in error, in his argument, stated that many of his assignments of error were technical, and that he relied more particularly upon want of demand. However, the errors are discussed in the briefs of both parties, and, so far as material, we will briefly notice them.

The allegations of ownership, right to the immediate possession, the wrongful detention, and the damages for such wrongful detention, are not different causes of action improperly joined. On the contrary, they are the proper allegations for the recovery of the possession of personal property and the damages for the wrongful detention, if any damages are claimed. There was no error in overruling the demurrer or the motion to make the petition more definite and certain. There were no objections to the instructions given, and no exceptions taken to the giving thereof, hence they cannot be reviewed by us.

The fourth assignment of error is in the admission of the deposition of Carrie Williams, and in overruling the objection to some of the questions therein. The deposition, as a whole, seems to be regular; and the plaintiff in error only urges its objection to the testimony of the witness as to her evidence touching the substance of the written contract between her and M. Thornell, the owner of the land upon which the wheat was raised. The testimony objected to is as follows: "Ques. State how you got charge of that land during the years 1890 and 1891? Ans. By lease from M. Thornell. Ques. What kind of a lease had you? (The defendant objects to the question, for the reasons that it is incompetent, irrelevant, and immaterial, and not the best evidence, which objection was by the court overruled, and the defendant at the time duly excepted to the ruling of the court.) Ans. A written lease. Ques. Have you the lease to this quarter section of land which you got from M. Thornell? Ans. I have. Ques. Will you



attach the lease to this deposition, and make it a part of, and mark it 'Exhibit A'? Ans. I will." "The witness produces the lease, which is marked by me 'Exhibit A,' and attached hereto, and made a part thereof. Wm. Johnstone, Notary Public." There is not one word in the deposition touching the substance of the lease.

The plaintiff in error also contends that the court erred in admitting a letter written by Mr. Thornell to Mrs. Williams, for the reason that the genuineness of the instrument is not proven. It was abundantly proven by Mr. Jeffries, who testified that he was acquainted with the handwriting of Mr. Thornell, and the letter was in his handwriting.

The fifth assignment of error is in the overruling of the demurrer to the evidence of the plaintiff below. The plaintiff below introduced evidence tending to show that she rented the land upon which the wheat was raised, furnished seed wheat, and had it put in, doing part of the work herself, and hired Jeffries to cut and thresh it; and that she was still the owner of it, and was entitled to the immediate possession thereof; and that the defendant below failed and refused to deliver it to her, and still detained it, after due demand had been made upon it by an agent of the plaintiff below. There was abundant evidence to sustain the plaintiff's petition, and the court committed no error in overruling the demurrer to the evidence. The plaintiff in error contends that fraud was committed by the defendant in error and Horace Williams and Mr. Jeffries in attempting to cover up the property of Horace Williams, so as to place it beyond the reach of his creditors. This question was properly submitted to the jury, upon conflicting evidence, and they found for the defendant in error, and their verdict was approved by the trial court. It is not our province to disturb their finding. We do not weigh evidence. If we did, we might find the facts to be different from what this jury did. The evidence is not entirely free from a taint of fraud, but the jury has found that the transaction was all right; and we, as well as the plaintiff in error, must submit to their finding.

This brings us to the last assignment of error which we deem material, and the real contention of the plaintiff in error, i. e. that there was no demand made upon the plaintiff in error for a return of the property, as required by law. The petition alleges wrongful detention, and also a demand. Mr. Jeffries testified that he, as agent for the defendant in error, made a demand for the wheat prior to the commencement of the action, and that he made his demand in writing, and delivered it to William Work. A copy of the demand is as follows: "La Crosse, Kansas, July 14, 1891. To the La Crosse Milling Company: I hereby demand the wheat belonging to Mrs. Carrie Williams, now in your possession, on the northeast quarter of section six, in township

seventeen, range eighteen west of the 6th P. M., in Rush county, Kansas. R. O. Jeffries, Agent for Carrie Williams." The plaintiff in error contends that Mr. Work had no interest in the controversy, and was not a member of the firm of the "La Crosse Milling Company," and was only an employé or hired hand. The plaintiff in error attempted to prove this by Mr. Work, but they were not permitted to do so. The petition alleges that "the 'La Crosse Milling Company' is composed of Joseph Namur, F. H. Davis, and William Work"; and the denial of this allegation was not verified by the affidavit of the plaintiff in error, its agent or attorney, as is required by section 4191 of the General Statutes of 1889. Therefore, the demand was made upon a member of the firm, and is sufficient.

No material error prejudicial to the substantial rights of the plaintiff in error has been committed by the trial court. The judgment of the district court is affirmed. All the judges concurring.

ATCHISON, T. & S. F. R. CO. v. BRIGGS.  
(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

RAILROAD COMPANIES—ACTION FOR FIRE—MEASURE OF DAMAGES—EVIDENCE.

1. The evidence on the trial of a case should be confined to the issues stated in the pleadings between the parties; and a witness should not be permitted, over the objection of the adverse party, to state facts that are collateral to the matters in dispute.

2. The court should exclude all evidence of collateral facts or those which are incapable of affording any reasonable presumption or inference as to the principal facts of matters in dispute. It is error for the court to permit a witness to detail facts that are collateral and irrelevant, which are calculated to draw the minds of the jurors from the point in issue, and to excite prejudice and mislead them.

3. Damages caused by setting out fire in the operation of a railroad, and destroying personal property, should be measured by the fair, reasonable value of the property at the time and place of destruction.

4. The correct rule for the measurement of damages done to land alone, caused by fire communicated to it by the operation of a railroad, is the difference in the fair market value just before and just after the fire.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action by J. O. Briggs against the Atchison, Topeka & Santa Fé Railroad Company to recover damages resulting from a fire set by a locomotive. There was a judgment for plaintiff, and an order denying a new trial, and defendant brings error. Reversed.

On the 28th day of January, 1889, J. O. Briggs commenced this action in the district court of Ford county, Kan., against the Atchison, Topeka & Santa Fé Railroad Company, to recover damages on account of a fire set out by the railroad company in the operation of its line of railroad through Ford county, on the 5th day of April, 1888, in

which he alleges that the railroad company, through its agents and employes, carelessly and negligently set fire to and burned, on his land, stubble and growing grass, and thereby damaged his land and grass in the sum of \$300, and alleges that the fire was set out from the defective smokestack in a defective engine, the property of the railroad company. The case was tried before the court and jury, and resulted in a verdict and judgment against the railroad company. Defendant below filed a motion for a new trial, which was overruled, and defendant duly excepted, and made case, and brings the matter here for review.

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error. Ed H. Madison, for defendant in error.

JOHNSON, P. J. (after stating the facts). The first error complained of is that the court erred in permitting the introduction of certain testimony over the objections and exceptions of the defendant below. The plaintiff had one Elliott sworn and examined as a witness on his behalf. This witness was examined at great length in the direct and cross-examination, and re-examined several times, and recross-examined several times, and in the course of his examination, cross-examination, redirect and recross examination it appeared that he had had some trouble with the defendant below (railroad company), growing out of damages on account of fires burning over his premises. And for the purpose of affecting his credibility as a witness, and showing his prejudice and hostility to the railroad company, he was asked on the cross-examination the following question: "You are not friendly to the railroad company?" And the witness, in a kind of evasive manner, said: "Well, I don't expect to upset any trains for them." And then, on redirect examination, the plaintiff below was permitted, over the objection of defendant below, to examine the witness as follows, and the witness to answer the following questions: "Q. State why you were dissatisfied with the settlement with the railroad company?" This question was objected to. Objection overruled by the court, and witness answered: "Witness: I would like to ask your honor a question. I don't wish before this audience to be placed in a false light; and for my own individual reputation, at least, I would like to make an answer to the question as to the claim I made, which I believe to be strictly honest." This statement was objected to, and asked to be stricken out. The objection was overruled, and the ruling of the court excepted to. By the witness: "My hostility towards the railroad company is simply for the reason that they have paid me very little over half of an honest claim that I put in. That is the reason of my hostility." Motion of defendant below to strike out this statement overruled, and ruling excepted to. And the court further

permitted the plaintiff below to put the following questions to the witness, and the witness to answer the same, as follows: "Q. About how many times has the Santa Fe Railroad Company failed to pay you anything for fires that have been on your place? (Objected to; incompetent, irrelevant, and immaterial, and not in issue in this case. Objection overruled, and ruling excepted to.) A. They have paid me once probably without litigation; may be twice. I don't recollect of more than twice. I don't recollect more than that. May have been possibly more than once; may be twice. Q. You always got damage when you did sue them? (Objected to; incompetent, irrelevant, and immaterial. Objection overruled, and ruling excepted to.) A. I have, and I have compromised after suit was commenced. Well, I don't know that I have ever got that suit has not been carried clear through, and I think compromise has been had after suit was commenced. Q. They never came up and offered to pay you for damages they did to you? (Objected to; incompetent, irrelevant, and immaterial, and not in issue in this case. Objection was overruled, and ruling excepted to.) A. They have come. They have at some times come to see me before suit was commenced, but we did not agree. I did not take what they offered me." The whole of the foregoing evidence was incompetent, and not relevant to the matters at issue. The court should have excluded all evidence of collateral facts, or those which were incapable of affording any reasonable presumption or inference as to the principal facts or matters of dispute. This evidence was calculated to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them. The issue in the case on trial had no relation to the matters in dispute between the witness, Elliott, and the railroad company, and a detail of his grievances before the jury was prejudicial to the defendant below, and tended to present a collateral issue as between the witness and the railroad company, which the jury should not have heard.

The plaintiff below called one Stubbs as a witness on his behalf, and examined him in relation to the duties of the master mechanic and other employes of the defendant below at the shops and roundhouse at Dodge City in 1886, and his knowledge of the manner in which inspections of engines were made by employes in the yards and roundhouses in 1886. This evidence was all given over the objections of the defendant below. We think this evidence was too remote, and was not competent to prove the condition of the engine that is claimed to have set out the fire in April, 1888, and should have been excluded, as it did not prove any fact in dispute in this case, nor tend to prove any fact from which the jury could infer, or presume negligence of the railroad company in caring for its engines and machinery in 1888.

The plaintiff in error complains of the instructions of the court to the jury. We do not deem it necessary to go over and consider all the instructions complained of by the plaintiff, as the judgment will have to be reversed for errors already pointed out, and it is not probable that the same instructions will again be given to the jury.

The court gave the following instruction to the jury: "You are instructed that the measure of damages in this case is to be determined by finding—First, what was the quantity in value of the crop of hay grown on the burned land, in the year 1888, at the nearest market at the time the same was harvested and ready for sale; second, what the quantity and value of said crop would have been if the fire had not occurred; third, how much of such difference, if any there be, was the direct result of the fire. Any deterioration of said crop occasioned by any other circumstance or condition cannot be considered." We do not think that this instruction contains the correct rule for the measurement of damages in a case like this. The instructions of the court to the jury should be framed so as to present clearly to the jury the issues stated by the pleadings, and correspond with the evidence given under the issues. The plaintiff below, after the preliminary allegation, states: "Said defendant, in April, 1888, through its agents and employes, carelessly and negligently set out fire to and burned, on the land of the plaintiff, growing grass, and thereby damaged plaintiff's land and grass in the sum of three hundred dollars;" and then alleges that the fire was set out by reason of a defective smokestack in a defective engine. The plaintiff below, in stating his cause of action in his petition, seems to base his damages on the theory that the injury was to the land itself, and this is the theory upon which he seemed to offer his evidence. Plaintiff below called one James Crawford as a witness on his behalf, for the sole purpose of proving his damages, and after showing his occupation as a farmer, and laying the foundation for introducing the evidence, put the following questions to the witness: "State if you know, from experience or observation or any other source, the damage which is caused to the productive qualities of land with growing hay crop by fire, late in the fall or early spring?" After the witness answered that he did, counsel for plaintiff propounded the following question to the witness: "You may state, Mr. Crawford, to the jury, if you know, what the damage would be to the producing elements of the soil if the land was burned over, say, in April of any given year, for that year. I mean by that, how much would the crop be diminished per acre by burning the grass during the month of April?" The witness answered that it would be 30 to 50 per cent. Plaintiff below also called Mr. Giles as a witness, to prove the damages, and after showing that the witness was a farmer, and had

had experience in the way of fire burning over the land, propounded to him the following question: "Do you know what the damage is to the yield, the producing elements, and of the soil to have a fire pass over it in the early spring?" The witness answered that he did, and, in answer to questions, gave the jury his judgment as to the damage to the producing qualities of the soil. Other witnesses for plaintiff below were examined also as to the injury of the producing qualities of the soil after it had been burned over in the early spring. We think that, if the plaintiff below had based his action on the damages to the stubble and grass alone, the damages should have been confined to the injury done at the time of the fire. The rule laid down by the court in the instructions was dependent upon too many contingencies, and was too uncertain and remote. The value of personal property destroyed by fire should be determined as of the time and place of the destruction, where the injury done by setting out fire in the operation of a railroad consists in an injury to the land itself. The measure of damages is the difference in the market value of the land just before and just after the fire. The instruction of the court does not state the correct rule for the determination of damages to either personal or real estate.

The judgment of the district court is reversed. All the judges concurring.

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STAUFFER et al. v. DOTY et al.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

JOINT ACTION ON NOTE.

Where a promissory note is assigned to two parties, whose interests are not equal in said note, said parties may bring a joint action to recover upon said note.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action by D. W. Stauffer and N. O. Jones against Lee L. Doty and others. Judgment for defendants. Plaintiffs bring error. Reversed.

Milton Brown, for plaintiffs in error. Hopkins & Hoskinson, for defendants in error.

COLE, J. The defendants in error executed their promissory note for \$130 to one T. C. Mitchell, who afterwards assigned said note to plaintiffs in error; said assignment being indorsed upon the note in the following words: "Without recourse, pay to D. W. Stauffer, or order, \$55.00, and to N. C. Jones, or order, \$75.00,—each with the interest thereon. T. C. Mitchell." Plaintiffs in error brought their action before a justice of the peace upon said note, and recovered. The cause being appealed to the district court, it was tried without a jury, and a judgment rendered against the plaintiffs in

**error for costs.** From the decision of the district court plaintiffs in error bring the case here for review.

Several errors are alleged, but all may be considered together. The trial court held that the assignment of the note was an attempted assignment to each of the plaintiffs in error, and was therefore void, and hence they could not maintain the action; and it is here contended that, even if the assignment was valid, the plaintiffs in error could not maintain a joint action on the note in question. We think the trial court was in error. Our statute prescribes (paragraph 4103): "Every action must be prosecuted in the name of the real parties in interest except as otherwise provided in section twenty-eight." It further provides (paragraph 4114): "Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants." Section 28 (Gen. St. 1868, c. 80), referred to in the first section quoted, is as follows: "An executor, administrator, guardian, trustee of an express trust, \* \* \* may bring an action without joining with him the person for whose benefit it is prosecuted." We suppose it will not be questioned that if the above assignment had been made to Stauffer and Jones without specifying the particular interest of either in the note, they could have maintained a joint action thereon, however unequal their interests might have been; and, under the section of the statute last quoted, if the assignment had been made to another person as trustee for the plaintiffs in error, such trustee could have maintained an action for the benefit of plaintiffs in error, although their interests in the note were unequal. We fail to see why an action could be maintained by a trustee for the benefit of the plaintiffs in error, or by the plaintiffs in error, where the amount of interest of each is not disclosed, and yet that an action may not be maintained like the present one. The interest of the plaintiffs in error is a common interest. It is true each is not interested to the same degree, but the community of interest exists in the one cause of action upon which they seek to recover against the same parties defendant. In the case of *Swarthout v. Railroad Co.*, 49 Wis. 625, 6 N. W. 314, an action was brought by Swarthout and several insurance companies for damages caused by the railroad company. Prior to the beginning of the action, each of the insurance companies paid to Swarthout the amount of their respective policies, and Swarthout delivered to each of said companies a written assignment of his claim to the extent of the several payments made. It was objected in that case that the rights so acquired by the insurance companies were distinct and several, and that therefore there could not be a joinder of the insurance companies as parties plaintiff, but that each must sue separately for its own individual injury. In delivering the opinion of the court

in that case, Cole, J., said: "But it is insisted that the facts stated show that the plaintiffs have no right to join in bringing the suit. \* \* \* It is said, if the defendant is liable at all, it is separately and distinctly liable to each insurance company to the amount paid on its policy. But it seems to us it would be an intolerable rule to allow each insurance company to bring a separate suit. The railroad might well say, were this attempted: 'The claim is indivisible. There is but one wrongful act complained of, one loss, and one liability.'" In the same case the doctrine laid down in *School Dist. v. Edwards*, 46 Wis. 150, 49 N. W. 968, is approved. In that case Lyon, J., in delivering the opinion of the court, at page 158, 46 Wis., and page 968, 49 N. W., says: "The fact that the several school districts are entitled to the money in unascertained, and probably in unequal, proportions, is no impediment to this action. That is a matter between the districts, with which the appellants have no concern. It is sufficient, for the purpose of maintaining the action, that they are jointly entitled to the money claimed. In the case of *Railway Co. v. Huitt*, decided by this court, and reported in 41 Pac. 1051, the facts were the same as in *Swarthout v. Railroad Co.* In that case Denison, J., in delivering the opinion of the court, says: "Who are interested in the subject-matter of this action? The insurance companies, to the extent of the amount paid by them, respectively, and the interest thereon, and Huitt & Johnson for the remainder; and, clearly, all of them are interested in obtaining relief demanded. The relief demanded was the judgment against the railroad company for the burning of the barn."

In this case neither the execution of the note sued upon nor the written assignment thereof has been put in issue, and, such being the case, it stands admitted that the defendants in error executed the note, and that it was duly assigned. Paragraph 491, Gen. St. 1889, provides as follows: "It shall be lawful for any person or persons, having the right to demand any sum of money upon any protested bill of exchange, bond, or note as aforesaid, to commence and prosecute an action for principal, damages, interest, and charge of protest, against the drawers or indorsers, makers or obligors, jointly or severally, or against either of them separately." Paragraph 4492, Gen. St. 1889, provides: "Judgments may be given for or against one or more of several plaintiffs and for or against one or more of several defendants. It may determine the ultimate rights of the parties on either side as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled." The plaintiffs in error had obtained the title to the note in question by a legal assignment. That which they obtained was a single cause of action, and they were equally interested in that cause of action being upheld. They

were suing upon a single contract, and the statute last above cited provides the manner in which judgment might be rendered in said cause. It is the policy of our Code to avoid a multiplicity of actions, and to simplify the manner in which relief shall be obtained in the different courts of this state; and, whatever may have been the rule under the common law, to hold that, under our Code, an assignment like the one in question may not be recovered upon, is, in our opinion, opposing not only the spirit, but the letter, of the statute. We have examined the cases cited by counsel for defendants in error, and, while some of them hold a different doctrine from that which is above announced, such holding was under statutes entirely different from those of our state. On the other hand, the cases are numerous which hold as we do upon this question. So far as the cases from this state, cited by counsel, are concerned, we believe this decision to be in harmony with them. The judgment of the district court will be reversed, and this cause remanded for further proceedings in accordance with this opinion. All the justices concurring.

#### GRAY v. HAISH.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

#### APPEAL—ORDER FOR NEW TRIAL—REVIEW—JURISDICTION.

1. The power to review an order of the district court that grants or refuses a new trial, as set forth in paragraph 4641 of the General Statutes of 1889, refers to new trials granted or refused on statutory grounds, contained in paragraph 4401, and not to orders setting aside judgments because they were rendered before the action regularly stood for trial.

2. An order setting aside a judgment because it is alleged to have been rendered before the action regularly stood for trial is not reviewable by this court while the action is still pending, undetermined upon its merits, in the court below.

3. In an action to quiet title to real estate, where the record does not show such amount in controversy as gives this court jurisdiction, and the judge of the district court does not certify that it is one of the excepted cases, we must dismiss the case for want of jurisdiction.

(Syllabus by the Court.)

Error from district court, Stafford county; Ansel R. Clark, Judge.

Action by Howard Gray against Jacob Haish. Judgment against Haish was set aside, and plaintiff brings error. Dismissed.

J. W. Rose, P. R. Nagle, and Moseley & Dixon, for plaintiff in error. Whiteside & Gleason, for defendant in error.

DENNISON, J. This is an action brought by Howard Gray, as plaintiff, against Jacob Haish, a nonresident of the state of Kansas, as defendant. Service was made by publication, and judgment was rendered by default against said Haish. Said defendant, upon proper proceedings, procured the vacation of

said judgment, and permission to answer instant; whereupon said defendant filed his answer and cross petition, and the cause was on February 8, 1894, continued until the next term of the court. On March 1, 1894, the said plaintiff filed a motion asking the court to compel the said defendant to make his answer more definite and certain. At the May term of said court, the cause was continued to the next term of court. No action was had on said motion at said May term. At the October term of said court, the motion to make more definite and certain was overruled; and the plaintiff filed a reply to the answer of the defendant, leave of the court having first been obtained. At said October term, judgment was rendered against the said defendant in favor of said plaintiff. There was no appearance of said defendant at said October term of court. Thereafter, on February 5, 1895, said defendant filed a motion to vacate and set aside said judgment, for the following reasons, to wit: "(1) Because of the rendition before the action stood regularly for trial, and without the presence or knowledge of defendant; (2) because the alleged judgment was taken in the absence of defendant, on the day plaintiff filed his reply to defendant's answer and cross petition, viz. October 18, 1894, the last term before the present of this term of court,"—which said motion was by the court sustained, upon condition that the said defendant, on or before April 1, 1895, pay all cost which had accrued in said action up to said time. The plaintiff duly excepted, and brings the case to this court for a review of the ruling of said court sustaining said motion to vacate and set aside said judgment.

The defendant, in his brief, raises a jurisdictional question, which we will first consider. It is alleged that the ruling of the trial court by which it vacated and set aside a judgment alleged to have been rendered before the action regularly stood for trial is not such a ruling as is reviewable by this court, or appealable from the district court while the action is still pending therein. The jurisdiction of the supreme court is embraced in paragraph 4641 of the General Statutes of 1889. The jurisdiction of this court is embraced in section 9 of chapter 96 of the Session Laws of 1895. The question of authority to review such rulings as this is very fully discussed in *McCulloch v. Dodge*, 8 Kan. 476, and cases therein cited. The material difference between that case and the case at bar is that in that case the order set aside a judgment by default, and permitted the defendant to answer; while in the case at bar the order set aside the judgment because it was rendered before the action regularly stood for trial. The plaintiff in error contends that this order is, in effect, an order granting a new trial. We are of the opinion that this contention is correct if there has been an examination of an issue of fact in the action. "A new trial is a re-examina-

tion in the same court of an issue of fact, after a verdict by the jury, report of a referee, or decision by the court." Gen. St. 1889, par. 4401. The effect of the order made in this case will be to grant the defendant a new trial, and, if there has been one trial, this will be a re-examination of the issues of fact; therefore, a new trial. This is a matter within the knowledge of the trial court. If there has been an examination of the issues of fact in this case, the evidence was not brought to this court; and the certificate of the clerk is that the record is a full and complete transcript of all proceedings in said case. If the record had affirmatively shown that evidence had been introduced, and that an examination of the issues had been had, yet we do not think this is such a granting of a new trial as would be reviewable until the final determination of the case in the court below. Paragraph 4401 sets forth the statutory grounds for a new trial, and paragraphs 4403, 4404, and 4405 set forth the manner of procedure to obtain it. The power to review an order of the district court that grants or refuses a new trial as set forth in paragraph 4641 refers to new trials granted on such statutory grounds, and not to orders setting aside judgments because they were rendered before the action regularly stood for trial. An order setting aside a judgment because it is alleged to have been rendered before the action regularly stood for trial is not reviewable by this court while the action is pending undetermined upon its merits in the court below.

If this order had been properly reviewable by us, we must, nevertheless, have dismissed this case for lack of jurisdiction. The record discloses the fact that this is an action to quiet title to real estate; and, although not mentioned in the brief of either party, it nowhere appears what the value of the real estate is, or what the amount in controversy is. True, the answer of the defendant sets up a tax deed under which the plaintiff claims title, but the consideration thereof is only \$94.75. The answer also sets up a sheriff's deed under which the defendant claims title, but the consideration thereof is \$2,300. Neither does the judge of the district court certify that this is one of the excepted cases, as is required by paragraph 4642. This case will be dismissed, at the costs of the plaintiff in error. All the judges concurring.

#### LIBBEY v. RALSTON.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

RECORD ON APPEAL—CERTIFICATE OF JUDGE—  
CONCLUSIVENESS—RECITALS IN DEED—  
ESTOPPEL.

1. The statement in a record prepared for review in this court, when accompanied by the certificate of the judge that the record contains all of the evidence introduced on the trial of said cause, and all of the proceedings of every

nature and character done or had in the said cause, must be held to be conclusive, in this court, when a controversy arises between the parties of the cause upon that question.

2. The recital of a material and particular fact in a deed binds the parties to such instrument, and they are estopped from denying the truth of said recital.

(Syllabus by the Court.)

Error from district court, Rice county; Ansel R. Clark, Judge.

Action by Laura N. Libbey against J. T. Ralston. Judgment for defendant, and plaintiff brings error. Reversed.

C. F. Foley and J. W. Brinckerhoff, for plaintiff in error. Samuel Jones, for defendant in error.

COLE, J. This was an action commenced in the district court of Rice county by the plaintiff in error to foreclose a mortgage upon certain property in said county. The only defendant that answered, claiming any rights opposed to plaintiff in error, was the defendant in error, J. T. Ralston, who alleged that he was the absolute owner of the real estate in controversy, having obtained his title by a certain sheriff's deed, executed and delivered to him by the sheriff of Rice county under an order of court in an action brought by one L. Judson upon the interest coupon secured by the same mortgage sought to be foreclosed in this action. The defendant further alleged in his answer that the coupon sued upon by Judson was the first coupon maturing, and, as such, a first lien for the amount thereof upon the premises, and, further, that he was in possession of the premises, and that the same were discharged from any claim or lien of the plaintiff in error. There seems to have been but one question presented to the district court, and there is but one argued in the briefs filed by counsel in this court, for decision in this case, and that is as to whether the lien of plaintiff in error under her mortgage is superior to that obtained by the defendant in error at the sheriff's sale in the foreclosure brought by Judson. The trial court held that it was not, and plaintiff in error is here complaining of a judgment declaring the lien of Ralston to be superior to hers. It is, however, contended by defendant in error that there is no question properly before this court, for the reason, as it is claimed, that it affirmatively appears that the record does not contain all the evidence introduced in the trial court. The record itself contains a statement, as well as a certificate of the trial judge, that it does contain all the evidence introduced at the trial, but it is contended by counsel for defendant in error that the decree entered in the case brought by Judson, under which the deed to Ralston was issued, was introduced in evidence, and that the record so shows, but that said decree is not contained in the record. There is a statement in the record that a certain paper, marked "Exhibit A," was offered in evidence, but the rec-

ord does not disclose whether it was received and read. There is also a statement showing that the decree referred to was handed to one of the witnesses being examined, and his attention directed to its contents, the paper being referred to as "Exhibit A." The record contains an Exhibit A, which is the sheriff's deed to Ralston under the Judson foreclosure. With the record in this condition, it is impossible for us to say whether the Exhibit A which was offered in evidence was the sheriff's deed which is properly made part of the case made, or whether it was the paper exhibited to the witnesses marked "Exhibit A." We must, however, presume, under the statement that the record contains all the evidence, and the certificate of the trial judge to the same effect, that the proper Exhibit A, was included in the case made, and that the question raised by plaintiff in error is therefore properly before us for decision.

We are of the opinion that the district court erred in its decision. The plaintiff in error in this case claims under the mortgage given by Bell and wife to the Western Farm & Mortgage Trust Company, and by it assigned to her. The defendant in error, Ralston, claims under the sale made in the foreclosure brought by Judson upon the first interest coupon of the same bond which is sued upon by plaintiff in error, and the sheriff's deed executed upon the confirmation of such sale. The rights of Ralston must therefore be the same as, and cannot be superior to, those obtained by Judson, who was the plaintiff in the foreclosure action upon the interest coupon. This is evident from the fact that, in his answer, Ralston alleged that he obtained his title in the manner above referred to, and pleads the same and that title alone. What were the rights of Judson? By reference to the petition filed in the Judson foreclosure, it appears that the holder of the principal mortgage bond here sued upon was not made a party, but Judson, in his petition in that case, asks "that said lands and tenements may be sold according to law, without appraisement, subject, however, to any interest therein, lien thereon, or claim thereto by the holder of the promissory note, to wit, the real-estate coupon mortgage bond first herein described, together with interest notes, to wit, the coupons attached thereto and not included in plaintiff's claim herein." The bond first described in said petition is the one in suit in this action. Judson was entitled to no stronger decree than that prayed for in the petition, and the petition plainly admits that the claim of Judson was to be subject to any lien or claim of the holder of the bond and mortgage here in suit. Again, the evidence disclosed that, at the sale under the Judson foreclosure, Ralston was personally present, and was informed that the premises were being sold subject to a mortgage of \$2,000. Counsel for defendant in error contends that the words "subject to" do not mean subject to a prior

lien. We think, when a person purchases a piece of real estate subject to a mortgage, that he well understands that the rights of the holder of the mortgage are paramount to those obtained by him. Again, is Ralston in a position to question the priority of the lien of the mortgage of the plaintiff in error? We are of the opinion he is not, not only for the reason that he obtained only the rights of Judson, who admitted the priority of plaintiff in error's mortgage, but also because, in this case, he bases his defense and his title upon the sheriff's deed issued in the Judson foreclosure, which deed recites that the title thereby conveyed was subject to the lien of the mortgage of plaintiff in error. Ralston is certainly estopped from denying the validity and priority of plaintiff's lien, which is admitted in the very deed under which he claims title in this action. *Scott v. Douglass*, 7 Ohio, 227; *Kaine v. Denniston*, 22 Pa. St. 202; *Freeman v. Auld*, 44 N. Y. 55; *Clapp v. Halliday*, 48 Ark. 258, 2 S. W. 853.

It is further contended by counsel for defendant in error that Ralston is entitled to a prior lien for the reason that he paid the taxes which were due and unpaid at the time of the Judson foreclosure. Our view of the matter is that Ralston purchased simply the equity of redemption at the sale under the Judson mortgage. The taxes due and unpaid at that time were not paid by Ralston, but were paid by the sheriff, under the direction of the court, out of the proceeds of said sale, and he thereby extinguished the tax lien existing upon the premises. There are no special equities in this case in favor of defendant in error. He had actual knowledge of the condition of the title which he purchased and accepted a deed for, which admitted the priority of the lien of plaintiff in error. The judgment of the district court will be reversed, and this cause remanded, with instructions to render judgment according to the views expressed in this opinion. All the judges concurring.

# VAN ZANDT et al. v. SHUYLER.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

HUSBAND AND WIFE—BONA FIDES OF TRANSACTIONS—EVIDENCE—PRIVILEGED COMMUNICATIONS—DECLARATIONS OF HUSBAND—PROOF OF DOCUMENTS.

1. It is immaterial to the defendant in error, who claims the property in controversy by virtue of a purchase from her husband, whether the judgment, or the execution against said husband by virtue of which the levy was made, is sufficient or not. She must recover, if at all, because she is the owner of the property converted, and must rely upon the strength of her title, and not upon the weakness of the title of the plaintiff in error.

2. In Kansas a married woman can hold her own separate property, can purchase property from her husband, and can be by him made a preferred creditor; but where she claims to have purchased property from, or to have been

a preferred creditor of, the husband, who is financially embarrassed, the court should require clear and convincing proof of the transaction, and the good faith and adequate consideration thereof.

3. Except as stated in section 2 of this syllabus, the same rules of evidence are to govern in transactions between husband and wife as in other cases.

4. Communications between husband and wife, made while the marriage relation exists, cannot be testified to by either of them.

5. A bill of sale identified by the subscribing witness is sufficiently identified to be introduced in evidence.

6. The acts and statements of the husband in the absence of the wife cannot bind her, unless done or made by him as her agent, while transacting her business, and connected therewith as part of the *res gestæ*, and were within the scope of his authority as such agent.

(Syllabus by the Court.)

Error from district court, Rice county; J. H. Balley, Judge.

Action by Lodema Shuyler against W. G. Van Zandt and another, for conversion. There was a judgment for plaintiff, and defendants bring error. Affirmed.

John W. Roberts, for plaintiffs in error.  
Clark & Green, for defendant in error.

DENNISON, J. This is an action brought in the district court of Rice county, Kan., by Lodema Shuyler, as plaintiff, against W. G. Van Zandt and H. H. Carr, as defendants, to recover the value of a quantity of broom corn of which she claims to be the owner, and which she claims was taken from her possession by said defendants and converted to their own use. The plaintiff claims to be the owner of the broom corn by reason of having purchased it from her husband, D. M. Shuyler, at a time prior to its being baled, and before a portion of it had been cut or seeded. She claims to have paid him \$95 for it, and to have paid \$79.70 as the expenses of gathering, seeding, and baling, etc.; making a total of \$174.70 which the broom corn cost her. She claims that she had loaned her husband some money which she had received from her father's estate, and that by a settlement had with him on February 14, 1888, he owed her \$736.66, and that he then conveyed to her personal property of the value of \$434, leaving a balance due her on that day of \$302. A statement to that effect, bearing said date, signed by said D. M. Shuyler, is introduced in evidence, marked "Exhibit B." She also introduces a bill of sale, dated September 17, 1890, of the broom corn, for \$95, as a part payment on the sum of \$338 of money borrowed of her. Said bill of sale is signed by D. M. Shuyler and is marked "Exhibit A." The defendant H. H. Carr claims that he levied upon said broom corn and took possession thereof under and by virtue of an execution issued out of the district court of Reno county, Kan., upon a judgment of record therein in favor of the Smith-Keating Implement Company against D. M. Shuyler et al.; that he levied upon said broom corn

as the property of said D. M. Shuyler, and that he sold the same to the highest and best bidder for cash, to wit, W. G. Van Zandt, for the sum of \$173. The defendant W. G. Van Zandt was the purchaser of the property at the sale, and took possession of it. The agreed value of the broom corn is \$173.18. The case was tried with a jury, who returned a verdict for the sum of \$175.80 in favor of the plaintiff, and judgment was rendered thereon against the defendants, and they bring the case here for review.

The defendant in error contends that the plaintiffs in error have paid the judgment upon which the execution issued, and hence cannot maintain their defense to the action. The evidence discloses the fact that they had indorsed a note to the Smith-Keating Implement Company, and after judgment had been rendered thereon they had paid the company. Whatever there may be in this question, the defendant in error is in no position to complain of it. The objection is raised in her brief for the first time, and we cannot, therefore, review the question. Besides, it is no concern of the defendant in error whether the judgment or the execution is sufficient or not. She must recover upon the strength of her own title, not upon the weakness of the title of the plaintiff in error. If she is the owner of the broom corn she can recover, whatever may be the condition of the judgment or the execution; and if Mr. Shuyler is the owner of the broom corn, then the condition of the judgment and execution is his affair, and not hers.

The only issue in the court below was, did the broom corn belong to the defendant in error, and, if so, did she, by any act of hers, waive the right to assert her ownership? The broom corn was raised upon the homestead of Mr. and Mrs. Shuyler, and if Mrs. Shuyler owned it she must rely upon the purchase from her husband for her title. This property was apparently in the possession of the husband. He appeared to be the owner thereof, and there was some evidence tending to show that he had sold it as his own to one Harris. However, the deposition of Harris and the bill of sale do not appear in the record. It must be conceded that a married woman can hold her own separate property, can purchase property from her husband, and can be by him made a preferred creditor. Where a wife claims to have purchased property from, or to have been a preferred creditor of, her husband, and he is financially embarrassed, the courts should require clear and convincing proof of the fact of the transaction, and the good faith and fair consideration thereof. In *Dresher v. Corson*, 23 Kan. 813, the supreme court says: "Communications between husband and wife, being privileged, the opportunity for fraud, if fraud is desired, is great, and searching inquiry is proper. \* \* \* Unless care is taken and



courts are watchful, those laws which were designed for the protection of married women will become repulsive to the moral sense, as mere covers for fraud. Except the close scrutiny to be given such transactions between husband and wife, and the clear and convincing proof necessary to satisfy the court that the transaction has actually taken place, and that the same is in good faith and for adequate consideration, actually paid out of the separate estate of the other, we apprehend that the same rules as to the admission of testimony are to govern as in other cases." The plaintiff in error contends that the court erred in not requiring a communication of the husband to the wife to be related by D. M. Shuyler, and cites an Indiana decision to sustain his position. This may be correct in Indiana, but in Kansas both the husband and wife are prohibited from testifying to any communication between them while the marriage relation exists. See Gen. St. 1889, § 4418.

The plaintiff in error claims that the court erred in admitting in evidence Exhibits A and B, being the bill of sale and statement of settlement given by D. M. Shuyler to the defendant in error. As to Exhibit A, which is the bill of sale of the broom corn, the defendant in error testifies that she received the bill of sale from D. M. Shuyler on the day it bears date, and that he wrote it, and Albert Corn testifies that he signed it as a witness at the request of Mr. Shuyler. Exhibit B is a statement of a settlement between Mr. and Mrs. Shuyler, and a payment of stock thereon, and the only purpose it could serve would be to furnish cumulative evidence that Mrs. Shuyler had received some money from her father's estate and had loaned \$400 of it to her husband, and all of it had not been repaid. Mr. and Mrs. Shuyler had both testified to this fact, and Mrs. Shuyler testifies that Mr. Shuyler wrote and delivered the statement to her. As to Exhibit A, it was identified by the subscribing witness, which is sufficient. As to Exhibit B, no prejudicial error was committed in its admission.

Several of the errors complained of relate to the refusal of the court to admit testimony of the acts and conversations of D. M. Shuyler in the absence of the defendant in error, and also as to a forthcoming bond executed by D. M. Shuyler and others. All of these matters may be considered together. The acts and statements of D. M. Shuyler in the absence of the defendant in error cannot bind her, unless they were done or made by him as her agent, while transacting her business, and connected therewith as a part of the *res gestæ*, and were within the scope of his authority as such agent. D. M. Shuyler was her agent to fit the broom corn for market and to market it. He certainly was not her agent in the purchase of it, for he was the seller. The question which was material to the plaintiffs in error was: Did

she own it? Had she actually purchased it in good faith, for an adequate consideration, out of the proceeds of her separate property? If so, then it was entirely immaterial to the plaintiffs in error what she or her agent may have done with it or said about it; and if she was not the owner, it would also be immaterial to the plaintiffs in error what they may have done with it or said about it, for their rights could not be prejudiced thereby. The only purpose the evidence could serve would be to assist in establishing the ownership in D. M. Shuyler, and he was not her agent in the purchase thereof, and she could not be bound by his acts or statements in her absence.

The remaining error complained of is in the refusal of the court to give the instructions asked for by the plaintiffs in error. The brief of the plaintiffs in error, upon this assignment of error, like all the others, is little more than a repetition of the petition in error. Our attention is not called to any particular question upon which they were entitled to instructions not given by the court. We are left to study it out ourselves, or let the client suffer if actual error has been committed. We have fully examined the instructions asked for and those given, and find that nearly every instruction asked for was given in the general instructions, and in almost the same language as those asked for. The second and third instructions were not given in substance, and should not have been, for there is no evidence upon which to base them. No material error was committed upon the trial of this action prejudicial to the substantial rights of the plaintiffs in error. The judgment of the district court is affirmed. All the judges concurring.

# BOSTWICK v. BLAIR et al.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

## APPEAL—NECESSARY PARTIES—TIME OF TRIAL—ABSENCE OF PLAINTIFF.

1. Only the parties who are bound by the judgment rendered in the trial court are necessary parties to the proceedings in error in this court.

2. It is substantial error to force a plaintiff to trial at a term prior to that at which the action first became triable; and where such trial is had in the absence of plaintiff, and within three days thereafter such plaintiff files a motion for a new trial, by which that question is brought to the attention of the court, it is error sufficient to compel a reversal of a judgment for the court to overrule the motion for a new trial.

(Syllabus by the Court.)

Error from district court, Rice county; J. H. Bailey, Judge.

Action by Elizabeth Bostwick against Joseph A. Blair and others. Judgment for defendants, and plaintiff brings error. Reversed.

Houston & Craig and Wm. Osmond, for plaintiff in error. Saml. Jones and C. F. Foley, for defendants in error.

COLE, J. Elizabeth Bostwick brought her action in the district court of Rice county against Joseph A. Blair, Albert L. Perry, Celia Perry, Albert L. Perry, trustee, Alfred M. Boomer, Nancy D. Boomer, T. E. Nash, the Lyons Town Company (a corporation), M. D. Tucker, Mary J. Tucker, A. L. McMillan, and the Bunnell & Eno Investment Company, for the foreclosure of a certain mortgage upon real estate situated in said county. The defendant the Bunnell & Eno Investment Company filed a disclaimer. The defendant Joseph A. Blair filed his demurrer to the petition in said cause, and the defendants A. L. Perry, trustee, A. L. Perry, and Celia Perry filed their demurrer to the petition of plaintiff in said cause. On the 1st day of September, 1891, at the September term of said court, both of the demurrers filed were overruled, and thereupon, on the 8th day of September, 1891, the defendants Joseph A. Blair and A. L. Perry filed their separate answers, and on the 17th day of September, 1891, the plaintiff filed her replies to the separate answers of Blair and Perry, and this was all the pleadings filed in said cause. On the 25th day of September, 1891, the cause was tried, the plaintiff not being present, and a judgment rendered against said plaintiff; and thereupon in due time she filed her motion for a new trial, setting up, among other grounds, irregularity in the proceedings of the court, and that said cause was not properly reached for trial at the time the same was tried, which motion was overruled, and the plaintiff brings the case here for review.

The defendants in error present a preliminary question which first demands our attention. They claim that the judgment of the district court affected not only the parties who are made defendants in error in this court, but also all other parties defendant in the lower court, and that, as the other defendants have not been brought to this court, the proceedings in error should be dismissed. We will first examine this question. The decree rendered by the district court of Rice county on the 25th day of September, 1891, recites as follows: "And be it further remembered that on the 25th day of September, 1891, being a regular day of the September, 1891, term of this court, and this cause being regularly on the docket, and regularly set for trial, on this day came duly on to be heard upon the issue heretofore joined in this cause between the plaintiff herein, Elizabeth Bostwick, and the defendants Albert L. Perry, trustee, Albert L. Perry, Celia Perry, and Joseph A. Blair. The plaintiff appeared not. The defendants Albert L. Perry, trustee, Albert L. Perry, and Joseph A. Blair appeared in person, and the said Albert L. Perry, Celia Perry, and Joseph A. Blair appeared also by their attorneys, A.

M. Lasley, Jones & Jones, and C. F. Foley. Whereupon the court proceeded to hear the cause upon the issues joined between the plaintiff and the said defendants Albert L. Perry, trustee, Albert L. Perry, Celia Perry, and Joseph A. Blair, a jury being in open court expressly waived, and thereupon the defendant Joseph A. Blair introduced his testimony, and rested his case; the plaintiff having failed to introduce any testimony." And said decree further recites: "It is further ordered that this cause, as between the plaintiff, Elizabeth Bostwick, and the defendants Alfred M. Boomer, Nancy D. Boomer, T. E. Nash, the Lyons Town Co. (a corporation), M. D. Tucker, Mary J. Tucker, A. L. McMillan, and the Bunnell & Eno Investment Co., do stand continued until the January, 1892, term of this court." It is clear from this decree that when the district court of Rice county took up this case on the 25th day of September, 1891, it entered upon the trial of a specific issue between the parties which are named in the decree as above set forth. It is also clear that the court could only hear and determine one case at a time, and that in the hearing of said case no judgment could be rendered by the court affecting the interests or rights of any party not before the court. The decree recites that the case which was heard was one in which Elizabeth Bostwick was plaintiff and Joseph A. Blair, Albert L. Perry, trustee, Albert L. Perry, and Celia Perry were defendants; and, if the cause was properly triable at that time, the court could render a decree affecting the rights of those parties. It is true that there are statements in the decree setting forth that the title to the real estate in question in that case was quieted in Joseph A. Blair so far as all the defendants as well as the plaintiff were concerned, but the decree must be taken as a whole, and so construed, if possible, as to give force and effect to all of its statements. If this cannot be done, then any general statements in the decree must yield to those which are specific and positive in their terms. It ought not to be presumed that the court rendered a decree which it had not the power to render; and where such decree specifically recites first that it was the judgment of the trial court in an action between certain parties, who are named, and afterwards recites that the action, so far as all other parties are concerned, is continued until another term of court, it must be assumed that the general statements contained in the decree with regard to the quieting of title in Joseph A. Blair as to all defendants refer to such defendants as were properly before the court. In any event, as before stated, they were the only parties who could be affected, and a decree which attempted to affect the rights of others would be of no force or effect. It follows from these views that the only parties who were affected by the judgment of the trial court were the plaintiffs in error on

the one hand and Joseph A. Blair, Albert L. Perry, trustee, Albert L. Perry, and Celia Perry, and all of these parties having been brought into this court, unless it be Albert L. Perry, trustee. The record nowhere discloses for whom Albert L. Perry was trustee, and the appending of the simple term "trustee" does not grant any rights, and is void for uncertainty. It is merely descriptive personæ, and all proceedings against Albert L. Perry are binding in such a case upon Albert L. Perry, trustee. We are of the opinion, therefore, that the motion to dismiss must be overruled.

With our view of this case we only consider it necessary to pass upon one question presented, so far as the merits of the controversy are concerned. Upon the first day of the September, 1891, term of the district court of Rice county this controversy, as far as it affects the parties herein interested, stood upon an issue of law raised by the demurrers of Blair and the Perrys. This issue was determined during said term of court, and an answer filed by the defendants Blair and A. L. Perry, to which replies were filed eight days prior to the day upon which said cause was heard, and during the same term of court. It appears from the record that the regular judge of said court, after having disposed of the demurrers in said cause, necessarily absented himself on account of sickness, and one of the attorneys for defendants in error was elected judge pro tem., and set this cause for trial for the 25th day of September. Now, we believe that the action of the trial court in setting a cause for trial is in the nature of an order, and could only be made by one having the right to make such an order, and, while the judge pro tem. had all the powers of the regular judge in his absence, it must still be doubted whether either the regular or the pro tem. judge could make an order to the prejudice of an absent party in a case in which such judge is an attorney of record. Our opinion is that he could not. In a case where the judge has been of counsel in a cause, either a judge pro tem. should be elected under paragraph 1965 of the General Statutes, who should make all orders in the case, or a change of venue should be granted, the jurisdiction of the interested judge closing with the order changing the place of trial. Gen. St. 1889, par. 4135. From these views it follows that no proper order was made setting this cause for trial. We are of the opinion, however, that, even if such order had been regularly made, the action was not properly triable at the September, 1891, term of the district court of Rice county. The attorneys for plaintiff were present when the demurrers were heard and overruled, and at that time this cause was not set down for trial. The regular judge of the court had stated that he must absent himself on account of personal illness; and, while the record discloses that the plaintiff was insisting upon the trial of

the cause at the September term, it cannot be presumed that she wished the trial to take place in the absence of herself or her attorney, and with no notice having been received by them of the day when said cause was set for trial.

It appears also from the record that one of the attorneys for the plaintiff, having received a telegram upon the day of trial that said cause had been set for trial on that day, drove immediately some 40 miles for the purpose of being present, if possible, when said case was called for hearing. We cannot see where any blame could be imputed to the plaintiff in error in this case, and are clearly of the opinion that the refusal of the trial court to grant a new trial was reversible error, under the decisions of our supreme court, *Gapen v. Stephenson*, 18 Kan. 140; *Leighton v. Dixon*, 42 Kan. 616, 22 Pac. 732. The judgment of the district court will be reversed, and this cause remanded for a new trial. All the justices concurring.

#### STATE ex rel. LAMKIN, County Attorney, v. KELLY.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

COURT OF APPEALS—JURISDICTION—QUO WARRANTO—INSTITUTION—SUFFICIENCY OF PETITION.

1. Appellate courts have original concurrent jurisdiction with the supreme court in cases of quo warranto in their respective divisions.

2. The county attorney of Stevens county is a proper person to commence and prosecute this action in the appellate court, in the Southern department, Western division. *State v. Allen*, 5 Kan. 213.

3. Where the petition states all the necessary facts to authorize the removal of a county treasurer by the board of county commissioners, and the appointment of his successor, in accordance with an act of the legislature of 1874, being an act entitled "An act to provide for the publication of statements showing the condition of the county treasury, examination of the same, and to prevent the improper use of public moneys, and for the punishment thereof," and states that the defendant was duly removed from the office of county treasurer, and his successor appointed and qualified, and the defendant refuses, on demand, to surrender the office and turn over the moneys, papers, books, and properties belonging to such office to his successor, and stating that the defendant is unlawfully exercising the office of county treasurer of Stevens county, after he has been duly removed therefrom and his successor appointed, states a good cause of action against the defendant in the proceedings of quo warranto in the appellate court.

(Syllabus by the Court.)

Original proceeding in quo warranto on the relation of A. W. Lamkin, county attorney, against John A. Kelly. Defendant demurred to the petition. Overruled.

On the 9th day of September, 1895, an original petition was filed in the office of the clerk of the Kansas court of appeals, Southern department, Western division, at Garden City, Finney county, Kan., by A. W. Lamkin, county attorney of Stevens county, Kan., which petition is as follows:

"Now comes A. W. Lamkin, the duly elected and qualified county attorney of Stevens county, in the state of Kansas, into the Kansas court of appeals, Southern department, Western division, and gives said court to understand and be informed that Stevens county is one of the duly-organized counties of the state of Kansas, and has been since prior to January 1, 1889; and that he is the duly elected, qualified, and acting county attorney of said county; and that on the 7th day of November, 1893, defendant, John A. Kelly, was duly elected county treasurer of said county, and duly qualified as such treasurer, and entered upon the duties of said office, and collected the revenues of said county, and received all the public funds payable to said defendant, John A. Kelly, as treasurer of said county, until the 6th day of July, 1895; and prior to said 6th day of July, 1895, the defendant, John A. Kelly, as such county treasurer, had received large amounts of money as the public funds belonging in said county treasury; and that upon said 5th day of July, 1895, the books of said defendant, John A. Kelly, as such county treasurer, showed that there was in the hands of the defendant, as such county treasurer, of the public funds belonging in the county treasury of said county, the sum of one thousand dollars; and that the board of commissioners of said Stevens county, Kansas, on the 3d day of July, 1895, appointed R. C. Crawford and Monroe Traver, who were each citizens and taxpayers of said Stevens county, Kansas, to assist the probate judge of said county in examining and counting the funds in the hands of the county treasurer of said county during the quarter ending September 30, 1895; and that on the 5th day of July, 1895, W. T. Stotts, the probate judge of said Stevens county, assisted by R. C. Crawford and Monroe Traver, examined and counted the funds in the hands of the defendant, John A. Kelly, as county treasurer of said Stevens county, and the said probate judge and examiners, upon such examination and count, found a deficiency in the funds of said county treasury in the sum of nine hundred and eighty-five dollars and fifty-six cents, and immediately reported the fact of said deficiency in writing to the county clerk of said Stevens county, a copy of which report is hereto attached, marked 'Exhibit A,' and made a part hereof; and that Daniel Forker, the county clerk of said Stevens county, Kansas, immediately notified Roland Tull, A. J. Hughes, and J. C. Gerrond, the county commissioners of said Stevens county, of the filing of said report, a copy of which notice is hereto attached, marked 'Exhibit B,' and made a part hereof; and the said commissioners forthwith met to take such action as was necessary to protect and preserve the funds of said county; and the said county commissioners, having duly met as the board of county commissioners of said Stevens county, notified the defendant, John

A. Kelly, that an order of the board of county commissioners had been made requiring him to forthwith appear before the commissioners and show cause why said deficiency existed, and the said defendant, John A. Kelly, having been notified of the said order, and failing to appear or to account for said deficiency, the said board of county commissioners found that, in their judgment, it was necessary and proper, to protect the public interest, that the said John A. Kelly be removed from the office of county treasurer of Stevens county, Kansas, and therefore ordered that the said John A. Kelly be removed from the office of county treasurer of Stevens county, Kansas, and that C. H. Wright be appointed as county treasurer of said Stevens county, Kansas, to fill the unexpired term of office of said John A. Kelly, ending on the second Tuesday in October, 1896; and that the said C. H. Wright executed to the state of Kansas a bond, with three or more sufficient securities, in the sum of ten thousand dollars, to be approved by the board of county commissioners of said county, or the chairman thereof, conditioned as required by the statutes in such cases made and provided; and that the said C. H. Wright was, at the time, and long prior thereto, a legal elector in said Stevens county, Kansas, and eligible to the office of county treasurer of said county; and that on the 6th day of July, 1895, the said C. H. Wright executed his bond as treasurer of said Stevens county, Kansas, in due form, in the sum of ten thousand dollars, which bond was duly and legally approved, and the said C. H. Wright duly and legally qualified as the county treasurer of said Stevens county, Kansas; and that on the 11th day of July, 1895, the defendant, John A. Kelly, was duly notified of his removal from said office of county treasurer of Stevens county, Kansas; and that on the 11th day of July, 1895, the said C. H. Wright demanded of the said John A. Kelly that he turn over to him, as his successor in the office of county treasurer of Stevens county, Kansas, all the money, papers, books, and records belonging to the said office of county treasurer of Stevens county, Kansas, and which came into the possession of the said defendant, John A. Kelly, as treasurer of Stevens county, Kansas, and defendant, John A. Kelly, refused to deliver to the said C. H. Wright the money, books, papers, and records of said office, or any part thereof, and the defendant, John A. Kelly, refused to surrender to said C. H. Wright the office of county treasurer of Stevens county, Kansas, and is unlawfully holding and exercising the office of county treasurer of Stevens county, Kansas, after he has by an order of the board of county commissioners of said Stevens county, Kansas, been removed from said office, and his successor in said office duly appointed and qualified, and after the said C. H. Wright is lawfully entitled to said office, and to exercise the functions thereof,

and to receive the emoluments thereof,—contrary to the statutes of the state of Kansas in such cases made and provided. The plaintiff therefore prays judgment ousting the defendant, John A. Kelly, from the office of county treasurer of Stevens county, Kansas, and for all proper relief. A. W. Lamkin, County Attorney, Stevens County, Kansas. A. J. Hoskinson, of Counsel.

“State of Kansas, Stevens County—ss.: A. W. Lamkin, of lawful age, being first duly sworn, on his oath says he is the county attorney of Stevens county, Kansas, and that he has read the foregoing petition, and knows the contents thereof, and that the statements and allegations contained in said petition are true. So help me God. A. W. Lamkin.

“Subscribed and sworn to before me by A. W. Lamkin this, the 8th day of August, 1895. [L. S.] R. C. Crawford, Notary Public. (My commission expires May 17, A. D. 1897.)”

Exhibit A: “State of Kansas, Stevens County—ss.: To Daniel Forker, County Clerk of said County: The undersigned, probate judge of said county, and R. C. Crawford and Monroe Traver, citizens and taxpayers of said county, appointed by the board of county commissioners of said county to assist the probate judge of said county to examine and count the funds in the hands of the county treasurer of said county, and having on the 5th day of July, 1895, made said examination, for the quarter ending September 30, 1895, find a deficiency of said funds, in the sum of \$985.56, and report the same to you as county clerk of said county. This 5th day of July, 1895. W. T. Stotts, Probate Judge. R. C. Crawford, Monroe Traver, Examiners Appointed by Board.

“I hereby certify the above to be a true copy of the original notice. Daniel Forker, County Clerk. [Seal.]”

Exhibit B: “Tc Roland Tull, A. J. Hughes, and J. C. Gerrond, Each Members of the Board of County Commissioners of Stevens County, Kansas: You, and each of you, are hereby notified that on the 5th day of July 1895, W. T. Stotts, probate judge of Stevens county, and R. C. Crawford and Monroe Traver, citizens and taxpayers of said county appointed by the board of commissioners of said county to assist the probate judge of said county in examining and counting the funds in the hands of the county treasurer of said county, have this day reported to me in writing that there is a deficiency in said funds, in the sum of \$985.56, of all of which you will take due notice. This the 5th day of July, 1895. Daniel Forker, County Clerk of Stevens County.

“We acknowledge service of the foregoing notice this 5th day of July, 1895. Roland Tull (Chrm.), A. J. Hughes, J. C. Gerrond, County Commissioners.

“I hereby certify the above to be a true copy of the original notice. Daniel Forker, County Clerk. [Seal.]”

To the petition the defendant filed his demurrer, as follows:

“Comes now the defendant by his attys., Wm. O’Conner and D. P. Lindsay, and demurs to the plaintiff’s petition for the following reasons, viz.: First. The court has no jurisdiction of the person of the defendant. Second. The court has no jurisdiction of the subject-matter of the action. Third. The plaintiff has not the legal capacity to sue. Fourth. The plaintiff, on the relation of A. W. Lamkin, county attorney of Stevens county, Kansas, has not the legal capacity to sue. Fifth. There is a defect of parties plaintiff. Sixth. There is a defect of parties defendant. Seventh. The petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. Wherefore the defendant prays that said action be dismissed at plaintiff’s costs.”

A. W. Lamkin, Co. Atty. (A. J. Hoskinson, of counsel), for relator. Wm. O’Conner and D. P. Lindsay, for defendant.

JOHNSON. P. J. (after stating the facts). The first contention of counsel for the defendant, under his demurrer, is that the appellate court has no jurisdiction in quo warranto proceedings. In the consideration of this objection it is necessary to consider the source from which the jurisdiction of this court is derived. Some of the courts of this state derive their existence directly from the constitution, which expressly defines and limits their jurisdiction, and makes the jurisdiction within these limits exclusive, and provides also that they shall possess such other and further jurisdiction as may be conferred upon them by law. Where the constitution, in the creation of a court, defines its jurisdiction, and makes such jurisdiction exclusive in such court, that court alone can exercise such jurisdiction; but where the constitution, in the creation of a court, defines its jurisdiction, without making the same exclusive, and in the same instrument gives authority for the creation of such other courts, inferior to the supreme court, as may be provided by law, the legislature may thereafter, under the constitution, determine what other courts, inferior to the supreme court, are necessary and proper for the interest of the people of the state, and in the creation of such courts may confer upon them such jurisdiction as is not vested exclusively in the supreme court or other courts, by the constitution. The legislature may confer upon such new court concurrent jurisdiction with the supreme court in all cases where such jurisdiction is not exclusive or inconsistent with the jurisdiction already conferred. In framing and adopting a constitution for the state, the convention had regard to the then wants and interests of the inhabitants of the territory to be included within the new state, and made

provision for the judicial department of the state that was then thought to be adequate for the interests and well-being of the people, but put in a provision that, if it should become necessary to increase the judicial branch of the state, the legislature should have power to create such other courts, inferior to the supreme court, as the requirements of the people may seem to demand. In creating the judicial department of the state, the constitution provides that the judicial powers of the state shall be vested in a supreme court, district court, probate court, justices of the peace, and such other courts, inferior to the supreme court, as may be provided by law. Const. art. 3, § 1. In 1895 the legislature, deeming it necessary to increase the judiciary of the state, passed an act entitled "An act concerning appellate courts and defining their jurisdiction and the proceedings therein," being chapter 96 of the Laws of 1895. Section 9 of the act creating this court defines its jurisdiction as follows: "Sec. 9. Said courts of appeals, within their respective divisions, shall have original jurisdiction, concurrent with and to the same extent as is now given by law to the supreme court in quo warranto, mandamus and habeas corpus." This act, in terms, gives the appellate courts, within their respective divisions, original jurisdiction in cases of quo warranto, concurrent with the supreme court, and the appellate court has jurisdiction, unless such jurisdiction is exclusive in the supreme court. In the case of *Henderson v. Kennedy*, 9 Kan. 164, *Brewer, J.*, delivering the opinion of the court, says: "The mere granting of original jurisdiction in an ordinary action to other tribunals does not, of itself, operate as exclusive. Both acts may stand; both tribunals have jurisdiction. \* \* \* Original jurisdiction in mandamus is by the constitution given to the supreme court, but the legislature granted such jurisdiction also to the district court. Such grant was sustained by this court. The constitutional grant was held not conclusive. *Judd v. Driver*, 1 Kan. 455." In the case of *Shoemaker v. Brown*, 10 Kan. 392, the supreme court, by *Valentine, J.*, says: "The mere giving of jurisdiction to one court does not show that it must be exercised exclusively by that court. The constitution gives the supreme court original jurisdiction in quo warranto, mandamus, and habeas corpus. \* \* \* But still it has never been supposed that either of these courts had exclusive jurisdiction of any of these matters, for the legislature has given such jurisdiction also to the district court." In the case of *McNab v. Heald*, 41 Ill. 326, *Walker, C. J.*, delivering the opinion of the court, says: "Even where courts of law have been vested by legislative enactments with equitable jurisdiction, unless there are prohibitory or restrictive words employed, the uniform interpretation is that they confer concurrent, and not exclusive, authority."

It is insisted that the grant of original jurisdiction in the supreme court to hear and determine cases of quo warranto under the constitutional provision, no matter in what county the cause of action may arise, and without reference to where the defendant may be summoned, is a grant of power to the supreme court only, and cannot be extended or conferred by the legislature upon any other tribunal or court of special or limited jurisdiction, and inferior to the supreme court. The contention is that the writ of quo warranto and proceedings in the nature of quo warranto are abolished, and the remedies heretofore obtainable under those forms must now be had by civil action. Quo warranto, being a civil action, is local, and must be brought in the county where the cause of action or some part thereof arose. The Code of Civil Procedure, having provided that a civil action must be brought in the county in which the defendant or some of the defendants reside or may be summoned, prohibits the legislature from conferring jurisdiction on the appellate court, where it may require a citizen to appear in a county other than that of his residence, or where he or some one connected with him in the suit may be summoned. There is no constitutional prohibition against the legislature conferring concurrent jurisdiction with the supreme court on such new courts as it may create under the constitution. In the case of *State v. Allen*, 5 Kan. 213, *Valentine, J.*, speaking for the court, says: "The legislature, by abolishing both the writ of quo warranto and proceedings in the nature of quo warranto, have not thereby destroyed the constitutional jurisdiction of the supreme court in such cases. \* \* \* Article 29 of the Code of Civil Procedure merely provides a new method of procedure for the supreme court in such cases, but does not in the least affect its jurisdiction. The jurisdiction of the supreme court in such cases is coextensive with the state. \* \* \* The legislature have not and cannot limit the jurisdiction of the supreme court in such cases to Shawnee county merely, and the supreme court is not, therefore, forced to dismiss this action for the reason that the cause of action arose in Jefferson county." The supreme court, of course, obtains its original jurisdiction in cases of quo warranto from the constitution of the state, and the legislature cannot take that jurisdiction away or limit its scope. It may change the procedure in such cases, and the supreme court must follow the new mode of procedure prescribed by the legislature; but it does not follow, because the supreme court derives its jurisdiction in quo warranto proceedings from the constitution, that the legislature cannot confer concurrent jurisdiction on some new court of its creation. And the act of the legislature conferring original jurisdiction on the appellate court, within their respective divisions, concurrent with the supreme court, gives it the same jurisdiction

within its division in quo warranto, mandamus, and habeas corpus as possessed by the supreme court. This act was passed with the full knowledge of the decisions of the supreme court holding that its jurisdiction in those cases was coextensive with the state, and the legislature simply, under the constitutional provisions and the decisions of the supreme court, limited the jurisdiction of the appellate court to their respective divisions, giving to the appellate court original jurisdiction, concurrent with the supreme court, coextensive with the respective divisions thereof. But, if these observations are not correct, and the court could not take jurisdiction over a party residing beyond the limits of Finney county, the defendant has waived the question of jurisdiction over his person by voluntarily coming into this court and entering his appearance to the action. Of course, if he had only appeared for the purpose of objecting to the jurisdiction of the court over his person that would not be a waiver; but his appearing to contest the sufficiency of the petition by general demurrer is an appearance to the action, and subjects him personally to the jurisdiction of the court, if the court has jurisdiction of the subject of the action. We do not think the facts stated in the petition constitute a local action, of which the court could not take jurisdiction in some other county than the one in which the party is unlawfully exercising an office.

The second reason urged in support of the demurrer of the defendant is that the county attorney of Stevens county is not a proper party plaintiff in a quo warranto proceeding, commenced originally in Finney county. The county attorney, being a county officer, his jurisdiction is limited to Stevens county, and he could not prosecute an action on behalf of the state in any other county than the one of which he is an officer. This action is not by the county attorney as plaintiff, but is in the name of the state as plaintiff, the county attorney appearing as relator. The action is commenced under article 29, § 654, of the Code of Civil Procedure, which reads as follows: "When the action is brought by the attorney general, the county attorney of any county of his own motion, or when directed to do so by competent authority, it shall be prosecuted in the name of the state, but where the action is brought by a person claiming an interest in the office, franchise or corporation, or claiming an interest adverse to the franchise, gift or grant, which is the subject of the action, it shall prosecute in the name and under the direction and at the expense of such person. Whenever the action is brought against a person for usurping an office, by the attorney general or county attorney, he shall set forth in the petition the name of the person rightfully entitled to the office, and his right or title thereto. When the action in such case is brought by the person claiming title,

he may claim and recover any damages he may have sustained." Gen. St. 1889, c. 25, art. 10, provides that a county attorney shall be elected in each county organized for judicial purposes, who shall hold his office for a term of two years. It shall be his duty to appear in the several courts of their respective counties, and prosecute and defend on behalf of the public all suits, applications, or motions, civil or criminal, arising under the laws of this state, in which the state or their county is a party or interested in. This has been the law respecting the election, qualification, and defining the duties of county attorneys since October 31, 1868. In the case of *State v. Allen*, 5 Kan. 218, the defendant objected to the authority of the county attorney of Jefferson county appearing in that case, and prosecuting the case on behalf of the state as relator. The supreme court says: "The county attorney of Jefferson county is the proper person to commence and prosecute this action. Gen. St. 1868, p. 760, § 654. The supreme court will not, therefore, dismiss an action because the attorney general of the state has made no appearance in the case, and does not prosecute the same." The statute in relation to the election, qualification, and duties of county attorneys is the same now as it was when this decision was announced, and the Code of Civil Procedure, in relation to the manner in which quo warranto proceedings are to be commenced and conducted, is the same as when this decision was rendered. The case of *State v. Majors*, 16 Kan. 440, was a proceeding in the nature of quo warranto, commenced originally in the supreme court by the county attorney of Crawford county, to oust the county treasurer of that county from office. Following the decision of the supreme court in the case of *State v. Allen*, supra, which was followed by *State v. Majors*, supra, we must hold, in this case, that the county attorney of Stevens county was a proper person to prosecute this case in the appellate court.

The remaining reason urged by defendant in support of his demurrer is that the petition does not state facts sufficient to constitute a cause of action against this defendant. The petition states: That Stevens county is one of the organized counties of this state. That the defendant, John A. Kelly, was duly elected county treasurer of said county on the 7th day of November, 1893, and that he duly qualified and entered upon the discharge of the duties of his office as such treasurer, and that he has from time to time, as treasurer of Stevens county, received the public funds belonging to the treasury of said county. That large sums of money belonging to the public funds of the treasury of Stevens county came into his hands as such treasurer, prior to the 5th day of July, 1895, and that on the 3d day of July, 1895, the board of county commissioners of Stevens county duly appointed two persons, who were citizens

and taxpayers of said county, to assist the probate judge of said county in examining and counting the funds in the hands of the county treasurer of such county during that quarter, and that on the 5th day of July the probate judge, together with said two persons, examined the treasury and counted the funds in the hands of the defendant, John A. Kelly, as county treasurer. That upon such examination, and counting the funds in the hands of defendant as county treasurer, they found a deficiency in the funds in said county treasury in the sum of \$985.56, and they immediately reported the facts of said deficiency to the county clerk of Stevens county. A copy of the report is attached to the petition, and made part thereof. The county clerk, immediately upon the receipt of such report, notified the county commissioners of the filing of such report, and the commissioners forthwith met at the office of the county clerk to take such action as was necessary to protect and preserve the funds of said county. The commissioners, having met as the board of county commissioners of Stevens county, notified the defendant, John A. Kelly, that an order of the board of county commissioners had been made requiring him to forthwith appear before the board of commissioners and show why such deficiency existed; and defendant having been duly notified of said order, and failing to appear or to in any manner account for said deficiency, the board of county commissioners found that in their judgment it was necessary and proper to protect the public interest that the said John A. Kelly be removed from the office of county treasurer of Stevens county. That an order was thereupon made removing the said John A. Kelly from the office of county treasurer of said county of Stevens, and also made an order appointing C. H. Wright as county treasurer of said county, to fill the unexpired term of office of the said John A. Kelly. That the said C. H. Wright duly qualified as such treasurer, and that said Wright possessed all of the necessary qualifications to entitle him to said office, and that said John A. Kelly was duly notified of the order of his removal and of the appointment and qualification of his successor in office. That after his qualification the said C. H. Wright duly demanded of the said John A. Kelly that he turn over to him, as his successor in the office of the county treasurer of Stevens county, Kan., all the moneys, papers, books, and records belonging to the said office of county treasurer of said county, which came into the possession of the said John A. Kelly as treasurer of said county, and that said defendant refused to surrender to the said C. H. Wright the office of county treasurer of Stevens county, and the said John A. Kelly is unlawfully holding and exercising the office of county treasurer of Stevens county, Kan., after he had, by an order of the board of county commissioners of said county, been removed from said office, and his successor in office duly

appointed, and after said C. H. Wright is lawfully entitled to said office, and to exercise the functions thereof. The proceedings leading up to the removal of the defendant were under the Laws of 1874, being an act entitled "An act to provide for the publication of statements showing the condition of the county treasury and examination of the same, and to prevent the improper use of public money, and for the punishment thereof." There is no question made as to the validity of this law, as that question was fully settled in the case of *State v. Majors*, supra, holding the law constitutional and the right of the board of county commissioners to remove the treasurer thereunder, and to appoint his successor. We think the petition states such facts, if true, as authorize the board of county commissioners to remove Kelly from the office of county treasurer and appoint a successor to fill out the unexpired term. The demurrer of the defendant is overruled, and the defendant is granted leave to file an answer to said petition on or before the first Tuesday in February, 1896. All the judges concurring.

**BANK OF CLAFLIN v. ROWLINSON et al.**  
(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

**SUFFICIENCY OF CASE MADE—NOTE—CONSIDERATION—PLEDGE—RIGHT OF RECOVERY.**

1. Where a case is brought to this court for review by means of a case made attached to the petition in error, all matters relating to the merits of the case must be shown by and embodied in the case made itself, and cannot be shown by any other or by extrinsic evidence; but other matters or things to make the case reviewable may generally be shown by extrinsic evidence, or, in other words, by evidence outside of the case made.

2. A deed to a certain tract of land, and a contract to repurchase the same in one year if not sold prior thereto, is a sufficient consideration for a note executed and delivered by the payor at the same time he receives the deed and contract from the payee, and an innocent purchaser thereof before maturity is entitled to recover thereon.

3. Where the payee of a note assigns the same before maturity to the bank as collateral security for a certain indebtedness, the bank is entitled to recover from the makers the full amount of the note if the makers have no defense thereto; but, if the makers have a defense to said note, and the bank, at the time of taking said note, was unaware of said defense, then it is entitled to recover upon said note the amount of the balance for which the note was delivered as security, and the makers of the note are entitled to their defense as an offset to the balance of the amount due upon the note.

(Syllabus by the Court.)

Error from district court, Barton county; J. H. Bailey, Judge.

Action by the Bank of Clafin against John C. Rowlinson and others on a note. There was a judgment for defendants, and plaintiff brings error. Reversed.

Wm. Osmond and E. L. Hotchkiss, for plaintiff in error. C. F. Foley, for defendants in error.



DENNISON, J. A motion has been filed in this court asking us to dismiss this case. We will first pass upon the motion. The defendants in error contend that we have no jurisdiction to review this case, for the reason that no legal case made or transcript is attached to the petition in error. The case made fails to show notice to the defendants in error or their attorney of the time of settling and signing the case or their presence at said time, or a waiver of the suggestion of amendments. The plaintiff in error has filed the affidavit of G. W. Nimocks, one of its attorneys, in which he says that C. F. Foley, the attorney for the defendants in error, at the request of said Nimocks, presented the case to the judge, and, after it was settled and signed, it was sent to him at Great Bend, by said Foley. He attaches to his affidavit the following letter: "Lyons, Kansas, April 14, 1891. G. W. Nimocks & Bro., Great Bend, Kansas—Gentlemen: Your favor of recent date received. I will have case settled and signed in a day or two, and will express it to you, as requested. Very respectfully, C. F. Foley." The defendants in error file the affidavit of C. F. Foley, their attorney, in which he states that the case was properly served, and that he dictated the letter attached to Nimocks' affidavit; that the said case was not settled in a day or two after writing said letter, but that he does not now recollect why it was not done (the record shows it to have been settled and signed on April 24, 1891, 10 days after the letter was written); that he did express the case made to some one of the plaintiff's attorneys at Great Bend,—he thinks to Nimocks; that no notice of the time of settling the case had been served upon him, and that he has no recollection of being present at the time of settling the case. From these affidavits it appears uncontradicted that the case was served in time on Foley, and while it was in his possession he promised to present it to the judge for settlement, and then send it to the attorneys for plaintiff in error. He sent it to them by express, and when they received it it was signed and settled. The irresistible conclusion is that the case was presented to the judge by Foley, and that he was present when it was settled and signed. The question, then, is, must these matters be incorporated into the record itself, or can they be shown by extrinsic evidence? This relates to a question of practice, and justice would dictate that, if it can be clearly established by any method that the opposite party was actually present, or had notice of the time and place of settlement, or had waived amendments, the case should be decided upon its merits. The practice in the supreme court seems to be that, where nothing is shown to the contrary, the record must affirmatively show that the necessary duties devolving upon each litigant prior to the settling and signing of the case made have been performed, but where the record fails to show

such performance it may be shown by extrinsic evidence. In *Jones v. Kellogg*, 51 Kan. 263, 33 Pac. 997, and in *Roser v. Bank* (Kan. Sup.) 42 Pac. 341, it is held that all matters relating to the merits of the case must be shown by and embodied in the case made itself, and cannot be shown by any other or by extrinsic evidence, but other matters or things to make the case reviewable may generally be shown by extrinsic evidence, or, in other words, by evidence outside of the case made. In the case of *Safford v. Turner*, 53 Kan. 729, 37 Pac. 985, the affidavits filed by the attorneys flatly contradicted each other, and the court dismissed the case, and very properly criticised and condemned the practice of leaving these matters out of the record, and relying upon such outside evidence to establish them. In the case at bar we think the presence of the defendants in error at the time and place of settling and signing the case is clearly shown by the affidavits, and we will consider the case upon its merits. By doing so we believe no injustice is done to either side. Should we refuse to do so, we believe an injustice would be done the plaintiff in error.

This is an action brought in the district court of Barton county, Kan., by the plaintiff in error against John C. Rowlinson, S. H. Ryker, and W. A. Gilles as defendants, upon a promissory note for \$627.70, dated November 1, 1888, due April 17, 1889, with interest from maturity at the rate of 12 per cent. per annum. Said note was executed and delivered by said defendants to the plaintiff in error, the Bank of Claflin. W. A. Gilles was guarantor, made no defense, and judgment was taken against him by default; hence he is not in this court. Defendants in error admit the execution of the note, but allege a failure of consideration. They allege that on or about October 17, 1887, they executed to one Jacob Knupp their promissory note for \$500, payable in one year, bearing 10 per cent. interest from date; that on said date, contemporaneous therewith, and as a part of the same transaction, said Knupp entered into an agreement with said Rowlinson by which said Rowlinson gave said Knupp the said note of \$500 and a team of mules, valued at \$300, for certain real estate in Rice county, Kan., subject to mortgage of \$450; that said Knupp should have the right to sell the real estate at any time during the year, and should receive as his commission, if he made such sale, two-thirds of what he obtained for it over \$1,100; if at the expiration of one year said real estate had not been sold, said Knupp agreed to repurchase the same for the sum of \$1,100, and said note of \$500, and the interest thereon, should be taken as so much of a payment on it. They also allege that the real estate has not been sold; that Knupp had refused to repurchase it, and the defendants have been damaged in the sum of \$800, which sum they would be entitled to set off against the

note if suit had been brought by Knupp; that the plaintiff took the note with full knowledge of the above contract and defense, and gave no consideration to Knupp for the note, and that the only consideration for the note of \$627.70 was the renewal of the \$500 note given to Knupp; that said Knupp indorsed, transferred, and delivered the said note to the plaintiff as collateral security, and his debt has been fully paid to said plaintiff by the proceeds of a sale of personal property belonging to said Knupp. The case was tried with a jury, and they returned special findings of fact and a general verdict for the defendants. Judgment was rendered on the general verdict against the plaintiff, and it brings the case here for review.

We will discuss the rights of the parties to this transaction before we consider the errors complained of. As between the defendants and Knupp, it is evident that Knupp gave a consideration for the note. He gave the title to the real estate subject to the \$450 mortgage, and the contract to repurchase the same for the note and the mules. Had Knupp brought suit upon the note, the defendants could have set up the contract, and the breach thereof, as an offset to the amount to be recovered thereon. Is the bank entitled to any greater rights than Knupp would have had? If it was the owner and holder of the said note before maturity, without knowledge of the defenses thereto, it would be entitled to recover the full amount thereof. The jury, in their special findings, found that the \$500 note was assigned to the plaintiff to secure overdrafts and for current indebtedness which might accrue to the bank in the course of business, and that at the time of said assignment the plaintiff did not know of any defense which defendants might have to said \$500 note; that at the time the note for \$627.70 was given by the defendants to the plaintiff there was an overdraft of Knupp and Simpson due to plaintiff, for the payment of which the \$500 was assigned as collateral security; and that there was no evidence showing that the defendants were ignorant of any material fact which would constitute a defense to said note. Upon these findings it is obvious that the plaintiff is entitled to recover at least the amount of the balance of the claim for which the \$500 note was assigned as collateral security. If the defendants had no defense as against Knupp, the plaintiff could have recovered the whole amount, although it might not have been entitled to apply to its own use the whole proceeds. *Williams v. Norton*, 3 Kan. 295. They could have applied to their own use the amount of their claim against Knupp for which the said note was collateral, and must have answered to Knupp for the balance. We think, therefore, that from the facts established by the special findings of the jury the plaintiff was entitled to recover upon said note the amount of the balance of its claim

against Knupp for which it was assigned as collateral security, and of any balance remaining the defendants were entitled to offset their damages for the breach of the contract of Knupp and the costs of suit, and, if any balance remains, it should be added to the amount for which the bank is entitled to judgment. The defendants in error contend that there is no evidence tending to show whether the \$500 note was payable to order or bearer, and, if payable to order, that it had been indorsed by Knupp to the plaintiff. While this may be true, the deficiency is abundantly supplied by the answer of the defendants. In the fifth paragraph thereof they allege "that said Knupp indorsed, transferred, and delivered the said note to the plaintiff," etc. They cannot now be heard to deny it. It will be seen from the view of this case expressed herein that the special findings of the jury are not in harmony with the general verdict, and at the same time they are not so complete that the court could render a judgment on the special findings. A new trial should have been granted, and it was error to overrule the plaintiff's motion therefor.

We deem it unnecessary to consider the different assignments of error in detail. They are sufficiently explained in this opinion. The judgment of the district court is reversed, and the case remanded, with instructions to grant the plaintiff a new trial. All the judges concurring.

#### AIKEN et al. v. FRANZ.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

#### ASSUMPSIT—ISSUES—VERIFICATION OF PLEADINGS.

1. Where the plaintiff's petition contains an itemized statement of an account, and the same is duly verified by the affidavit of the plaintiff as true, and the same is denied by the answer of the defendant, which answer is duly verified by the affidavit of the defendant, it puts in issue the correctness of such account.

2. Where the answer of the defendant denies the truth of the allegations of the plaintiff's petition, and then sets up a counterclaim and an itemized account thereof, and the same is verified by the affidavit of the defendant as true, the same must be taken as true, unless the denial thereof is verified by the affidavit of the plaintiff, his agent, or attorney.

3. Where a pleading is verified by an attorney, in the absence of the party the affidavit of the attorney should show that he has some personal knowledge of the facts stated in such pleading.

(Syllabus by the Court.)

Error from district court, Pawnee county; S. W. Vandivert, Judge.

Action by M. P. Aiken & Co. against J. A. Franz. Judgment for defendant, and plaintiffs bring error. Modified.

C. N. Sterry, for plaintiffs in error. W. H. Vernon and G. Polk Cline, for defendant in error.

JOHNSON, P. J. On the 14th day of July, 1890, M. P. Aiken & Co., grain commission merchants of Chicago, Ill., commenced an action in the district court of Pawnee county, Kan., against J. A. Franz, to recover the amount alleged to be due to plaintiffs for overdrafts and commission on the sale of grain consigned by defendant to plaintiffs for sale on the market at Chicago, Ill. The petition and amended petition of plaintiffs set out the contract between the parties for the shipment and sale of grain, and the honoring of drafts attached to bills of lading on each shipment, and attached is an itemized statement of shipments, containing a description of the car, date of the receipt, date of sale, freight, quantity, price, amount, charges on freight, inspection and weight, and commission, the amount of cash paid on each draft and amount received on each sale, with a statement of balance due plaintiffs. To this petition the defendant in answer denies all the allegations of the petition, except such as are therein specifically admitted. He admits and states as follows: "Defendant admits that he shipped grain (wheat and rye) to plaintiffs during the period mentioned in the petition filed herein, and that plaintiffs were to receive the sum of one cent per bushel for handling and selling the same, and that defendant was to pay the expenses necessarily incurred in the shipment thereof; but says that this is all he was to pay plaintiffs. Defendant further says that the contract between plaintiffs and defendant was that defendant should ship the plaintiffs wheat and rye from Larned, Kansas, to plaintiffs, at Chicago, Illinois, was to receive the highest market price for the same, was to notify the plaintiffs immediately after the shipment from Larned of the kind and quantity of grain, and was allowed permission to draw on the plaintiffs for an amount equal to ninety per cent. of the net value of each amount so shipped according to the highest market price at Chicago, Illinois. On the other hand, the plaintiffs were to receive the sum of one cent per bushel for handling and selling the same, were to inform the defendant of the state of the market, and, if anything was unsatisfactory in regard to the shipping, quality, or amount of same claimed by defendant from plaintiffs, they were to notify the defendant immediately. Defendant further says that in pursuance of the provisions of said contract defendant was induced to and did ship plaintiffs a large amount of grain (wheat and rye) of the kind and quality and price as set forth in a certain instrument of writing hereto attached, made a part hereof, and marked 'Exhibit A'; that in pursuance of said contract defendant drew on plaintiffs for the several amounts specified in said Exhibit A, aggregating the sum of \$3,659; that there is now due and unpaid this defendant from this plaintiff the sum of \$886.33, all of which is shown by said Exhibit A, all of which is

just and correct, together with the interest thereon from the 1st day of November, 1889." The remainder of the answer charges the plaintiffs with misrepresentation and fraud in procuring the contract, and for violation of the contract, and for wrongfully converting grain to their own use, and refusing to account to the defendant for the manner in which it was disposed of. To this answer is attached an itemized statement of account between the parties in the shipment and sale of grain, showing the date of each shipment, the number of cars, number of bushels, price per bushel, kind of grain, freight charges, weighing and commission, the amount of drafts on each shipment, and the balance due to the defendant. This answer is verified as follows: "J. A. Franz, of lawful age, being first duly sworn according to law, deposes and says that he is the defendant in the above-entitled cause; that he has read the foregoing answer, and knows the contents thereof; that the allegations therein contained are true; that the items in the annexed account, marked 'Exhibit A,' are just, correct, and a balance of \$886.33, as shown thereby, remains due and unpaid. [Signed] J. A. Franz." To this answer the plaintiffs filed the following reply: "Comes now the plaintiff, and for reply to the answer of defendant herein denies each and every material allegation therein contained." At the April, 1891, term of the court, this cause was called for trial, and the parties announced themselves ready for trial, and a jury was duly impaneled and sworn to try the cause, and thereupon the attorneys for the defendant moved the court for a judgment against the plaintiffs on the pleadings, and the court, on motion of the plaintiffs' attorney, granted leave to plaintiffs to verify their reply. Thereupon, the plaintiffs not being present, the attorney for plaintiffs verified his reply as follows: "State of Kansas, Pawnee County—ss.: Comes now Henry W. Scott, who, of lawful age, being first duly sworn, upon his oath deposes and states that he is one of the attorneys in the above-entitled cause; that plaintiff is a nonresident, not residing within the county or state; and that the foregoing allegations are true, to the best of his information and belief. H. W. Scott." "Subscribed and sworn to before me this 10th day of April, 1891. J. B. Gilkison, Clerk District Court." After the verification of the reply, the attorneys for defendant renewed their motion for judgment on the pleadings on the grounds that the account attached to defendant's answer was admitted by the reply that there was due from the plaintiffs to the defendant the amount so admitted,—which motion was sustained by the court, and plaintiffs duly excepted to the ruling of the court at the time, and thereupon the court discharged the jury, and rendered a judgment upon the pleadings in favor of the defendant and against the plaintiffs for the sum alleged in the an-

swer to be due on the itemized statement attached to the answer. Motion for a new trial was filed by plaintiffs, overruled, and excepted to, and case made by plaintiffs.

There is but one question involved in this case, and that is, did the court err in sustaining the objection of the defendant to the introduction of any evidence by plaintiffs to support their cause of action, and rendering judgment for the defendant on the pleadings; or, in other words, was the allegation in the answer and counterclaim, with the itemized statement attached thereto, and verified in the manner in which it was, such that it must be taken as true, unless denial thereto be verified by the oath of the plaintiffs? The petition sets out the agreement between the parties, and the transactions under the agreement, with an itemized statement of the account, duly verified as true, and shows a balance due to the plaintiffs; but their allegations are partly controverted by the defendant, and he then sets up what he claims to have been the agreement between the parties, substantially as stated by the plaintiffs, but alleges a different result growing out of the performance of the agreement; and also sets out an itemized statement of the account as a counterclaim, and shows by such itemized statement of account that there is a balance due him by reason of the contract and transactions thereunder, and this answer and counterclaim is duly verified as true, and defendant specifically states in his affidavit "that the items in the annexed account marked 'Exhibit A' are just and correct, and a balance of \$886.33, as shown thereby, remains due and unpaid." We think the answer and counterclaim, with the itemized account, verified as it was, contain such allegations as must be taken as true, unless the denial thereof be verified by the affidavit of the plaintiffs, their agent or attorney. Code Civ. Proc. § 108. This answer was filed on the 30th day of January, 1891, and the plaintiffs in a few days thereafter filed an unverified reply. The case stood in this condition until the next term of the court, which occurred about two months thereafter; and when the case was called for trial each party announced themselves ready to proceed, and after the impaneling of a jury the plaintiffs then asked to be allowed to verify their reply. Leave being granted, the attorney, in the absence of plaintiffs, made the verification of the reply. The question then arises, was this verification a sufficient denial of the itemized account, so as to require the defendant to introduce evidence to prove the same? The reply to the answer of the defendant denies each and every material allegation therein contained, is signed by the attorneys for the plaintiffs; and one of the attorneys for plaintiffs (they being nonresidents of the state, and being absent from the court), verified the reply as true to the best of his information and be-

lief. Was this a sufficient verification under section 114 of the Code of Civil Procedure? This section of the Code provides: "It can be made by the agent or attorney only: 1. When the facts are within the personal knowledge of the agent or attorney. \* \* \* 4. When the party is not a resident of or is absent from the county." The affidavit of the plaintiffs' attorney is insufficient as a verification of the reply, for it does not in any manner show or attempt to show that the attorney had any personal knowledge of the facts set out or involved in the pleadings. We do not think this attempted verification was such as to put in issue the correctness of the defendant's counterclaim. On the failure of plaintiffs to deny the truth of the counterclaim under oath, it then stood as admitted. This being so, we must then examine the statement of account, and see whether it authorized the court to render the judgment it did. We do not think the court should have rendered judgment for the amount shown by the footing of this account. The court should have examined the account which was admitted as true, and rendered judgment only in accordance with what the account showed on its face. The second item in the account of date of October 5th charges the plaintiffs with one car of wheat at \$380, but does not show anything in relation to what was done with this shipment; does not give the plaintiffs credit for freight, weighing, inspection, commission, or the draft attached to the bill of lading. This item is so uncertain and indefinite that we do not think it should have been allowed as a charge against the plaintiffs. We must take the statement of account in connection with the allegations of the defendant's answer, which set it up as a counterclaim. The answer alleges that the defendant was to pay all expenses necessarily incurred in the shipment, was to pay plaintiffs a commission of 1 per cent per bushel for handling grain at Chicago, and was allowed to draw on each shipment for 90 per cent. of the highest market price at Chicago. The item for \$380 should have been deducted from the footing of the account, and judgment rendered for the remainder only. Therefore the judgment of the district court will be modified by reducing the same to the sum of \$467.17, together with 6 per cent. per annum thereon from the 10th day of April, 1891; and the costs are equally divided in this court. All the judges concurring.

ATCHISON, T. & S. F. RY. CO. v.  
SCRAFFORD et al.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

FIRMS SET BY LOCOMOTIVES—EVIDENCE—RIGHT TO ATTORNEY'S FEE.

1. The evidence in this case supports the verdict rendered by the jury.

2. It is error for the court to render judgment for an attorney's fee in an action brought against a railroad company for damages, where no proof is offered upon that subject, and no agreement made as to what is a reasonable attorney's fee in the particular case which is being tried.

(Syllabus by the Court.)

Error from district court, Pawnee county; S. W. Vandivert, Judge.

Action by C. G. Scrafford and J. P. Cone, partners as Scrafford & Cone, against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiffs, and defendant brings error. Modified.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. G. P. Cline and H. S. Rogers, for defendants in error.

COLE, J. The defendants in error recovered a judgment in the district court of Pawnee county for \$101 against the railroad company for damages arising out of the alleged destruction of certain prairie grass, and including an attorney's fee of \$40 for the trial of said cause. The railroad company brings the case here for review. There are but two questions which demand our attention in this case. Counsel for plaintiff in error contends that under the evidence the plaintiffs below were not entitled to recover, and the court erred in overruling the demurrer to the evidence.

It appears from the record that the agents and servants of the plaintiff in error were burning off the right of way, and it admitted that the damage to the property of the defendants in error was occasioned by the fire escaping from the servants of the plaintiff in error. It was contended on behalf of the defendants in error that the setting out of the fire and permitting it to escape were acts of negligence on the part of the railroad company, and the jury found, in answer to certain special questions submitted to them, that the negligence consisted in setting out the fire upon a very windy day; and it is contended by counsel for the plaintiff in error that this finding is not supported by the evidence. We cannot agree with counsel in this position. There is abundance of evidence from several witnesses upon this proposition, and we suppose the negligence may be established by showing that a fire was set out at a time when it ought not to have been, as well as by showing that it was permitted to escape when it ought not to have been. It is immaterial what particular section of the statute the original bill of particulars was intended to be drawn under. It stated facts sufficient to constitute a cause of action, and the record discloses no attempt upon the part of the counsel for plaintiff in error to have the same made more definite and certain.

The only remaining question in this case is that the court rendered judgment for an

attorney's fee of \$40, no evidence having been introduced upon that question, nor the same submitted to the jury, who rendered a verdict upon the question of damages. It is conceded by the counsel for the defendants in error that the record fails to show such a state of facts as would permit the rendition of such a judgment, and all claim for attorney's fees is released in their brief. The judgment of the district court must therefore be modified upon the admission of counsel and the state of the record. This cause is remanded to the district court of Pawnee county, with instructions to modify the judgment rendered by striking out the attorney's fee of \$40 allowed by the court. In all other respects the judgment is affirmed. The costs of this court will be equally divided between the parties. All the justices concurring.

# CABELL et al. v. KNOTE.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

## NOTE AND MORTGAGE—CONSTRUCTION.

1. A mortgage given to secure the payment of a note must be construed together with the note as a part of one transaction or contract, the same as if they were a part of the same instrument.

2. A note signed by several persons individually may be modified by a mortgage given to secure said note, so as to show that said persons signed the note in their representative capacity.

(Syllabus by the Court.)

Error from district court, Pratt county; S. W. Leslie, Judge.

Action by W. P. Knote against E. B. Cabell and others. Judgment for plaintiff, and defendants bring error. Reversed.

Thompson & Apt, for plaintiffs in error. Ellis & Barrett, for defendant in error.

DENNISON, J. The defendant in error brought suit in justice court in Pratt county, Kan., on a promissory note of \$150, dated August 27, 1888, executed and delivered by the plaintiffs in error to him, a copy of which said note is as follows: "\$150.00. Pratt, Kansas, 8/27, 1888. For value received, one year after date, we promise to pay to the order of W. P. Knote one hundred and fifty dollars, at the First National Bank in Pratt, Kansas, with interest from date at the rate of 12 per cent. per annum. E. B. Cabell. Z. Bright. Thomas W. Gannaway. G. W. Fox. R. F. Whitman." Judgment was rendered for said defendant in error, and plaintiffs in error appealed to the district court. In the district court the plaintiffs in error obtained leave to answer, and filed a verified answer, denying that they gave the note sued on as their joint and several promissory note. They allege that said Knote, through his agent, G. A. Sears, sold to the First African M. E. Church of Pratt, Kan., a corporation

duly organized under the laws of the state of Kansas, a certain building for the sum of \$200; that the said corporation paid at the time \$50, and gave its note and a mortgage to secure the payment thereof for \$150; that the said note and mortgage are each parts of one and the same contract, and that said Knote, by his said agent Sears, accepted said note with the distinct understanding that the same was signed by the said defendants as trustees of said corporation, and that the making, execution, and delivery of said note and mortgage was the act of said corporation. The said mortgage is attached to and made a part of the answer. The mortgage states that the trustees of the First African M. E. Church of Pratt City are indebted to W. P. Knote in the sum of \$150. The property described in the mortgage is as follows: "All that tract or parcel of land situated in the county of Pratt and state of Kansas, described as follows, to wit: Lot eight in block thirteen (13) in Calhoun addition to the town of Pratt Center, now Pratt City, as shown by the original plat of said addition now on file in the register of deeds of said county; also a building now standing on lot three (3) in blk. thirty-three (33) in the town of Saratoga, Kansas, being a one-story frame building, forty feet long and twenty feet wide. Said trustees, of the first part, are to move said building from off the last-described lot and place same on the lot first described in the mortgage, to wit, lot 8 in block 13 in Calhoun's addition to Pratt Center, Kansas, and this mortgage to be the first lien on said building and lot." The mortgage also contains the following stipulation: "This grant is intended as a mortgage to secure the payment of the sum of one hundred and fifty dollars according to terms of a certain note this day executed and delivered by the said trustees of said church to the said W. P. Knote payable to the First National Bank of Pratt, Ks., as follows, to wit: \$150.00 on the 27th day of August, 1889, with interest thereon at the rate of 12 per cent. per annum from date to the said party of the second part." The plaintiff below filed a motion for judgment for the plaintiff on the pleadings, which motion was sustained, and judgment rendered against these plaintiffs in error for \$188.40 and costs, and they bring the case here for review, alleging that the court erred in sustaining said motion for judgment and in overruling their motion for a new trial. Our supreme court have decided causes similar to this a number of times, and they have uniformly held that the note and mortgage are parts of one transaction, constitute one contract, and must be construed together as if they were parts of one instrument. In *Chick v. Willetts*, 2 Kan. 384, the court held that a mortgage made in Kansas to secure a note made in Missouri over four months prior to the execution of

the mortgage was effective to change the terms of the note and extend the time of payment. In *Round v. Donnel*, 5 Kan. 54, the court held that the note and mortgage and a separate agreement by the payee to extend the time of payment five years must all be construed together, and the statute of limitations would not begin to run until the expiration of five years, although the note upon its face was due one day after date. In *Muzzy v. Knight*, 8 Kan. 456, the court held that a note which was due in five years, with 10 per cent. interest, was modified by a mortgage which stipulated that interest was payable annually. The same doctrine was held in *Meyer v. Graeber*, 19 Kan. 166. In *Bank v. Peck*, 8 Kan. 660, the court held that when three separate notes were due in 6, 12, and 18 months, respectively, the one due in 18 months was modified by the mortgage, which stipulated that if any part of the money was not paid when due it should all immediately become due and payable, and upon default upon the first notes the last one became due, although by its express terms it was not due until eighteen months after date. The same doctrine was held in *Darrow v. Scullin*, 19 Kan. 57. It is therefore clear that in construing the pleadings in the case at bar the note and mortgage must be construed as though they were one instrument, and parts of the same contract. The note is signed by the plaintiffs in error without any designation of the capacity in which they sign. The mortgage states that the note was executed and delivered by the "trustees of said church." Admitting the answer to be true,—which must be done in considering the motion,—and it clearly appears that said Knote entered into an agreement with said corporation by which he sold them a building for \$50 cash and \$150 due in one year, for which said corporation gave him its note, and to secure the same gave a mortgage back on said building and a certain lot, and agreed to move the building onto the said lot. The trustees were the proper persons to do this on behalf of said corporation. Section 3 of article 12 of the constitution provides that "the title to all property of religious corporations shall vest in trustees," and paragraph 1179 of the General Statutes of 1889 provides that "the secular affairs of a religious corporation shall be under the control of a board of trustees"; and also follows the provisions of the constitution as to title to property. If the evidence sustains the allegations of the answer, the defendant in error is not entitled to a personal judgment against the plaintiffs in error. Therefore the motion for judgment on the pleadings should have been overruled. The judgment of the district court is reversed, and the cause remanded, with instructions to grant a new trial in accordance with the views expressed in this opinion. All the judges concurring.

**WEAVER et al. v. LOCKWOOD et al.**  
(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

**WRITS—SERVICE BY PUBLICATION—AMENDMENT OF AFFIDAVIT.**

Where an affidavit made to procure notice by publication under section 74 of the Code of Civil Procedure is merely defective, the defect in the affidavit may be cured by amendment after publication notice has been published.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action by R. H. Lockwood and J. W. Glendennis against Oliver Marsh and others. From a judgment H. M. Weaver, E. O. Jones, and H. H. Kimbrell bring error. Affirmed.

Sutton & McCarrey, for plaintiffs in error.  
Huston & McCollock, for defendants in error.

**JOHNSON, P. J.** On the 2d day of May, 1887, Oliver Marsh and Clarissa A. Marsh made their promissory note, payable to R. H. Lockwood and J. W. Clendenin, and to secure the payment of this note and the money to become due thereon they executed and delivered to the payees therein named a mortgage on land situated in Ford county, Kan. The conditions of the note and mortgage having been broken, the payees of the note and mortgage, on the 9th day of February, 1889, commenced suit in the district court of Ford county, Kan., to recover judgment upon this note, and for a decree of foreclosure of the mortgage; and in the suit a number of persons other than the payers and mortgagors were made defendants, for the reason, as stated in the petition of the plaintiffs below, that since the execution of said mortgage said persons had acquired some interest or lien into and upon the mortgaged premises, which interest and lien was inferior and subordinate to and subject to the lien of the plaintiffs. Upon the filing of the petition and præcipe a summons was issued by the clerk of said court, directed to the sheriff of said county, and all of said defendants were duly served with summons by the sheriff, except Wiler, Ackerland & Co., Herman Mier, Mrs. S. H. Overhuls, H. M. Weaver, E. O. Jones, and H. H. Kimbrell. On the 9th day of July, 1889, the plaintiffs, by their attorney, made and filed an affidavit of nonresidency of defendants Wiler, Ackerland & Co., Herman Mier, Mrs. S. H. Overhuls, E. O. Jones, H. H. Kimbrell, and H. M. Weaver, setting forth that all of them are nonresidents of the state of Kansas, and service of a summons cannot be made on said defendants within the state of Kansas, and that plaintiffs, with due diligence, are not able to make service upon them or either of them within the said state of Kansas. Said affidavit states that the action was for the foreclosure of a mortgage on land in Ford county, Kan., describing the land; and afterwards, to wit,

on the 11th day of July, 1889, the plaintiffs below caused a notice of publication to be published for three consecutive weeks in a newspaper printed and published in Ford county, and of general circulation therein, as required by section 74 of the Code of Civil Procedure, and made due proof of such publication before the court. On the 6th day of August, 1889, the defendants E. O. Jones, H. H. Kimbrell, and H. M. Weaver, by their attorneys, appeared specially in court, and filed motion to set aside and hold for naught the publication summons in this case, for the reason the same does not describe the mortgage on which the plaintiffs' cause of action is based, as required by law, and does not state the nature of the judgment to be rendered against these defendants. At the January term, 1890, of said court this motion was sustained by the court, and the publication notice set aside and held for naught; and thereafter, on the 6th day of March, 1890, the plaintiffs, without filing another affidavit, thereafter caused the service to be made on said defendants by publication for three consecutive weeks in a newspaper printed and published in Ford county, Kan., and of general circulation therein, as required by section 74 of the Code of Civil Procedure, and made proof to the court of such publication; and the defendants H. M. Weaver, E. O. Jones, and H. H. Kimbrell, by their attorneys, again appeared specially for the purpose of a motion only, and moved the court to set aside and hold for naught the publication service of summons, for the reason that no affidavit for service by publication was made by any one and filed herein for said service by publication on these defendants; that the affidavit for publication service on these defendants, on which said service was based, was made on July 9, 1889, about eight months before said service of publication was made. On application of the plaintiffs the court permitted them to make and file an amendment or supplement to their original affidavit for publication, to which ruling of the court these defendants, by their attorneys, excepted, and thereupon plaintiffs filed an amendment or supplemental affidavit stating the following facts: "B. F. Milton, on his oath, says that he is an attorney for plaintiffs; that as such attorney he made the within affidavit, dated July 9, 1889; that he now amends said affidavit so that the same shall stand and include the following additional statement: Affiant says the facts as to nonresidence of the defendants Wiler, Ackerland & Co., Herman Mier, Mrs. S. H. Overhuls, H. M. Weaver, E. O. Jones, and H. H. Kimbrell were true from said date, July 9, 1889, up to and on said March 6, 1890, when a new service by publication was made; and that at no date during the time intervening were plaintiffs able, with due diligence, to make service of summons upon said defendants personally within the state of Kansas, for that said defendants were at and between

said dates nonresidents of said state of Kansas. All other allegations of the within affidavit are hereby referred to and made a part hereof, and the same continued to be true from the date as above stated up to and on March 6, 1890." The motion of defendants to set aside and hold for naught the publication service was overruled by the court, and defendants duly excepted. Afterwards, at the September, 1890, term of the court, judgment was rendered upon said note against Oliver Marsh and Clarissa A. Marsh for the amount due as principal and interest thereon, and a decree of foreclosure of such mortgage against all of the defendants named in the petition; the court making the following findings: "And the court further finds that said defendants Oliver Marsh, Clarissa A. Marsh, H. M. Weaver, E. O. Jones, H. H. Kimbrell, J. H. Crawford, Lewis Wiler, Isaac Wiler, William Ackerland, Max Ackerland, and E. A. Wiler, doing business under the firm name of Wiler, Ackerland & Co., George Ingleheart, Robert Winnie, and John A. Johnson, doing business as Ingleheart, Winnie & Co., J. H. Crawford, Peter Smith, Herman Mier, M. V. Markley, Mrs. S. H. Overhuls, J. S. Marcus, Steven Field, as assignee of O. Marsh & Sons, were duly summoned to appear in this action. And the court further finds that said plaintiffs have a lien on the real property in said petition described by virtue of the mortgage in said petition set out, to secure the payment of said indebtedness, subject, however, to the lien of ——— dollars described in said petition." At the same term of court at which the decree was taken, the defendants H. M. Weaver, E. O. Jones, and H. H. Kimbrell filed their motion to set aside the judgment of foreclosure rendered against them, for the reason that it is void for want of jurisdiction over them, which motion was overruled by the court, and these defendants duly excepted, and the court allowed them 90 days to make and serve a case for the supreme court. Case was made, signed, and settled and filed, with petition in error, in the supreme court, and afterwards duly certified to this court by order of the supreme court.

The only error complained of by plaintiffs in error is that the court erred in permitting plaintiffs below to amend their affidavit for publication notice, and rendering judgment against these defendants upon such service. The original affidavit, filed July 9, 1889, contained all the facts that were required under section 73 of the Code of Civil Procedure, and was in every way sufficient to authorize the service of summons on defendants by publication; and the publication notice based on this affidavit, being set aside because it did not comply with the requirements of section 74 of the Code of Civil Procedure, left the affidavit for publication just as though no attempt to give notice by publication had been had, and the plaintiffs could proceed and give another notice by publication on

this affidavit, as it had not spent its force, and was not void, and could properly be the basis of another publication service; and when the publication notice had been made based on this affidavit, any defect which was found to exist in the affidavit could be cured by amendment. Gen. St. 1889, c. 80, § 139, *Pierce v. Butters*, 21 Kan. 128. *Valentine, J.*, speaking for the court, says: "After this case was brought to the supreme court, the defendants in error (plaintiffs below) discovered the said defects and error in their case, and with due notice to the adverse party, and with leave of the court below, amended the defective and erroneous proceedings in the following particulars, to wit: They amended the first affidavit by filing an amended or new affidavit stating and showing that at the time of the commencement of this suit all of the defendants were nonresidents of the state, and that service of summons could not be made upon any of them within the state, and that the action was and is one to foreclose a mortgage. This amended affidavit was sufficient. \* \* \* Now, with these amendments, we think the judgment of the court below ought to be affirmed." In the case of *Harrison v. Beard*, 30 Kan. 532, 2 Pac. 632, the supreme court says: "While the affidavit was thus defective and insufficient, it was not wholly void. Therefore, as the amended affidavit was positive and sufficient, the court erred in not permitting the affidavit for publication to be amended." There being no error in the proceedings of the district court, the judgment is affirmed. All the judges concurring.

STATE BANK OF ST. JOHN et al. v.  
NORDUFF et al.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

PLEADING AND PROOF—VARIANCE—INSANITY—REPLEVIN—DEMAND—EVIDENCE.

1. Where a case is tried by the court upon an agreed statement of facts, and no objection is raised in the trial court, either by demurrer or otherwise, to the sufficiency of the petition, a defect therein will be considered waived, in a case where an amendment of the petition ought to be allowed to conform to the facts admitted, and the judgment will not be reversed on account of a variance between the allegations of the petition and the admitted facts.

2. Where a party to an action admits in a pleading the execution of a written instrument relied upon as a cause of action by the opposite party, but alleges, as an affirmative defense to such written instrument, that one of the parties who executed the same was insane and not capable of giving consent to the execution thereof, evidence may be introduced to support such allegation.

3. Where a defendant in a replevin action bases his defense upon title in himself and the right of possession incident thereto, and does not rely on want of demand by the owner, and it appears that a demand would be vain and unavailing, if made, no proof of demand and refusal is required.

4. Wherever a contest arises between two parties as to which has the prior or superior lien upon the property owned by a third person,



either party may show any fact that will defeat the other party's lien, or postpone the same so as to render it subsequent or inferior. *German Ins. Co. v. Nichols, Shephard & Co.*, 21 Pac. 111, 41 Kan. 133.

(Syllabus by the Court.)

Error from district court, Rice county; J. H. Bailey, Judge.

Replevin by George Norduff and others against the State Bank of St. John and others. There was a judgment for plaintiffs, and certain defendants bring error. Affirmed.

J. W. Rose, for plaintiffs in error. C. F. Foley, for defendants in error.

COLE, J. In the month of July, 1889, G. F. Hubner was a resident of Stafford county, Kan., and the owner of certain personal property, to wit, one bay mare, one sorrel horse, one farm wagon, one set of double harness. Said Hubner was a married man, and all of the property above described was exempt property to him as the head of the family. On the 9th of July, 1889, the wife of said Hubner was declared insane by the proper proceedings in the probate court of Stafford county, Kan. On the 12th day of July, 1889, Hubner and wife executed a note and chattel mortgage to the State Bank of St. John for \$90, said mortgage being given upon the property above described, and being duly filed for record July 15, 1889. After the above dates, and prior to December 14, 1889, Hubner sold all of said property to the defendants in error, who paid him the full consideration and fair value therefor. On December 14, 1889, B. F. Harmon, a constable of Stafford county, received from the State Bank of St. John a certified copy of the chattel mortgage above referred to, and on said day demanded the property therein described and above set forth from defendants in error; said demand being made in Rice county, where said property had been taken by Hubner and sold to defendants in error. On the same day defendants in error brought this action in replevin to recover said property, which was returned to plaintiffs in error within 24 hours, they having executed a redelivery bond. At the time B. F. Harmon obtained possession of the property, the conditions of the mortgage to the State Bank of St. John had been broken, and said bank and the officer representing it would have been entitled to the possession of said property if the mortgage was a valid lien thereon. This cause was tried to the court upon an agreed statement of facts, which was, in substance, like the one given above, and a judgment rendered in favor of the defendants in error (plaintiffs below), from which judgment the bank and Harmon bring the case here for review.

The first specification of error is that the petition does not state facts sufficient to constitute a cause of action against plaintiffs in error, and this question is raised in this court for the first time. No objection, either by de-

murrer or otherwise, was taken in the court below. We do not consider that, under the pleadings in this case, and the fact that the case was tried to the court upon an agreed statement of facts, plaintiffs in error are now in a position to raise this question. The objection now raised is to the form of the petition alone, and all the subsequent pleadings, and the action of the parties in the trial of the cause, were upon the theory that the petition was sufficient. Undoubtedly, after the submission of the case to the court upon the agreed statement of facts, an amendment would have been permitted if the attention of the trial court had been directed to the alleged defect, and it cannot be claimed that the defendants would have been in any manner prejudiced by such amendment. Such being the case, we feel that this court should treat the record as if such amendment was in fact made, and that the judgment ought not to be disturbed for this alleged error. *Railroad Co. v. Caldwell*, 8 Kan. 244; *Pape v. Bank*, 20 Kan. 440.

The next specification of error is the overruling of the demurrer filed by the State Bank of St. John to the second count of the reply filed by the defendants in error. It appears from the record that the State Bank of St. John filed its separate answer alleging the execution and delivery to it of a note and chattel mortgage by Hubner and wife, which mortgage covered the property in dispute. The reply of defendants in error consisted—First, of a general denial; and, second, of an allegation that Hubner's wife had not given, and was not capable of giving, consent to the execution and delivery of the mortgage in question, for the reason that, at the time of such execution and delivery, she had been adjudged and was insane, and that the same was executed and delivered without her knowledge or consent, and that the property described in said mortgage was by law exempt, and not subject to alienation except by joint consent of husband and wife. The objection raised to the second count of the reply was that, as this virtually admitted the execution and delivery of the note and mortgage, the facts stated did not constitute any defense. This position is not well taken. It is true our statute provides that the allegation of the execution of a written instrument, unless the same is denied under oath, is taken as true, and it also is true that our supreme court has held, in a number of cases, that a failure to verify such denial not only admits the execution but the legal effect of such instrument; but it does not follow, from this, nor has any case been cited which so holds, that a failure to verify a denial of the execution of a written instrument admits everything necessary to constitute a valid execution, nor is there a presumption of sanity, of power and right to execute, where the pleading which admits the execution of the instrument sets forth a specific reason why the execution was invalid. The defense, as stated

in the reply, was in the nature of a confession and avoidance, and the demurrer thereto was properly overruled, and evidence admitted thereunder.

This brings us to the main proposition in this case, which is, was the mortgage to the State Bank of St. John valid, under the agreed statement of facts in this case? If it was, then the State Bank was entitled to the possession of the property in question. Paragraph 3914, Gen. St. 1889, provides: "It shall be unlawful for either husband or wife (where that relation exists) to create any lien, by chattel mortgage or otherwise, upon any personal property owned by either or both of them and now exempt by law to resident heads of families from seizure and sale upon any attachment, execution or other process issued from any court in this state, without the joint consent of both husband and wife; and from and after the time when this act shall take effect, no such mortgage of personal property shall be valid unless executed by both husband and wife." This statute took effect May 25, 1889. The consent referred to in the statute is not a physical consent, but such intelligent, intellectual consent as would constitute a legal consent thereto. It has been held that where money is paid to one by mistake, and the person who receives the same, knowing that he has received that to which he is not entitled, converts the same to his own use with intent to defraud the owner, he is guilty of larceny; there not being in such a case, the courts say, the intelligent consent exercised in the payment of the money necessary to constitute a legal consent. If such is the rule where one is sane and presumed to act intelligently, how much more ought it to apply where the person performing an act has been adjudged insane. Now, in this case, the statute plainly says that a chattel mortgage upon property such as in dispute in this case shall not be valid unless given by the joint consent of both husband and wife; and the wife of Hubner had been declared insane by the probate court three days prior to the execution of the mortgage in question, of which action the bank must be presumed to have had knowledge, it having been rendered by the proper tribunal. This brings the case within the principle laid down in *Trust Co. v. Spittler*, 54 Kan. 560, 38 Pac. 799. In that case Allen, J., in delivering the opinion of the court, says: "The facts of this case are essentially different from those in either of the cases heretofore decided by this court, cited in the brief of counsel for plaintiff in error. In this case it appears, not only that the plaintiff was insane at the time of making the deeds to McNaughton, but that he had been duly adjudged insane by the proper court, and a guardian of his person and estate appointed. These facts appear of record in the office of the probate judge. Benjamin Spittler had been confined in the insane asylum, but was then out on a tempo-

rary leave of absence. There is nothing in the findings indicating that McNaughton acted in good faith, or in ignorance of Spittler's mental condition. Under these circumstances, the court rightly held that the deeds to McNaughton were void." See, also, 1 Pars. Cont. 383. *Gribben v. Maxwell*, 34 Kan. 8, 7 Pac. 584. It is true this case presents the anomaly of a person being able to convey full title to the property in question, but being unable to create a valid lien thereon; but that is a proposition addressed to the legislature, and not to the judicial branch of our state government. It is urged by counsel for plaintiffs in error that this mortgage should be upheld for the reason that a portion of the proceeds of the loan which the mortgage was given to secure were used to purchase necessities for Hubner's wife, and our attention is directed to a number of cases where contracts entered into by an insane person for the necessities of life have been upheld; but the difficulty is that this was not a contract of that character, and it is impossible to tell, from the agreed statement of facts, how much or how little was used for that purpose. This was a loan made by the bank to G. F. Hubner only, and was not made for the purpose of procuring necessities for an insane person.

The next specification of error is that no demand was made in this case prior to the bringing of this action. Under the pleadings and the agreed statement of facts no demand was necessary. The plaintiffs in error did not base their defense in the trial court on the theory that they would have surrendered the property on demand. Their defense was based upon a claim wholly inconsistent with the rights and ownership of defendants in error, namely, a specific ownership in the bank. Having based their defense on title in themselves, and not on the alleged consent of defendants in error, they cannot now insist upon a want of demand. *Raper v. Harrison*, 37 Kan. 243, 15 Pac. 219; *Farmers' & Merchants' Bank of Cawker City v. Bank of Glen Elder*, 46 Kan. 376, 26 Pac. 680.

It is further contended that the defendants in error are in no position to attack the mortgage of the bank. This position is not correct. Whenever a contest arises between two persons as to which has a prior lien upon property of a third person, either party may show any fact that will defeat the other's lien. *German Ins. Co. v. Nichols, Shephard & Co.*, 41 Kan. 133, 21 Pac. 111. The judgment of the district court will be affirmed. All the justices concurring.

#### WILLARD v. WHINFIELD.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

INSTRUCTIONS—AGISTER'S LIEN—PRIORITY—LOSS.  
1. If the instructions given by the court cover all the material and proper points cover-

ed by special instructions asked by either party, it is not error to refuse to give such special instructions.

2. *Case v. Allen*, 21 Kan. 217, as to priority of agister's lien, cited and followed.

3. Where an agister leaves the stock he is feeding and caring for to be herded temporarily by another person, and they are driven off during his temporary absence by the owner or one having a special ownership in them, the agister will not be deemed to have lost his lien if, within a reasonable time, he demands a return of the stock.

(Syllabus by the Court.)

Error from district court, Rice county; Ansel R. Clark, Judge.

Action by George C. Whinfield against Frank G. Willard. Judgment for plaintiff, and defendant brings error. Affirmed.

Bailey & Foley and J. Warner Mills, for plaintiff in error. Samuel Jones, for defendant in error.

DENNISON, J. This is an action brought in the district court of Rice county, Kan., by George C. Whinfield, as plaintiff, against Frank G. Willard, as defendant, to recover the damages sustained by said Whinfield by reason of the conversion of 101 head of his sheep by said Willard, and also to recover the amount of an alleged agister's lien upon about 1,400 sheep, claimed to have been wrongfully taken from the possession of said Whinfield by said Willard. Willard claimed the right to the immediate possession of the sheep by virtue of a chattel mortgage given by J. M. Ostrander to said Willard. Whinfield claimed that the larger portion of the 101 sheep were bought by Ostrander of one Moore, after the execution of the Willard mortgage, and were not included therein, and had been bought by said Whinfield of said Ostrander. He also claimed to have been feeding and caring for the 1,400 sheep which were included in the Willard mortgage, under a contract with the mortgagor, Ostrander. The 101 sheep were valued by Whinfield at \$353.50, and the feed bill was alleged to be \$492.90. The case was tried with a jury, and a verdict returned by them in favor of Whinfield for the sum of \$448.25, and judgment for said amount and the costs was rendered against said Willard, and he brings the case here for review.

One of the errors complained of by the plaintiff in error is in the refusal of the court to give the instructions asked for by him. The instructions asked for are quite long, and those given by the court cover about 20 closely typewritten pages, and will not be set forth in this opinion. We have carefully considered the instructions given and those refused, and find that those given cover all the material and proper points covered by those refused. No material error prejudicial to the substantial rights of the plaintiff in error was committed by the trial court either in giving or refusing to give instructions.

The plaintiff in error, in his brief, contends "that the lien of a chattel mortgage properly filed is paramount to that of an agister for subsequently pasturing the mortgaged stock, unless it is shown that the mortgagee consented, either expressly or impliedly, that such stock might be so pastured and subjected to such lien; and the fact that the mortgagor retains possession of the mortgaged property is not of itself proof of such consent." This question has been decided by our supreme court in the case of *Case v. Allen*, 21 Kan. 217; and, following that decision, we must hold that the contention is not good.

The plaintiff in error also contends that Whinfield voluntarily relinquished the sheep, and therefore his lien is not good. The evidence shows that Willard and several others came and took possession of the sheep while Whinfield was temporarily absent, hunting stalk fields, and had left the stock to be herded by another person; and that upon his return, after being informed of what had transpired, he immediately followed after the sheep, and demanded the return of them. Under such circumstances, Whinfield cannot be deemed to have waived or lost his lien.

Upon a careful examination of the whole record, we find no material error has been committed prejudicial to the substantial rights of the plaintiff in error. Therefore, the judgment of the district court is affirmed. All the judges concurring.

#### YORK DRAPER MERCANTILE CO. v. HUTCHINSON et al.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

DEFAULT JUDGMENT—MOTION TO VACATE—PLEADING—DEMURRER.

1. Where a judgment has been obtained against a party without service of summons upon him, or other notice, as required by law, and he has made no appearance to said action or waived the service of summons upon him, such judgment is void, and may be set aside on motion at the term of the court subsequent to the term at which the same is rendered.

2. A judgment rendered against a minor without the appointment of a guardian ad litem, or without the appearance of such minor by guardian or next friend, where his property rights are affected, is irregular and voidable, and may be set aside on motion of such minor by his next friend at the next term of the court after such judgment is rendered.

3. Where a petition states sufficient facts, well pleaded, that, if they were all true, would entitle the party to judgment against the defendants, *held*, that a demurrer thereto for the reason that such petition does not state facts sufficient to constitute a cause of action should be overruled.

(Syllabus by the Court.)

Appeal from district court, Ford county; A. J. Abbott, Judge.

Action by the York Draper Mercantile Company against R. N. Hutchinson and others, wherein there was a judgment for

plaintiff. The judgment was subsequently set aside on application of defendant R. N. Hutchinson, who thereupon interposed a demurrer to the petition, which was sustained. From the order setting aside the judgment, and sustaining the demurrer, plaintiff appeals. Reversed.

In May, 1888, the York Draper Mercantile Company, a private corporation, commenced suit in the district court of Ford county, Kan., against R. N. Hutchinson, R. P. Hutchinson, and the Dodge City Ice Company, a private corporation, for the purpose of subjecting certain shares of the capital stock of the Dodge City Ice Company, held by R. P. Hutchinson (minor son of R. N. Hutchinson), to the payment of certain judgments against R. N. Hutchinson, and to restrain the Dodge City Ice Company and R. P. Hutchinson from transferring or in any manner disposing of such stock.

Sutton & McGarry and J. F. Frankey, for plaintiff. W. E. Hendricks, for defendants.

JOHNSON, P. J. On the filing of the petition and affidavits, and proof that the judge of the district court was absent from the county of Ford, the probate judge of said county granted a temporary restraining order, as prayed for in the petition, and fixed the amount of the undertaking for the injunction; and thereupon the clerk of the district court issued a summons to the defendants named in the petition, and indorsed the summons, "Injunction allowed." Said summons was dated May 19, 1888, directed to the sheriff of Ford county. The sheriff made the following return, indorsed on the summons: "Received this writ on the 19th day of May, 1888, at 4 o'clock p. m. May 19th, 1888, served the same, by delivering a copy thereof, with the indorsements thereon, duly certified, to the within-named defendants, the Dodge City Ice Company, by order of its president, H. M. Berverly, and R. N. Hutchinson, and R. P. Hutchinson, personally." On the 12th day of June, 1888, an answer was filed by the defendants. On the 30th day of November the case was tried before the court, without a jury, and resulted in a judgment for the plaintiff, sustaining the injunction; also judgment against R. N. Hutchinson for \$105.68 and costs of suit; that, if the same should not be paid in 30 days thereafter, six shares of the capital stock of the Dodge City Ice Company, held by R. P. Hutchinson, be sold to the highest bidder, in the same manner that sales of chattels are made under execution, by an order of the court to be issued by the clerk to the sheriff of Ford county, Kan., and the proceeds of such sale be applied to the payment of said judgment. On the 4th day of February, 1889, on application of plaintiff, the judgment of November 30, 1888, was amended so as to order that all the shares of the capital stock of the Dodge City Ice

Company, to wit, 10 shares, held by R. P. Hutchinson, be sold. Afterwards an order of sale was issued by the clerk of said court, and the 10 shares of stock sold by the sheriff of said county, and a return of the sale thereof made to the court. On the 4th day of May, 1889, R. P. Hutchinson, by W. E. Hendricks, his next friend, filed a motion to set aside the judgment in the case, for the reasons: (1) That the judgment was irregular because no guardian ad litem was appointed. (2) That the judgment is irregular and void for want of jurisdiction, this defendant not having been served with summons or other legal process. (3) That the judgment is illegal and void for that it was rendered on the 1st day of December, 1888, subjecting certain property of this defendant to the payment of the debt of another; that afterwards, to wit, on the 4th day of February, 1889, said judgment was increased 40 per cent., without filing a motion therefor, as required by the rules of the district court in and for Ford county, Kan., and without any notice to or knowledge of this defendant." On the 25th day of May, 1889, this motion was heard by the court, and the court thereupon made the following order: "Being fully advised in the matter, ordered and adjudged that said judgment be opened, and R. P. Hutchinson be allowed to plead to plaintiff's petition; \* \* \* that R. N. Hutchinson is hereby appointed guardian ad litem for R. P. Hutchinson." Thereafter, R. P. Hutchinson, by his guardian ad litem, filed a demurrer to the petition of the plaintiff, which was by the court sustained; and, the plaintiff electing to stand upon its petition, judgment was rendered against it for costs of suit. The plaintiff now brings its case to this court, and assigns two errors, upon which it asks that the judgment of the district court be reversed: (1) That the court erred in opening up the judgment of November 30th, as amended February 4th; and (2) that the court erred in sustaining the demurrer of R. P. Hutchinson, and rendering judgment thereon against the plaintiff.

This brings us to the consideration of the errors in the order assigned. Was the judgment void or voidable only? If the judgment was vacated because there was no service of summons on R. P. Hutchinson, then the judgment would be absolutely void, for want of jurisdiction over his person. If it was vacated because R. P. Hutchinson was a minor, and no guardian ad litem had been appointed, then the judgment would be voidable only. The record is very indefinite as to whether the court found there was any service of summons on R. P. Hutchinson, or whether it vacated it solely for the reason that it was irregularly obtained, by reason of no guardian ad litem having been appointed. The record of the court in vacating the judgment reads as follows: "Now, on this 25th day of May, 1889, this cause came on to be heard in its regular

order on the docket, on motion of R. P. Hutchinson; and the court, after hearing the argument of counsel for plaintiff and defendant, and being fully advised in the matter, orders and adjudges that said judgment be opened." Take the evidence set out in the record in connection with the order and findings of the court; we are led to conclude that the court vacated the judgment for want of jurisdiction over the person of the defendant R. P. Hutchinson, and we do not think the court erred in setting aside and vacating the judgment herein.

The second error complained of is the sustaining of the demurrer of the defendant R. P. Hutchinson to the petition of the plaintiff. The petition of the plaintiff alleges that it is a corporation duly and legally incorporated under and by virtue of the laws of Kansas, and that the defendant the Dodge City Ice Company is a corporation duly incorporated under and by virtue of the laws of Kansas; that the defendant R. P. Hutchinson is a minor, and R. N. Hutchinson is his father and guardian by nature. Petition then sets out the obtaining of three several judgments against the defendant R. N. Hutchinson, the issuing of execution thereon, directed to the sheriff of Ford county, Kan., the return of the sheriff that no property of the defendant could be found whereof to make said judgments. Petition further alleges that the debt for which the judgments were rendered was contracted for before the month of December, 1887, and alleges that certain shares of capital stock in the Dodge City Ice Company were procured by the said R. N. Hutchinson in said corporation for certain interest that the said R. N. Hutchinson owned in a partnership of which he was a member, and which was taken and formed a part of the assets and stock of the Dodge City Ice Company; and that, for his interest in said partnership and property, the company issued shares of stock therefor; but that for the purpose of hindering, delaying, and defrauding the creditors of R. N. Hutchinson, and especially those creditors whose claims are represented by the judgments set out in the petition, said defendant had said shares of stock in said corporation, without any actual consideration having been paid therefor, issued in the name of his minor son, R. P. Hutchinson, and he now holds and claims to own the same. Petitioner further alleges that, after careful inquiry, it has been unable to find any property of the defendant R. N. Hutchinson subject to levy under execution, and alleges the fact to be that defendant R. N. Hutchinson is wholly insolvent, and that, unless said shares of stock of the Dodge City Ice Company are subjected to the payment of said judgment, it cannot be collected. Petition then alleges the necessary facts to obtain an injunction against the ice company and R. P. Hutchinson to restrain them from the transfer of such shares of

stock until such time as the case could be heard by the district court. We think that this petition contains sufficient facts to constitute a good cause of action in favor of the plaintiff, and as against all of the defendants, and think that the judgment of the district court in sustaining the demurrer of R. N. Hutchinson was erroneous.

For the error hereinbefore stated, the judgment is reversed, and the case remanded to the district court, with directions to set aside the judgment, and overrule the demurrer, and grant the parties a new trial. All the judges concurring.

#### KIMBLE et al. v. SHORT.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

#### JUDGMENT OBTAINED BY FRAUD—ENJOINING ENFORCEMENT.

Where a judgment has been obtained by fraud and deceit against a party, and he has not been guilty of negligence on his part, but has been misled and deceived by false and fraudulent representations of the adverse party and others confederating with him, for the purpose of obtaining an undue advantage over him, and preventing him from having a fair trial on the merits of his case, where he has a meritorious defense to the action against him, but has been prevented by the false and fraudulent representations of the party from making such defense, he may have such judgment stayed by an injunction, and set aside, and a new trial awarded him.

(Syllabus by the Court.)

Error from district court, Rice county; H. W. Gleason, Judge pro tem.

Action by J. J. Short against J. W. Kimble and H. B. Revel. Judgment for plaintiff, and defendants bring error. Affirmed.

Samuel Jones and C. F. Foley, for plaintiffs in error. J. W. Brinckerhoff, for defendant in error.

JOHNSON, P. J. This suit was commenced by J. J. Short in the district court of Rice county against J. W. Kimble and H. B. Revel, to restrain them from enforcing a certain judgment rendered by H. B. Revel, a justice of the peace of Pioneer township, in Rice county, Kan., on the 23d day of March, 1892, in a certain action before said H. B. Revel, justice of the peace, wherein J. W. Kimble was plaintiff and J. J. Short was defendant, and to set said judgment aside, and hold the same for naught, and to allow the parties a trial of the matters involved in such action. The plaintiff below, in his amended petition, alleges that H. B. Revel was on the 23d day of March, 1892, a justice of the peace of Pioneer township, in Rice county, Kan., and that J. W. Kimble commenced an action before said justice of the peace against plaintiff below to recover \$298, and such action was set for trial before the justice of the peace on March 23, 1892. Plaintiff below alleges that he was not

indebted to J. W. Kimble at the time of the commencement of the action before H. B. Revel, as justice of the peace, in the sum of \$298, or in any other sum; that he then had, and ever since has had, a good, valid, and meritorious defense to the pretended claim of J. W. Kimble. And he says that he prepared an answer in defense to the cause of action set forth by the plaintiff in his bill of particulars filed before said justice, and on the return day of said summons, at the hour required by said summons, he appeared before said justice, and filed his answer, setting up a full and complete defense to the action then pending before such justice; that, upon the filing of the answer, he stated to the justice of the peace and the plaintiff and plaintiff's attorney that he did not desire to have the case tried before the justice of the peace; that he intended to appeal the case to the district court on any judgment which might be rendered against him before said justice of the peace; whereupon said defendant and said justice, conspiring, confederating, and agreeing, and intending to cheat, wrong, and defraud this plaintiff, and for the purpose of preventing him from having a fair trial or any trial, and for the purpose of obtaining an unjust and unlawful judgment against him, did fraudulently, wrongfully, and unlawfully state by and through said justice of the peace to this plaintiff that, if he would confess judgment, he could take an appeal to the district court. He further says that he was then and there in said justice's court without counsel and without witnesses, and not expecting to try said case; that he is a farmer; that he was not at said time familiar with the rules of law regarding appeals from justice's court to the district court; that he relied upon and believed the statements of said justice so made to him touching his rights of appeal after a confession of judgment, and thereupon said that if that was right, and if that was the law, he supposed he would have to confess judgment, as he wanted to appeal to the district court. He further says that the defendant Kimble, and his attorney, C. F. Foley, an attorney and counselor at law, were then and there present during the aforesaid conversation between the plaintiff and said justice, and that neither of them dissented from the legal proposition as stated by said justice of the peace, but that, on the other hand, very shortly thereafter, the said counsel for said Kimble did draw and draft an appeal bond from the justice's to the district court, for the use of said plaintiff in taking his intended appeal, which he used. He further says that he did not, in the presence of said justice or elsewhere, state that he was indebted to said Kimble in the sum of \$298, or in any other sum, and that he was not so indebted; that he did not intend that said Kimble should have final judgment against him for such sum, or any other sum, but that what transpired as above set forth

was done on his part for the sole and only purpose of getting said cause transferred to the district court for trial. But he says that the part taken therein by said justice of the peace, and assented to by said Kimble, was taken and assented to with a fraudulent purpose and design on their parts to wrong and defraud this plaintiff, and prevent him from having any trial on the merits of said cause as tendered by the pleadings therein, and of obtaining an unlawful judgment against and an advantage over him; and he says that he then and there, for the purpose of effectuating and perfecting his said appeal, did sign and execute said appeal bond, and in the presence and with the knowledge of said justice of the peace, said Kimble, and his said attorney; and the plaintiff says that the said justice of the peace did thereafter make an entry of judgment and of said case, and attaches a copy of said judgment to this petition. He further alleges that said justice, after the filing of the appeal bond, transmitted to the clerk of the district court a copy of the entry of judgment and the files and records of said case; and he also says that thereafter, at the April term of the district court of Rice county, the said Kimble, in pursuance of the fraudulent and unlawful design as aforesaid, and for the purpose of preventing plaintiff from having any trial on the merits of said action, and for the purpose of taking, holding, and enforcing said judgment so fraudulently obtained, did move the district court to dismiss the appeal of plaintiff below, on the ground that, the record showing that the judgment was one made by confession, the same was not appealable, although said justice, Kimble, and his counsel well knew that said J. J. Short fully intended and expected to appeal, and they had before said justice of the peace, at the time of the alleged confession of judgment, read plaintiff's answer, as had also said justice. He further alleges that the district court did upon Kimble's motion, and over the objection of plaintiff below, dismiss his attempted appeal; whereupon he duly made a motion before the justice of the peace to vacate, set aside, and hold for naught the alleged judgment by confession so wrongfully obtained, and to grant a new trial therein, which motion defendant Kimble, by his counsel, did oppose, and which the said justice, in pursuance of said fraudulent design, did overrule. He further alleges that, before the commencement of the action by Kimble before the justice of the peace, the said justice did act as agent and attorney in fact for said Kimble, and came to this plaintiff, and presented said claim, which was thereafter sued on before said justice, and said justice urged this plaintiff to pay the same. He further alleges that the judgment and costs of action were wrongfully, unlawfully, and fraudulently obtained, as against equity and good conscience, and were obtained by misrepresentation and fraud on the part of said defend-

ant; that he relied, as he had a right to, upon the representations and statements made to him by the justice, and acquiesced in by said defendant and his counsel, touching his right to an appeal; that what he said and did before said justice of the peace in the way of a confession of judgment was said and done because he was misled by said justice, Kimble, and his attorney as to what his rights were in the premises; and that he is not now, and never was, indebted to said Kimble in the sum represented by said judgment.

The petition of the plaintiff is duly verified. On the filing of the petition in the district court, and on proof that the judge of the district court was absent from the county, a temporary injunction was granted by the probate judge. A demurrer to the original petition was filed, and sustained. The plaintiff below, by leave of court, amended his petition, and a demurrer was then filed to the amended petition, which was overruled by the court, and defendants below duly excepted to the judgment of the court overruling said demurrer, and this ruling of the court is the first error assigned by the plaintiffs in error.

The demurrer to the amended petition was a general one, for the reason that the amended petition wholly failed to state facts sufficient to constitute a cause of action against the defendants below, and to entitle the plaintiff below to any relief. The amended petition charged Revel, the justice of the peace, and Kimble, the plaintiff in the suit before Revel, and Kimble's attorney, of conspiring together to defraud the plaintiff below, and to obtain an undue advantage over him, and, by fraud, falsehood, and deceit, in procuring the judgment by confession to be entered up by said justice against him; that said Revel, Kimble, and his attorney well knew that he did not confess to be indebted to Kimble in any sum, but wholly denied any indebtedness, and at the same time he filed with such justice a written answer, denying specifically any indebtedness to Kimble, and attached to said answer a copy of a receipt in full, dated just 12 days before the commencement of said suit, signed by Kimble, acknowledging the receipt of \$30 in full of all demands up to date; and Short, at the time of filing such answer, told the justice, Kimble, and his attorney that he did not want to try the case before the justice; that, whatever judgment was rendered, he intended to appeal the case to the district court. And the amended petition further charged that Justice Revel was acting as attorney for Kimble in the prosecution of said claim against the plaintiff below, and, for the purpose of defrauding and cheating him, falsely and deceitfully stated to him that he could not appeal the matter then, but that he must do one of three things,—either stand a trial before Revel, take a change of venue, or confess a judgment and he could then

appeal. Short, being there without an attorney, being a farmer, and not knowing the effect of such judgment, told the justice, Revel, Kimble, and his attorney, if that was the law, and he could appeal, he would confess judgment and appeal; and upon that statement alone the justice entered up a judgment by confession, and, after some considerable delay, approved of an appeal bond, and sent a transcript of the judgment and proceedings had before him to the district court; and then, in furtherance of such fraudulent purpose, on motion of Kimble's attorney, the appeal was dismissed, for the reason that the record showed a judgment by confession, which was not appealable. The demurrer to this amended petition, admits the truth of all these charges. The petition and amended petition state such facts as entitled the plaintiff below to the relief therein sought.

The contentions of counsel for plaintiffs in error are: First. That in the case of Kimble v. Short an appeal was taken to the district court, which appeal was by the court dismissed, and no exception to the judgment of the court taken or review had. That judgment is conclusive against Short. Second. That the motion to vacate the judgment in the case of Kimble v. Short was filed before Justice Revel, and was, upon hearing, overruled; that the action of the district court in dismissing the appeal in the case of Kimble v. Short, whether such judgment was right or wrong, as a legal proposition, was absolutely binding upon the parties.

We do not think this position tenable. The appeal was dismissed for want of jurisdiction of the district court over the parties and of the action. The justice of the peace entered up judgment against Short by confession, and it so appeared on his transcript of the record filed in the district court. Under section 132, c. 81, Gen. St. 1889, no appeal is allowed on a judgment rendered by confession; and, where no appeal is allowed, the district court cannot acquire jurisdiction of either the parties or the subject of the action by a mere attempt to appeal. When the record of the justice shows a judgment rendered on confession, the appeal must be dismissed. In order to give the district court jurisdiction of a cause appealed from the justice of the peace, the transcript of the justice must show that the appeal bond was filed within 10 days after the rendition of the judgment, and that the case is one that is appealable. The district court cannot try the truth of the recitals in the record of a justice of the peace on an appeal. If there are facts material that are omitted from the transcript of record, or which are untruthfully stated, the party may, by suggestion of a diminution of the record, have the justice ordered to send up a corrected transcript of his record; but the district court cannot control the justice as to what the record must show.

The petition in this case alleges that the judgment was wrongfully, unlawfully, and fraudulently obtained, and is against equity and good conscience, and was obtained by misrepresentation and fraud on the part of the defendants below; that the plaintiff below relied upon the representation and statements made to him by said justice, and acquiesced in by Kimble and his attorney, touching his right of appeal; that what he said and did say to said justice in the way of alleged confession of judgment was said and done because he was misled by the justice as to what his rights were in the premises. We do not think the dismissal of the appeal was in any sense an adjudication of the rights of Short. The district court could not do otherwise than dismiss the attempted appeal, as shown by the records of Justice Revel. If Short had excepted to the dismissal of the appeal, and gone to the supreme court, the order of dismissal would have been affirmed, for the reason that the record in the district court showed that the judgment attempted to be appealed from was rendered on a confession.

We do not think the second position of counsel is well taken. The justice of the peace could not vacate and set aside the judgment unless a motion for that purpose was made within five days after the judgment was entered up. This is a proceeding to set aside a judgment obtained by fraud and conspiracy between the justice of the peace, the plaintiff in that action, and his attorney, on the grounds that the party was misled, deceived, defrauded, and induced to do an act that he did not intend to do, and was induced to do so by falsehood and deceit, and that thereby an undue advantage was taken of him; that, if the judgment is permitted to stand and be enforced, the plaintiff in that suit and the justice will receive from him the payment of money that was wrongfully, unjustly, and dishonestly procured; that they will thereby be permitted to take advantage of their own wrongful and fraudulent acts. Counsel seems to confound this judgment, and the proceedings to enjoin and set it aside, and give the parties a fair trial of the matters therein involved, with the proceedings to set aside and avoid a judgment obtained irregularly. High, in his work on Injunction (section 190), says: "Where the judgment was obtained through such fraudulent conduct, or such deceitful representation has prevented the defendant from asserting his rights in the court where the case was pending, and where, through fraud upon the part of the plaintiff or his representatives, defendant is prevented from making his defense, equity will relieve against such a judgment." In *Carrington v. Holabird*, 17 Conn. 530, the rule is thus stated: Where the person aggrieved shows a good reason why the defense was not made at law when he shows a meritorious defense to the action which he seeks to enjoin. This being shown,

and it appearing that defendant was prevented from the assertion of his rights by fraud, unmixed with negligence of his own, a court of equity will afford relief, either by opening the case and allowing another trial, or by awarding a perpetual injunction. In the case of *Pearce v. Olney*, 20 Conn. 544, the court says: "Indeed, this falls directly within, and is but an illustration of, the general rule that equity will interfere to restrain the use of an advantage gained in a court of ordinary jurisdiction, which must necessarily make the court an instrument of injustice in all cases where such advantage has been gained by fraud, accident, or mistake of the opposite party." In the case of *Babcock v. McCamant*, 53 Ill. 214, the supreme court say: "But it is urged that the remedy was complete under the statute, by applying to the circuit judge at chambers to order a stay of proceedings under the execution, until a motion to quash the execution and levy could be heard at the next term. This may be true of the execution and levy, but it is not clear that the circuit court could correct the judgment on a motion. But, even if it could, it is more satisfactory and complete to grant the relief in equity. The facts alleged and admitted by the demurrer show gross fraud; and fraud is a matter of equity jurisdiction, and that court did not lose it by statute conferring similar jurisdiction upon the court of law. If, then, under the statute, or the inherent power of the court of law to control its process and record, that court could correct the judgment, still it would not deprive equity of jurisdiction. Had the only relief sought been to quash the execution and set aside the levy, the proper course would have been to apply to the judge at chambers, and obtain an order staying further proceedings until the hearing of the motion; but the relief goes to the judgment itself, and to relieve against fraud." In the case of *Rickle v. Dow*, 39 Mich. 91, being an injunction to restrain the collection of a judgment, the court says: "While the judgment might bind complainant personally, yet it would not affect the security or prevent claimant from having the mortgage set aside, upon showing that the obligation it had been given to secure had in fact been paid. The fact that a judgment had wrongfully been obtained upon the note, binding upon the defendant in that case, would be no answer to the suit to have the mortgage set aside, and his real estate released from the mortgage cloud resting thereon. The court, having obtained jurisdiction for this purpose, may, we think, well proceed and examine into the whole case, and give complete relief in the premises." There was no error in the order of the court overruling and denying the demurrer to the amended petition.

After the court had overruled the demurrer of the defendants below to the amended petition of the plaintiff below, the defendants filed an answer to said petition, setting



up the proceedings had before Justice Revel in the suit of Kimble v. Short, setting out the judgment, alleging the appeal therefrom by Short to the district court, the motion to dismiss the appeal, the dismissal thereof, and that afterwards Short filed his motion to vacate the judgment before Revel, the order overruling such motion, and alleging that Short is estopped by the judgment of the district court in dismissing such appeal, and also that the judgment of the justice in overruling the motion to set aside and vacate the judgment is also an estoppel against Short. A demurrer was interposed by the plaintiff below to the second count in the answer, which demurrer was sustained, and defendants below filed an amended answer, setting up substantially the same matters; and plaintiff below demurred to said amended answer, which demurrer was by the court sustained, and defendants duly excepted. The judgment and order of the court sustaining the demurrer to the second count in the answer and amended answer are the second assignments of error complained of by the plaintiffs in error. The second count of the defendants' answer pleads as a defense, in substance, that in the suit of Kimble v. Short said Short appealed from the judgment of Revel to the district court of Rice county; that his said appeal was, upon motion, dismissed; that the judgment of the district court was a full and complete adjudication of the questions involved between Kimble and Short; that it decided the identical question sought to be relitigated by Short in the present suit, and was and is *res adjudicata*; and this count sets out, as exhibits, copies of the motion to dismiss and journal entry of judgment in the case of Kimble v. Short. The argument of counsel is based on the theory that the order and judgment of the justice of the peace overruling the motion of Short to set aside and vacate the judgment of Kimble against Short, and no appeal or proceeding in error having been taken from such ruling, the matter was therefore *res adjudicata*, and was conclusive on Short. This motion was made several weeks after the judgment was rendered, and was after the justice of the peace had lost jurisdiction to hear motion to set aside and vacate the judgment. The justice could not entertain a motion to vacate the judgment, unless the motion was made within five days after the rendition thereof. The action of the justice where he has no jurisdiction is not binding on any person; it is a mere nullity. The right to hear and determine a case is jurisdiction; it is *coram iudice*. And, where the court has jurisdiction of the subject-matter and of the parties, its judgments and orders are binding upon the parties. No matter how irregular the judgment and proceedings may be, they are valid and binding until set aside or vacated in some action authorized for the purpose, and cannot be disregarded in any

collateral proceeding. But where the court has no jurisdiction of the action, or has not acquired jurisdiction of the party, or where it has once had jurisdiction of the subject of the action and of the parties, and that jurisdiction has spent its force by final judgment or lapse of time, its orders and judgments made therein are without jurisdiction, and void, and may be treated so in any court of competent jurisdiction when brought in question. The proceedings had before Justice Revel on the motion to set aside and vacate the judgment were unauthorized, and of no force whatever, and are not binding on either party. The proceedings thereon are the same as though no motion had ever been filed. The authorities cited by counsel for plaintiffs in error, and relied upon in their arguments based thereon, are not applicable to a suit to enjoin and set aside a judgment obtained by fraudulent conduct. Where a judgment is tainted with fraud, equity will interfere and restrain the party obtaining such advantage by reason of his own willful fraud, and not permit him to reap the benefits of an advantage so wrongfully and fraudulently obtained. Fraud vitiates and destroys all advantages attempted to be gained thereby. It is an elementary principle of law that a person shall not be allowed to profit by a known fraud practiced by him upon another. Therefore, the demurrer to the answer and amended answer were properly sustained.

The third error complained of by plaintiffs in error is in the judgment of the court overruling and denying the defendants' demurrer to the plaintiff's evidence. The same reason urged against the judgment of court in sustaining the demurrer to the defendants' answer and amended answer are used to support the contention of counsel against the judgment of the court in overruling the demurrer to the evidence. The plaintiff below proved all the allegations set out in his petition, and it was sufficient to authorize the court to grant the relief sought in this suit; and it follows, from the reasons already given in the former portion of this opinion, that the demurrer to the evidence was properly overruled.

It is contended by counsel for plaintiffs in error that the court erred in excluding testimony offered by defendants on the trial, to wit, the transcript of Justice Revel, the motion to dismiss the appeal, and the journal entry of judgment in the district court. These proceedings were all a part of the petition of the plaintiff below, and attached to his petition, and were a part of the record; and the proof of their contents was immaterial, because the whole matter was before the court in the pleadings, and admitted by the pleadings, and it would have been surplusage to have received any evidence of what was admitted by the pleadings. The trial of the allegations of fraud involved what took place at the justice's office, which

brought about the confession of judgment; and the entry afterwards made by the justice in his docket had only a very remote connection with what the journal entry of the judgment dismissing the appeal had with the rights of the party on the trial of this cause. The same reason urged for the admission of these proceedings was urged in the argument of counsel on the proposition of sustaining the demurrer to the second count in the answer and amended answer of the defendant. Whatever the journal entries do show does not relieve the case from the fraud practiced by the successful party in obtaining the judgment in this case. They simply show what was done in pursuance of the fraudulent design of the justice of the peace, the plaintiff in the case before the justice, and his attorney; and they were properly excluded as evidence on the trial of the case.

The final complaint of plaintiffs in error is that the court erred in overruling the motion of defendants below for a new trial. The case was tried by the court without a jury, and after hearing all the evidence, and taking the matter under advisement for a number of days, the court found all the allegations set forth in the plaintiff's petition were true.

We have examined the evidence in this case with great care, and think that the findings of the court are fully justified under the evidence; and, there being no error in the proceedings upon the trial of the case, therefore the judgment of the district court is affirmed. All the judges concurring.

#### AULBACH v. DAHLER et al.

(Supreme Court of Idaho. Jan. 21, 1896.)

CORPORATIONS — LIABILITY OF STOCKHOLDERS — ACTION TO ENFORCE — PLEADING — SEPARATE CAUSES OF ACTION — WAIVER OF DEFECTS.

1. Under that provision of Rev. St. § 4169, which requires each cause of action to be separately stated, it is not necessary to rewrite, in each subsequent count, the preliminary averments of the first count; but it is sufficient if such allegations be referred to by apt and express words, making such allegations a part of each subsequent count.

2. Held, that the complaint states a cause of action against appellant, and alleges his liability as a stockholder under the provisions of section 2609, Rev. St.

3. If the complaint is ambiguous, unintelligible, or uncertain, and the defendant fails to demur thereto on these grounds, he waives them.

4. If, during the trial of a cause, the defendant is misled, to his prejudice, because of the variance between the allegations of the complaint and the proofs, he should then and there notify the court of that fact, and ask for proper relief. If he does not, he will not be permitted to first raise said question on motion for a new trial or on appeal.

5. A transfer of stock under the provisions of section 2611, Rev. St., is not valid, except between the parties thereto, until the same is entered upon the books of the corporation in manner and form as required by said section.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; J. Holleman, Judge.

Action by Adam Aulbach against Charles L. Dahler and others to enforce the liability of stockholders. From a judgment for plaintiff, said defendants appeal. Affirmed.

Charles W. O'Neill, for appellants. W. B. Heyburn and E. M. Heyburn, for respondent.

SULLIVAN, J. This action was brought by Aulbach, the respondent, against the Bank of Murray (a corporation), Charles Hussey, and Charles L. Dahler, to recover about \$3,000, alleged to be due on certain certificates of deposit issued by said bank to divers persons, and assigned to said Aulbach. The amended complaint alleges that the Bank of Murray was and is a corporation organized under the laws of Idaho, and began doing business at the town of Murray, in Shoshone county, about August 9, 1884; that defendant Charles L. Dahler is, and during the existence of said corporation was, the president of, and a stockholder of, said corporation, and as such stockholder, at all times mentioned in the complaint, was the owner of 250 shares of the capital stock of said corporation, which was one-half of its capital stock, and that said Dahler is and was a citizen and resident of the state of Montana; that said 250 shares of stock were issued and delivered to said Dahler, and that during all the time mentioned in the complaint he owned and held the same, and received profits and dividends earned by and accruing to his interest in said bank, but that he did not pay the full price for said shares, the par value of which was \$25,000; that he had paid only \$10,000 thereon, and that there remained unpaid on said shares the sum of \$15,000; that said Charles Hussey was the owner of 247 shares of said stock; that there is now due and owing from said Hussey to said bank, on said stock, the sum of \$24,700. In paragraph 3 of said amended complaint, it is alleged that the capital stock of said bank consisted of 500 shares, of the par value of \$100 per share, and on the 1st day of September, 1884, all of the shares aforesaid were subscribed for and issued to the following named persons, viz.: To Warren Hussey, 1 share; to Charles L. Dahler, 250 shares; to C. D. Porter, 1 share; to Charles Hussey, 247 shares; to Albert Allen, 1 share; that said stock so issued has continued to be held and owned by said subscribers, and that no part of the price of the stock issued to the said Warren Hussey, Charles Hussey, C. D. Porter, or Albert Allen had ever been paid to said corporation. Paragraph 5 alleges the insolvency of said bank; that it has closed its doors, and has no property or assets with which to pay the claims of its creditors. Paragraph 6 alleges that on June 10, 1890, the said bank made, issued, and delivered its certificate of deposit to one William Foster for the sum of \$120, payable in current

funds; that said Foster duly indorsed said certificate to the plaintiff; that thereafter said certificate was properly indorsed and presented to said bank for payment, and payment thereof refused; that there is now due on said certificate the sum of \$120, with interest thereon at the rate of 10 per cent. per annum from the 20th day of December, 1890. There are 26 additional causes of action set forth in said amended complaint, each of which is substantially the same as the one above set forth, except as to date of certificate of deposit, name of depositor, and amount deposited, and the concluding paragraph, which is changed to meet the facts of each case. Service of summons was made by publication. The bank and Charles Hussey failed to appear, and default was entered against them. Defendant Dahler appeared, and demurred to the complaint. The demurrer was overruled, and defendant Dahler thereupon answered, the substance of which answer is that he did subscribe for said 250 shares of stock, and that the same were issued to him, and that he paid therefor the full price, at its par value, for each and every share of said stock; that he became president of said bank, and a stockholder therein, about April, 1885, and about April, 1887, said 250 shares of stock were issued to him; that about December 1, 1887, for a valuable consideration, he sold all of the interest which he had then in said bank, and transferred and assigned to the purchasers all of said stock, and that since that date he had had no interest in said bank, nor been its president, nor in any way connected with it, nor owned or controlled any shares of stock therein; that since about April 1, 1887, each and every share of the capital stock of said bank, to the number of 500 shares, of the par value of \$100 each, was fully paid to said corporation; and that all of the indebtedness mentioned in said complaint was incurred since December 1, 1887. The cause was tried by the court with a jury, and a verdict was found in favor of the plaintiff for \$2,995.59, and a several judgment entered thereon against the Bank of Murray for \$2,995.59; against Charles L. Dahler for \$1,497.79; against Charles Hussey for \$1,491.80. A motion for a new trial was interposed and overruled, and defendant Dahler appealed from said order, and from the judgment entered against him.

There are 27 causes of action stated in the complaint, and they cover 108 pages of the transcript. The first 4 paragraphs, and a part of the 5th, of each cause, are identically the same, and each covers a little more than 3 pages of the transcript; thus making 26 repetitions of said paragraphs, which repetitions cover fully 80 pages of the transcript, and all other allegations only 20 pages thereof, exclusive of the prayer, thus creating a large expense to the litigants. The question has been raised as to whether the provision of section 4169, Rev. St., requires the pleader to rewrite,

in all counts after the first, the allegations of the first which are common to all subsequent counts, or whether the paragraphs of the first count which are common to all may not be referred to, in each subsequent count, in apt and express words, and thus be made a part of each subsequent count. I am aware that some authorities condemn the latter method of pleading suggested, as slovenly and not to be tolerated; but in the case at bar those useless repetitions occupy at least two-thirds of the transcript, at a cost of not less than \$100 to the litigants, and subserve no beneficial purpose. Referring to this method of pleading, the supreme court of California, in *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398, says, "Each count of a pleading must state a cause of action, and be complete within itself, without reference to any other count;" while in *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331, that court says, "It has never been the settled law here that the preliminary averments of a complaint can never be made part of subsequent counts, by apt and express reference, and without being rewritten," and holds that the hostile criticism of that method of pleading in *Pennie v. Hildreth*, supra, was mere dicta. In *Haskell v. Haskell*, 54 Cal. 265, the court quotes approvingly from Chitty's Pleading as follows: "But, unless the second count expressly refers to the first, no defect therein will be aided by the preceding count." The conclusion I reach is that when several causes of action are united, under the provisions of section 4169, Rev. St., it is not necessary to rewrite in each count after the first all common allegations, but it is sufficient if apt and express reference is made in each subsequent count to the preliminary allegations stated in the first, thus making them a part thereof.

The main contention of appellant is that the complaint states a cause of action under an act approved March 11, 1891, amending section 2609, Rev. St. (see 1 Sess. Laws 1891, p. 172), while the court tried the suit as one brought under the provisions of said section 2609, and for that reason appellant was misled, and was thereby prevented from making a successful defense. Said section provides, among other things, that each stockholder of a corporation is personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the subscribed capital stock of the corporation, and for a like proportion only of each debt or claim against the corporation. The act of 1891, above cited, amends said section in such a manner as to make each stockholder liable for the full amount unpaid upon the stock held by him. The second section of said act is as follows: "That all corporations doing business in this state, whether organized under the laws of this state, or some other state, desiring to avail themselves of the provisions of this act, shall cause to be written or printed after the corporate name, on its stock certificates, letter and bill heads, and all its official documents the word 'Limit-

ed'; also after the corporate signature to all official or public documents the word 'Limited.' Approved March 11, 1891. The complaint shows that said banking corporation was organized under the laws of this state in 1884, and became insolvent and went out of business in 1890,—some time before act of March 11, 1891, became a law; hence its stockholders could not come within its provisions, as to their liability to the creditors of the bank. Their liability is governed by the provisions of said section 2609, and the complaint states a cause of action thereunder. If the complaint was ambiguous, unintelligible, or uncertain, the defendant should have demurred on those grounds. Having failed to do that, he waived all rights that he may have had on those grounds. *Palmer v. Railway Co.*, 2 Idaho, 294, 13 Pac. 425. If he found during the trial that he had been misled by the allegations of the complaint, he should have then and there so advised the court. Section 4225, Rev. St., provides that no variance between the allegations and proofs shall be deemed material, unless it has actually misled the adverse party, to his prejudice. In that case it is the duty of the adverse party to show such fact to the court. When the variance is not material, the court may direct the fact to be found according to the evidence. Rev. St. § 4226. If there is a variance between the cause of action, as stated in the complaint, and the proofs, the objection cannot be first made on motion for a new trial, or on appeal in this court. *Bell v. Knowles*, 45 Cal. 193. The complaint contains allegations that are mere surplusage, which might have been stricken out on motion; but, as no motion was made for that purpose, that objection was waived.

The appellant contends that, had he not been misled by the allegations of the complaint, he might have established by the testimony of Dahler and Charles Hussey such a registry of the stock of Dahler as would satisfy the provisions of section 2611, Rev. St., which section provides, among other things, that the transfer of shares of stock is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the name of the parties by and to whom transferred, the number and designation of the shares, and the date of the entry. Mr. Dahler testified that he sold his shares to Charles Hussey, and surrendered them to him, in December, 1887; but the books of the corporation were introduced, and they do not show a transfer of the stock from Dahler. So, under the provisions of said section, the sale and transfer to Hussey would not be valid, as between Aulbach and Dahler, as the transfer was not entered on the books of the corporation. The testimony of Hussey should not have been admitted, if offered, and, if admitted, could in no wise relieve Dahler of his liability as stockholder of said corporation, under the provisions of said section 2609. The books of the

corporation contained the only proper evidence to show the transfer of said stock as between Aulbach and Dahler. That being true, the testimony of Mr. Hussey could have been of no benefit to Dahler in establishing his defense in this case. It appears from the record that as complete a defense as was possible to be made, on the ground that Dahler had sold and transferred his stock, was made, and that a new trial could not possibly result more favorably to the appellant than the one entered. The several alleged errors, discussed by counsel for appellant in his brief, have been examined, and no prejudicial error discovered. The judgment of the court below is affirmed. Costs of this appeal awarded to respondent.

#### HAMPTON v. BOARD OF COM'RS OF LOGAN COUNTY.

(Supreme Court of Idaho. Jan. 16, 1896.)

CONTRACTS—VALIDITY—QUANTUM MERUIT—APPEALABLE ORDERS—REVIEW.

1. Services rendered under a void contract with a board of county commissioners cannot be recovered for in an action upon quantum meruit.

2. The provision of our statutes permitting an appeal from "any specific part" of a judgment does not extend to a money judgment for a definite sum.

3. When the appeal to this court brings up the whole record, and it is apparent therefrom that an erroneous judgment has been rendered by the court below, such judgment will be reversed.

(Syllabus by the Court.)

Appeal from district court, Logan county; C. O. Stockslager, Judge.

Appeal by H. S. Hampton from the action of the board of county commissioners of Logan county disallowing a claim in toto. From a judgment of the district court allowing the claim in part, this appeal is prosecuted. Reversed with directions.

Texas Angel and H. S. Hampton, for appellant. Geo. M. Parsons, Atty. Gen., and N. M. Ruick, for respondent.

HUSTON, J. The board of commissioners of Logan county in 1893 made a contract with the plaintiff by which they agreed to employ, and did employ, him as the attorney of said county,—to act as the legal adviser of the board of commissioners of said county, and to attend to all litigation in which said county was interested, both in the district court for said county, and in the supreme court of the state. This court, in the case of *Meller v. Board* (Idaho) 35 Pac. 712, affirming the judgment of the district court, declared said contract null and void. The plaintiff thereafter presented an itemized bill for his services rendered under said contract to said board, which bill was disallowed by said board, and from which action of the board plaintiff appealed to the district court for said Logan county.

The aggregate of plaintiff's bill so as aforesaid presented to the board of commissioners was the sum of \$3,642, as appears by the record. Of this sum the district court, on appeal from the board, allowed the sum of \$832, and affirmed the action of the board as to the residue. From this action of the district court this appeal is taken.

It is contended by the plaintiff that, notwithstanding the contract under which the services were performed was null and void, still, as the services were performed by him at the request of the board, he is entitled to his compensation therefor, upon a quantum meruit, as both the constitution and the statutes of this state authorize the employment of counsel other than the district attorney by the board of commissioners, "when necessary." In *Meller v. Board*, supra, this court held that, before a board of county commissioners can employ counsel as provided in the constitution and statutes, the necessity therefor must be apparent. The discretion given to the board by the constitution is not an arbitrary, limitless discretion, to be controlled only by the caprice of the board, or a majority of its members, but is rather a discretion to be exercised under, and with due regard to, the provisions of the statutes. Section 18 of article 5 of the constitution, in making provision for the election of district attorneys, and defining their duties, provides that the district attorney shall "perform such duties as may be prescribed by law." 1 Sess. Laws 1890-91, p. 47, § 3, tit. "District Attorneys—Duties," provides as follows: "It is the duty of the district attorney: (1) To prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his district in which the people or the state, or any of the counties of his district, are interested or a party; and when the place of trial is changed in any such action or proceeding to another county, he must prosecute or defend the same in such other county. (2) To give advice to the board of county commissioners and other public officers of his district, when requested in writing, in all public matters in which the people or the state or counties of his district are interested, or relating to the discharge of the official duties of such boards or officers," etc. 1 Sess. Laws 1890-91, p. 47, § 2, amending section 2051, Rev. St., provides that whenever, from any of the causes therein mentioned, the district attorney is incapacitated for, or unable to attend to, his duties in the district court, such court may appoint some suitable person to act in his place for the time being, and such person so appointed "may receive such compensation as the court may allow, out of the salary of the district attorney, for all services by him performed." Now, do these statutes mean anything, or are they mere "sound and fury, signifying nothing"? It seems to me, the object and purpose of

these statutes is palpable. They were not passed upon the eve of an election, and cannot, therefore, be considered as the nudum pactum pledges and promises of a political platform. They are the solemn acts of the legislative power of the state. They were enacted under, and are in conformity with, the provisions of the constitution. The intent and object are palpable and unequivocal. But it is contended the constitution provides that "the county commissioners may employ counsel when necessary." Const. art. 18, § 6. And this provision, it is claimed, invests the commissioners with plenary powers, in the exercise of which they may nullify, abrogate, or ignore any and all provisions of the statutes enacted by the legislature for the economical and proper conduct of the affairs of the state and the counties thereof. Under the "divine right of kings," as arrogated by the house of Stuart, they were not more lawless, and disregarding of the people's rights, than have been some of the boards of county commissioners of this state in the assumption of what they claim to be their powers under the constitution. In an honest and laudable effort to reduce the expenses of the state and the counties to the lowest figure consistent with a proper and efficient administration of the affairs of the state and the counties, the makers of the constitution fixed therein the compensation to be allowed to the various state and county officers. But some of the boards of county commissioners have practically ignored such provisions, and have, in innumerable instances, assumed to allow to various county officials compensation double, and sometimes quadruple, that limited and allowed by the constitution and the statutes. Take the case under consideration. The evident purpose and intent, both of the constitution and the statutes, was that the counties should be put to no expense on account of attorney's services, beyond that of district attorney, but having in view the fact that each district was composed of several counties, an emergency might arise where the interests of the county or the people might require other legal services than those of the district attorney; and it was in anticipation of, or to meet, such a contingency, that the provision above referred to was incorporated in the constitution. And the case under consideration is an apt and instructive illustration of how little regard has been paid by boards of county commissioners of this state to the provisions of the constitution and the statutes. Under the necessity clause of the constitution, the board of commissioners have, it is claimed, assumed to incur an indebtedness against said county of \$4,142 for legal services for about three-quarters of a year,—a compensation in excess of that received by both the attorney general and the district attorney for the same period, and for the performance

of duties which the law expressly imposes on said officers. Surely there should be some means of putting a stop to such a reckless, extravagant, and illegal disposition of the money of a tax-burdened and financially depressed people. We are apprehensive that the majority of taxpayers do not realize the importance of the office of county commissioners, or have a sufficient appreciation of the extent of the powers with which such officers are invested under the law. Much of the indebtedness of the counties of this state is attributable either to the malfeasance or misfeasance of these officers. We think that before the authority given to county commissioners by section 6, art. 18, of the constitution can be exercised, the necessity which authorizes it must not only be apparent, but the facts creating such necessity must be made a matter of record by the board. The rule in California, given in *Hornblower v. Daden*, 35 Cal. 664, that "the judgment and discretion of boards in the exercise of this power are not open to review by the courts," is not recognized by this court. *Meller v. Board*, supra.

The plaintiff cannot recover in this case upon any implied contract to pay for services, for the reason that there was no authority vested in the board to make the contract under which the services were performed. *Perry v. Superior City*, 26 Wis. 64. The doctrine that if a municipality obtain the money or property of another by mistake, or without authority of law, it is her duty to make restitution or compensation, not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial, does not apply here. The plaintiff was especially presumed to know the law. He is presumed to know that, for any services rendered by him under such a contract as was entered into by himself and the board of commissioners, he could not recover. If the board were not originally authorized (as they were not) to make the contract, no liability can attach upon any ground of implied contract. 15 Am. & Eng. Enc. Law, 1084, and cases cited; *Argenti v. San Francisco*, 16 Cal. 255.

The appellant's claim, as filed with and disallowed by the board of county commissioners, was for \$3,642. Plaintiff had, besides, received \$500 for services in the year 1893; \$4,142 charged to a county with a voting population of 788, according to the returns of the last election,—a little over \$5 per capita of the voting population of the county,—for services which the law had already provided for, and which the taxpayers of the county and state had already paid for. Verily, such an exhibition of patriotic solicitude for the public weal makes the chasm of Curtius a mere gopher hole.

We infer from the argument of counsel for appellant that he assumes that this court

will not review the judgment or the record, so far as it is in his favor. In this he is wrong. This appeal is from the judgment, not from the findings of fact. The judgment is an entirety,—a money judgment for a definite sum. Our statutes which permit an appeal from a final judgment, "or any specific part thereof," do not contemplate an appeal from "a part" of a money judgment for a definite sum. This appeal brings the whole record before us for review. The most careful and studious examination of the record has failed to show us any legal grounds upon which the judgment of the district court can be sustained. The record shows—in fact, it is conceded—that all the services for which claims were presented to the board were rendered under the void contract. Upon what theory, consistent with legal principles, the district court could segregate the amounts, and allow some and disallow others, we are unable to divine. It was really but one cause of action. There could be no segregating of items, as the fatal objection permeated the whole. Either the appellant was entitled to all he claimed under the contract, or he was entitled to nothing. Under the rules of law as recognized by the authorities we have cited, we are satisfied he was entitled to nothing. The judgment of the district court is reversed, and the cause remanded to the district court, with instructions to enter an order affirming the order of the board of commissioners.

MORGAN, C. J., and SULLIVAN, J., concur.

#### On Petition for Rehearing.

HUSTON, J. We have examined the petition for a rehearing in this case. There is nothing in it. It is a mere repetition of the argument and a recitation of the authorities presented at the hearing. Simply stated, the case is this: The constitution of the state provides for a district attorney for each of the several districts of the state. The statutes prescribe the duties of such officer, and fix the amount of his compensation. They also provide for the appointment of a substitute or deputy when the district attorney is, for any cause, incapacitated for the performance of the duties of his office, and also for the compensation of such substitute or deputy. The constitution also provides for the office of attorney general, prescribes his duties, and fixes his compensation. The constitution prohibits the legislature from creating any county office not provided for in the constitution. In the face of all these constitutional provisions and statutory enactments, the plaintiff entered into a contract with the commissioners of Logan county whereby and under which he was to act as county attorney for said county, and also perform all the duties of the attorney general in cases where said county was interested, for a period of two years, for which he was to receive from said county a compensa-

tion exceeding that of both the district attorney and the attorney general. The provision of the constitution authorizing boards of county commissioners to employ counsel when necessary does not apply to this case. The contract was set aside by this court, and now the plaintiff seeks to recover as upon an implied contract. The proposition is simply monstrous, in its absurdity. No authority has been, nor can be, produced to sustain such a contention. The petition for a rehearing is denied.

MORGAN, C. J., and SULLIVAN, J., concur.

### WARNER v. FREMONT COUNTY.

(Supreme Court of Idaho. Dec. 27, 1895.)

#### SHERIFFS AND CONSTABLES — MILEAGE — ARREST WITHOUT WARRANT.

1. Under the provisions of subdivision 18 of section 2 of an act entitled "An act concerning fees and compensation of county officers" (1 Sess. Laws 1890-91, p. 174), the sheriff is entitled to mileage for taking a prisoner from the place of arrest to prison or before a court or magistrate, regardless of whether such prisoner is arrested with or without a warrant.

2. The execution of a warrant of arrest, and taking of prisoner from the place of arrest before a magistrate, are mentioned in said section as separate and distinct acts, and mileage allowed for each.

(Syllabus by the Court.)

Appeal from district court, Fremont county; D. W. Standrod, Judge.

Appeal by J. P. Warner from the action of the board of commissioners of Fremont county disallowing a claim. From a judgment in the district court for defendant, plaintiff appeals. Reversed with directions.

F. S. Dietrich and Philletus Averett, for appellant. Geo. M. Parson, Atty. Gen., for respondent.

SULLIVAN, J. This is an appeal from the judgment of the district court of Fremont county involving the claim of the sheriff for fees for mileage for taking a prisoner from the place of arrest before a magistrate. The sheriff of said county, who is appellant here, did, by virtue of a warrant of arrest issued out of the probate court of said county, and placed in his hands for service, arrest the person named in the warrant, at a considerable distance from the county seat, and duly filed his claim against said county for mileage for going to make the arrest, and for mileage for taking the prisoner so arrested before the magistrate who issued said warrant. His claim for going to make the arrest was allowed by the commissioners of said county, and the claim for taking the prisoner from the place of arrest before the magistrate was not allowed, on the ground that it was not a legal charge. There are two items in appellant's claim, both of which

involve the same point of law, and what is said of one applies to both items.

The provisions of law regulating the fees of the sheriff in the matter under consideration are found in subdivision 18 of section 2 of an act entitled "An act concerning fees and compensations of county officers," approved March 13, 1891 (1 Sess. Laws 1890-91, p. 177). That subdivision, after making provision for certain services of sheriffs, provides that they shall receive "for traveling to execute any warrant of arrest, subpoena, venire or other process in criminal cases, or for taking a prisoner from prison before a court or magistrate or for taking the prisoner from the place of arrest to prison, or before a court or magistrate, for each mile actually and necessarily traveled, in going only, thirty-five cents."

The question for consideration is, was the sheriff entitled to a fee of 35 cents per mile for taking the prisoner from the place of arrest before a court or magistrate, he having been allowed 35 cents per mile for going to the place where said arrest was made? Appellant contends that the provisions of said act are too plain to admit of construction. That it declares that the sheriff is allowed, and may demand and receive, for taking a prisoner from the place of arrest to prison or before a court or magistrate, for each mile actually and necessarily traveled in going, only, 35 cents; while respondent contends the plain intent and purpose of said provisions were to allow the sheriff mileage in going, only, in executing a warrant of arrest, and the provision allowing him 35 cents per mile for taking the prisoner from the place of arrest to prison or before a court or magistrate only applies to cases where arrest is made without a warrant. Some of the acts for which a sheriff may demand and receive 35 cents per mile for each mile actually and necessarily traveled in going, only, as provided by said act, are as follows: For traveling to execute any warrant of arrest; for traveling to execute subpoena or venire; for traveling to execute other process in criminal cases; for taking a prisoner from prison before a court or magistrate; for taking a prisoner from the place of arrest to prison or before a court or magistrate. The language used, stating each of said acts, is clear, plain, and direct. The meaning is too obvious to be misunderstood, and the language too plain to admit of construction. If the legislative intent was not to allow the sheriff mileage for taking a prisoner from the place of arrest to prison or before a court or magistrate except when arrested without a warrant, the legislature signally failed to confine it to that class of prisoners. As the law now reads, no distinction is made between a prisoner arrested with or without a warrant so far as the mileage of the sheriff is concerned in taking them from the place of arrest to prison or before a court or magistrate.

The case of *Yavapai Co. v. O'Neil* (Ariz.) 29 Pac. 430, is cited as an authority sustaining the contention of respondent. That decision was under a statute different from ours. It contained no provision for mileage for taking a prisoner from the place of arrest to prison or before a court or magistrate, and provided for compensation for mileage one way only for executing a warrant of arrest. The court there held that to "execute a warrant" is to do what is in the writ commanded, and that included taking the prisoner from the place of arrest to prison, etc. Very true, our statute declares that, for executing a warrant of arrest, the sheriff shall receive mileage for one way only. In the same sentence, it declares that he may demand and receive mileage for taking the prisoner from the place of arrest to prison or before a court or magistrate; clearly indicating that it was not intended to include that act as a part of the execution of the warrant, or, if a part, to permit fees to be charged for it.

It is contended that the intention was not to permit double mileage. While I think that is true, I also think that the legislature knew that there might be expense in transporting the prisoner from the place of arrest to prison or before a court or magistrate, which expense the sheriff must pay, and the allowance of 35 cents per mile for that service was to cover that expense. In the service of a subpoena or venire, there is no expense of transporting prisoners, and the sheriff is allowed 35 cents per mile in going only. Executing a warrant of arrest, and taking a prisoner before a court or magistrate, are treated in said section as separate and distinct acts, and not as a single act, and compensation for each allowed. Under the statute of California, which is not as explicit as ours on the question under consideration, the supreme court of that state holds that the sheriff is entitled to mileage for executing a warrant of arrest, and also mileage for taking the prisoner so arrested before a magistrate. *Cunningham v. San Joaquin Co.*, 49 Cal. 323; *Allen v. Napa Co.* (Cal.) 23 Pac. 43; *Monahan v. San Diego Co.* (Cal.) 29 Pac. 417. The act under consideration, instead of prohibiting mileage for said service, has plainly stated that the sheriff may demand and receive 35 cents per mile for taking a prisoner from the place of arrest before a court or magistrate, whether such prisoner is arrested with or without a warrant, and, for each additional prisoner taken, the law allows 15 cents per mile; thus providing, as I think, for the expense of transporting such prisoners.

The judgment of the court below is reversed, with instructions to enter judgment in favor of appellant, in accordance with the views expressed in this opinion. Costs awarded to appellant.

MORGAN, C. J., and HUSTON, J., concur.

# JENKINS et al. v. COLUMBIA LAND & IMPROVEMENT CO.

(Supreme Court of Washington. Jan. 14, 1896.)

**CITY WATER COMPANY—CONTRACT WITH CITY—ASSIGNABILITY—ACTION TO ENFORCE BY LESSEE—EQUITY—JURISDICTION—APPEAL—DEFECT OF PARTIES—REVERSAL.**

1. Where the franchise of a city water company makes it its duty to supply the city with water, and to furnish stations of the city's electric plant with water at a specified price, and the city leases the electric plant, equity has jurisdiction of an action to enjoin the company from refusing to supply the lessee with water for such electric stations on the lessee's refusal to pay a greater price than that for which the company agreed to supply it to the city, though the complaint does not allege that there is no other source from which a supply could be obtained.

2. Defect of parties plaintiff cannot be urged for the first time on appeal.

3. Where a city water company contracted by its franchise to supply the stations of the city's electric plant with water at a specified monthly rental, the fact that the company agreed that the rental should be paid at the end of the month did not destroy the assignability of the contract, on the ground that a special confidence was placed in the city, where it did not appear that the city's lessee, seeking to enforce the contract, relied on such stipulation or refused to pay the rent in advance.

4. The objection that an action has been brought by the lessee instead of by the lessor for his benefit, urged for the first time on appeal, is not ground for reversal, if defendant has not thereby been deprived of any substantial right.

Gordon, J., dissenting.

Appeal from superior court, Clarke county; A. L. Miller, Judge.

Action by De Witt Jenkins and Joseph R. Harvey, copartners under the firm name of Jenkins & Harvey, against the Columbia Land & Improvement Company, to enjoin defendant company, chartered to furnish the water supply of a city, from cutting off plaintiffs' water supply for its electric plant, leased from the city, on plaintiffs' refusal to pay a greater price therefor than that for which defendant had agreed, by its franchise, to supply it to the city for such purpose. From a judgment for plaintiffs, defendant appeals. Affirmed.

N. H. Bloomfield, for appellant. Moody, Coovert & Stapleton, for respondents.

HOYT, C. J. The appellant is a corporation organized for the purpose of supplying the city of Vancouver and its inhabitants with water. At the time the ordinance which granted the franchise under which it is operating was passed, the city was the owner of a certain electric light plant, and said ordinance contained a condition requiring the appellant to furnish water for the electric light stations of the city, at a price not exceeding \$5 per month for each station. Thereafter the city leased its electric light plant and the station connected therewith to the respondents, for three years, which term, at the option of the city, could be extended to five years. After the respondents had



taken possession of the plant and the electric light station connected therewith, the appellant demanded water rent for such station at the rate of \$15 per month. This amount the respondents refused to pay. Whereupon the appellant threatened to cut the pipe which connected the electric light station with the water main, and deprive the respondents of the use of the water for such station, until the \$15 per month rent demanded should be paid. To restrain this threatened action, respondents brought this suit. The appellant demurred to the complaint, and upon such complaint and certain statements of fact agreed upon, in some degree explaining it, the cause was submitted to the trial court, and a decree, substantially as prayed for, in favor of the plaintiffs, made and entered. Appellant claims that such decree was erroneous, for two reasons: (1) That the plaintiffs had an adequate remedy at law, and for that reason could not ask the interposition of a court of equity; and (2) that the conditions of the ordinance as to the amount to be charged for water for the electric light stations of the city, when accepted by the appellant, amounted to a contract between it and the city, and that such contract could not be assigned by the city without the consent of the appellant.

For the purposes of determining the first question, it must be assumed that the plaintiffs were entitled to have the pipe between the electric light station and the water main retained, and to have the flow of water necessary for the uses of such station continued, and that the plant could not be operated without a supply of water. Where a right exists a court of equity will protect its enjoyment, unless the remedy by an action for damages for its violation will be adequate. It is conceded by the appellant that an action for damages would not afford plaintiffs an adequate remedy, if there was no other source from which they could reasonably obtain a supply of water. But it is contended that, in the absence of an allegation of such fact, a court of equity had no jurisdiction. It appears, however, from the complaint and the agreed facts, that the appellant had a franchise under which it was its duty to supply water for the use of the city of Vancouver and its inhabitants, and it will not be presumed, against the jurisdiction assumed by the trial court, that any other company had such a franchise; and for that reason we think the jurisdiction should be determined as it would have been had there been an allegation to the effect that there was no other source from which a supply of water could be obtained. Besides, it having been the duty of the company, under the franchise, to supply the water, and it having the ability so to do, a court of equity would have jurisdiction to compel it to do its duty. The case of *Young v. Boston*, 104 Mass. 95, though decided upon facts differing from those in the case at bar, in our opinion de-

cided principles the application of which will sustain the jurisdiction assumed by the superior court.

Connected with the question of the assignability of the contract between appellant and the city was one as to the proper parties plaintiff. It is claimed that if the lease to the plaintiffs should be so construed that the plant and the stations connected therewith still belonged to the city, it, and not the plaintiffs, should have brought the action to prevent the violation of the terms of the contract. But appellant is not in a condition to derive any benefit from such claim. The demurrer was not for want of proper parties, and there is nothing to show that relief upon the ground of a defect of parties plaintiff was asked of the trial court. Hence, such defect, if it existed, can furnish no ground for a reversal of the decree. If the lease to the plaintiffs so dispossessed the city of the electric light plant and of its stations that they could no longer be said to belong to the city, the question as to the assignability of the contract would be decisive of the controversy between the parties. That contracts of this kind can usually be assigned where there is no relation of trust or confidence between the contracting parties is not disputed by appellant; but it claims that, by reason of the fact that under the contract it had been agreed between the appellant and the city that the water rent should not be paid until the end of each month, there was a dependence by the appellant upon the responsibility of the city, which involved such a relation of trust and confidence as took away from the contract its assignable character. In our opinion, this agreement as to the water rent not being paid until the end of the month was not so connected with the terms of the contract under which the city had the right to have it supplied that it in any manner affected the assignability of said contract. It was not made to appear that the plaintiffs relied upon this arrangement as to the time of payment, and on that account refused to pay the water rent in advance. It is not necessary to say more as to the assignability of this contract. The electric light plant and the station connected therewith were as much the property of the city after the lease was executed as they were before, and the water to be supplied was for an electric light station of the city after the execution of the lease the same as it was before; and no attempt having been made in the superior court to take advantage of the fact that the action should have been brought in the name of the city instead of that of the plaintiffs, and it not appearing that the appellant was deprived of any substantial right by reason of the action having been prosecuted in the name of the plaintiffs instead of that of the city, the fact, if it be a fact, that the city should have been the party plaintiff furnishes no ground for the reversal of the decree.

There was a suggestion in the brief that the appellant offered to furnish the water for \$15 a month, and that for that reason there was an adequate remedy for the violation of the contract by an action at law. For the plaintiffs to avail themselves of the offer to furnish water for \$15 a month, and rely upon an action for damages to recover the difference between the rent per month demanded and that to which the appellant was entitled, would lead to such a multiplicity of suits that the remedy thus furnished would be in no sense an adequate one. The facts disclosed by the record authorized the court to enter the decree appealed from, and it will be in all things affirmed.

DUNBAR and ANDERS, JJ., concur.

GORDON, J. (dissenting). I feel constrained to dissent from the conclusion reached by the majority in the foregoing opinion. The complaint in the action, after alleging that the defendant, a corporation, obtained from the city of Vancouver a franchise to lay water pipes in and through its streets, also alleged that, as a part of the consideration for said franchise, said ordinance provided as follows: "Sec. 3. The said company, its successors and assigns, in consideration of said grant, shall also, during its continuance, furnish water sufficient to supply the electric light stations of the city at a rate not to exceed five dollars per month for each station," etc. And it was stipulated in the court below "that unless defendant [appellant] is bound to furnish to plaintiffs [respondents] water for \$5 per month, then \$15 is a reasonable price therefor." In my opinion, the interpretation to be given to that section of the ordinance above quoted is that the reduced rate of \$5 per month was to apply only to electric light stations of the city; that is, plants owned and operated by the city, as distinguished from light plants operated by private firms or corporations for a profit. It seems to me that the city could not have been concerned in having water furnished to a particular party at a reduced rate, but it was contracting so as to keep down the cost and expense of its own business, which it was then conducting. After the city leased its plant to the respondent, the electric light stations were no longer "electric light stations of the city," within the meaning of those words as expressed in the ordinance.

#### EDMUNDS v. BLACK.

(Supreme Court of Washington. Jan. 14, 1896.)

TRIAL AMENDMENT—WAIVER OF ERROR—GENERAL PLEA OF PAYMENT—DELIVERY OF PERSONAL PROPERTY—ACCEPTANCE—EVIDENCE—JUDGMENT ON APPEAL—TRIAL—ADMISSIONS TO SUPPORT.

1. A trial amendment of the complaint on a judgment to show a judgment of the supreme

instead of the circuit court of a foreign state, so as to conform the complaint to the judgment roll in evidence, cannot be urged as error by defendant, where his counsel, to procure the opening and closing before the jury, admitted the judgment, and that the judgment roll in evidence was a proper exemplification of it.

2. Delivery and acceptance of personal property in payment of a demand may be shown under a general plea of payment.

3. In an action on a judgment for \$2,000, where defendant counterclaimed for \$500, evidence that plaintiff wrote to defendant that defendant's father had delivered a bond amounting, with interest, to about \$1,530, and "that he guessed they were about square," is insufficient to support defendant's general plea of payment of the judgment.

4. In an action on a judgment, an admission by defendant of the judgment, in order to procure the opening and closing before the jury, will not authorize the supreme court, on reversal of a judgment for defendant, on his plea of payment, to enter judgment for plaintiff.

Gordon, J., dissenting.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by James Henry Edmunds against Alfred L. Black on a foreign judgment. Defendant counterclaimed. From a judgment for defendant, plaintiff appeals. Reversed.

Kerr & McCord and J. P. De Mattos, for appellant. Black & Leaming and Fairchild & Rawson, for respondent.

HOYT, C. J. This action was brought upon a judgment stated in the original complaint to have been rendered in a circuit court of the state of New Jersey. Defendant denied the existence of the judgment, and alleged "that any judgment ever obtained as set out in said complaint, or any judgment ever obtained by plaintiff against this defendant (if such judgment ever was obtained), had been fully paid and satisfied." He also alleged certain facts by way of counterclaim. It appeared from the transcript of the judgment offered in evidence that it was rendered in the supreme court of the state of New Jersey, instead of the circuit court, and thereupon leave was given to the plaintiff to amend his complaint to correspond with the transcript. Complaint is made by the respondent of this action by the court, but it was not made to appear that the defendant was in any manner misled or prejudiced by such amendment; and, even if respondent was in a situation to take advantage of any error made by the court, his rights were not so affected that he would be entitled to any relief. Before the case was submitted to the jury, it was stated by the defendant or his counsel that he at this time withdrew his denials, and admitted "that there is a judgment roll against us, and that it is a proper exemplification of the judgment rendered against us in the supreme court of New Jersey, and we now demand the opening and closing of the case before the jury." After this admission had been made, there were but two questions to be submitted to the jury,—one, as to whether or

not the judgment had been paid; and the other, as to the counterclaim pleaded by the defendant. Under the latter, the defendant claimed only about \$500, and the amount of the judgment was something over \$2,000; hence the verdict of the jury finding generally for the defendant could not have been rendered, unless it was found that the judgment had been paid. Did the testimony warrant this finding on the part of the jury? The answer of the defendant set up generally the fact that the judgment had been paid, but did not state how it had been paid. The proof tended to show that payment was made, not in money, but by the delivery to the plaintiff, on behalf of the defendant, of a certain chose in action. Appellant claims that, under the general plea of payment, evidence of payment in money alone was admissible, and there are some authorities which sustain this claim. The respondent contends that, under such plea, evidence is admissible which shows the delivery of personal property, if it appears that, at the time such property was delivered, it was received as payment of the demand. The modern authorities establish the law to be as contended for by the respondent; but in all of them it is held that a general plea of payment cannot be sustained by evidence of the delivery to the claimant of anything other than money, unless it clearly appears that it was accepted and applied by the claimant in payment of the demand.

Did the evidence in this case warrant the jury in coming to the conclusion that the bond delivered in behalf of the defendant to the plaintiff was so received and applied by him? The only testimony bearing upon that question was that of the respondent, to the effect that in a letter the plaintiff had stated that respondent's father had delivered to him the bond; that, with interest, it amounted to some \$1,530; and that he guessed they were about square. Did this admission, if made, warrant the jury in finding that plaintiff accepted this bond in payment of the judgment which he held against the respondent? In our opinion, it did not. There was no statement whatever as to the bond having been accepted in payment of the judgment. The only thing which could be inferred from the language used was that he recognized the fact that there was due upon the bond, when delivered to him, the amount stated; and that, in his opinion, upon an adjustment of the accounts between the respondent and himself, it would be found that they about offset each other; and that he and the respondent, in relation to their business affairs, were about square. But these admissions, while they might have been sufficient to have supported a claim for the amount due upon the bond surrendered to plaintiff as an offset against the judgment, were not sufficient to support a plea that the same had been paid.

It follows that there was no testimony to sustain the verdict of the jury, and that the

judgment rendered thereon must be reversed. If we were to hold that the admission of the respondent as to the judgment had been made for any other purpose than that of the trial in which it was made, it might be our duty to direct a judgment in favor of the plaintiff, but we are not satisfied that such admission should have force against the respondent, excepting for the purpose of deciding questions involved in the trial in which it was made; hence the order will be that the judgment be reversed, and the cause remanded for a new trial.

DUNBAR and ANDERS, JJ., concur.

GORDON, J. (dissenting). In my opinion, there was competent evidence tending to support the verdict, and the order denying a new trial should be affirmed.

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SEATTLE NAT. BANK v. CARTER et al.  
(Supreme Court of Washington. Dec. 24, 1895.)

PLEADING—ANSWER—INCONSISTENT DEFENSES.

Totally inconsistent defenses are not allowable under the code practice.

Appeal from superior court, King county; R. Osborn, Judge.

Action by the Seattle National Bank, a corporation, against George R. Carter, Daniel Jones, and others, on promissory notes, and to foreclose a mortgage. From a judgment for plaintiff, defendant Jones appeals. Affirmed.

James Leddy, Gleason & Babcock, and Thompson, Edsen & Humphries, for appellant. Carr & Preston and W. R. Bell, for respondent.

DUNBAR, J. This case was originally begun by the respondent in the equity department of King county, but, some questions of fact arising for determination between the appellant and the respondent, it was transferred to the law department in the superior court of said county. The notes in suit were made by the appellant as a subscription in aid of an enterprise in which he and a number of other persons were interested, viz. the building of a boulevard along the west shore of Lake Union. At a meeting of those interested in the enterprise, at which appellant was present, he subscribed \$2,500 towards carrying on the enterprise, and a committee was elected and appointed by the meeting as an executive committee to have full charge and control of the work. This committee consisted of L. H. Griffith, Edward Bluett, and C. E. Remsburg. The committee, through its manager, Griffith, afterwards sold the notes given by appellant to respondent, the Seattle National Bank. The notes were made payable to the order of the members of the

committee. One of the notes sued on is a renewal of the note, made payable three months after its date. The renewal was made after the maturity of the original note, and while it was held by respondent. The other note was made payable six months after date. Griffith indorsed on the back of each note the following: "L. H. Griffith, Edward Bluett, C. E. Remsburg, Committee, by L. H. Griffith, Chairman," and delivered them, so indorsed, to the respondent, and received from the respondent the sum of \$2,500, the full face of the notes. This money was deposited to the credit of the treasurer of the boulevard enterprise, and was expended in prosecuting that enterprise. George R. Carter and Nellie Phinney, as the executrix of the last will and testament of Guy C. Phinney, deceased, were made defendants for the purpose of reforming and foreclosing a certain mortgage given as security for the notes in question; but they have not appealed from the judgment rendered, and need not be further noticed in this opinion. The amended complaint alleged that, prior to the maturity of the notes in suit, the said Griffith, Bluett, and Remsburg, as such committee, for a valuable consideration, duly indorsed and delivered the said promissory notes to plaintiff, and plaintiff then became, and now is, and ever since has been, the owner and holder of said promissory notes. These allegations are denied by general denial in the amended answer of the appellant, and on this denial the principal point in this case is raised.

We have examined the testimony in this case in minutiae, and believe that it is sufficient to sustain all the contentions of the respondent as to the manner of executing the notes, the reason for their execution, the authority conferred upon Griffith, the manager of the committee, to transfer the notes, and in every other particular. On all these propositions, it is true, the testimony is conflicting; but we think it would be sufficient to sustain the verdict, even if the law of the case were as contended by appellant. But as the question of inconsistent defenses is raised squarely in this case, and has been argued with much zeal and ability by the attorneys on both sides, we have concluded to enter upon an investigation of that question and settle the law, so far as this state is concerned, on that proposition. Cases from this court are cited by both counsel to sustain their respective contentions, but whatever may have been said by this court on this subject heretofore has been of the character of dicta, or an incidental reference to a question which was not material to the decision of the case under discussion. So we feel at liberty to enter upon its investigation as an original proposition. The answer, as we have said, denies that the plaintiff was the owner and holder of said notes, or that they had been indorsed and delivered to it for a

valuable consideration, or otherwise. The court in its instructions, to which the appellant duly excepted, charged the jury that under the pleadings in this case the only question for their consideration was the question of whether the notes were paid. The defendant, after his general denial, which was upon information and belief, affirmatively alleges the transfer of the notes to the plaintiff. He alleges, in his first affirmative defense, that the notes were executed and delivered to L. H. Griffith, Edward Bluett, and C. E. Remsburg, and that, subsequently to the execution and delivery of the said notes, the said committee transferred them to the plaintiff, and, in another paragraph of the same affirmative defense, alleges the payment of these notes by L. H. Griffith to the respondent. The averment of the transfer of the notes to the respondent is repeated in the second affirmative defense, where it is also alleged that the respondent, for a valuable consideration, extended the time of payment of the notes, and by reason of such extension of time the appellant claims that he is exonerated from the payment of the notes. The allegation of transfer is again repeated in the third affirmative defense, and an agreement for the settlement and the compromise for the appellant's liability upon said notes is there averred, by which it is alleged it was agreed that certain lands owned by the appellant should be conveyed in full payment of the notes, and appellant alleges the conveyance of the said lands to George R. Carter as trustee for the respondent, in full payment of the said notes. He further alleges, in the third affirmative defense, that, subsequently to the maturity of the notes, he demanded the surrender to him and possession of said notes. Now, the question under this pleading is, was the court justified in instructing the jury, in substance, that the question of ownership of the notes and transfer to the respondent was not for their consideration?

On this subject of inconsistent defenses there have been many conflicting decisions, but we think their origin has been in a misunderstanding of the cases cited and relied upon as sustaining the doctrine that inconsistent defenses, under the reformed practice of pleading, could be maintained; and, secondly, a loose discussion and misapprehension of what inconsistent pleadings really are. The idea that inconsistent defenses, to the extent of being false defenses, could be tolerated under the Code, has received a stimulus from the announcement of Mr. Pomeroy, in his excellent work on Remedies and Remedial Rights (section 722), that, "assuming that the defenses are utterly inconsistent, the rule is established by an overwhelming weight of judicial authority that, unless expressly prohibited by the statute, they may still be united in one answer. It follows that the defendant cannot be com-

pelled to elect between such defenses, nor can evidence in favor of either be excluded at the trial on the ground of the inconsistency." This announcement is attempted to be fortified by the citation of a large number of authorities. It was insisted by counsel for the respondent that an investigation of these authorities would show conclusively that they do not bear out the statement made by the author, and for the purpose of obtaining all the light possible on this question we have carefully examined the cases cited, and are forced to the conclusion that the learned author was unwarranted in making the assertion that the rule he announced was established by an overwhelming weight of judicial authority, or any weight of authority at all, under the code practice. We think it legitimately follows, however, that if these inconsistent defenses are allowed to be pleaded, evidence under them cannot be excluded at the trial on the ground of the inconsistency. Then, if they are inconsistent to the extent that, if one of the averments in the answer is true, the other must be false, and we follow the rule, as we must, that, if it is a proper subject of allegation, it is a proper subject of proof, a court of justice is placed in the absurd position of listening to proof of a defendant tending to sustain one proposition, and in the next breath proving another proposition, the facts of which are inconsistent with the one just testified to. This theory, carried to its logical result, would permit a defendant who was sued upon a promissory note to allege nonexecution, want of consideration, and payment. Under such allegations he would be permitted to swear that he never executed the note; that he did execute the note, but that it was without consideration; and that he did execute the note, that the consideration was good, but that he had paid the same. Such a practice as this would not only be farcical, but absolutely wrong and immoral, and an encouragement of perjury; and the example given is not extravagant, if the theory announced by the author be correct.

We take it that the only object of a lawsuit is the elicitation of truth, and that the only object of pleadings is to aid in determining the truth of the controversy. But the result of allowing pleadings to stand which are inconsistent, to the extent of being untrue, would have exactly the opposite tendency, and courts would simply become machines to aid unconscionable litigants in avoiding their just responsibilities. Under the common-law practice pleadings were based upon fictions, but the Code has undertaken to work a revolution in that respect, and under its provisions it is the evident intention that the pleadings shall be based upon facts which are susceptible of proof. Our Code provides that the complaint shall contain a plain and concise statement of facts constituting a cause of action, and while

it does not, in so many words, provide that the answer shall contain a statement of facts, it does so, in substance, so far as any affirmative allegations are concerned; for the language of the Code is that it shall contain a statement of any new matter, constituting a defense or counterclaim, in ordinary and concise language. It is true that it further provides that the defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both. This is all the authority there is for claiming that, under the Code, the defendant is allowed to plead inconsistent defenses. It is true that he may set forth as many defenses as he has, but it could not have been the intention of the Code that he should set forth anything that was not true; for, if it was not true, it would not be a defense. There certainly could have been no intention to have discriminated against the plaintiff by giving advantage to the defendant, so far as the pleadings are concerned. It is just as consistent to insist that the plaintiff may state in his complaint inconsistent causes of action, or facts constituting his cause of action which are inconsistent with each other, as to insist that the defendant may do so in his answer. The evident intention of the Code was to place them upon an equal footing,—to compel the plaintiff by his complaint, through the medium of a statement of facts, to inform the defendant what the true cause of action or complaint was; and it was just as much the intention of the framers of the Code to compel the defendant, if he had an affirmative defense, to inform the plaintiff by his answer what that affirmative defense was. There can be no reason or right in any other theory. The object of the Code was to simplify lawsuits. Whether it has succeeded in doing so may be questioned, but certainly it must be consistent with itself; and it would bring about untold confusion and bad results to undertake to ingraft into the Code practice practices which were admissible under, and probably harmonized with, the theory of the common-law practice. The two are incongruous, and must be kept separate and distinct, and therefore the commingling of the two evolves a system which is worse than either. -

But, notwithstanding the inconsistency of the courts in announcing the doctrine of inconsistent defenses, the authorities cited by Mr. Pomeroy in the text above referred to, while they use the expression, in some instances, that under the Code inconsistent defenses may be allowed, yet evidently do not mean that the defendant is allowed to plead a false defense,—a defense which is utterly inconsistent with the other defenses pleaded. Thus, one of the cases cited in the note of the author, viz. *Bell v. Brown*, 22 Cal. 671, announces that several defenses inconsistent with each other may, under proper circum-

stances, be set up in a verified answer. In that case, in an action to recover a mining claim, the complaint alleged title and possession in plaintiffs on a certain day. The answer denied that plaintiffs ever had either title or possession, and afterwards averred that if plaintiffs ever had a title to the claim, they had abandoned and forfeited it before defendants' entry. The question of title and possession might have been very largely a question of law, which it would have been unsafe for the defendants to have admitted. But that is altogether a different proposition from the one under consideration, where there is an affirmative allegation in the answer, which, if true, sustains an allegation of the complaint,—a fact alleged, the proof of which is material to the support of the plaintiff's cause of action. In this case there are no hypothetical facts pleaded; but the answer plainly avers that the notes were transferred, that the appellant dealt with the respondent as the owner and holder of them, and that, as such owner and holder, he made settlement for said notes. The most that could be said of such a pleading as this, where in one breath the pleader denies a fact and in the next admits it, is that the denial and admission balance each other, and leave the complaint in the position it would be in if no denials or admissions had been made. But in this instance the case is stronger against the defendant, for he denies by general denial and avers by special averment the truth of the thing which he denied. *Buhne v. Corbett*, 43 Cal. 264, was an action of ejectment, where the plaintiff demanded the premises, and averred that at a certain date the possession was unlawfully withheld from him by the defendants. The defendants, in their answer, denied that on said day, or at any other time, they entered into the possession of the premises, or that they then withheld the possession of the same. And they affirmatively made the showing that the lands belonged to the United States; that the United States had continually occupied and possessed said lands, from a date long prior to the date of the alleged withholding by the defendants, for lighthouse purposes; that it had erected and maintained a lighthouse thereon; that the defendants were the keepers of the lighthouse and employed by the United States at stipulated wages, and that as such keepers they were mere servants and employes of the United States, subject at any and all times to the orders, directions, and commands of the United States; that as such servants they were in the temporary charge of the light and lighthouse buildings on said land for the sole purpose of keeping the light burning at proper times. Averred that they did not at that time, and never had, claimed any interest in said lands or improvements, or any part thereof, but that, since its reservation for a lighthouse, the land had been in the sole possession of the United States through

its employes. And this case was based upon the doctrine announced in *Bell v. Brown*, *supra*. So that it will be seen at a glance that, while the court announces in words the rule that inconsistent answers may be pleaded, these answers were really not inconsistent; that the sole object was to raise the issue that the possession alleged by the complaint was the possession of the United States, and not the possession of the plaintiff in the action. The next case cited, that of *Willson v. Cleaveland*, 30 Cal. 192, is a still weaker case, and cites in its support, also, the case of *Bell v. Brown*. All that was decided in that case was that a defendant may deny the title of the plaintiff, and also plead the statute of limitations. It would seem that comment on this case was unnecessary. One is the pleading of a legal defense, and the other a defense on the merits; and the court in that case specially says that the defenses are not inconsistent.

It may profitably be noted here that a great majority of the cases which have announced the doctrine that inconsistent defenses may be pleaded cite, in support of the announcement, *Hollenbeck v. Clow*, 9 How. Prac. 289, which announces the rule that, in pleading defenses under the Code, the defendant shall not be required to elect between a denial of the material allegations in the complaint and new matter constituting a defense; that is, that the defendant should never be required to admit allegations in the complaint, which he might otherwise be able to deny, as the condition upon which he is permitted to set up affirmative matters of defense. This was an action for slander, where the charge, as stated in the complaint, was that the defendant stated that plaintiff had stolen the defendant's hay. There was a general denial by the defendant, and then the answer proceeded as follows: "And the said defendant, further answering, says that all the words which were spoken or uttered by the defendant of, to, or concerning the said plaintiff, as set forth in the complaint, charging him, said plaintiff, with stealing or taking hay, or that the plaintiff had stolen the defendant's hay, were spoken and uttered by the defendant in reference to a quantity of hay which the defendant had cut and stacked in the summer of 1853, and to which hay the plaintiff claimed title, and which hay the plaintiff, under such claim of title, in the daytime, took and removed upon lands adjoining to and in sight of where it had been left by the defendant, which trespass or transaction, and not the crime of larceny, was all that the defendant intended by the speaking of said words, and was so understood by and explained to all who heard the defendant utter the words." We have set this answer out at length because it conclusively shows that the defenses pleaded in this case were not inconsistent, but that the averment, after the general denial, was simply a pleading of the facts, the legal effect of which would be to

sustain the general denial, and would in no sense be an untrue averment, conceding the truth of the general denial; and it will be seen that they are in no sense inconsistent, although the court, in announcing its decision, speaks of them as inconsistent defenses. But the cases cited and reviewed by that court conclusively show that, in the judgment of the court, the defenses were not actually inconsistent, and certainly did not attempt to lay down the rule that inconsistent defenses could be pleaded to the extent of pleading untruthful defenses; for, in commenting on the case of *Arnold v. Dimon*, 4 Sandf. 680, cited by Justice Crippen in *Roe v. Rodgers*, 8 How. Prac. 356, where the action was against a carrier for the loss of goods, and defendant denied that he was the owner of the vessel upon which the goods were shipped, and then averred that the goods had in fact been delivered to the plaintiff, the court said: "It is quite possible, to say the least, that both of these defenses might have been true. They were, therefore, not wholly inconsistent, and should have been allowed to stand." So that it will be seen that this case is no basis at all for the announcement of the rule that defenses which are utterly inconsistent may be pleaded. *Butler v. Wentworth*, 9 How. Prac. 282, was also a case of slander, where the defendant answered, saying: "I have no recollection or belief of having so accused you; but, secondly, if I did, the charge was true." As a matter of course, if the defendant had no recollection of having used the slanderous words, he had a right to put the plaintiff upon his proof upon that question. He might not have known as a matter of fact whether he did use them or not. He may have used them, and forgotten them. And if it should eventuate in the trial that he did use them, then certainly he should not be deprived of his defenses of the truth of the words uttered. It cannot be said that, in any sense, these defenses are inconsistent. *Vail v. Jones*, 31 Ind. 467, announces the doctrine that, under the Code, the defendant may set forth in his answer as many grounds of defense as he may have, without regard to the location of the subject-matter, which was simply the language of the statute; but the case itself decides nothing that tends to sustain the doctrine claimed by the appellant. *Weston v. Lamley*, 38 Ind. 486, was a slander case, and the court there simply reiterated the doctrine announced in the other cases of that kind which we have reviewed, although what was said by the court, even in this case, was simply dictum, for it decided that the question could not be raised upon demurrer as it was attempted to be raised there. The case of *Moore v. Locks Co.*, 7 Or. 353, was where the answer alleged that the defendant was the owner of the entire estate, and also pleaded that he was the owner of one undivided part thereof, and the court decided there that inconsistent defenses could

be pleaded, but that these defenses were not inconsistent, because the defendant might be mistaken as to his legal title, and if he was he had the right to rely upon the title not being in the plaintiff. *Barr v. Hack*, 46 Iowa, 308, was a slander case, and the doctrine there announced was simply that which we have noticed in the decisions above.

We are at a loss to know why *Wright v. Bachellor*, 16 Kan. 259, was cited to sustain this doctrine, for there it was expressly said by the court that inconsistent pleas should not be encouraged; and while the case did not come up on instructions to the jury, the court below refused to allow the plaintiff to reply to an inconsistent averment in defendant's answer, and the supreme court held that such refusal on the part of the lower court to allow this averment to be put in issue by a reply was error, the defendant there having denied that she voluntarily or involuntarily executed a mortgage, and afterwards averred that, if she executed the mortgage, she was forced by her husband to execute the same against her will. And the court said: "These allegations are inconsistent with the affirmative allegations of the answer, for it cannot be true that she executed a mortgage under duress which she never executed. The setting up of inconsistent defenses like these should never be encouraged." The court expressly says that they do not pass upon the question as to whether the second defense stated in the answer was sufficient, as a defense, to require a reply thereto; that they express no opinion upon that subject, but that, assuming it to be such a defense, the court below erred in not allowing a reply to be filed. In *Bruce v. Burr*, 67 N. Y. 237, it was held that, in an action for breach of a contract of sale, the defendant might set up a rescission of the contract on the ground of fraud or mistake, and also breach of warranty on the part of the plaintiff. It is manifest that these defenses are not inconsistent, and that they both might be true, and both or either would be a proper defense to the action; for the plaintiff may have committed a fraud in procuring the contract, and he also may have been guilty of a breach of the warranty after the contract was procured. The case of *Amador Co. v. Butterfield*, 51 Cal. 526, in no way sustains the contention. *Bank v. Closson*, 29 Ohio St. 78, was an action by the bank against Closson upon a promissory note alleged to have been made by him to R. R. Fenner & Co. and indorsed to the bank before due. Closson set up the following defenses: (1) He denied the execution of the note; (2) he alleged that if the signature to the note was his, it was obtained by a fraudulent and cunningly devised scheme or trick without his knowledge, setting forth the fact that he was induced by false and fraudulent representations of Fenner & Co. to sign certain papers, represented to be mere receipts or orders relating to a proposed agency for selling a patent invention, and that if he

signed the note his signature was procured by making him believe that he was signing one of the receipts or orders, that it was obtained without consideration, and that the bank had knowledge of these facts when it purchased the note. The supreme court very properly held, and could not have held otherwise under any system of pleadings, that these defenses were all open to the defendant. They are not in any sense inconsistent; for, even though the note was made as affirmed in the second defense, it would not be a legal execution of the note, and consequently does not contradict the first denial, viz. the denial of the execution of the note. The case of *Pavey v. Pavey*, 30 Ohio St. 600, is exactly the same kind of a case, and is based upon the decision of the case of *Bank v. Closson*, supra, and the court says that it cannot be distinguished from that case. These are all the cases that are cited by Mr. Pomeroy to sustain the text, and we think it must be conceded, upon an investigation of them, that they absolutely fail to do so. Many of these cases are cited by the appellant in his reply brief. Many others, however, are cited, and an investigation of those cases convinces us that they are as far from sustaining the doctrine of inconsistent defenses as those cited by Mr. Pomeroy, which we have just reviewed.

Want of time prevents us from reviewing these cases in detail, but a careful examination of them convinces us that they go no further than the cases above reviewed, with the exception, possibly, of *Stebbins v. Lardner* (S. D.) 48 N. W. 847, and this case is based upon the announcement of the text above referred to by Mr. Pomeroy, and cites the cases cited by that author to sustain the theory announced by the court. In none of the cases examined has it been held that an affirmative allegation by the defendant of a fact which, if true, would necessarily compel the conclusion that some other fact which had been pleaded in the same answer was false, can be sustained; and while much loose talk has been indulged in by the courts concerning the pleading of inconsistent defenses, when the facts involved in the cases are scrutinized, it can easily be ascertained that the courts have never announced the rule established under the code pleading where the answer has to be verified by oath, that the pleader will be allowed to compel the plaintiff to enter upon the investigation of a state of facts which, if admitted to be true, would subject the defendant to the penalties of perjury. There are other cases, however, that have decided this question as we are deciding it now, and the courts in those cases have spoken with no uncertain sound. It is not difficult to tell what they have decided. They base their decisions on principle, and sustain them with practical and cogent reasoning. Chief among these cases is that of *Derby v. Gallup*, 5 Minn. 119 (Gil. 85). The opinion of the judge in that case, says Mr. Pomeroy, in his notes,

"is very able and difficult to be answered on principle," thus showing that the sympathy of that learned author was with this line of decisions, and that the rule he announced was based upon a false conception of the authorities quoted. In conclusion, this much, at least, must be demanded: That, however diversified the answers may be, they must all contain the essential element of truth, and if the admission of the truth of one answer necessarily proves the falsity of another, they cannot be allowed to stand, and the plaintiff will not be compelled to sustain the truth of an allegation the truthfulness of which is asserted by the defendant. The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

LAMBERTON et al. v. SHANNON et al.

(Supreme Court of Washington. Jan. 9, 1896.)

ACTION ON NOTE—GENERAL DENIAL—INCONSISTENT DEFENSES.

An answer, in an action against defendants as makers of a note, denying that they executed the note as principals, and denying "each and every part \* \* \* of the complaint, except as herein expressly admitted, explained, or qualified," followed by an affirmative defense that they signed as sureties, which was demurrable, and inconsistent with a general denial, did not disclose an independent defense, to prevent plaintiff from taking judgment on the pleadings.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Action by Henry W. Lamberton and another against George D. Shannon and others on a note. Plaintiffs had judgment, and defendants appeal. Affirmed.

John P. Judson and John C. Kleber, for appellants. R. B. Lehman, B. F. Heuston, and T. W. Hammond, for respondents.

DUNBAR, J. The complaint alleges that the defendants, for valuable consideration, made, executed, and delivered to the plaintiffs a promissory note on the 6th day of March, 1893, whereby they jointly and severally promised to pay to the order of plaintiffs the sum of \$2,000; and that said note was signed on its face by the Olympia Light & Power Company, and at the same time, for the purpose of giving credit to said note, as part of the original transaction, and before the delivery thereof, the defendants signed said note by writing their respective names upon the back thereof, waiving demand, protest, and notice of nonpayment; alleges the maturity of the note and failure to pay; and demands, for judgment, the amount due, viz. \$1,500, with interest and attorneys' fees provided for in the note. The answer admits the first allegation in reference to the corporate capacity of the Olympia Light & Pow-



er Company; denies that on March 6, 1893, or at all, either jointly or severally, with one A. Farquhar of the Olympia Light & Power Company, they made the note referred to in the complaint; denies that there was any consideration from the plaintiffs and the payee named in the said note to these defendants, or either of them; denies that ever, jointly or severally, or otherwise, as principals, they promised to pay to the plaintiffs the sum of \$2,000, or any other sum; and the paragraph ends with these words, "that they deny each and every part, and the whole, of paragraph 2 of the complaint, except as herein expressly admitted, explained, or qualified," and then proceeds to affirmatively set out that, on the 6th day of March, 1893, the Olympia Light & Power Company was indebted to plaintiffs in the sum of \$2,000, and that it was mutually agreed between plaintiffs, the Olympia Light & Power Company, and these defendants that the Olympia Light & Power Company should make, execute, and deliver to the plaintiffs its promissory note to secure the payment of said sum, and that these defendants should indorse said note as sureties only, and that in pursuance of said agreement the note was executed and indorsed, and that the defendants did not receive any part of the money, but that the Olympia Light & Power Company received it all. Wherefore they pray that the question of suretyship of them to said corporation be tried and determined upon these issues, and that they have all proper relief herein. To this answer the plaintiffs demur, which demurrer was overruled. Afterwards plaintiffs made a motion for judgment on the pleadings, which judgment was sustained by the court.

It appears that the judge who overruled the demurrer was not the same judge who afterwards sustained the motion for judgment on the pleadings; and while this may appear to be an irregular and inconsistent practice, we think that no substantial harm was done, as motion for judgment on the pleadings was in effect setting aside the order overruling the demurrers. It is contended by the appellants that the affirmative defense should not be considered with reference to that portion of the general denial which provides that the defendants deny, except as herein "expressly admitted, explained, or qualified"; that that exception applied only to the matters and things set out in the first answer or the general denial; that it had no reference to the subsequent answer or the affirmative allegations pleaded in the second answer; and that, consequently, a good independent defense had been pleaded, which should prevent the plaintiffs from taking judgment upon the pleadings. We do not think there is the least merit in this contention. The expression, "except as herein expressly admitted, explained, or qualified," evidently was intended to refer to both the first and second defenses. This is the only

construction which renders the pleading intelligible, and, after using the expression above quoted, the answer proceeds in the second answer to set out the qualifications and admissions, which we must hold, under the law announced in *Bank v. Carter*, 43 Pac. 331; *Allen v. Power Co.*, 43 Pac. 55, and *Allen v. Chambers*, 43 Pac. 57, lately decided by this court, are inconsistent with the general denial, and therefore that the answer does not plead a defense which will place the plaintiffs upon proof of their allegations. The other contention in this case, viz. that the defendants had a right to show by parol testimony that they were sureties, falls squarely under the rule announced by this court in the case of *Allen v. Chambers*, supra, so that it would be useless to discuss the proposition here. The judgment will be affirmed.

HOYT, C. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

ANDERSON v. RISDON-CAHN CO. et al.  
(Supreme Court of Washington. Jan. 14, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF CREDITORS—WAIVER—APPEALABLE JUDGMENT.

1. That a creditor of an insolvent debtor, who had made an assignment for the benefit of creditors, under the belief that certain of the property assigned belonged to a partnership comprised of the assignor and his wife, and therefore did not pass under the assignment, sells the same under a judgment recovered against the husband and wife as partners, does not prevent the creditor, on his judgment being set aside as to the wife, and recovery of judgment against him by the assignee for the value of the property sold, from sharing in the assigned estate.

2. An assignee for benefit of creditors, who has recovered judgment against a creditor for the sale of assigned property on judgment against the assignor, will not be enjoined from collecting such judgment, on bond being given to pay the excess thereof over the creditor's share in the estate assigned. Gordon and Scott, JJ., dissenting.

3. On recovery of a judgment by an assignee for the benefit of creditors against one of the creditors, an order restraining him from collecting such judgment on the giving of a bond by the creditor to pay the excess of such judgment over the share of the creditor in the assigned estate, is appealable as a final order affecting a substantial right of the assignee.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Proceeding by the Risdon-Cahn Company and another against Fred H. Anderson, as assignee of the estate of J. P. Hayden. There was a judgment for the former, and the latter appeals. Reversed.

Bruce, Brown & Cleveland, for appellant. Fairchild & Rawson, for respondents.

HOYT, C. J. In the fall of 1890, J. P. Hayden made a voluntary assignment for the benefit of his creditors. Among them

was the respondent Risdon-Cahn Company, which at the time had an action pending in the superior court against said Hayden and wife, who had been sued as copartners. Appellant duly qualified as assignee of the estate of said J. P. Hayden, and thereafter the said respondent filed with him a claim for the same debt sought to be recovered in the suit against the partnership. Thereafter the suit against said Hayden and wife was tried, and judgment had for the plaintiff. The wife appealed from the judgment, and it was reversed, and the action dismissed as to her. After such judgment was rendered, and before the appeal of the wife had been perfected, a writ of attachment was issued, and property in the hands of the assignee seized as the property of the copartnership. The assignee then informed the court of the action taken, and asked an order directed to said respondent and the sheriff, commanding them to return the property. An order was made vacating the attachment, and directing the property to be turned over to the appellant. The respondent took an appeal, pending which it caused an execution to be issued upon the judgment against the partnership, and thereunder the attached property was sold, and the proceeds paid to the respondent. Thereafter the appellant brought suit against said respondent, and obtained judgment for \$2,000, which is in full force and unpaid. Webb & Co., the other respondent, succeeded to the assets of Risdon-Cahn Company, and thus became the real party in interest. Without paying the judgment for \$2,000, the respondents filed an affidavit setting out the facts above stated, and asked that the appellant be required to make a report as to the condition of the insolvent estate, and to distribute its assets, for the purposes of which he was to treat such judgment as a cash asset in his hands, and allow respondents' share of the estate as a payment thereon. In such affidavit it was stated that, upon this being done, they were ready and willing to pay to the assignee the balance remaining unpaid upon said judgment. The court made an order substantially as prayed for, and restrained the appellant from proceeding in the collection of the judgment until it had been complied with. It is contended by the respondents that from such order an appeal will not lie, but, in our opinion, it so determined the rights of the parties that it was a final order, affecting a substantial right within the meaning of our statute as to appeals. It purported to absolutely determine the right of the respondents to share in the proceeds of the insolvent estate, and prevented the appellant from collecting the judgment against the respondents. It is urged by the appellant that the court committed error in making the order, for two reasons: (1) That under the facts disclosed by the record the respondents were not entitled to share in the proceeds of the estate; and (2) that, if they were, the appellant could

only have been rightfully required to apportion such proceeds among the creditors after they had been reduced to possession; that it was not proper for the court to direct him to consider the judgment against the respondents as an asset of the insolvent estate for the purposes of distribution, until the money due thereon had been collected. The ground of the first contention is that the respondents had claimed and attempted to assert rights so adverse to those of the appellant that they must be presumed to have elected to waive any claim against the insolvent estate. If a creditor attempts to assert rights clearly adverse to those of the assignee of an insolvent estate, he will be held to have waived any right to a distributive share thereof. Such has been the uniform holding of the courts, and it is not contended by the respondents but that such would be the effect of such action. But it is claimed by them that during the entire litigation the rights which the respondent Risdon-Cahn Company were asserting were not supposed to be adverse to those of the assignee. Such litigation proceeded upon the theory that the claim was against a copartnership composed of J. P. Hayden and wife, and that the property belonged to such copartnership, and did not pass to the assignee of J. P. Hayden. By adjudications subsequent to the time of the assertion of such rights against the property it was determined that it was not that of a copartnership, but was that of the individual partner who had made the assignment. But it nowhere appears from the record that after this fact had been finally adjudicated any rights adverse to the assignee had been asserted by the respondents. Nor was it made to appear that their attempt to assert a claim against the property as that of the copartnership had been in bad faith. On the contrary, it appeared that there was sufficient foundation for such claim to induce the superior court to decide in accordance therewith, and it was only upon an appeal to this court that the contrary was determined. For these reasons it must be assumed that at the time the attempt was made by the respondent Risdon-Cahn Company to assert rights under its judgment it believed that they were not adverse to those of the appellant. This being so, the rule as to election does not apply. The general rule is that an election, to be binding, must be made with a full knowledge of the facts; and there is no good reason why such general rule should not apply in the case at bar. On the contrary, there seems to be special reason why it should. A mistake of law will not usually relieve a party from the results of an election. But even such a mistake has been held sufficient to relieve from the effect of the assertion of rights adverse to an assignee of an insolvent estate. In the case of *Epwright v. Kauffman* (Mo. Sup.) 1 S. W. 736, a creditor attempted to enforce his claim against property which belonged to the assignee of an insolvent es-

tate, and it was claimed that by such action he had forfeited his right to a share of said estate. But, it having been made to appear that by reason of a mistake of law he believed that the property would not pass to the assignee, it was held that he had not forfeited his right to share in the estate. If a mistake of law would relieve from the consequences of acts, much more would a mistake of fact. Under the circumstances the respondents did not act so adversely to the rights of the appellant that they were debarred from sharing in the proceeds of the insolvent estate.

The other question presented must be decided in favor of the appellant. An assignee of an insolvent estate could not be required to treat as cash assets for the purposes of distribution an uncollected claim against one of the creditors, or any other person. That the judgment in the case at bar was not in itself equivalent to cash was admitted by the action of the respondents in tendering a bond to the effect that they would pay any balance after their share of the insolvent estate had been deducted from the judgment. But the bond was no more equivalent to the cash than was the judgment. In fact, so far as the actual reduction to possession was concerned, it was one step further removed. No money could be realized thereon without an independent action commenced and prosecuted to judgment. The prosecution of such an action would require the expenditure of time and money by the assignee, and, if distribution had been made upon the assumption that the judgment was cash, the assignee, or some one of the other creditors, would have to stand this expense. The assignee was entitled to enforce the judgment against the respondents without regard to any claim which they might have as creditors of the estate. The order will be reversed, and the cause remanded, with instructions to deny the application.

DUNBAR and ANDERS, JJ., concur.

GORDON, J. I fully concur with what is said in the foregoing opinion upon the first proposition therein discussed, but I respectfully dissent from the views expressed concerning the remaining proposition, and from the conclusion reached. The record discloses that the case was heard in the court below upon a stipulation of the parties as to the facts. It further appears that the claim of the respondents against the insolvent estate amounted to \$2,400, or \$400 in excess of the judgment recovered by the assignee against respondent corporation. It further appears that the only claim due to the estate remaining uncollected at the time of respondents' application to the lower court was the judgment for \$2,000 in favor of the assignee and against respondents, hence there will be no difficulty in determining the distributive share due the respondents after the appel-

lant shall have filed his report as assignee. The relief sought by the respondents was "an order of court direct to Fred H. Anderson [assignee] directing and commanding him forthwith to file with the clerk of this court an accounting, and, after such accounting be had, showing the moneys collected and expended by the said Fred H. Anderson, an order of apportionment be made to the creditors of said insolvent estate, and that upon paying the balance found due to said assignee after crediting the amount due from said insolvent estate to Risdon & Cahn Company the said action of said Fred H. Anderson as assignee against Risdon & Cahn Company be abated and dismissed." The judgment of the court was: "That Webb & Co., a corporation, is successor to Risdon & Cahn Company; \* \* \* that the said Webb & Co., as successors, \* \* \* have filed with the said Anderson, as assignee of the said J. P. Hayden, a claim exceeding \$2,400, upon which claim they are entitled to their distributive share from the insolvent estate of J. P. Hayden & Co.; and, it further appearing that the said Webb & Co. is ready and willing to pay any balance that may be due from it to the said Fred H. Anderson, as assignee of the said insolvent estate, after the said distributive share is deducted from the judgment heretofore rendered in favor of the said Fred H. Anderson, as assignee of such insolvent estate, and against the said Risdon-Cahn Company; and that the said Webb & Co. has brought into court a bond in the sum of three thousand dollars (\$3,000), conditioned to pay the said judgment so obtained against the said Risdon-Cahn Company, or such sum, if any, as the court may find to be due from it, after allowing the amount due to the said Webb & Co. from the said insolvent estate, and further conditioned to obey all orders of the court made in the premises: It is now by the court ordered and adjudged that upon the filing of said bond, and the approval thereof by the clerk of the court, the said judgment of Fred H. Anderson, assignee, against the said Risdon-Cahn Company be stayed until the said Fred H. Anderson, assignee, shall have filed his report, and an order of distribution is made, at which time any sum that may be due from the said insolvent estate shall be credited upon said judgment." So much of the order as pertained to the bond was in the interest and to the advantage of the appellant, and, in my view of the law and of the record, it might properly have been dispensed with, as I conceive that the respondent was entitled to have the judgment against it canceled upon payment of the amount remaining due upon said judgment after it received credit for its distributive share in the estate of said Hayden & Co. The vital part of the order or judgment appealed from is contained in the words following, viz.: "That the said judgment \* \* \* against the said Risdon-Cahn Company be

stayed until the said Fred H. Anderson, assignee, shall have filed his report, and an order of distribution is made, at which time any sum that may be due from the said insolvent estate shall be credited upon said judgment." It seems to me that this was no more than the respondent was entitled to. It was seeking only to be credited upon the judgment held by the assignee against it with the amount which it was entitled to receive as its share in the estate, and, as already suggested, the condition of the estate was such as to render it neither difficult nor impossible to determine what that distributive share should be. No substantial right of the appellant or of any creditor was affected injuriously by the order appealed from, and, in my opinion, it should be affirmed.

SCOTT, J., concurs.

### RUSSELL v. GUPTILL.

(Supreme Court of Washington. Jan. 3, 1896.)

#### SCHOOLS—OFFICERS—QUALIFICATIONS—WOMEN.

Laws 1889-90, p. 348 (1 Hill's Code, § 775), providing for the election of county superintendent of schools, provides that "he" shall give bond, etc., and fixes "his" term of office. Section 78 of the same act (1 Hill's Code, § 856) provides that whenever the word "he" or "his" occurs in the act referring to county superintendent, etc., or other school officer, it shall be understood to mean also "she" or "her." *Held*, that a woman was capable of holding the office of county superintendent of schools.

Appeal from superior court, Clallam county; James G. McCilinton, Judge.

Action by Charles E. Russell against Ella L. Guptill. From a judgment annulling defendant's election as superintendent of schools, she appeals. Reversed.

Trumbull & Trumbull and Louis Williams, for appellant. Geo. C. Hatch, for respondent.

ANDERS, J. This is an appeal from the judgment of the superior court of Clallam county annulling and setting aside the election of the appellant to the office of superintendent of common schools for said county. There is no dispute as to the facts, and the sole question to be determined is whether the appellant, being a woman, is eligible to the office to which, it is admitted, she was duly and regularly elected. It is conceded by respondent that the state constitution does not prohibit females from holding the office of county superintendent of schools, and that the legislature possesses the power to confer the right to hold such office upon a woman. His contention is that, prior to the election of appellant, there was no law in this state conferring this right upon her, and that the judgment of the court below should therefore be affirmed. The legislature has not prescribed the qualifications of county superintendents, but it is claimed by re-

spondent that section 3050 of the Code of 1881, which he insists is still in force, expressly precludes women from holding any office whatever. That section provides that "all American males above the age of twenty-one years, \* \* \* and none other, shall be entitled to hold office or vote at any election in this territory." The fact is, however, that this section is for the most part, if not altogether, superseded by the provisions of the constitution, except, possibly, the provision concerning the election to office of persons belonging to the army or navy. See Const. art. 6, §§ 1-4, inclusive, and article 27, § 2. But, if that were not so, the provisions therein contained would not in any way affect any other provisions the legislature may have made as to what persons may or may not be eligible to the particular office in question.

It being confessedly within the province of the legislature to provide that a person of either sex may hold the office of county superintendent, let us see what they have said upon the subject. The first legislature passed a comprehensive act establishing a general, uniform system of common schools, which, among other things, provides for the election, in each county of the state, of a superintendent of schools, and prescribes his duties. Laws 1889-90, p. 348. Section 10 of that act, being section 775, 1 Hill's Code, reads as follows: "A county superintendent of common schools shall be elected in each county of the state at each general election, whose term of office shall begin on the second Monday in January next succeeding his election, and continue for two years, and until his successor is elected and qualified. He shall take the oath or affirmation of office, and shall give an official bond in a sum to be fixed by the board of county commissioners. He may, at his own cost, appoint a deputy, who shall qualify in the same manner as the county superintendent, and perform all the duties of the office, subject, however, to revision by the county superintendent. The county commissioners of each county shall fill any vacancy that may occur in the office of county superintendent until the next general election." It will be observed that the legislature in this section used the pronouns "he" and "his" in speaking of the term of office and of the official oath and bond of the county superintendent. These words imply the masculine gender, and it is nowhere in the act, or elsewhere, provided expressly that females may hold this office; but that they may, we think, must necessarily be implied from the language used in section 78 of the same act (1 Hill's Code, § 856), which is: "Whenever the word 'he' or 'his' occurs in this act, referring to either the members of the board of education, county superintendents, city superintendents, teachers, or other school officers, it shall be understood to mean also 'she' or 'her.'" It is often necessary for the courts to resort to

artificial rules of construction in order to arrive at the meaning of the legislature; but where the legislature itself puts a construction upon an act, by a provision embodied therein, such construction is binding upon the courts, although the latter, without such a direction, would have understood the language to mean something different. *End.* *Interp. St. § 365; Suth. St. Const. §§ 229, 231; Byrd v. State, 57 Miss. 243; Herold v. State, 21 Neb. 50, 31 N. W. 258.* Now, if the legislature, when they enacted section 78, did not contemplate that women might be elected to the office of county superintendent, it seems clear that the language used is entirely without force or meaning. It was idle and senseless for them to say, "She shall take an oath of office, and give an official bond," if they did not understand, and mean to be understood, that female citizens might hold the office of which they were speaking. It is the duty of the courts ordinarily to give full force and effect to every word of a statute, rather than to attribute to the legislature either folly or ignorance of the words they employ. There being in this state, therefore, no constitutional or statutory disqualification of females to hold the office of county superintendent of schools, and the legislature having, by clear implication, recognized the right, our conclusion is that the office may legally be held by a woman who is competent to discharge the duties pertaining thereto. For a more full and complete discussion of this question, see *Wright v. Noell, 16 Kan. 601; Opinion of the Justices, 115 Mass. 602; Huff v. Cook, 44 Iowa, 639.* The judgment is reversed, and the cause remanded to the superior court, with directions to dismiss the proceeding.

HOYT, O. J., and DUNBAR, J., concur.

#### SCHOOL DIST. NO. 5 OF SNOHOMISH COUNTY v. SAGE et al.

(Supreme Court of Washington. Jan. 8, 1896.)

#### ARBITRATION—REVIEW OF EVIDENCE—ERROR IN LAW.

1. Under Code Proc. § 429, providing that, if it shall appear that the arbitrators have committed error in fact or law, the cause may be referred back to the arbitrators, the errors must be apparent upon the face of the award alone, or in some paper delivered with it, and the evidence submitted to the arbitrators cannot be examined.

2. Where arbitrators are required to decide according to the strict rules of law, if the error complained of is not plain or if the point of law is doubtful, their decision will not be interfered with on account of error in law.

3. Though arbitrators found that a building, as completed by plaintiff, varied in some particulars from the original plan, but made their award in plaintiff's favor, after having credited defendant with a certain amount for such variation, their award will not be disturbed by the court.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

In the matter of Frank Sage and others against school district No. 5 of Snohomish county. Exceptions to the arbitrator's award were overruled, and the school district appeals. Affirmed.

Geo. J. Sherry and A. D. Austin, for appellant. A. K. Delaney, for respondents.

ANDERS, J. The respondents entered into a written contract with appellant to erect for it a schoolhouse for the sum of \$18,179, according to plans and specifications prepared by its architect, F. A. Sexton, and signed by the parties, and according to the terms of said contract. Prior to the making of this contract, appellant had purchased the Smead heating and ventilating apparatus, for \$3,000, to be used in the schoolhouse proposed to be erected, under a written agreement by which the Smead Company were to furnish plans and specifications, and to superintend the putting of the apparatus into the building. Soon after the signing of the contract, the respondents commenced the construction of the schoolhouse, which they completed on or about October 23, 1893, to the satisfaction of appellant's said architect, who delivered to them a certificate of completion, and also a certificate showing the balance due respondents, including the value of extra labor performed and materials furnished by them. Payments were made by appellant to respondents, from time to time, as the work progressed, the last one having been made on October 15, 1893. Further payment was refused, for the alleged reason, among others, that respondents had not complied with the terms of their contract. Appellant also claimed that, under the contract, respondents were obliged to furnish everything requisite for the building, including the Smead system of heating, and that its cost should be deducted from the contract price of the building. On the contrary, the respondents claimed that they had complied with their contract, and that their agreement did not require them to furnish or pay for the heating and ventilating apparatus purchased by appellant. On its completion, appellant took possession of the building, and occupied it as a schoolhouse. Appellant insisted on deducting the cost of the Smead system from the contract price, and that the final certificates of the architect were not binding upon it, on account of his bad faith with the appellant and collusion with respondents, and of his unfaithfulness to his trust in the preparation of details, and in accepting inferior work and materials, and deviating from plans and specifications, and assuming authority not given by the contract, and that respondents were entitled to no further payment until they had fully and completely performed their contract. In order to settle their differences and disputes, the respond-

ents and appellant, by its board of directors, entered into a written agreement, submitting to arbitration the following questions: (1) As to the mutual differences between said parties, and to determine the amount, if any, due the parties of the first part (respondents) under and by virtue of the aforementioned contract, without any consideration of the heating and ventilating apparatus known as the "Smead System"; (2) as to whether or not the expense of putting said system into the building should be borne by the parties of the first part, and thereupon determine the gross amount, if any, due the parties of the first part under said contract, and to make the proper award under this agreement, as provided by the laws of this state. Under this agreement, the respondents chose L. K. Church, and the appellant chose J. S. White, as their respective arbitrators, and the two chose R. McFarland as the third. After being duly sworn, said arbitrators proceeded to hear, try, and determine the differences submitted to them by said agreement; and, after hearing and considering the evidence produced by the respective parties, a majority of them, on May 16, 1894, made their award, finding that the furnishing of said heating and ventilating system and apparatus was not within the terms of respondents' contract with the school district, and that there was due from said school district to respondents Chapman and Sage the sum of \$5,582.89, together with the costs of arbitration, including the fees of respondents' witnesses. This award, together with the written agreement of submission, was filed with the clerk of the superior court of Snohomish county, and a copy thereof served on the school district, as provided by law. Exceptions to the award were served and filed by the appellant, all of which were overruled by the court, and judgment was rendered in favor of the respondents for the amount stated in the award. The school district brings the cause here for review.

The argument of the learned counsel for appellant, as indicated by their brief, seems to proceed upon the theory that this court will try and determine the matters in controversy between these parties upon the evidence which was submitted to the arbitrators, and which has been transmitted to this court as part of the record herein. But such is not the theory of the law. The only power conferred by law upon the court below respecting the questions presented by the exceptions was that which authorized it to refer the cause back to the arbitrators for amendment of their award, in case it appeared that they had committed error in fact or in law, or, if no such error appeared, to confirm the award as made. With the merits of the controversy the court had nothing whatever to do. It was not possessed of the case for the purpose of proceeding to its determination. Code Proc. § 429. Neither is this court so possessed of it. The sole ques-

tion for our determination is whether the superior court erred in sustaining the award. The court filed no findings of fact or conclusions of law, but simply overruled the objections to the award, the ground of which objections was the statutory one that the arbitrators committed error in fact and in law. *Id.* § 428.

Having shown the extent and limit of the power of the court in the premises under the statute, the question arises as to how it was to determine whether the errors complained of had been committed. Was it by an examination of all the evidence taken before the arbitrators, and upon which they based their award, or was the question to be determined from the award itself? The legislature has provided that arbitrators shall have power to decide both the law and the fact that may be involved in the cause submitted to them (Code Proc. § 430); and that is the common-law rule, upon a general submission, unless the arbitrators are restricted by the agreement to submit (Morse, Arb. p. 296). The legislature has also provided, as we have seen, that awards may be set aside for error in fact or law; but, inasmuch as there is no provision in the statute requiring arbitrators to file or preserve the evidence received upon the hearing, it would seem to follow that the errors which will sustain an exception to an award on the ground indicated must be discovered by an examination of the award alone. If it was the intention of the legislature to require the court, upon hearing exceptions taken to awards, to examine the evidence submitted to the arbitrators, or, in other words, to try the cause *de novo*, it is but reasonable to presume that they would have so declared. And, in the absence of such provision, we think we are justified in adopting the rule announced in many well-considered cases, and which we believe is subject to but few exceptions, *viz.* that the errors and mistakes contemplated by the statute must appear on the face of the award, or, at least, in some paper delivered with it. 1 Am. & Eng. Enc. Law, p. 710; *Pleasants v. Ross*, 1 Wash. (Va.) 156; *Hartshorne v. Cuttrel*, 2 N. J. Eq. 297; *Goldsmith's Adm'r v. Tilly*, 1 Har. & J. 361; *Fudickar v. Insurance Co.*, 62 N. Y. 392; *Halstead v. Seaman*, 52 How. Prac. 415; *De Castro v. Brett*, 56 How. Prac. 484; *Morse, Arb.* 325. In 1 Am. & Eng. Enc. Law, *supra*, it is said that "the mistake for which an award will be set aside must be palpably apparent upon its face, in some material point, and extremely prejudicial to the losing party"; and numerous decisions are referred to in support of the proposition. Arbitration is favored by the law as an easy, expeditious, and inexpensive mode of adjusting disputes and differences, and awards are generally very liberally construed by the courts. All reasonable intentions and presumptions will be indulged to uphold them, and no intentions will be made to overthrow them. The principal ob-

ject of submitting controverted questions to arbitration is to avoid the expense and delay incident to ordinary proceedings in the established courts of justice, and, after parties have submitted their disputes to a tribunal of their own selection, they ought generally to be bound by the result. *Wilson v. Wilson* (Colo. Sup.) 34 Pac. 175; *Wood-Working Co. v. Schnieder*, 119 N. Y. 475, 24 N. E. 4. The adoption of any other rule would result in making arbitration the beginning instead of the final determination of controversies, and would create a fruitful source of litigation. This was a general submission of all differences growing out of the contract between the parties, and all that either party was entitled to was the honest judgment of the arbitrators upon the questions submitted to them. It is not claimed that the arbitrators in this instance were guilty of corruption or misconduct, or that they did not exercise their judgment honestly, after a full and fair hearing of both parties. The contention is simply that they erred in their judgment upon the facts and the law. Under such circumstances, awards will not be set aside for mistakes or errors in judgment, for the very purpose of a submission to arbitration of all questions of law and fact touching particular matters in controversy is to obtain the decision and judgment of the arbitrators thereon. Upon a submission like the present, where it is not shown that the arbitrators were deceived and misled by some error or mistake, so that the award is not really the result of their judgment, but where it appears that their decision was fairly and honestly made, upon due consideration of all the evidence before them, the award ought to be held conclusive and binding upon the parties. *Power Co. v. Gray*, 6 Metc. (Mass.) 131. See, also, *Burchell v. Marsh*, 17 How. 344; *Godard v. King*, 40 Minn. 164, 41 N. W. 659; *Wood-Working Co. v. Schnieder*, supra. In the case last cited, the court, by Gray, J., said: "I think the rule should be a settled one that the submission by parties of all matters in dispute, growing out of a particular transaction or contract, will estop them from thereafter claiming that the award is not conclusive, if its language and terms, when fairly regarded, are comprehensive. The presumption should be strongly upheld by the courts that the arbitrators' decision was a final adjustment of all matters in controversy." As to matters of law, arbitrators, unless restricted by the agreement to submit, are not bound, in all cases, to follow the strict rules of law governing the courts, but may decide in accordance with their views of the equitable rights of the parties. *Wilson v. Wilson*, supra. In *Fudickar v. Insurance Co.*, supra, the court, in discussing this question, uses language peculiarly applicable

to this case, and which is as follows: "But it is held, in accordance with what seems to be a just view of the subject, that arbitrators may, unless restricted by the submission, disregard strict rules of law or evidence, and decide according to their sense of equity. *Kleine v. Catara*, 2 Gall. 61, Fed. Cas. No. 7,869; *Power Co. v. Gray*, 6 Metc. (Mass.) 131; *Tyler v. Dyer*, 13 Me. 41; *Hazeltine v. Smith*, 3 Vt. 535; *Cushman v. Wooster*, 45 N. H. 410; 2 Story, Eq. Jur. § 1454. If, for example, a claim for compensation for the erection of a building by one person on the land of another, under a contract which, by technical construction, makes the right to compensation dependent upon full performance by the builder, is referred to arbitration, and it turns out that there has been a failure by the builder to comply with the contract in some particulars, although the benefit which the other party has received from part performance is greater than the injury sustained by the failure to perform the contract in full, the arbitrator may, I think, where the submission is general, award the excess of benefit, although, in an action at law upon the contract, he could not, within the decision in *Smith v. Brady*, 17 N. Y. 173, recover." If the language quoted expresses the correct doctrine,—and we think it does,—it disposes of the contention of appellant that the arbitrators committed error in law by finding in favor of respondents, after having found that the building, as completed by them, varies in some particulars from the original plans and specifications, but was built and completed according to the details and working drawings of said architect, Sexton, and as by him directed. In making their award, the arbitrators credited the school district with the sum of \$1,318.03, as compensation or damages on account of respondents' failure to comply with the exact terms of their contract in the particulars referred to in the award. But even where arbitrators are required to decide according to the strict rules of law, if the error complained of is not plain, or if the point of law is a doubtful one, it has been held by respectable authority that their decision will not be interfered with on account of error in law. *Morse, Arb.* p. 314. In this case the points of law made by appellant are, to say the least, not free from doubt; and we are therefore not prepared to say, even if it were conceded that the arbitrators were bound by the strict rules of law, that their award should be set aside on the ground that it is contrary to law. We perceive no error in the ruling of the superior court, and the judgment must therefore be affirmed.

HOYT, C. J., and DUNBAR, SCOTT, and GORDON, JJ., concur.

**BOYLE v. GREAT NORTHERN RY. CO.**  
et al.

(Supreme Court of Washington. Jan. 9,  
1896.)

**STATEMENT OF FACTS—FILING—INDEPENDENT CONTRACTORS—PLEADING—JUDICIAL NOTICE.**

1. A statement of facts appearing to have been filed after the copy was served, although on the same day, cannot be considered.

2. An allegation that a certain firm were constructing a portion of the roadbed of a railroad company, and that plaintiff was working for them as a common laborer, sufficiently shows that said firm were independent contractors.

3. Courts take judicial notice that railway companies are common carriers.

4. A complaint against a railroad company for personal injuries sustained by one who was employed by independent contractors who were then building a portion of the road, alleging that there was an "arrangement" between the railroad company and said contractors whereby said railroad company was to transport the employees of said contractors, sufficiently showed that there was an agreement to that effect.

5. Plaintiff's statement, in an action for personal injuries, that an action for the same cause, which had been commenced in the federal court, was dismissed after the filing of a plea in abatement alleging the pendency of said action, was a sufficient reply to said plea.

Appeal from superior court, Spokane county; Jesse Arthur, Judge.

Action by Philip Boyle against the Great Northern Railway Company and others for personal injuries. Plaintiff had judgment, and defendants appeal. Affirmed.

C. Wellington, Jay H. Adams, and M. D. Grover, for appellants. Plummer & Thayer, for respondent.

HOYT, C. J. The motion of respondent to strike the statement of facts from the record was granted at the hearing, and the argument upon the merits confined to questions arising upon the pleadings. Two reasons were assigned why said motion should be granted: (1) That a copy of the proposed statement of facts had not been served upon the respondent after it was filed in the cause; and (2) that no notice of such filing had been served upon one of the parties who had appeared in the action. It appeared from the transcript that a copy of the proposed statement of facts was served on the 31st day of May, 1895, at 2:20 p. m., and that such proposed statement was filed in the cause on the same day at 3:30 p. m. It was held by this court in *Erickson v. Erickson*, 39 Pac. 241, that the service of the copy of the proposed statement could not properly be made until after the original had been filed in the cause, and that service of such copy before the filing of the original was ineffectual; and numerous decisions of the supreme court of California upon their statute, from which ours was taken, were cited in support of the decision. In adopting the construction of the statute in the state from which it was taken, this court followed a well-settled rule of decision. Besides, the plain language of

the statute indicates that the paper to be served should be a copy of a paper then on file, and a part of the record of the cause. Upon the argument of this motion it was sought to distinguish this case from the one above cited, for the reason that it appeared that the statement in the case at bar was filed on the same day that it was served, while in the other case such fact did not appear; and it was contended that the decisions of the California courts were to the effect that, where the service was upon the same day that the proposed statement was filed, it was sufficient. We have carefully examined the California cases, and have been unable to so interpret them. It is true that it is stated in some of them that a service made at the time of the filing is sufficient, but it is nowhere stated that such service would be at the time by reason of the fact that it was upon the same day. The general rule that the law will not take notice of fractions of days was not referred to in any of such decisions, and, in our opinion, it was not the intention of the supreme court of that state to apply it in determining what service was simultaneous with the filing. What was said in the case above cited was, we think, justified by the cases from California.

If the statute were to be construed independently of the construction placed upon it in California, one of two conclusions would necessarily follow,—either that it is mandatory, and must be construed as it reads, in which case it would necessarily follow that the filing must precede the service; or that it is directory, in which case the relation of the service to the filing would be immaterial, unless it was made to appear that by reason of such relation being other than that named in the statute the party upon whom the service was made had been deprived of some right. The last construction would open the door to such a loose practice, and so frequently call upon courts to enter upon an investigation of collateral questions, that it should not be adopted unless absolutely necessary. The statute, when given the other construction, is easily complied with, and there is no necessity for adopting a construction which would lead to such uncertainty. Besides, the legislature had an object in view when they provided that the statement should be filed before the copy was served. If the copy was served before the original was filed, there would be nothing to prevent the original being changed, and the burden of making such an examination as would show that it had not been would be cast upon the respondent. If filed before the copy was served, no such change could be made. The design of the statute was that, when the service of the copy of the proposed statement was made, the party upon whom it was served might rely upon it as a copy of a paper of record in the cause. In the case of *Turner v. Bailey*, 42 Pac. 115, the question



of the relation of the service to the filing was before this court, and it was stated therein that, both appearing to have been on the same day, the service was good; but it was not there made to appear by anything in the record that the service preceded the filing, and the decision could well have been placed upon the ground that the service and filing having been shown to be upon the same day, and, there being nothing to show which was first, it would be presumed, in aid of the proceedings of the lower court, that the filing preceded the service. It is true that it was attempted to be shown by statements outside of the record that the service preceded the filing, but such showing should have been made in the lower court, and brought up here as a part of the record, to have been entitled to consideration. The reasonable construction of the statute and the decisions in California require us to hold that a service shown by the record to have preceded the filing is without force. It is not necessary to consider the other reason stated in the motion.

A demurrer was interposed to the complaint, the overruling of which by the trial court is the first alleged error of which we can take notice, and the only one which was presented upon the oral argument. The reasons why the complaint was claimed to be insufficient were: (1) Failure to state facts showing that Shepard, Seims & Co. were independent contractors; (2) failure to allege that the railway company was a common carrier; (3) failure to allege that respondent was a passenger; and (4) that it appeared from statements therein that plaintiff was injured by the negligence of a fellow servant.

Upon the first point the complaint states that Shepard, Seims & Co. were constructing a portion of the roadbed of the railroad company, and that plaintiff was working for them as a common laborer; and this statement, when taken in connection with other allegations in the complaint, sufficiently showed that said company were independent contractors of the railway company. If they were not independent contractors, plaintiff would have been working for the railroad company, and not for them. But the complaint stated that he was working for them, and in so doing fairly negated any conclusion which might otherwise have been drawn from the language of the complaint that said company were not independent contractors. It was not necessary to allege that appellant was a common carrier. The courts will take judicial notice that railway companies are common carriers, for the reason that the law makes them such. Besides, it was not necessary that the railway company should have been a common carrier to make it liable to the plaintiff for the personal injuries received by him under the circumstances disclosed by the complaint.

The third point was founded upon the claim that there was no sufficient allegation

of any agreement, between the railroad company and the copartnership for which the plaintiff was working, requiring the railroad company to transport the employes of the copartnership. The allegation of the complaint was to the effect that there was an arrangement of that kind, and it is contended that this was not equivalent to an allegation of the existence of a contract. But this contention is untenable, for while it is true that the word "arrangement," when taken by itself, has a different signification from the word "contract" or "agreement," yet, when taken in connection with the other allegations in this complaint, it could mean nothing less than that by some mutual agreement between the parties the railroad company was to transport the employes of the copartnership.

There is nothing in the complaint which warranted the contention that it appeared therefrom that the plaintiff and the persons operating the train were fellow servants. It will be seen from what we have said that the contrary clearly appeared. The complaint might have been vulnerable to a motion to make more definite and certain, but was good when tested by general demurrer.

The only other error mentioned in the brief which is not dependent upon the statement of facts is that founded upon the overruling of appellant's demurrer to plaintiff's amended reply. The appellant had pleaded in abatement that another action for the same cause was pending in the federal court, and the reply alleged that subsequent to the filing of said plea the suit in the federal court had been dismissed. This statement was a sufficient reply to the plea of the appellant. The court committed no error in construing the pleadings, and, the statement of facts having been stricken, no other error can avail appellant. The judgment will be affirmed.

DUNBAR, ANDERS, and SCOTT, JJ., concur. GORDON, J., took no part.

#### GILMORE v. WESTERMAN et al.

(Supreme Court of Washington. Jan. 9, 1896.)

#### PUBLIC BRIDGE—MATERIAL MEN'S LIENS—ASSIGNMENT—PAYMENT.

1. As bridges are specially designated by Gen. St. § 1663, as subject to mechanics' liens, those who furnish material for public bridges are entitled to the benefit of Gen. St. § 2415, requiring a bond to be given by contractors who do work for a county which, if done for an individual, would create a right of lien.

2. All material men, whether privity of contract exists with the original contractor or not, are entitled to the protection of Gen. St. § 2415, requiring persons contracting with a county to give a bond conditioned for the payment of all laborers and material men.

3. A material man's right of action on the bond required by Gen. St. § 2415, to be executed to a county, conditioned that the person contracting with the county will pay all laborers and material men, is assignable.

4. A subcontractor's right to recover on the bond required by Gen. St. § 2415, to be executed to a county, conditioned that the person contracting with the county will pay all laborers and material men, is not defeated by the original contractor's acceptance of an order drawn on him for the amount of the subcontractor's claim.

Appeal from superior court, King county; R. Osborn, Judge.

Action by William Gilmore against Robert G. Westerman and others on a contractor's bond. Defendants had judgment, and plaintiff appeals. Reversed.

Frank Quinby and Millon & Houser, for appellant. Stratton, Lewis & Gilman and Carr & Preston, for respondents.

ANDERS, J. Briefly stated, the complaint in this action alleges that on August 10, 1892, the defendants Westerman & Yeaton entered into a contract with Skagit county whereby they agreed to furnish all materials and labor and construct and erect a bridge across the Skagit river, at Mount Vernon, in said county; that at the time of entering into said contract, and for the purpose of securing persons who should perform labor upon, or assist in the construction of, said bridge, or furnish materials therefor, said defendants entered into a bond to the state of Washington, as provided by law, in the sum of \$30,000, conditioned that the said Westerman & Yeaton should pay all laborers, mechanics, and material men, and persons who should supply said Westerman & Yeaton with provisions or goods of any kind, and all just debts due to such persons, or to any person to whom any part of such work is given, and incurred in carrying on such work; that said Westerman & Yeaton entered into a contract with the firm of Bacon & Henderson, whereby the latter agreed to furnish certain building materials, consisting of lumber and dimension timber, to be used in the construction of said bridge; that the Parker Lumber Company furnished, at the request of said Bacon & Henderson, and delivered to said Westerman & Yeaton, a large quantity of lumber and building materials and dimension timber, which was used by said Westerman & Yeaton in the construction of said bridge; that on February 25, 1893, there was due and owing said Parker Lumber Company, on account of said materials so furnished, the sum of \$1,000; that on said day said Bacon & Henderson gave to said Parker Lumber Company an order on Westerman & Yeaton for the payment of said sum, which order was presented to, and duly accepted by, said Westerman & Yeaton, but was not paid by them; that thereafter the said Parker Lumber Company, for value received, assigned and transferred to plaintiff said claim of \$1,000, for said materials, and that the plaintiff is now the owner and holder thereof; that the contract for the construction of said bridge has been wholly completed, and said bridge has been accepted by Skagit county, and said Westerman & Yeaton

have been paid by said county for the same. Plaintiff prays judgment against the defendants for said sum of \$1,000, together with interest thereon, and his costs and disbursements herein. To this complaint a general demurrer was interposed, which was sustained by the court, and, the plaintiff declining to plead further, judgment was rendered dismissing the action. The plaintiff appeals.

Section 2415 of the General Statutes, by virtue of which the bond sued on was required, provides that "whenever the board of county commissioners of any county of this state \* \* \* shall contract with any person or persons to do any work of any character which, if performed for an individual, a right of lien would exist under the law, \* \* \* such board of county commissioners \* \* \* shall take from the person with whom such contract is made a good and sufficient bond, with two or more sureties, who shall justify as bail upon arrest, which bond shall be conditioned that such person shall pay all laborers, mechanics, and materialmen, and persons who shall supply such contractor with provisions or goods of any kind, all just debts due to such persons or to any person to whom any part of such work is given, incurred in carrying on such work. \* \* \*" And section 2417 declares that "the bond mentioned in section twenty-four hundred and fifteen of this volume of General Statutes shall be in an amount equal to the full contract price agreed to be paid for such work or improvement, and shall be to the state of Washington, and all such persons mentioned in said section twenty-four hundred and fifteen shall have a right of action in his, her, or their own name or names on such bond, for the full amount of all debts against such contract [contractor], or for work done by such laborers or mechanics, and for materials furnished or provisions and goods supplied and furnished in the prosecution of such work, or the making of such improvements." It will be observed that the condition of the bond in suit is in exact conformity to the requirements of the statute, and the only question, therefore, to be determined, is whether the appellant is entitled to the relief sought, upon the admitted facts of this case. The respondents contend that he is not, for the reasons (1) that there would have been no right of lien under the law if the materials in question had been furnished for a private individual; (2) that, even if Bacon & Henderson were material men, and would have had a right of lien in case the bridge had been built by a private individual, the Parker Lumber Company would not have had any such right; and (3) that, even although the Parker Lumber Company was entitled to sue upon the bond, its right was a personal one, and could not be assigned so that its assignee could maintain an action thereon in his own name.

In support of the first proposition, it is

argued that, inasmuch as the bridge for which appellant's assignor furnished material was a public bridge and a part of a public highway, there could not, in any event, be either a right of lien, or a right of action on the bond, under the ruling of this court in *Clough v. City of Spokane*, 7 Wash. 279, 34 Pac. 934, and *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, and 39 Pac. 280. That the statute was designed to protect laborers, mechanics, and material men who work upon or furnish material for public buildings or structures, upon which liens might be claimed if the same belonged to private persons, seems evident from the language therein employed; but this court held, in the cases above mentioned, that laborers employed in grading public streets were not within its provisions. But, in section 1663 of the General Statutes, bridges are structures which are specially designated as subject to mechanics' liens; and, it being a well-known fact that there may be private as well as public bridges, it requires no extended argument to prove that those who furnish material for public bridges are entitled to the benefits of the statute requiring a bond to be given by contractors who undertake to build them.

The next question is: Were appellant's assignors within the statute, and entitled to sue on the bond? In our opinion, it can hardly be questioned that they were material men. In fact, it seems to be conceded by the learned counsel for respondents that they might be considered such; but they insist that, if they were, they were material men in the second degree only, and therefore neither contemplated by the statute nor secured by the bond. The bond, however, shows on its face that it was given to secure the payment of all just debts due material men, incurred in constructing this bridge. It is admitted that the material was furnished to the contractors; that it was used by them in constructing the bridge; and that they have not paid for it; and how, then, can it be successfully maintained that respondents would not have been liable therefor to the Parker Lumber Company? A similar question arose in *Kansas*, in an action upon a bond given by contractors for the construction of a railroad, under a law of that state, and conditioned almost exactly like the bond here under consideration, and *Brewer, J.*, said: "The bond binds the contractor to pay for all labor done upon and materials used in the construction of the road, so far as his contract with the company calls for labor and materials, no matter how many subcontracts therefor may be made. In this respect it is a quasi mechanic's lien law, the lien being upon the bond, instead of upon the road." *Wells v. Mehl*, 25 Kan. 205. The same doctrine was again announced by the same learned judge in *Mann v. Corrigan*, 28 Kan. 194, in which he said, speaking of the *Kansas* statute.

that, if a subcontractor's employes are not within its terms, it would be a very easy matter in the building of any railroad to avoid the statute entirely, and the evil which was designed to be remedied by this would continue the same as before. The same thing might well be said in reference to our own statute. See, also, *Railway Co. v. Baker*, 14 Kan. 563; *Redmond v. Railway Co.*, 39 Wis. 426; *Mundt v. Railroad Co.*, 31 Wis. 451; *Kent v. Railroad Co.*, 12 N. Y. 628. Moreover, it is not necessary to rely upon the adjudged cases to determine this question, for the most superficial examination of section 1663 will convince any one that every person furnishing material for a (private) bridge has a lien thereon, "no matter how many subcontracts therefor may be made." And, that being so, all material men are entitled to the protection provided for by section 2415.

Is a material man's right of action on the bond assignable? is the next question. Under the broad and comprehensive provisions of our Code, we think it can hardly be doubted that it is, and it has been so decided, under analogous statutes, by other courts. *Sepp v. McCann* (Minn.) 50 N. W. 246; *City of St. Paul v. Butler* (Minn.) 16 N. W. 362; *Peters v. Railroad Co.*, 24 Mo. 586. Those cases proceed upon the well-known principle that the bond is security for the debt, and that the assignment of the debt carries the security with it.

It is also urged on behalf of the respondents that even if there was a right of lien, or a right to sue on the bond, originally, that right is gone, because, upon the facts stated in the complaint, the original debt was paid by the order given by *Bacon & Henderson*. But the fact is, appellant is suing on a debt due from *Westerman & Yeaton*, the principal obligors in the bond, and acknowledged by them to be due, and which, it is admitted, they have not paid. If the lumber company had been paid, they would have had no debt or claim to assign, and, presumably, no assignment would have been made or attempted by them.

We are firmly of the opinion that the complaint states a cause of action, and the judgment must therefore be reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

HOYT, C. J., and DUNBAR, SCOTT, and GORDON, JJ., concur.

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MOODY v. WESTERMAN et al.

(Supreme Court of Washington. Jan. 9, 1896.)

Appeal from superior court, King county; R. Osborn, Judge.

Action by C. S. Moody against Robert G. Westerman and others. Judgment for defendants. Plaintiff appeals. Reversed.

Frank Quimby and Million & Houser, for appellant.

ANDERS, J. The questions involved in this case are identical with those presented and determined in the case of Gilmore against these same defendants (43 Pac. 345); and, for the reasons given in that case, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

HOYT, C. J., and DUNBAR, SCOTT, and GORDON, JJ., concur.

#### MCDONALD v. LUND.

(Supreme Court of Washington. Jan. 9, 1896.)

**ASSUMPSIT—MONEY HAD AND RECEIVED—ILLEGAL BUSINESS—DISTRIBUTION OF PROFITS.**

Where plaintiff and defendant enter into a partnership to conduct an illegal business, which, after its conclusion, leaves undivided profits in the hands of defendant, and it is agreed by them that plaintiff is entitled to a certain portion thereof, which he leaves on deposit with defendant, plaintiff may recover it.

Appeal from superior court, Yakima county; Carroll B. Graves, Judge.

Action by Finley McDonald against Thomas Lund to recover money had and received by defendant to plaintiff's use. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Frank H. Rudkin, for appellant. H. J. Snively and Fred Miller, for respondent.

DUNBAR, J. This was an action brought by the plaintiff against the defendant to recover the sum of \$452.25, alleged to be the balance due for money had and received by the defendant to the plaintiff's use. The answer denied the main allegations in the complaint, and alleged, affirmatively, that the plaintiff and defendant were engaged together in running certain games of chance, and that all moneys received by the defendant were so received, for the purpose of using the same as the capital in running the games of chance so carried on by plaintiff and defendant, and that the defendant did not otherwise receive any money in which the plaintiff had an interest. The plaintiff replied, denying the affirmative portions of the answer, and the case was submitted to the court upon the following agreed statement of facts, viz.: (1) That at the time mentioned in the complaint the plaintiff and defendant and one French were engaged in conducting and carrying on certain faro and crap games in the city of North Yakima, as partners,—plaintiff having a one-half interest in the moneys invested in said games, and sharing one-half the profits and losses of said games; the two other partners having a one-fourth interest each. (2) That from time to time moneys were drawn from said games, and the sums so drawn were divided between the plaintiff and de-

fendant and the said French in the proportions above mentioned,—plaintiff's portion thereof being deposited and left with defendant, in whose place of business said games were conducted; the plaintiff never receiving the same. (3) That when the said plaintiff and defendant and the said French ceased to conduct and carry on said games, the moneys then on hand belonging to said partners were divided in like manner in the proportions above mentioned,—the plaintiff's portion thereof being deposited and left with the defendant; the plaintiff never receiving the same. (4) That the plaintiff's portion of the money, after division, was never actually segregated from the defendant's, but that they agreed upon the portions thereof to which each was respectively entitled. (5) That the defendant was the banker for said games in said partnership; that all of the moneys belonging to said games were kept by said defendant, both capital and winnings; that at the close of the games, from time to time, it was agreed between the said partners what the interest of each was in the moneys in the hands of said defendant, but the moneys continued in the defendant's possession without any change in said possession. (6) That when plaintiff and defendant and said French ceased to operate together as such partners, it was understood and agreed by all of said partners that the plaintiff was entitled to the sum of \$431.25, out of the moneys belonging to said partnership in said games then in defendant's possession. It was further agreed that judgment should be entered on the foregoing facts as the law might require. The court below was of opinion that the case fell within the maxim, "*Ex turpi causa non oritur actio*," and dismissed the action.

It is conceded by the appellant that courts will decline to lend their aid to the enforcement of an executory contract which has for its object the performance of some act or the accomplishment of some end which is contrary to law or a sound public policy, and this whether the act or end contemplated by the contract is a felony or misdemeanor at law. It is conceded that the business in which these parties were engaged was an illegal one, by express statutory provision. It is insisted, however, by the appellant, that this case does not fall within the rule above conceded, but within one of the limitations of such rule; that the obligation of the respondent in this case was a collateral obligation, in a manner connected with or growing out of the illegal transaction, but that it is not an attempt to enforce the illegal contract; that the illegal contract had been fully executed; and that there is a new, independent, and implied contract which the plaintiff will not be precluded from enforcing. The first case cited by appellant in support of his theory is *Sharp v. Taylor*, 2 Phil. Ch. 801, where the court drew a distinction between enforcing illegal contracts and asserting title

to money which has arisen from them. There it was held that the courts would not refuse to administer justice between joint importers of articles of commerce merely upon proof that such importation was illegal and a violation of the laws of the country, and that one of two partners who had possessed himself of the property of the firm would not be allowed to retain it by showing such illegality. In the course of its opinion the court says: "Can one of two partners, in any import trade, defeat the other, by showing that there was some irregularity in passing the goods through the custom house? The answer to this \* \* \* will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties. Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant v. Elliott*, 1 Bos. & P. 3, and *Farmer v. Russell*, Id. 296, and recognized and approved by Sir William Grant in *Thomson v. Thomson*, 7 Ves. 473." It would seem that this case is identical with the one at bar. The transaction that is alleged to be illegal here—that is, the carrying on of games of chance—is completed and closed, and cannot in any manner be affected by what the court is asked to do between the parties to this action.

Again, this is not a case to enforce any illegal contract, but it is to assert title to money which was accumulated under such illegal contract. If the plaintiff here had brought an action against the defendant for not complying with his contract in running these games, of course it would fall within the rule claimed by the respondent; but here the real contract on which he sues, it seems to us, is a contract of deposit. Under the stipulated facts the illegal transaction which these parties had agreed to pursue had ended. The partnership for that purpose was no longer in existence. The business was no longer being carried on. A determination of the amount of money due from the defendant to the plaintiff had been reached. It was agreed that the defendant owed the plaintiff the sum of money sued for, and that he was entitled to that amount, and the plaintiff's portion was simply left with the defendant on deposit. It is true that it was not segregated from the money belonging to the defendant and the other partner, but that would have been a purely physical transaction, which could not have affected the result in any way, and it would have made no difference in the right or wrong of the case whether the money had been actually counted out to the plaintiff and then deposited with the defendant, or, when the amount that was due the plaintiff was agreed upon, he had deposited it without such physical segregation.

This doctrine was announced and this distinction made nearly 100 years ago in the case of *Tenant v. Elliott*, 1 Bos. & P. 3, where, A. having received money to the use of B. on an illegal contract between B. and C., it was held that he should not be allowed to set up the illegality of the contract as a defense in an action brought by B. for money had and received. Buller, J., in deciding the case, said: "Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the defendant, in conscience, keep the money so paid? For what purpose should he retain it? To whom is he to pay it over? Who is entitled to it but the plaintiff?" And Eyre, C. J., said: "The question is whether he who has received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him. I think he cannot." And in *Farmer v. Russell*, 1 Bos. & P. 296, it was held that if A. received money of B. to the use of C., it could be recovered by C. in an action for money had and received, though the consideration on which B. paid it was illegal. In that case the case of *Tenant v. Elliott*, supra, was reviewed, and it was held that the obligation arose out of the fact of the money having been received to the use of the plaintiff, which created a promise in law to pay; and Buller, J., in concurring in the opinion of Chief Justice Eyre, said: "It seems to me that all the confusion in this case has arisen from the plaintiff having proved too much at the trial. He should have shown that the plaintiff received so much money to his use, and it was immaterial whether the money were paid on a legal or an illegal contract. \* \* \* Here, the money having been paid by another to the plaintiff's use, the illegal contract is out of the question."

This distinction, viz. the difference between suing on or trying to enforce the illegal contract itself, and a suit to recover money which is admitted to be due, although it may have been obtained by prosecuting an illegal enterprise, has always been respected by the courts, from its announcement in the cases we have above cited up to the present time. In the case of *McBlair v. Gibbes*, 17 How. 232, the cases of *Tenant v. Elliott*, *Thomson v. Thomson*, *Sharp v. Taylor*, and *Farmer v. Russell*, supra, were indorsed. In *Brooks v. Martin*, 2 Wall. 70, the supreme court of the United States held that, after a partnership contract, confessedly against public policy, had been carried out, and money contributed by one of the partners had passed into other forms,—the results of the contemplated operation completed,—a partner in whose hands the profits are cannot refuse to account for and divide them, on the ground of the ille-

gal character of the original contract. And in *Planters' Bank of Tennessee v. Union Bank of Louisiana*, 16 Wall. 483, it was held that, though an illegal contract will not be enforced by courts, yet it is the doctrine of that court that where such a contract had been executed by the parties themselves, and the illegal object accomplished, the money or thing which was the price of it would be a legal consideration, between the parties, for a promise, expressed or implied, but that the court will not unravel the transaction to discover its origin. This doctrine is applied to the case of money received for the sale of Confederate bonds. In the course of its opinion the court said: "But when the illegal transaction has been consummated, when no court has been called upon to give aid to it, when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them." In the case at bar, it is conceded, by the statement of facts, that the defendant has in hand a thing of value that belongs to plaintiff. It certainly does not belong to defendant, and he has no right, either moral or legal, to keep it. If the question were between the plaintiff and the parties from whom this money was obtained, of course, another principle would intervene; but to allow a depository of a person's money to refuse to turn it over to him, because the owner of the money had violated some law in obtaining it, would be little short of encouraging robbery. In *De Leon v. Trevino*, 49 Tex. 89, it was held that, although a contract may be illegal, it does not follow that it is illegal or immoral for the parties to it, after its completion, to fairly settle and adjust the profits and losses which have resulted from it. The vice of the contract does not enter into such settlement. It is true that, in that case, at the settlement, the defendant had given his note in settlement of the balance agreed upon; but that does not change the principle, nor add anything to the settlement. The note was only an evidence of the amount that had been agreed upon as the share of the plaintiff, and it is conceded in this case that the amount sued for had been agreed upon. In *Pfeuffer v. Maltby*, 54 Tex. 454, the same principle was announced, and it was also decided in *Gilliam v. Brown*, 43 Miss. 641, that it was well settled that, after the illegal contract had been executed, one party, in possession of all the gains and losses resulting from the illicit traffic and transactions, would not be tolerated to interpose the objection that the

business which produced the fund was in violation of law. This case goes further than is necessary to support the action in the case at bar, because here there was a settlement, and no occasion for an accounting; and many of the cases cited by the respondent simply go to the extent of holding that the courts will not enforce an accounting under contracts admitted or proven to be illegal.

We have with some considerable care examined all the numerous cases cited by respondent, but have been unable to conclude that they in any way contradict the principles announced in the cases cited by appellant, which, we think, are cases parallel to the one under consideration. Referring to the most prominent cases upon which respondent relies to sustain his theory, we commence with *Dent v. Ferguson*, 132 U. S. 50, 10 Sup. Ct. 13. We think that case is easily distinguished from the one at bar. That was an action brought directly to set aside and declare void the contract itself which was alleged to have been illegal, and under all the authorities we think this could not be done; that the parties to the illegal contract would be left by the law where they placed themselves, and there could be no independent or implied contract in the case. The court specially distinguishes that case in the following language: "The principle established by those decisions, in diversified forms, according to the varying cases, is that a new contract, founded on a new and independent consideration, although in relation to property respecting which there has been unlawful or fraudulent transactions between the parties, will be dealt with by the courts on its own merits. If the contract be fair and lawful, and the new consideration be valid and adequate, it will be enforced. If, however, it be unfair or fraudulent, or the new consideration so inadequate as to import fraud, imposition, or undue influence, it will be rescinded, and justice done to the parties,"—citing the cases of *McBlair v. Gibbes*, *Brooks v. Martin*, and *Planters' Bank of Tennessee v. Union Bank of Louisiana*, supra, and *Railroad Co. v. Durant*, 95 U. S. 576. "But in all of those cases the court was careful to distinguish and sever the new contract from the original illegal contract. Whether in the application of this principle some of them had trenched upon the line which separates the cases of contracts invalid in consequence of their illegality from new and subsequent contracts arising out of the accomplishment of the illegal object, is not the subject of inquiry here. The present case does not involve any question of a subsequent and distinct contract, but seeks relief directly from the original fraud, to which the person under whom the complainants claim was a contracting party fully sharing in the fraudulent intent." That was a case wherein the defendant under the contract was to sell, and did sell, to the plaintiff all his estate, for the purpose of

compelling a settlement with the creditors of the defendant on terms which were not favorable to the creditors; so that it will be seen that the language quoted in the appellant's brief from this case has no application or bearing upon the case at bar, but that the cases are expressly distinguished by the court, and there is no intimation in that case that the rule announced by the same court in *Brooks v. Martin*, *McBlair v. Gibbes*, and *Planters' Bank of Tennessee v. Union Bank of Louisiana*, supra, should be in any way modified or disturbed. *Goodrich v. Tenney* (Ill. Sup.) 33 N. E. 44, is the same kind of a case. It was an action upon a contract, founded upon the decision of *Dent v. Ferguson*, supra, and specifies the same distinctions announced in that case, and the court in that case said: "The controversy here arises between the parties to the illegal agreement, and appellant must, if at all, assert his claim to the money in Tenney's hands through and under that contract. Treat that as void, as if never made, and there is nothing upon which appellant can base a claim to the money." The court proceeds to distinguish that case from the cases of *McBlair v. Gibbes*, supra, and *Willson v. Owen*, 30 Mich. 474, and the other cases cited above. In fact, without specifically reviewing them further, they are all cases in which, as said by the court just quoted, if the contract itself was wiped out of existence, there would be nothing upon which to base the claim of the plaintiff which was denied. But not so in the case at bar. There is an admission in this case that there was due the plaintiff the amount which he claims, and it was upon that admission or settlement or fact that this action was brought, and the court will not be anxious to inquire into the way by which this money, admitted to be the money of the plaintiff, came into the hands or the possession of the defendant. The action was not founded upon the alleged illegal contract, nor brought to enforce any of the conditions or stipulations of that contract. As was said by the court in *De Leon v. Trevino*, supra, the illegal enterprise and all the matters connected with it were voluntarily settled and adjusted by these parties, and, while we are not enthusiastic in aiding a confessed lawbreaker to obtain the fruits of his illegitimate enterprise, we think that all the authorities, when properly discriminated, accord this right in a case of this kind, and we feel constrained to follow them. The judgment will therefore be reversed, and as it appears by the stipulated facts that there is no other defense to this action than the one we have just discussed, it would be imposing unnecessary expenses and delays to send it back for a new trial, and therefore the lower court will be instructed to enter judgment in favor of the plaintiff for the amount prayed for.

HOYT, O. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

## RYAN v. GUILFOIL et al.

(Supreme Court of Washington. Jan. 9, 1896.)

## LOGS AND LOGGING—HAULING POSTS—LIEN.

Where fence posts have been completed, one employed by the vendor to haul them from the place of their manufacture, and to deliver them to the vendee, acquires no lien on the posts for his services, within Laws 1893, p. 428, § 1, providing that "every person performing labor on or who shall assist in obtaining or securing saw logs, spars, piles or other timber, has a lien upon the same."

Appeal from superior court, King county; Alfred Battle, Judge pro tem.

Action by John Ryan against O. D. Guilfoil, Lawrence Desmond, and John W. Hart to foreclose a laborer's lien for services. From a judgment in favor of plaintiff, defendant John W. Hart appeals. Reversed.

Tipton & Haddock, for appellant. Samuel S. Carlisle, for respondents.

DUNBAR, J. The appellant, John W. Hart, and defendant O. D. Guilfoil entered into a written contract whereby Guilfoil agreed to deliver to Hart 30,000 fence posts, of dimensions specified in the article of agreement, which appears in exhibit in the case, and Hart agreed to pay Guilfoil therefor upon their delivery. Respondent Ryan had been employed by Guilfoil to haul said posts from the place where they were manufactured to the place where they were to be delivered to Hart. Guilfoil failing to pay him for his services, he brought an action for the same, alleging the labor upon the posts aforesaid, and alleging that Guilfoil acted as an agent of Hart, the owner and reputed owner of the posts, in employing him; that he had duly filed his lien upon said posts, which said lien was duly recorded; asking for judgment against defendant Guilfoil and appellant, Hart, and for a decree establishing his lien upon the said logs; also alleging that respondent Lawrence Desmond claimed some lien upon or interest in the said described posts, and asking that the said Lawrence Desmond be obliged to set forth the nature of his lien or claim, and that his said lien, if he had any, should be considered to be junior to plaintiff Ryan's lien; whereupon Desmond came into the court, and asked for foreclosure of his lien upon the said posts. Upon the trial of the action, judgment was rendered in favor of plaintiff, Ryan, and against the defendant Guilfoil, for the sum of \$13.15, with costs and attorney's fees, and in favor of respondent Desmond, and against the defendant Guilfoil, for the sum of \$100, together with costs and attorney's fees; and it was further decreed that plaintiff, Ryan, and defendant Desmond have, respectively, liens for the full amount of their said judgments upon the fence posts mentioned in the complaint, and that the same be sold to satisfy said judgments.

We do not think this judgment can be sustained. The court found, and the evidence shows, that the labor for which the lien is claimed was the hauling of the fence posts, after they had been manufactured, to the place designated by Hart for their reception by him. The contract between Hart and Guilfoill was a simple contract of purchase and delivery, or, rather, a purchase upon delivery. There was nothing in the contract or in the evidence which would warrant the conclusion reached by the court that Guilfoill was acting as Hart's agent in procuring this labor upon the posts. Guilfoill simply agreed to deliver 30,000 posts to Hart at a place specified, and Hart agreed to pay him for the same upon their delivery.

It is contended by the respondent that a lien of this kind is provided for in section 1, p. 428, Laws 1893, which section provides that "every person performing labor upon or who shall assist in obtaining or securing saw logs, spars, piles or other timber, has a lien upon the same. \* \* \*". And it is insisted that these posts fall within the definition "other timber." But it does not seem to us that this contention can be reasonably sustained, especially in view of section 2 of the same act, which provides that "every person performing work or labor or assisting in manufacturing saw logs and other timber into lumber and shingles, has a lien upon such lumber while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer, whether such work or labor was done at the instance of the owner of such logs or his agent or any contractor or subcontractor of such owner." It would seem that the kind of services rendered in this case would fall within the provisions of the last section. Certainly, no labor was performed upon these fence posts, under the testimony in the case, before they were completed fence posts; neither did these respondents assist in obtaining or securing these fence posts in the sense in which the words "assist in obtaining or securing" are evidently used in section 1, which simply means to provide a lien for persons performing labor other than labor directly upon the logs, such as labor in opening roads or keeping the skids in order, or doing various things around the logging camp, which in reality assist in obtaining or securing the logs, spars, or piles, although the labor is not directed primarily to the logs, spars, piles, or other timber. But here is something the manufacture of which is already complete, and, if it could be doubted that these posts fell within the definition of "lumber," such doubt is dispelled by the concluding sentence in section 2,—that "the term 'lumber,' as used in this act, shall be held and be construed to mean all logs or other timber sawed or split for use, including beams, joists, planks, boards, shingles, laths, staves, hoops, and every article of whatsoever nature or description manufactured from saw logs or

other timber." If these fence posts had been sawed in a mill, they certainly would have been manufactured articles, under the provisions of section 2; and they are no less manufactured articles because they are split. And it matters not whether they are split through the medium of a maul and wedge, or through the medium of machinery in a mill; they are in either case manufactured from timber, and, being so manufactured, they are articles described in section 2; hence no lien attaches to them after they leave the possession or control of the manufacturer.

The judgment will be reversed, and the cause remanded, with instructions to the lower court to amend its judgment by expunging from the decree all that portion commencing with and following the words, "It is further considered, adjudged, and decreed by the court that the said plaintiff and the said defendant Lawrence Desmond have, respectively, liens for the full amount of their said judgment," etc.; and that judgment of dismissal shall be entered in favor of the appellant, Hart; and that he shall have judgment for his costs against respondent Ryan.

HOYT, C. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

KINCAID v. THOMPSON et al.  
(Supreme Court of Washington. Jan. 9, 1896.)

#### CREATION OF TRUST.

The fact that a bank, which had a mortgage on chattels and the crop to be raised on a farm, insisted on payment of the mortgage unless the mortgagor would lease the farm on shares to one of three persons, one of whom was vice president of the bank,—the mortgage to be released as to the lessee's share,—does not constitute the taking of the lease by the said vice president a trust for the bank.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by W. C. Kincaid against F. E. Thompson and the Bank of Sumner. Judgment for defendants. Plaintiff appeals. Affirmed.

John P. Judson, for appellant. Remington & Reynolds, for respondents.

HOYT, C. J. On December 27, 1892, plaintiff and his wife borrowed of the Bank of Sumner \$1,789.14, and executed to F. E. Thompson, as trustee for said bank, their promissory note secured by their chattel mortgage upon certain articles of personal property, and upon the hop crop to be grown upon their farm in the year 1893. The money so borrowed and secured was due on the 1st day of April, 1893. At this time the plaintiff was not in a situation to pay it, and entered into negotiations with the bank by which it was sought to secure an extension of the time of payment. The result of these negotiations was that an agreement was en-



tered into by which the farm was to be leased to E. C. Meade, who at the time was vice president of the bank; that he was to pay for the use of it one-fourth of the hop crop; that three-fourths of the crop, which was to be the lessee's share, was to be released from the force of said mortgage, and it was to be continued in force upon the lessor's share only. In pursuance of this agreement a written lease was entered into between plaintiff and his wife, of the first part, and E. C. Meade, of the second part, conditioned as provided for in said agreement. Thereunder, the hop crop was cultivated by said E. C. Meade, and, with the consent of all the parties interested, the entire crop was sold for something over \$7,000, one-fourth of which was by said Meade turned over to the bank, to be by it applied upon the mortgage in question, or otherwise, as might be agreed upon. At the time the chattel mortgage in question was taken, and also at the time the lease was made to said Meade, the farm was incumbered by several real-estate mortgages, upon some of which the interest would become due before the hop crop could be harvested, and it was feared that unless the interest was paid the holders of such mortgages might interfere with the removal of the crop; hence it was agreed between the plaintiff and the bank that the bank should advance sufficient money to pay the interest upon said real-estate mortgages as it became due, and should have the right to repay itself out of the first moneys which came into its hands from the proceeds of the hop crop. At about the time the crop was ready for market, it was ascertained that one Ezra Meeker had a mortgage thereon, the existence of which was likely to interfere with its sale. To prevent this, it was agreed that the bank should advance money enough to secure the release of this mortgage, and repay itself out of the first moneys which came into its hands. The bank, out of the proceeds of plaintiff's one-fourth interest in the crop, repaid itself the amounts advanced to secure the release of the Meeker mortgage, and to pay interest on the real-estate mortgages, and applied the remainder upon the note and mortgage in question. After this had been done there was still due thereon something over \$400. This not having been paid, proceedings were commenced to foreclose the mortgage by notice and sale by the sheriff under the statute, whereupon plaintiff instituted this proceeding to enjoin such sale, and to have the cause removed to the superior court. It was so removed, and, by agreement, was treated as an action by the bank to foreclose the mortgage; and the principal questions which the court was called upon to decide grew out of the claims on the part of the plaintiff and the defendants, respectively, as to the relation which the bank sustained to the lease made by plaintiff and his wife to E. C. Meade. The claim of the plaintiff was that, in taking said lease, Meade act-

ed as trustee for the bank, and that, under the circumstances surrounding its execution, the bank must be held to have taken it in the name of said Meade, as its trustee, for the sole purpose of securing the payment of the note and chattel mortgage, while it is claimed on the part of the bank that it had no connection whatever with the lease; that its only interest in having it made was that the hop crop, which was covered by the mortgage, might be cultivated and prepared for market, so that its lien thereon might not become valueless. If Meade was acting as trustee for the bank, and the lease was for its sole benefit, the claim of plaintiff as to its liability to account for the entire crop as his trustee would depend upon whether or not the lease was taken solely to secure the payment of the note and mortgage. Upon that question it is claimed by the plaintiff that such advantage was taken of him by the bank that though, in the lease, it was agreed that the lessee should receive certain benefits not connected with the payment of the note and mortgage, such agreement could not be enforced; that, notwithstanding the conditions of the lease, the bank should have been treated solely as the trustee of the plaintiff in raising and marketing the hop crop, and should have been required to account to him for all the money received, over and above that necessarily expended in the production and marketing of the crop. If the evidence showed that the execution of the lease had been procured by fraud or duress, such might have been the result, but it did not. On the contrary, it fully appears that both plaintiff and his wife signed the lease freely and voluntarily. There is no proof tending to show that the plaintiff was in any manner deceived or oppressed, except that the bank insisted upon its right to collect the note and mortgage when due. To so insist has never been considered even morally wrong; and, as a matter of law, it has never been claimed that a creditor has not the right to insist upon payment, even although the debtor is not in a condition to pay.

It is not necessary to further discuss questions which might have arisen if the lease had been to Meade for the benefit of the bank. The trial court made a finding of fact to the effect that the lease was to Meade, and the bank had no interest whatever therein, and, if this finding is supported by the proofs, it will be unnecessary to determine any of the questions growing out of the alleged trust relation of the bank to the plaintiff. We have carefully examined all of the evidence bearing upon this question, and are satisfied that the finding could not have been other than it was. Three reputable witnesses testified to the fact that the lease was for the benefit of said Meade and two other persons associated with him, and that the bank had no interest therein. The testimony of these witnesses was strongly con-

firmed by entries upon the books of the bank which were made soon after the execution of the lease, and were entirely consistent with the claim that it was for the benefit of these individuals, and inconsistent with the claim that it was for the benefit of the bank itself. To meet this strong showing, little or no proof was offered on the part of the plaintiff. Even his own testimony failed to show that it was agreed that the lease should be for the benefit of the bank. On the contrary, it tended to show that it was to be for the benefit of Meade and the two persons associated with him. He testified that he was told that the lease was to be made to one of them, and that he himself selected Meade to be named as lessee. This was all that tended to show that the bank was interested in the lease, except some loose statements by some of its officers to persons having no interest in the transaction; and they were entirely insufficient to have established the claim of the plaintiff, even if there had been no testimony upon the part of the defendant tending to show a contrary state of facts.

There was a claim made that plaintiff should have received one-third, instead of one-fourth, of the hop crop; but the lease having been made upon the basis of one-fourth, and not one-third, this claim must fall, for the reason that the contract was freely entered into by the appellant and his wife, without any such advantage having been taken of them as would enable them to avoid any of its conditions. The bank did all that could be required, if, when it received from the lessee one-fourth of the proceeds of the hop crop, it applied it in payment of the obligations of the plaintiff in the order required by law. But it is claimed that such proceeds should have been applied first to the payment of the note and mortgage, and that, if they had been, said note and mortgage would have been fully paid and satisfied. It may be conceded that they should have been so applied, if there had been no direction by the plaintiff as to their application; but the trial court, upon abundant proof, found that it was agreed between the bank and the plaintiff that the proceeds of the hops should be applied first to repay the bank the amounts which it had advanced to pay the Meeker mortgage and the interest on the real-estate mortgages, and no reason was shown to exist why such agreement was not in full force. There was a claim that the bank had not accounted for the amount collected on a certain note turned over to it by the plaintiff, but it was clearly shown by the testimony of the cashier of the bank that the money so collected had been duly accounted for, and this was in no manner contradicted by the testimony of the plaintiff. The claim that there should have been a deduction from the amount due upon the note, on account of the leased premises not having been left in the condition required by

the terms of the lease, is determined by what we have said as to the finding that the bank was not interested in the lease. All of the findings of fact made by the trial court were abundantly supported by the proofs, and the law of the case, depending upon such facts, was correctly determined. The judgment and decree will be, in all things, affirmed.

DUNBAR, ANDERS, SCOTT, and GORDON, JJ., concur.

#### REICHENBACH v. SAGE et al.

(Supreme Court of Washington. Jan. 9, 1896.)

#### LIQUIDATED DAMAGES—CONTRACT—BREACH—DEFENSE.

1. A provision in a contract for the construction of a residence, that the builder, in case of noncompletion of the house by a given date, should pay \$10 for each day's delay, is a stipulation for liquidated damages.

2. The failure of a subcontractor to fulfill his contract is no defense to the recovery of the stipulated damages.

3. Where a builder contracts to build a building by a certain date, which requires its construction during the winter months, the severity of the weather is alone insufficient as an excuse for failure to perform, if the work could have been carried on by the exercise of extra means or effort.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by Charles Reichenbach against Frank Sage and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Town & Dillon, for appellants. Taylor & McKay, for respondent.

DUNBAR, J. On the 8th day of October, 1889, the respondent entered into a contract with the defendants Sage and Stratton whereby Sage and Stratton agreed to erect and complete a certain two-story residence with a stone basement in the city of Tacoma, except the plumbing and the gas fitting, for the sum of \$7,450. They contracted that the work should be commenced on or before October 10, 1889, and that the entire contract should be performed as rapidly as possible consistent with durability and safety, and should be completed on or before February 10, 1890; that in case of failure to complete the contract by February 10, 1890, they would pay as damages a sum equal to \$10 for each and every day said work and contract was delayed beyond said date through any fault or negligence of Sage and Stratton. The building was not completed until August 28, 1890, being a delay of 199 days, and plaintiff brings this action to recover \$10 per day as stipulated damages. The trial of the case resulted in a verdict for the plaintiff in the sum of \$1,160. Judgment was rendered, and an appeal taken from said judgment.

The main features of the answer were: (1) That the delay was caused by the plaintiff and his architect in this: that on account of the unusual cold and wet weather they stopped the plastering of said building, and that the contractors were not allowed to plaster during the cold weather, and that by such orders they were delayed and hindered, without their fault or negligence, and that the plaintiff thereby contributed to and caused such delay; (2) that the winter of 1889-90 was unusually and extraordinarily cold and wet, and that it was impossible to proceed with the ordinary work of building; (3) that the delay was caused by the failure of plaintiff to furnish the plumbing and gas fitting for the house, and that the delay of plaintiff in this regard contributed to and was the cause of the delay complained of; (4) that they were unavoidably delayed in procuring millwork for the building; (5) that they were delayed by the failure of the plaintiff to furnish the mantels, hearths, and tiles and the art glass for the building; (6) that the plaintiff failed to furnish the details of the millwork at a proper time, and that they were delayed on that account.

We think the question which should be logically first settled in this case is, was the contract to pay the damages specified a provision for a penalty or for liquidated damages? There has been some conflict of authority on this question, each case, however, necessarily being decided with reference to its own particular circumstances and the particular language of the contract. We are satisfied, however, that the overwhelming weight of authority sustains the contention that this contract provides for liquidated damages. There is nothing inequitable in the terms of this provision. The amount does not seem to us to be excessive or unreasonable. It does not provide for the payment of a sum in gross on the failure to comply with the contract at the expiration of the time limited, but the damages accrue according to the length of time the breach continues; and again, there is an element of uncertainty as to the real damages which would be sustained by the plaintiff which renders it more or less impracticable to be determined by a jury. Values of rents are fluctuating, and dwelling houses of the character and description of this one are ordinarily not built for rent at all, but for the convenience and comfort of the owners; and, inasmuch as the parties saw fit to settle in advance the question of damages, and it seems to be on an equitable basis, we do not feel justified in disturbing that contract, and holding that it was a contract which the parties had no right to make. In *Railway Co. v. Rust*, 19 Fed. 239, it was held that: "A provision in a contract to build a railroad bridge that, in case of noncompletion of the bridge or providing a crossing for trains by a given date, the sum of \$1,000 per week should be deducted from the contract price

of the bridge for the time its completion or provision for crossing trains is delayed beyond that date, is a stipulation for liquidated damages." In *Cotheal v. Talmage*, 9 N. Y. 551, it was held that: "Where the damages resulting from the breach of an agreement are in their nature entirely indefinite and uncertain, and the parties have mentioned a specific sum as liquidated damages, such sum will be regarded as damages, and not as a penalty, unless the amount be greatly disproportioned to any probable estimate of the actual damages." To the same effect is *Ward v. Building Co.* (N. Y. App.) 26 N. E. 256. In *Dwinel v. Brown*, 54 Me. 470, the court, in the course of its remarks sustaining the provisions of a contract similar to this one, said: "The parties themselves best know what their expectations are in regard to the advantages of their undertaking, and the damages attendant on its failure; and when they have mutually agreed upon the amount of such damages in good faith, and without illegality, it is as much the duty of the court to enforce that agreement as it is the other provisions of the contract. \* \* \* It is not for the court to sit in judgment upon the wisdom or folly of the parties in making a contract when their intention is clearly expressed, and there is no fraud or illegality. No judges, however eminent, can place themselves in the place or position of the parties when the contract was made, scan the motives and weigh the considerations which influenced them in the transaction, so as to determine what would have been best for them to do, who was least sagacious, or who drove the best bargain. Courts of common law cannot, like courts where the civil law prevails, award such damages as they may deem reasonable, but must allow the damages, whether actual or estimated, as agreed upon by the parties. The bargain may be an unfortunate one for the delinquent party, but it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence, where these contracts are free from fraud and illegality." The same doctrine is announced in *Clement v. Cash*, 21 N. Y. 253; and in the case of *De Graff v. Wickham* (Iowa) 52 N. W. 503, which was a case where the amount of forfeiture was the same as in this case, viz. \$10 for every day the house should remain uncompleted, the same being a dwelling house, the court held that the sum named was liquidated damages, which might be recovered in case of a failure to complete the erection of the house according to the terms of the contract. We think these contracts should be sustained where no fraud or illegality appears as a matter of policy, for it would frequently save expensive and troublesome litigation if the parties could contract in advance with reference to damages, with the knowledge that such contracts would without question be enforced. We have examined the testimony in this

case in detail, and a great deal of it, we think, was plainly inadmissible, and was admitted over the objections of the plaintiff. A great deal of testimony was admitted with reference to the difficulties which beset the contractors in their efforts to procure stone for the foundation of the building. After admitting testimony of this character, however, the court instructed the jury that the failure of the defendants' subcontractors to procure and furnish the stone, or their failure to secure and furnish the sash and doors in time to enable the defendants to complete the building in the time mentioned in the agreement, furnished no excuse for the failure of the defendants to complete the building within the time prescribed. It seems too evident for the indulgence of argument that this was a proper instruction. The plaintiff contracted with the defendants to furnish the stone and the sash and doors, and he cannot be relegated to a suit against any subcontractors with whom the defendants may have seen fit to enter into a contract for furnishing these materials, for the breach of the contract on the part of such subcontractors. The defendants' contract was to furnish these materials. It was for them to exercise good judgment with reference to the ability of the subcontractors to furnish these materials according to their contract; and they alone are responsible for their delinquencies. The rule is thus announced by Shearman & Redfield on the Law of Negligence (section 14): "One who is personally bound to perform a duty cannot relieve himself from the burden of such obligation by any contract which he may make for its performance by another person. Therefore the fact that he may have used the utmost care in selecting an agent to perform this duty, or that he has entered into a contract with any person by which the latter undertakes to perform the duty, is no excuse to the person upon whom the obligation originally rested, in case of failure of performance. His obligation is to do the thing, not merely to employ another to do it."

It is next objected that the court erred in instructing the jury that the severity of the weather was not alone a sufficient excuse for the failure of the contractors, if, regardless of this, the work could have been carried on with safety and durability by the exercise of extra means or effort on the part of the defendants during the continuance of such weather. This instruction, we think, was right. When this contract was entered into it was known that it would necessitate the doing of this work by the contractors during the winter months. They bound themselves to do the work between the 10th day of October and the 10th day of February, and they knew that they must necessarily do the plastering, which work it was claimed was delayed by reason of the cold weather and rain, during the winter months. Presumably they took this into consideration, and de-

manded a higher price for their work by reason of these necessary inconveniences, and on account of the extra expenses incident to building in the winter. They might as consistently complain that the days were shorter in winter than in summer, and that they were delayed on that account. We think the authorities are substantially uniform so far as this proposition is concerned. In *Railway Co. v. Rust*, supra, it was held that the fact that the contractors were retarded in the work by high water, sickness of hands, etc., did not excuse them from performance of their contract; that they assumed these risks when they executed the contract without a provision exempting them from the consequences of such casualties; and in *Dermott v. Jones*, 2 Wall. 1, the supreme court of the United States, in passing upon this question, said: "It is a well-settled rule of law that, if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him." And in commenting upon the case of *School Trustees v. Bennett*, 27 N. J. Law, 515, where a gale of wind arose without any of the usual premonitory signs of a storm, and prostrated the building, which, when rebuilt, fell down again solely on account of the condition of the soil, which was soft and miry, and where it was conceded that the defects of the ground were the cause of the second fall, the court held that, the contractors having contracted to build and complete the building on a certain lot, the loss fell upon the contractors, and said: "The principle which controlled the decision of the case referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do." Of course, these cases are all very much stronger, so far as any equities in the contractors were concerned, than the case at bar, where the parties are simply relying on the negligence or inability of their own subcontractors. See, also, 3 Am. & Eng. Enc. Law, § 900, and note.

The instructions of the court which were objected to, without mentioning them more specifically, were along these lines, and the instructions presented by the appellants and refused by the court presented the opposite view of the law. We think the instructions were substantially correct, and the jury, under the instructions of the court, gave the appellants the benefit of all the delays which were caused by the interference or neglect of the respondent; though we are not satisfied from the testimony that there were any such delays. It was testified by one of the contractors that the architect refused to allow them to proceed with the plastering, and that they were more or less delayed by the plumbers not doing their work on time; and

further, that they were delayed by reason of the architect not having furnished them the details as readily as he should have done,—but all these questions of delay by the architect not furnishing details, by the plumbers not doing their work on time, and the question regarding the plastering, etc., were disputed facts, which were submitted to the jury. The plumber who did the work and the architect flatly contradicted the assertions made by the witnesses of the defendants. The architect swears positively that he did not forbid them to proceed with the plastering, but that he told them that he would not receive the plastering if it was frozen; that they could put in "salamanders," which would warm the rooms, and proceed with their work. Indeed, the contractors themselves testified that it would have been possible to warm the rooms with "salamanders" so that the work could have proceeded with safety. Then, according to their own testimony, the greater part of the delay was caused by the failure of their subcontractors to furnish them the rock for the foundation and the millwork. Mr. Sage, one of the contractors, testifies: "The principal cause was in getting in the foundation. It was almost impossible to get the stone there. The next cause after the stone was the weather." As we have already seen, their failure to get the stone there and the millwork and the inclemency of the weather were matters which they could not plead in this action. The jury, having heard all the testimony, and having considered it under proper instructions from the court, must be presumed to have reached the correct conclusion as to the amount of damages which should be awarded under the contract. The judgment will therefore be affirmed.

HOYT, C. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

**DUGGAR et ux. v. DEMPSEY et ux.**  
(Supreme Court of Washington. Jan. 9, 1896.)

**VENDOR AND PURCHASER—CONTRACT FOR DEED—RESCISSIO—CROSS COMPLAINT—FORECLOSURE—DEMAND FOR DEED.**

1. In a suit brought to rescind a contract for the purchase of real property, and to cancel outstanding notes and a mortgage secured thereby, on the ground that defendant's deed to plaintiff had never been properly executed, defendant may maintain a cross complaint to foreclose the mortgage.

2. Before plaintiff can maintain such action where no fraud on the part of the grantor was shown, a demand for the delivery of a good and sufficient deed must have been made on defendant.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Edward Duggar and Dixie L. Duggar against T. H. Dempsey and Rowena R. Dempsey to rescind a contract for the pur-

chase of real property. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Richard Saxe Jones and Brinker, Jones & Richards, for appellants. S. H. Piles, for respondents.

HOYT, C. J. On or about March 31, 1893, the defendants were the owners of the real estate the title to which is involved in this action. The paper title was in the defendant Rowena R. Dempsey, wife of the other defendant; but whether she held such title as her own separate property, or for the community composed of herself and husband, did not clearly appear, and was not material upon any question presented by this record. On or about that day, the defendant T. H. Dempsey sold the property to Edward Duggar, one of the plaintiffs. The other plaintiff is his wife. At the time of such sale, \$200 of the purchase price was paid, and a receipt given therefor, which contained a memorandum of the terms and conditions of the sale, one of which was that, upon the payment of the further sum of \$800, a deed was to be given to said Duggar, subject to a mortgage then on the property. The remainder of the purchase price was to be secured by promissory notes of the said Duggar, secured by a mortgage executed by himself and wife. Soon thereafter the \$800 was paid, and what purported to be a deed from said T. H. Dempsey and his wife delivered to said Edward Duggar, who executed notes to said T. H. Dempsey in accordance with the conditions of the contract, and caused them to be secured by a mortgage on the property. The deed and notes and mortgage were not delivered until about the 5th of April, 1893; but, the deed having been dated March 30th, it was agreed that the notes and mortgage should also be dated on that day. Prior to the delivery of the deed, the plaintiffs were put in possession of the property, and have continued in such possession. For more than a year after the transactions connected with the contract of sale and the making of the deed and notes and mortgage, the plaintiffs, from time to time, made payments substantially in accordance with the conditions of the notes, when they ceased to make payments, and soon thereafter commenced this action, by which they sought to have the contract of sale rescinded, the mortgage and notes outstanding canceled, and to recover back the moneys paid by them upon the contract, together with certain other sums alleged to have been expended in improving the property. The ground upon which this relief was sought was that the deed which had been delivered, and which purported to be that of the defendants, husband and wife, had never been executed by the wife, and that for that reason no title had passed to the plaintiffs; that, at the time such deed was delivered, the

defendant T. H. Dempsey knew that it was void, and caused it to be so delivered with the intent to defraud the plaintiffs. The defendants denied the material allegations of the complaint, and alleged, by way of cross complaint or counterclaim, that the conditions of the mortgage had been broken, and asked that it be foreclosed. The plaintiffs made a motion to strike this cross complaint or counterclaim, and the refusal of the court to grant such motion is the first error relied upon for a reversal.

Was the foreclosure of this mortgage so connected with the subject-matter of the plaintiffs' action as to be entitled to be put in by way of counterclaim? One of the objects of the suit was to have this mortgage and the notes secured thereby declared invalid, and to have them canceled and delivered up. This being so, their validity was necessarily involved in a trial of the issues made upon the complaint, and that was one of the issues which would necessarily have arisen if an independent action to foreclose the mortgage had been instituted by the defendants. The facts to be determined under the complaint in this action, and in an independent action to foreclose the mortgage, would have been substantially the same; hence there was no good reason why the whole matter should not be determined in the action first brought. The subject-matter of the counterclaim was so connected with the cause of action set out in the complaint that it could properly be interposed.

The other alleged errors depend almost entirely upon the claim that the court erred in its findings of fact. The court found against the claim of plaintiffs upon every material issue, and, if its findings are supported by the evidence, its judgment in favor of the defendants must be allowed to stand. But it is earnestly contended by the appellants that the material findings are entirely unsupported by the proofs. It so clearly appeared from the evidence that the name of defendant Rowena R. Dempsey, who, it was alleged, had not signed the deed, had been by her written where it appeared in said deed, that it is not contended that the court did not rightfully find such to have been the fact; but it is claimed that the circumstances surrounding the execution of the deed made it certain that, if she in fact wrote her name where it appeared upon it, the instrument was in an incomplete state; that, at the time neither the name of the party of the second part, the consideration, nor the date when executed was written therein; that for that reason it was no more her deed than it would have been if her name had not appeared thereon. It is not necessary to decide as to the effect of a deed executed when so incomplete, for the reason that we are not satisfied that such was the state of the one under consideration when executed by said defendant. The evidence tending to show that it was incomplete at the time of

its execution is unsatisfactory. It was founded entirely upon the claim that negotiations by the plaintiffs for the purchase of the property were not commenced until after said defendant left the city of Seattle for San Francisco, while it clearly appeared that she signed the deed before she left. The evidence of both of the defendants was to the effect that the negotiations were commenced before the defendant Rowena R. Dempsey left for San Francisco, and that the deed was filled out at the time it was executed by her. It appeared that said defendant left on a certain day. Hence the day on which the negotiations commenced was material. Plaintiffs testified that it was on the 30th day of March, but gave no reason why they remembered that it was on that day, except as it related to certain days upon which the plaintiff Edward Duggar was off from duty as conductor on a railroad. But no reason was given why they remembered such days. Hence their testimony as to the date of the negotiations is not aided by any circumstance which could be relied upon to fix such date. Testimony as to the exact date of an occurrence long past was of little value, unless aided by reference to some circumstance the date of which was known. Especially was this so for the reason that it would have been easy to furnish more satisfactory evidence if the facts were as claimed by plaintiffs. The date when he was laid off as conductor must have appeared upon the books of the railroad company, and it would have been easy to have so fixed it that it could not have been questioned. Under all the circumstances, the evidence was insufficient to overcome the presumptions flowing from a deed regular upon its face, shown to have been signed by each of the grantors named therein. There was in the proofs some evidence other than that referred to tending to show that the consideration for which the land was to be sold was not in the deed at the time it was executed. But, even if the consideration had not been written in it at the time it was signed by the wife, that fact alone would not, in our opinion, under the circumstances, make the deed void.

But it is not necessary to decide as to whether or not the deed in question was properly executed. That a contract of sale was entered into between the plaintiffs and the defendant T. H. Dempsey is not disputed, and this contract could not be rescinded by the plaintiffs until default had been made by said Dempsey, and he would not be in default for not delivering a deed until one had been demanded. It was shown that no demand had ever been made. The claim that the contract could not be avoided without it was clearly made in the brief of respondents. In their reply brief, appellants substantially concede that such is the general rule, but say that it does not apply, for the reason that, in their complaint

they allege the fraud of the defendant T. H. Dempsey, on account of which they could not safely demand a deed. But the fact that allegations of fraud were contained in the complaint could not deprive defendants of any rights, unless such allegations were supported by proof; and a careful examination has satisfied us that there was no evidence tending to show any intent on the part of the defendants, or either of them, to defraud plaintiffs. Even if the deed was executed in an incomplete state, that fact alone would not tend to show that it was understood and intended to pass only a pretended title to the plaintiffs, and that thereafter the grantor, who had signed the deed in its incomplete state, should refuse to be bound thereby. Besides, we are of the opinion that the superior court was right when it found that the defendant Rowena R. Dempsey was estopped from claiming that the deed in question was void. The only circumstance relied upon to prevent this estoppel was an alleged conversation between said defendant and one of the plaintiffs, but, under all the circumstances, we do not think that such conversation could be invoked for that purpose. That it was not at the time deemed important by the plaintiffs is shown by the fact that for a long time thereafter they continued to recognize the contract and make payments thereon. This disposes of plaintiffs' case.

Upon the issues raised upon the counterclaim, but one question of fact was presented. It was claimed on the part of the plaintiffs that the notes secured by the mortgage had been changed by filling what was a blank at the time of their execution with the word "quarterly," so as to make the interest payable quarterly. The trial court found against this contention of plaintiffs, and we think rightfully. It is true that the plaintiff Edward Duggar testified that, at the time he signed the notes, the word "quarterly" was not written in them, and his evidence was supported in some degree by that of his wife; but their testimony was much weakened by the fact, also testified to by them, that the interest was to be paid annually, when, by the terms of the notes, it would only be due with the principal if the space now filled by the word "quarterly" had been left blank. Some of the notes had several years to run; hence, if the blank was unfilled, they did not express the agreement testified to by plaintiffs. Against this was the testimony of defendant T. H. Dempsey, confirmed by the appearance of the notes and by the testimony of the witness Jacobs, who, at the time of the execution of the notes and mortgage, was present, as an attorney representing the interests of the plaintiffs. It is true that he would not say whether or not the blanks were filled at the time the notes were signed, but it was easy to be seen from what he did say that he was strongly inclined to the opinion that

they were. The force of written instruments, fair upon their face, should not be changed by oral proof, unless it is of a satisfactory character, and such was not the character of the proof offered to show that these notes had been changed after execution.

We are of the opinion that, upon the entire record, the superior court made such a decree as the pleadings and proofs warranted; and it will be affirmed.

DUNBAR, ANDERS, SCOTT, and GORDON, JJ., concur.

#### DONOHOE-KELLY BANKING CO. v. PUGET SOUND SAV. BANK et al.<sup>1</sup>

(Supreme Court of Washington. Jan. 9, 1896.)

##### NEGOTIABLE INSTRUMENTS—WHO ARE JOINT MAKERS.

In response to a demand, by a person holding a certificate of deposit against a bank, that the bank, in consideration of an extension, send as security a note, signed by the bank and indorsed by the directors, payable in one day, a note, executed in Seattle, payable in one day, and signed on the back by the directors, was on the day following its execution mailed to the payee in San Francisco; the two towns being about 1,000 miles apart. *Held*, the directors were joint makers and not indorsers.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by Donohoe-Kelly Banking Company against the Puget Sound Savings Bank and others. There was a judgment for plaintiff, and defendants Julius Horton and J. Loring Whittington appeal. Affirmed.

Donworth & Howe, for appellant Whittington. John G. Barnes, for appellant Horton. Bausman, Kelleher & Emory and Cox, Cotton, Teal & Minor, for respondent.

DUNBAR, J. On August 2, 1893, the plaintiff (respondent in this case), the Donohoe-Kelly Banking Company, of California, wrote to the defendant bank, asking for a note of \$5,000 to take up a certificate of deposit which the plaintiff then held against the defendant bank. The reference in the letter to the note was as follows: "In view of the temporary extension we are compelled to grant you in the matter of the loan of \$5,000, please supply us with security at once, in the form of a promissory note, issued by the bank and indorsed by the directors, and made payable, say, one day after date." In accordance with this request an ordinary promissory note for \$5,000 was drawn up in favor of the respondent bank, signed by the Puget Sound Savings Bank, the defendant, and indorsed by A. H. Jose, W. D. Perkins, H. S. Martin, Julius Horton, and J. Loring Whittington. The note was dated at Seattle, August 7, 1893, and was made payable in Seattle at the Puget Sound Savings Bank.

<sup>1</sup> For opinion on rehearing, see 43 Pac. 942.

The note was indorsed as aforesaid, after its execution, and before it became due; was retained by the officers of the bank, who are the indorsers mentioned above, until the 8th day of August, and was then mailed to the respondent at San Francisco. In the course of time suit was brought against the bank and the indorsers to recover the amount specified in the note. Judgment was obtained against the defendants in the court below, from which judgment Horton and Whittington appealed to this court. It may be said that upon the close of the testimony the court instructed the jury to find a verdict for the plaintiff.

The pertinent question in this case is, what is the liability assumed by a third person, or a person other than the payee, who writes his name on the back of a promissory note after its execution by the maker and before the delivery to the payee? It is conceded by the appellants that the weight of authority is that, in the absence of special agreement, the law will imply an undertaking as maker, but they claim that the weight of reason is in favor of the liability as indorser. And it is also claimed by the appellants that the text writers are uniform in support of this proposition. It may be said, however, in answer to this, that it is the adjudication by courts, rather than the personal opinions of text writers, which settles the law in regard to questions of this kind. The text writers, however, we find, upon an examination, are not uniform in holding the liability of a signer of this kind to be that of an indorser. It is true that Mr. Daniels, in his work on Negotiable Instruments (section 714), states that his own view is that the party who puts his name on the back of a negotiable note before it is indorsed by the payee should be presumed to be a first indorser. But the idea of Mr. Tiedeman, in his work on Commercial Paper (section 271), is that the liability is that of a guarantor; while Edwards on Promissory Notes inclines to the rule enunciated by the supreme court of the United States in *Rey v. Simpson*, 22 How. 341, viz. that the liability is that of a joint maker; and Randolph on Commercial Paper (section 831) says, in discussing this question: "The view which finds most support is probably that which holds the indorsement of a negotiable note by a stranger before or at the time of its delivery to the payee to be, prima facie, an original undertaking as joint maker, with an implied liability as such to the payee and all holders for value." Mr. Daniels seems to think that the effect of the court's holding the parties liable as joint makers has been to mystify the law and make its administration uncertain. It seems to us, however, that such a holding would tend to simplify the administration of the law and make certain the liability. The confusion growing out of an attempt to determine the liability to be other than that of a joint maker is demonstrated by the fact that the New York, Pennsylvania, Tennessee, Ala-

bama, Indiana, Mississippi, Wisconsin, and Oregon courts have held in accordance with the theory announced by Mr. Daniels, viz. that such signers were first indorsers; while California, Illinois, Kansas, Kentucky, Nebraska, and Nevada reflect the idea enunciated by Mr. Tiedeman, that their liability is that of a guarantor. On the other hand, the courts of Vermont, Massachusetts, New Jersey, Missouri, Maryland, New Hampshire, Michigan, Virginia, Colorado, Wisconsin, Texas, Utah, Ohio, Rhode Island, Louisiana, Minnesota, North Carolina, South Carolina, and the supreme court of the United States have decided squarely that the liability of a person other than the payee who signs the note on its back before it is due is that of a joint maker. The reasons for these respective decisions are so multifarious and have been so often repeated, that it would serve no good purpose to indulge in an analysis of them here. But we are satisfied with the reasoning of the courts last mentioned, and hold, with them, that, prima facie, at least, the liability in such case is that of a joint maker.

We do not think, however, that the decision of this proposition was really necessary in this case, for the whole circumstances of the case show so plainly that it was neither the intention of the plaintiff nor the defendants that the defendant indorsers (and we use this word "indorsers" simply to distinguish those who signed on the back of the note from those who signed at the bottom) intended that their liability should be other than that of the liability of a maker, and that they waived their rights as indorsers or guarantors. The circumstances surrounding the request for and the execution of this note make it absolutely impossible that the intention on either side was that these indorsers should have a right to demand and notice. Here was a note, executed in Seattle, in favor of a party who lived in San Francisco, 1,000 miles away, made payable one day after date; and the court will take judicial notice that, if it had been mailed on the day it was executed, it would have been a physical impossibility for it to have been delivered in San Francisco before it was due; much less to have been returned to Seattle, and notice served upon the indorsers before its maturity. And the canon of interpretation, invoked by the appellants, and which was announced in the case of *Rey v. Simpson*, supra, that "the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties," when applied to this case, precludes the appellants from the benefit of the defense which they claim; for the idea that they could intend that their liability depended upon notice and demand, after maturity, under the circumstances of this case, is so absolutely contradicted by the circumstances themselves that we are at a loss to know how to discuss the proposition. We do not think there is



any merit in any of the contentions of the appellants, and the judgment will therefore be affirmed.

HOYT, C. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

**PETROS v. CITY OF VANCOUVER et al.**  
(Supreme Court of Washington. Jan. 9, 1896.)

**MUNICIPAL BONDS — FORM OF SUBMISSION TO VOTERS—GENERAL INDEBTEDNESS PURPOSES — AUTHORITY OF COUNCIL.**

1. The city of Vancouver was authorized to issue bonds to an amount not exceeding 5 per cent. of the taxable valuation of the city for the purpose of enlarging the light plant, and was also authorized to incur an indebtedness not exceeding 5 per cent. of the taxable valuation of the city for general municipal purposes. Certain bonds were issued with the approval of the voters, and part of the proceeds derived from the sale thereof was used on the light plant. The ordinance submitting to the people the question as to whether the bonds should be issued, stated that they were for the purpose of raising money for the light plant and for other municipal purposes. *Held*, that the moneys expended on the light plant did not constitute part of the 5 per cent. indebtedness authorized to be incurred for general municipal purposes.

2. The city council had authority to submit the question of the issuance of bonds for light purposes in connection with an issue for general municipal purposes, each purpose being specified in the ordinance submitting the question to the people.

3. If the council had no such authority, the bonds were invalid, and the moneys realized therefrom were therefore no part of the indebtedness authorized to be incurred for general municipal purposes.

Appeal from superior court, Clarke county; A. L. Miller, Judge.

Action by A. Petros against the city of Vancouver and others to enjoin the sale of certain municipal bonds. There was a judgment for defendants, and plaintiff appeals. Affirmed.

O. D. Bowles, for appellant. Moody, Covert & Stapleton, for respondents.

HOYT, C. J. On the 3d day of November, 1890, the common council of the city of Vancouver passed an ordinance submitting to the voters therein the question of borrowing \$55,000 by the city for municipal purposes. The proposition was approved by the requisite majority of the voters, and thereafter the common council issued 55 negotiable coupon bonds of the denomination of \$1,000, all of which were sold, and are now outstanding obligations of said city. Thereafter there was submitted to the voters of said city the question of legalizing its indebtedness to the amount of something over \$23,000. The proposition was indorsed at the election called for that purpose, and thereafter the common council adopted a resolution authorizing the issue of bonds to the amount of \$20,000 for funding the indebtedness so legalized. Un-

der the resolution so adopted, and by virtue of the provisions of the act "to authorize counties, cities and towns to issue bonds to fund outstanding indebtedness, and providing for the levy and collection of a specific tax to pay the principal and interest of such bonds and declaring an emergency," bids for said bonds were requested, and that of the defendants Morris & Whitehead accepted, and the right to purchase said bonds accorded to them; and the officials of said city were about to execute and deliver the bonds so contracted to be sold, to prevent which this action was instituted to have the defendants enjoined from further proceeding in the matter of the sale of said bonds. The ground upon which such injunction was sought was that the indebtedness which was to be funded by the issue of the bonds was not a part of the legal indebtedness of the city of Vancouver, and the foundation of this claim was that the vote by which it was sought to validate it was of no effect, for the reason that such indebtedness, with that already outstanding, was more than 5 per cent. of the assessed valuation of the city for the preceding year. From the figures set out in the complaint it appeared that, if the entire amount of the \$55,000 represented by the first issue of bonds was a part of the 5 per cent. of indebtedness which the city was authorized to incur for ordinary city purposes, the \$23,000 of indebtedness sought to be legalized would, when taken with the other outstanding indebtedness, amount to more than 5 per cent. of the assessed valuation of the city, and for that reason would not be capable of validation by a vote of the people. It, however, was made to appear that of the \$55,000 procured by the sale of the first issue of bonds about \$30,000 was expended in improving the electric light plant of the city, and about \$8,000 was used in the construction of a sewerage system, and it was contended on the part of the respondents that on this account only about \$17,000 of the indebtedness represented by said bonds was a part of the 5 per cent. of indebtedness which the city was authorized to incur for general municipal purposes, and that the \$38,000 constituted a part of the 5 per cent. of indebtedness which could be incurred for the purchase or construction of a light plant and for sewerage purposes.

The ordinance submitting to the people the question as to whether or not the first bond issue should be made provided that: "Whereas it is necessary, for the purpose of enlarging the electric light plant of the city and for the construction of a suitable building therefor and for a city hall and city offices and for the purchase of new and additional apparatus for the fire department of the city, to borrow money in addition to the amount necessary to fund the said general indebtedness; and whereas it is necessary for these purposes that the city should borrow the sum of \$55,000," etc. From this it will be seen that the proposition upon which the peo-

ple were called upon to vote contemplated the issue of bonds for the purpose of enlarging the light plant of the city, as well as for general municipal purposes, and, if the form of the submission was such that its ratification authorized the issue of bonds for that purpose, it would follow that \$30,000 of the \$55,000 should be charged against the 5 per cent. indebtedness authorized to be incurred for a light plant; and it is conceded that, if such amount is so charged, the amount of indebtedness sought to be validated would not, when added to the indebtedness already outstanding for ordinary municipal purposes, exceed the 5 per cent. authorized by law.

But it is contended on the part of appellant that it was not competent for the common council to submit the question of the issuance of bonds for light purposes in connection with an issue for ordinary municipal purposes, and that for that reason the \$30,000 issued in pursuance of the proceedings had for that purpose, although applied to the improvement of the electric light plant, constituted a part of the indebtedness for ordinary municipal purposes. But such was not the effect of such submission. If it was sufficient to authorize the issue of the bonds so that they became a charge against the city, it was for the reason that the objects for which they were to be issued were so expressed in the proposition submitted that authority to issue was conferred, and the improvement of the light plant of the city was as clearly set out in the proposition submitted as an object to be accomplished as was any other. All objects were included in the proposition, and, if the submission was of any force whatever, it authorized the issuance of bonds in the discretion of the common council in such amounts for each purpose as it should thereafter determine to be for the interests of the city; and as it was thereafter determined that \$30,000 of such amount should be applied to the improvement of the electric light plant of the city, that amount would constitute a portion of the indebtedness authorized to be incurred for that purpose, and would constitute no part of the 5 per cent. authorized to be incurred for general purposes. If, on the other hand, it was beyond the power of the common council to submit as one proposition the question of incurring indebtedness a portion of which should be chargeable to each class of indebtedness authorized to be incurred, the submission was without force, and the bonds issued in pursuance thereof were invalid, and for that reason constituted no part of the indebtedness of the city; in which event there was nothing to prevent the validation of the indebtedness to fund which the bonds in question were to be issued. It follows that, whatever may have been the force of the authorization procured from the people by the ratification of the proposition to issue the first \$55,000 of bonds, there was no legal objection to the validation of the indebtedness

for which the bonds in question were sought to be issued. For that reason the denial by the trial court of any relief to appellant was required by the facts shown, and its judgment in the premises must be affirmed.

DUNBAR, ANDERS, SCOTT, and GORDON, JJ., concur.

FRIDAY v. PARKHURST et ux.  
(Supreme Court of Washington. Jan. 10, 1896.)

EQUITY—RESCISSIOM—FRAUD.

After land had been platted, the owner vacated a portion of the plat, and afterwards sold land in the part vacated, the plat being referred to in the deed for description. In the original plat there was an alley in the rear of the land conveyed, but, on replatting, no alley was located. *Held*, that the grantor's fraud in concealing from the grantee the fact that the original plat had been vacated entitled him to rescind the contract. Hoyt, C. J., dissenting.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by Frank P. Friday against Daniel S. Parkhurst and wife. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Alex. Akerman, for appellant. H. A. Porter, for respondents.

DUNBAR, J. This is an action to foreclose a mortgage on certain lots in Friday's addition to Everett. The appellant filed a plat of this addition in the office of the county auditor of Snohomish county on the 24th day of February, 1892. Upon the 15th day of September, 1892, the county commissioners, at the request of the plaintiff, granted an order vacating certain portions of said plat. Upon the 28th day of October, 1892, appellant sold to the respondents certain lots in the vacated portion of said plat, and gave his warranty deed to the same, and described the lots as according to the plat filed February 24, 1892. A payment of \$400 in cash was received, and the respondents gave their notes for the deferred payment of \$900, with mortgage on the lots to secure the same. When appellant brought his action to foreclose the mortgage, respondents answered, and pleaded for a defense that, at the time of the execution of the notes and mortgage and the execution of the deed, the respondents were unaware of the vacation of the plat referred to in the deed; that the appellant, intending to mislead and deceive them as to the condition and surroundings of the lots purchased, concealed from them the fact that said plat had been vacated; that subsequent to the deed of conveyance, and without the knowledge or consent of the respondents, the plaintiff replatted same addition, and so changed it as to close up an alley which was shown to be at the back of the lots on the plat which

was referred to in the deed of conveyance; that said alley afforded the only means of access to the rear end of said lots, and its existence at the time of respondents' purchase was one of the main inducements thereto, and, had they known that it was to be closed up, they would not have made said purchase; alleged that, by reason of the closing up of said alley, the property had been impaired in the sum of \$1,300; that subsequent to said purchase, and before knowledge of the fact that said alley was closed up, they expended the sum of \$59 in improvements; that these improvements were made relying upon the existence of the alley shown on the plat referred to in the deed; that, when defendants learned that said alley had been closed, they requested plaintiff to take back the said lots, canceling said notes and mortgage, and pay back to them the \$400 cash payment; alleging that they were then, and ever since had been, and were at the time of the trial, ready and willing to make and execute to the appellant a deed to said lots upon the conditions aforesaid; and demanded judgment against the appellant that he accept conveyance back of said lots, and surrender up said mortgage and notes for cancellation, and for the sum of \$400, the legal interest thereon from the date of the execution of the notes, and \$59 expended for improvements, or, in case, that such relief could not be granted, that they should have judgment against the appellant for the sum of \$1,300 as damages. Appellant interposed a demurrer to the answer, which was overruled, and then filed a reply, admitting the making of the deed as alleged in the answer, and the vacation of the plat, but denying the other affirmative allegations of the answer. Upon the trial the court found in favor of the respondents, and entered a plea rescinding the contract, and for the return of the purchase money.

The contention of the appellant is that the answer was bad, and the demurrer should have been sustained. It is urged by the appellant that the reference in the deed to the plat filed February 24, 1892, had the effect of incorporating the plat in the deed as a part of the description of the land conveyed; and that the grant of land with reference to the plat or map upon which there are streets and alleys gives the grantee an easement over all the streets and alleys adjacent to the lots conveyed; and that, when the deed was delivered, the grantor became estopped from setting up any right over the said streets and alleys inconsistent with the rights of the grantee, or, in other words, as between grantor and grantee, there was a complete dedication of the streets and alleys by estoppel. There is no doubt that, so far as the grantor is concerned, he would be estopped from denying the easement of the respondents over the alleys described in the plat which was

made a part of the deed; but this does not give complete justice to the purchasers. They bought with reference to the recorded plat, which was described in the deed. That plat showed a dedicated alley, which probably tended to enhance the value of the lots in the minds of the purchasers; and, notwithstanding the fact that the vendor may be estopped from disputing the easement, other rights may have intervened. The vendor may have sold the land which comprised this alley to a third party between the date of the vacation of the plat and the sale of these lots to the respondents. In such case the respondents would be remediless, except by an action for damages against the vendor, and that might not be adequate. It would be but cold comfort to say to the respondents that, "because appellant deeded you a lot representing that it was surrounded by streets and alleys, the court will consider that it is surrounded by streets and alleys, and that, in your settlement with the vendor, you must pay him on the supposition that streets and alleys are there, notwithstanding it affirmatively appears that they are not there; and then you must enter into a series of lawsuits with third parties to maintain your rights." This is an equitable action, and it is hornbook law that, when a party comes into court asking the enforcement of an equitable remedy, he must come with clean hands, and show that the transaction on his part has been equitable. In this case the answer alleges, the court finds, and the proof shows, that at the time of this sale, not only was the plat referred to in the deed, but the vendor and vendee went onto the ground, the lots were examined, and the plat was there exhibited to the vendee; and he swears that he would not have bought the lots at all had it not been for the supposed existence of this alley. The vendor, then, under the plainest principles of equity, will not be allowed to retain the benefit flowing from his misrepresentations, and will not be allowed to foreclose the equity of redemption existing in these respondents, if it affirmatively appears that his own actions have been inequitable, fraudulent, and wrong. Here is an implied covenant; for, "if land is conveyed as bounded upon one or more sides by a way, this is not a description merely, but an implied covenant of the existence of such a way." 2 Devl. Deeds, § 881; *Parker v. Smith*, 17 Mass. 413. This covenant has been broken by the grantor, and the effect of the misrepresentation pleaded and proven gives the respondents a right to the rescission of the contract. The rule is thus laid down by *Pomeroy's Equity Jurisprudence* (section 899): "Wherever an agreement or other like transaction has been procured by means of a material fraudulent misrepresentation by one of the parties, the other has an election of equitable remedies. The injured party may, at

his option, compel the fraudulent party to make good his representation—that is, to carry it into operation in the nature of a specific performance—when it is of such a nature that it can be thus performed; or he may rescind the agreement, and procure the transaction to be completely canceled and set aside.” It stands confessed that the appellant in this case, through a misrepresentation, procured the sale of these lots and the execution of the mortgage which he is now attempting to foreclose; and it would be inequitable, in our opinion, to allow him in this action the benefit of those fraudulent misrepresentations, and to relegate the respondents to another forum to obtain redress, if it could be obtained at all. The judgment is right, and will be affirmed.

ANDERS and SCOTT, JJ., concur. HOYT, C. J., dissents.

# FREDERICK et ux. v. CITY OF SEATTLE et al.

(Supreme Court of Washington. Jan. 10, 1896.)

## MUNICIPAL IMPROVEMENTS—REASSESSMENTS—CONSTITUTIONAL LAW.

Act March 9, 1893, providing that, whenever an assessment for a local municipal improvement has been declared void, the council shall make a reassessment on the property benefited by the improvement, whether the defect in the council's original proceedings be jurisdictional or otherwise, and without regard to whether the improvement is already completed, is not unconstitutional, as disturbing vested rights, or on any other ground; and it is immaterial that the act does not require a petition of the property owners, which was a prerequisite to the original assessment. It is enough that the act requires notice of the reassessment.

Appeal from superior court, King county; Roger S. Greene, Judge pro tem.

Certiorari by Henry A. Frederick and wife against the city of Seattle and others. Judgment for plaintiffs. Defendants appeal. Reversed.

W. T. Scott and Frank A. Steele, for appellants. M. L. Baer, for respondents.

DUNBAR, J. This was a hearing on certiorari. A motion to quash the writ and the merits of the cause came on for hearing before the lower court, by consent, upon a single argument. The case involves the validity of the levy and collection of a reassessment for the grading and improving of Division street, in the city of Seattle. The mode of making payment for the improvement is the mode of immediate payment defined in article 8 of the charter of the city of Seattle, as amended and now in force, subject to the provisions of the act of the legislature approved March 9, 1893, entitled “An act relating to and authorizing the collection of assessments for local improvements by a new assessment or reassessment of the cost and

expense of making same in cities and towns, and declaring an emergency.” Under the law as it existed prior to the act of 1893, it was necessary, before the council acted, to have a certain petition, by the landowners affected by the improvement, presented for their consideration. It appears from the return that no such petition was presented. The superior court of King county had declared the assessment void under the law as it existed prior to the enactment of 1893, and no appeal from such judgment had been taken. Subsequent to such enactment, however, a reassessment was made, and this action was brought to set aside the subsequent assessment made by the city. On the trial of the cause the presiding judge overruled the motion to quash the writ, and gave judgment setting aside and quashing the assessment made against the property of the plaintiff. From such judgment, an appeal was taken to this court.

Many preliminary questions are discussed on this appeal, relating to the mode of procedure, the right of the plaintiffs to invoke the writ of certiorari, etc.; but, with the view we take of the merits of the case, it will not be necessary to discuss these preliminary questions. It seemed to have been the view of the learned judge who tried the case below that the curative act of 1893 did not authorize a new assessment or reassessment in any case where the original assessment was absolutely void for lack of any jurisdictional prerequisite; and that inasmuch as the city charter provisions were such as to require that the assessment, where the mode of payment was to be by immediate payment, should be by petition signed by the owners of more than three-fifths the number of front feet of the abutting property, and if such petition was necessary to give the common council jurisdiction to make the original assessment, it was necessary to have preceded the reassessment in order to make it valid; and that it was not the intention of the legislature in the new act to do away with the requirement of the petition; and that, on constitutional grounds, work done under an absolutely void assessment could not, by reassessment or in any other way, be imposed by the city upon the property benefited. We think the learned judge was mistaken, both as to the intention of the act and the power of the legislature to pass such an act. It seems plain to us from the reading of the statute that the legislature intended to provide for a reassessment in all cases where the assessment had been held to be void, whether for irregularities or for want of prerequisites which went to the jurisdiction of the council to levy the assessment and to order the work done. The language of the statute is that “whenever an assessment for laying out, establishing, \* \* \* paving, repaving, \* \* \* graveling, re-graveling, \* \* \* or for any local improvement which has heretofore been made or which may here-

after be made by any city or town, has been or may be hereafter declared void, and its enforcement under the charter or laws governing such city or town refused by the courts of this state, or for any cause whatever has been heretofore or may be hereafter set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court, the council of such city or town shall, by ordinance, order and make a new assessment or reassessment upon the lots, blocks or parcels of land which have been or will be benefited by such local improvement," etc. Laws 1893, c. 95, § 1. This language seems to clearly contemplate a case where there was no jurisdiction in the city council to order the improvements or make the assessments, which is the kind of a case that the courts would declare void. But, to put the question beyond peradventure, the legislature, in expressing the intent of the act, says: "It being the true intent and meaning of this act to make the cost and expense of all local improvements payable by the real estate benefited by such improvement by making a re-assessment therefor, notwithstanding that the proceedings of the common council or board of public works or any of its officers may be found irregular or defective, whether jurisdictional or otherwise." Id. § 6. And it further provides that "the fact that the contract has been let or that such improvements shall have been made and completed in whole or in part, shall not prevent such assessment from being made." Id. So that, it seems, the intention of the legislature to provide for cases where there was no jurisdiction in the common council to act is too plainly expressed to be misunderstood. Nor is there anything in the act to indicate that, before this reassessment can be made, the prerequisite to action under the old charter shall exist under the new; that is to say, there is no intimation that, before an assessment can be made under the new act, the petition provided for by the old law shall be presented. The legislature could itself have made this assessment directly, without any reference at all, but it saw fit to delegate the authority to the council, and it could delegate it with all the power which the legislative body possessed.

The rule deduced from all the authorities seems to be, in substance, that if the legislature had the power, in the first instance, to make valid the assessment, without the requirement which was disregarded by the authorities, it can, by legislative enactment, dispense with that requirement in providing for a new assessment; and there can be no question but that, under the almost unlimited exercise of authority on questions of tax or assessment, the legislature, in the first instance, could have provided that this work should be done and the assessment made without the requirement of any kind of a petition. It seems to be well established by the authorities that the fact that a judg-

ment of a court has pronounced an assessment void will not preclude the legislature from making provision for a reassessment on such property, if it had the original power to provide for such assessment. The only restriction on the powers of the legislature in our state is that the taxes must be uniform, and the further restriction that the person whose property is assessed must have notice. Of course, this is not parallel with a case where a judgment was held void because there was no service, or cases of that kind which would clearly fall within the constitutional inhibition of taking property without due process of law, and therefore the legislature would not have had the power to dispense with that requirement in the first instance. The retrospective power of the legislature over subjects of assessments and taxation where past proceedings have proved defective or irregular by reason of the want of power in local boards to act, or by reason of noncompliance with existing provisions of law, is well established by the authorities. One of the leading cases on this question is that of *Mills v. Charleton*, 29 Wis. 400, where it was decided that the reassessment of a tax under a new grant of authority is not a reopening of the judgment by which the former assessment was declared invalid and proceedings thereunder restrained, and that it did not conflict with the general rule that a statute which operates to annul or set aside the final judgment of a court of competent jurisdiction, and to disturb or defeat vested rights, is void; the distinction being that the general rule had reference to matters of mere private right. This case involved a "curative" or "remedial" statute (and we use the terms interchangeably), similar in character to the statute under discussion. The court, after arguing other propositions, approaches the one under discussion here in the following language: "The other principal question involved in this case is one which has become trite, and scarcely an open one, by repeated arguments and decisions in this court, as well as in the courts of other states. It relates to the retrospective power of the legislature over the subjects of assessment and taxation, where past proceedings have proved defective or irregular, either for want of power in the local boards or officers, or by reason of noncompliance with some existing provision of law. The cases in which this question has arisen and been decided are quite numerous, and always with one result. The authority of the legislature in this respect has always been affirmed where the subject acted or operated upon was purely and exclusively one of taxation and assessment, and concerned only the taxing power." "The principle," says the court, "upon which these and other similar decisions rest, is that the taxing power, when acting within its legitimate sphere, and unrestrained by positive constitutional provision, is a far-

reaching and unlimited power, which knows no stopping place nor moderation of force until it has accomplished the purpose for which it exists, namely, the actual enforcement and collection of the tax. It moves constantly forward to its object, until that is accomplished, and, if turned aside by any obstacles or impediments, may return again and again to the same tax or assessment, until, the way being clear, the tax is paid or the assessment collected. Such is the force of this power, or of the sovereign body which exercises it, that it may remove all obstacles, and never cease to act until it has attained the appointed end for which it was delegated,"—citing, with approval, *Grim v. School Dist.*, 57 Pa. St. 433, and *Musselman v. City of Logansport*, 29 Ind. 533. In these cases it was decided that, if the legislature has antecedent power to authorize a tax, it can cure, by a retroactive law, an irregularity or want of authority in levying it, though thereby a right of action which vested in an individual should be divested. The same principle was announced by the supreme court of Minnesota in the case of *City of St. Paul v. Certain Lots*, 6 N. W. 424. The curative statute in that case was no stronger than ours, and it provided and authorized the common council to direct a new assessment or reassessment when judgment is denied on the original assessment, or the assessment set aside or declared void for any cause whatever. This question has been before the supreme court of the United States in *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921. There an assessment had been made, and a portion of the lots upon which the assessment was made successfully contested the validity of the assessment; and the unpaid part of the assessment, being something over \$40,000, was returned for five years as uncollected by the treasurer of Kings county, N. Y., to the comptroller of the city. This assessment was made under the statute of 1869. In 1881 the legislature passed a curative act, and directed the board of supervisors of Kings county to levy on the assessment roll of the town upon those certain lots a sum equitably apportioned among the several parcels comprising said lands, including the interest which had accrued. This levy was contested, was held good by the court of appeals of New York, and was finally taken to the supreme court of the United States, where it was held that the act of 1881 determined absolutely and conclusively the amount of tax to be raised and the property to be assessed, and upon which it was to be apportioned; that each of these things was within the power of the legislature, whose action could not be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. It decided that the legislature might commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but that it was

not bound to do so, and could settle both questions for itself, and, when it did so, its action was necessarily conclusive and beyond review; that the power of taxation is unlimited, except that it must be exercised for public purposes,—citing *Welsmer v. Village of Douglas*, 64 N. Y. 91, and approving the words of Chief Justice Chase in *Bank v. Feno*, 8 Wall. 533, that "the judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." In *Williams v. Supervisors*, 122 U. S. 154, 7 Sup. Ct. 1244, the supreme court decided that the mode in which property should be appraised, by whom and when that shall be done, what certificate of their action shall be furnished by the board which does it, and when parties may be heard for the correction of errors, are all matters within legislative discretion; and it is within the power of the state legislature to cure an omission or a defective performance of such of the acts required by the law to be performed by local boards in the assessment of taxes as could have been in the first place omitted from the requirements of the statute, or which might have been required to have been done at another time than that named in it. In *Re Van Antwerp*, 56 N. Y. 261, it was held that the taxing power of the legislature for public purposes is unlimited, except as specifically restrained by the constitution; that, where an assessment for municipal improvements is irregular, the legislature may itself make, instead of authorizing, a reassessment. If this be true, it certainly destroys the objection that the legislature in this instance did not have power to provide that the assessment could be made by the city council without the presentation of a petition of the property owners, which was provided for by the law under which the first assessment was made. To the same effect are *Howell v. City of Buffalo*, 37 N. Y. 267; *McMillen v. Anderson*, 95 U. S. 37; *State v. Mayor, etc., of City of Newark*, 34 N. J. Law, 236. It is announced by Mr. Cooley, in his work on *Constitutional Limitations* (5th Ed., p. 593), that "the power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the power which exercises it."

A general review of this chapter conclusively shows that the overwhelming weight of authority—in fact, all authority—goes to the extent of according this power to the legislature, and the courts will not inquire into the policy of the tax, or undertake to limit the authority of the legislature, so long as it is exercised within the constitutional limitations, and so long as it appears that it is a proper

exercise of a taxing power. A defense of the law announced by the courts on this question is made by Cooley in his work on Taxation (2d Ed., p. 309), where he insists that this power is not inconsistent with reason or fair dealing, because the reassessment is only for the purpose of enforcing against the delinquent taxpayer a duty which he was likely to evade by reason of the nonfeasance or misfeasance of the officers who ought to have enforced it, and, when the new proceeding will give him the same opportunity to be heard that was given him in other cases, and will be conducted on principles that operate generally, he has no reasonable ground of complaint; and he sums up the law, and announces the particular cases where the legislature may provide a reassessment in cases where the first assessment has been held to be void; and after giving some instances where the new assessment cannot be provided for, as where the tax itself was originally void by reason of having been levied for an illegal purpose, he concludes: "And here it may be observed that a judicial decision against the first proceedings, if based upon errors and defects merely, and not upon the vicious nature of the tax itself, is not a bar to a reassessment. Such a decision merely points out the error, and the reassessment may be, of all others, the most proper and effectual way of correcting it." On this proposition, however, the authorities are so uniform that a further citation would be without benefit. It appears in this case that the subject of the assessment was a subject over which the legislature had proper control; that the new assessment law provides for notice to the property owners; that no constitutional limitation has been invaded; and, under the plain provisions of the statute, we think the new assessment provided for contemplated just such a case as the one at bar; that, so far as the record shows, the law has been substantially complied with.

We think there is nothing in the contention that the city is not a party in interest here, for, whatever its ultimate responsibility may be in cases of this kind, it is primarily responsible for the collection of this assessment.

Believing that the court erred in overruling the motion to quash the writ, the judgment will be reversed, and the case remanded, with instructions to grant the motion to quash the writ.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

CLINE et al. v. CITY OF SEATTLE et al.  
(Supreme Court of Washington. Jan. 13, 1896.)

MUNICIPAL IMPROVEMENTS—ORDINANCES—VOTE OF ACTING MAYOR—REASSESSMENTS.

1. Under a city charter requiring the mayor to preside at meetings of the council, and provid-

ing that, if he is absent from such meetings the council shall select one of its members to preside, and that, if the mayor is absent from the city, the council shall select one of its number as acting mayor, who shall thereupon be vested with all the powers of the mayor till his return, such acting mayor, when presiding at meetings of the council, has no vote, within a provision that certain ordinances be passed by a unanimous vote of the council.

2. A charter provision that where an assessment for local improvements is invalid, "because of want of form, insufficiency, informality or irregularity or non-compliance with the charter provisions governing such assessments," it shall be reassessed, authorizes the reassessment, though the first assessment was invalid by reason of want of jurisdiction.

3. Under an amendment to a charter providing, in case an assessment for local improvements be invalid, it shall be reassessed in accordance with the provisions of laws or ordinances existing at the time of the reassessment, a reassessment is valid though the assessment district on which it is made is different from what it was at the time of the original assessment, it being the one required by the charter in force at the time of the reassessment.

Appeal from superior court, King county; Roger S. Greene, Judge pro tem.

Action by William Cline and others against the city of Seattle and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Frank A. Steele, for appellants. John K. Brown, for respondents.

HOYT, C. J. This action was brought to prevent the collection of a tax for a street improvement, levied upon the property of the respondents, and to have such tax declared invalid and set aside, and the lien thereof removed. A motion was interposed to strike the statement of facts from the record, for the reason that it could not be considered for want of sufficient exceptions to the findings of fact made by the trial court. Upon the hearing of such motion, it was denied, for the reason that the statement could be considered in the investigation of the errors assigned upon the denial of defendants' motion for nonsuit, though no exceptions had been taken to the findings of fact. Upon a further examination of the record, we have become satisfied that the decision of the case requires no examination of the statement of facts. The findings of fact by the trial court were very full and complete, and their correctness is not challenged in the brief of appellants. Every issue of fact presented by the pleadings was covered by such findings, and they are as favorable to the appellants as they could ask.

From such findings it appears, among other things, that proceedings for the improvement of Fourteenth street were commenced under the provisions of the charter of the city of Seattle granted by the legislature by the act of 1880; that, while such proceedings were pending, the freeholders' charter was adopted, and under its provisions the improvement was completed, and accepted by the city, and an assessment made upon the abutting property to pay the cost of such.

improvement; that such assessment had been declared void and of no effect, by the judgment of a court of competent jurisdiction; that thereafter an amendment to said freeholders' charter was adopted, to the effect that "in all cases of special assessments for local improvements, where said assessments had failed to be valid in whole or in part, because of want of form, insufficiency, informality or irregularity or non-compliance with the charter provisions governing such assessments, the city council were authorized to reassess such special taxes or assessments and to enforce their collection in accordance with the provisions of laws or ordinances existing at the time of such reassessment"; that, by virtue of the authority conferred by this amendment, a reassessment was made upon the abutting property, to pay for this improvement; that the proceedings under which this reassessment was made were in all respects regular, and such as were required by the provisions of said freeholders' charter, as amended. The trial court held that the original assessment was absolutely void, for the reason that the ordinance providing for the improvement had not been passed by a unanimous vote of the council. The facts upon which it founded such holding were that one U. R. Niesz, who was a member of the council of the city at the time, and present when the vote was taken, did not vote therefor; but it appeared that, at the time the vote was taken, the mayor was absent from the city, and that said Niesz was the acting mayor, and, as such, presiding at the meeting of the council at which the ordinance was passed. This being so, the sufficiency of the vote must depend upon whether or not said Niesz, as such acting mayor, had a right to vote upon questions before the council. There was a provision in the charter of the city which required the mayor to preside at meetings of the common council, and a further provision that, if he was absent from such meetings, the council should select one of its members to preside. There was also a provision to the effect that, if the mayor was absent from the city, the common council should select one of its number as acting mayor, and that the person so selected should thereupon become vested with all the powers of the mayor until the return of such officer. If there had been only one provision in relation to the duty of the council to select a presiding officer when the mayor did not attend a meeting, there would be reason for holding that the selection of one of the members of the council to so preside would not deprive him of his right to vote. But the two distinct provisions, one of which went simply to the selection of a presiding officer, and the other to the election of an acting mayor with all the powers of such officer, including that of presiding at the council meetings, can only be given force by holding that in one case the person selected retained the rights

of a member of the council, and in the other that he did not. In view of these provisions, we think that the acting mayor, Niesz, who presided over the meeting, was not at the time entitled to vote as a member of the common council, and that the ordinance received a sufficient vote.

But, if we are right in the conclusion to which we have come as to the force to be given to the amendment to the charter above set out, the question as to whether or not this ordinance was properly passed is immaterial. In the case of *Frederick v. City of Seattle* (just decided) 43 Pac. 364, it was held that a reassessment provided for by the act of the legislature passed in 1893 could be sustained even though the original assessment was void for want of proper steps to give the council jurisdiction of the subject-matter; and, in our opinion, this amendment to the charter gave to the common council substantially the same authority as did the act of the legislature under consideration in that case. The language is not quite so broad, and it is not expressly stated that the reassessment may be made if the first one has been held invalid by reason of want of jurisdiction; but there would have been no occasion for the use of the language employed if it had only been the intention to give the right to make a reassessment when the first one had been held invalid on account of some irregularity after jurisdiction had been obtained. Such a construction might have been possible if it had only been provided that the reassessment should be made when the first one had failed to be valid in whole or in part, for want of form, insufficiency, informality, or irregularity. But even then the use of the word "insufficiency" would have been unnecessary to express the intention of the charter makers. But in addition to those words was the provision that the right to reassess should exist when the original assessment had been declared invalid on account of noncompliance with the charter provisions governing such assessment. To give force to this provision and to the other words of the amendment, it must be held that it was the intention to cover every ground upon which the original assessment should be held invalid. The plain intent seems to have been, where a street improvement had been made the cost of which should properly have been assessed upon abutting property, to provide a method by which such property should be charged when the first effort to charge it had failed for any reason whatever. The power of the legislature, and consequently of the freeholders acting under the provisions of the constitution, to give such power to the common council of the city, was so fully discussed and the authorities so fully collated in the case above cited that a further consideration here would be out of place.

From what we have said, it will be seen



that the common council was clothed with the power to make the reassessment under consideration, and that being so, and it having been found as a fact by the trial court that such reassessment had been made in all respects as required by the provisions of the charter in force at the time, it must be held to have been valid.

The only reason, except the one above considered, stated by the trial court for holding the reassessment invalid, was that the assessment district established by the common council for the purposes of such reassessment was different from that established for the purposes of the original assessment, and, in our opinion, such change did not invalidate the reassessment. If the reassessment could be made at all, it could only be made under the provisions of the charter in force at the time it was made, and thereunder no other district than the one upon which the reassessment was made would have been legal. Besides, the first assessment, having been held void, could serve no purpose whatever in the reassessment, excepting to bring the improvement within the provisions of the charter providing for such reassessment. Before such provisions could be invoked for the purpose of providing the means for paying for the improvement by an assessment upon adjoining property, it must have appeared that theretofore there had been an attempt made to collect the cost of such improvement by an assessment. Except for this single purpose, the first assessment and all proceedings thereunder could have no force in determining the legality of the reassessment. The facts necessary to sustain the reassessment were that a street improvement had been made and completed under the direction of the city; that an attempt had been made to collect the cost thereof by an assessment upon the adjoining property; that such attempt had failed by reason of the invalidity of such assessment; and that a reassessment had been made in accordance with the provisions of the charter in force at the time of such reassessment. All of these facts were found by the learned court who tried this cause, and, having so found, it should have further found that the reassessment was valid and of full force against the property of the respondents. The judgment will be reversed, and the cause remanded, with instructions to dismiss the action.

ANDERS and GORDON, JJ., concur. DUNBAR, J., dissents.

CITY OF SEATTLE v. PARKER et al.  
(Supreme Court of Washington. Jan. 13, 1896.)

PLEADING—BILL OF ITEMS—EVIDENCE—ASSESSMENT ROLL—PROOF OF USE.

1. Where suit is brought to recover on certain items set forth in exhibits attached to and  
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made a part of the complaint, no evidence is admissible to charge defendant, except that which goes to establish the items alleged.

2. Assessment rolls are themselves the best evidence of their contents, and they cannot be proven by the evidence of a city official.

3. Where assessment rolls are not properly certified and authenticated, they cannot be introduced to charge one who is alleged to have used them.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by the city of Seattle against Isaac Parker and others to recover money alleged to have been had and received to use of plaintiff by defendant Isaac Parker while city treasurer. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Stratton, Lewis & Gilman and White & Munday, for appellants. W. T. Scott and Frank A. Steele, for respondent.

DUNBAR, J. This is an action brought by the city of Seattle against Isaac Parker (who was the treasurer of said city at the time of the alleged defalcation) and his bondsmen. The case was referred to a referee, who found against the defendants. His findings were excepted to by the defendants. The exceptions were sustained, the report set aside, and the court made new findings against the defendants for the sum of \$5,535.96 and interest to date of judgment. The complaint alleges that during the time defendant Parker was treasurer of the city of Seattle he received for the use of the said city divers sums of money, in the language of the complaint, "from the persons and sources hereinafter specifically set forth and contained in the statements of accounts hereto annexed and marked Exhibits A, C, and D," which exhibits were made a part of the complaint; that he did not account to the proper authorities, as required by law, at all, for all of said sums of money, but that he neglected and refused to account to the proper authorities for a large amount of said sums, to wit, the sum of \$8,682.75, which he has converted to his own use; and the bill of items sets forth the particular sums, and their sources, which were not accounted for by the treasurer.

We have carefully examined this case, or have made as careful an examination as was possible under the circumstances, including an examination of all the testimony, and we feel certain that an injustice has been done the defendants by the findings of the court. It is urged by the appellants that the court erred in admitting the testimony in relation to the street assessments, and we think the reasonableness of this contention is plainly shown by the record. The city saw fit to sue upon certain items. Those items were set forth in certain exhibits, which amount to a bill of items; and, if the city could recover at all, it must recover upon the items alleged. It is urged by the respondent that the city was under no obligation to furnish a

bill of items; that the matters alleged were things within the knowledge of the defendant treasurer; that the progress of the trial was slow, many years having elapsed between the filing of the complaint and the time that the cause was tried. But, whether the city was under any obligation to furnish a bill of items or not, it saw fit to do so, and the proof must correspond with its allegations. Notwithstanding the length of time that elapsed, the defendants had a right to rely upon the allegations of the complaint, and upon the bill of items set forth in the exhibits, and had a right to prepare their defense with reference to those items, and those alone. On any other theory the bill of items would act as a trap or pitfall for the defendants. The attempt by the city to prove the contents of the assessment rolls by the succeeding treasurer, Ames, was so plainly contrary to the law governing testimony of this kind, and to the universally accepted rule that the rolls themselves were the best evidence of what they contained, that it is not worth while to cite authorities on that proposition or to discuss it; and when, at a subsequent stage, the rolls themselves were introduced,—or what was claimed to be the rolls,—it is too plain for discussion that there was no authentication of them, and nothing whatever to show that they were the assessment rolls of the city of Seattle for that year. To meet this objection it is urged by the respondent, and correctly urged, that, notwithstanding the fact that the assessment rolls might not be certified or authenticated, yet, if it was proven that the defendant Parker in fact used the alleged rolls, received money upon them, and failed to account for it, he is liable therefor. The trouble with this contention is that it is not supported by the testimony. A careful reading of the testimony of Ames, the succeeding treasurer, by whom this proof was attempted to be made, shows that there was nothing definite in this respect proven. Much might be said on this proposition, but it clearly appears to us from all the testimony that this testimony was incompetent, and that, if it had not been, it further appears from the circumstances of this case, viz. the conditions existing during a part of the administration of this treasurer, the want of facilities for conducting properly the business of his office, and the fact that a portion of the stubs of the assessment receipts and other portions of the records of the office were destroyed by fire, that the proof was entirely insufficient to sustain the findings of the court in relation to these accounts, which aggregated \$4,313.46. We have no hesitancy in substituting our judgment for that of the lower court on questions of fact in this particular case, for the case was tried by the lower court on the testimony reported by the referee, and this court has the same opportunity to reach a correct conclusion on the facts as had the court below. We cannot, however, sustain the contention

of the appellants as to the item of \$7,500, found by the court not to have been accounted for by the treasurer; this item being cash received by the treasurer for the sale of a lot belonging to the city, theretofore used as an engine house. This sum should have been credited to the fire fund. It was not so credited, and it seems to us, from the testimony of the defendant Parker, and also from that of his deputy, George Parker, that there is an absolute failure to account for this item. There appears no satisfactory showing of its entry anywhere, or of its having been credited to any fund. In fact, there seems to us to be no intelligent accounting for it at all. Accepting, then, the findings as to the item of \$7,500 and the amount of the credits which were found to be due the defendant, and subtracting from the amount found due by the court, viz. \$5,535.96, the aggregate sum of \$1,313.46, there is left \$1,222.50, which we think was the just amount of the judgment which should have been rendered against the defendants. Ordinarily, we should reverse a case like this, and order a new trial, but, inasmuch as the record satisfies us that the city offered the best proof which it could have offered with relation to the items upon which the judgment was based, outside of the item of \$7,500, and the further fact that it is evident from the testimony of the defendant Parker and his deputy that no other or better defense could be offered of the nonaccounting for the item of \$7,500, above referred to, we think the best interests of all parties will be subserved by reversing the case, with instructions to enter judgment in favor of the respondent for the sum of \$1,222.50, with interest the same as in the former judgment; the respondent to recover its costs in the court below, and the appellants to recover costs of the appeal.

ANDERS and GORDON, JJ., concur. HOYT, C. J., did not sit at the hearing.

#### JOHNSON v. BELLINGHAM RAY IMP. CO.

(Supreme Court of Washington. Jan. 13, 1896.)

#### CONTRIBUTORY NEGLIGENCE—PLEADING—INJURY OF EMPLOYE—MASTER'S LIABILITY—EVIDENCE.

1. Contributory negligence is matter of defense to be pleaded by defendant, and need not be negatived in the complaint.

2. The exclusion of evidence under defective allegations in a complaint renders the defective allegations harmless.

3. In an action by an employé for injuries from a truck breaking through the floor of defendant's mill, it appeared that two days before a truck had broken through the floor between two rafters, which were two feet apart, and the place repaired by removing a part of the broken plank; that the break causing the injury occurred in the same plank. Defendant's manager testified that the defects causing the break were latent, while two witnesses for plaintiff, who examined the broken pieces, testified that

the whole plank was rotten. *Held*, that defendant was liable.

Anders, J., dissenting.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by Johan G. Johnson against the Bellingham Bay Improvement Company for personal injuries. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Dorr, Hadley & Hadley, for appellant. J. J. Welsenburger, for respondent.

DUNBAR, J. This is an action for damages for personal injuries sustained by plaintiff while in the employ of the defendant and in defendant's sawmill. The wharf or flooring of the mill yard surrounding the mill was 600 or 700 feet long and about 90 feet wide. It was constructed of floor planking, 3 inches thick, laid upon stringers, resting upon piling, the stringers being 2 feet apart, and had been in constant use for about 2½ years prior to the accident. The lumber or product of the mill had to be trucked through an alleyway which led immediately in front of the door of the office which was occupied by defendant's agent, Mr. Fowle. Plaintiff was employed to truck and handle lumber in this mill. On the 24th of May, 1893, plaintiff, with other hired men, was engaged in trucking lumber from the mill across the wharf, to be loaded into cars for shipment. The lumber which was being handled was planed on both sides, and it was the custom, presumably under the direction of the agent, to pile the lumber high up on the trucks; and the lumber, being planed as above described, would slip easily, and it was somewhat difficult to keep it from sliding from the trucks. By the piling of timber and lumber along the sides where the truck lay there was a clear space of only about 10 feet in width, the truck being about 6 feet wide. On the said 24th day of May, while a truck load of lumber was passing through the alley nearly in front of the office door above mentioned, one of the truck wheels broke through the planking of the alley or wharf, and the lumber was precipitated from the truck, and a serious accident at that time was narrowly avoided, one of the men having the heel of his boot caught and wrenched off by the lumber. Either that evening or the next day the hole in the wharf was repaired. The repairs were made by cutting off the broken plank the length of the width of the stringers, being two feet; and the evidence is conflicting whether a new piece the full width of the planking, two feet long, was inserted, or a new piece two feet long and about half the width of the plank, though we do not consider this discrepancy material. On the next day, the 26th of May, while plaintiff and a number of the employes were engaged in carting this slippery lumber along the same alley, the truck broke through the flooring, and precipitated the lumber upon plaintiff, from which he sustained the injuries com-

plained of. This lumber was piled up high on the trucks, and was held there by the men putting their hands on it, walking along by the side of the truck, and pushing it and holding the lumber on at the same time. The case was tried by a jury, and a judgment rendered in favor of the plaintiff for \$6,000, the action having been for \$10,000. A demurrer was interposed to the complaint for the reason that it failed to state a cause of action, in that, while it alleged that the defendant knew of the defects and dangerous character of the roadway, and that plaintiff had no knowledge or notice thereof, it did not state that plaintiff could not have ascertained the facts upon reasonable inquiry. This demurrer was denied by the court. We think the complaint went far enough in the allegations of negligence on the part of the defendant, and it has been uniformly decided by this court that the question of contributory negligence is a matter of defense to be pleaded by the defendant, and that it need not be negatived by the complaint; and in all other respects we think the complaint a good one.

Some objection is made by the appellant to the allegations of the complaint in relation to the earning capacity of the plaintiff and the wages that defendant was paying plaintiff at the particular time of the injury; but, without passing upon the sufficiency of the complaint in this respect, we are satisfied that, if the complaint was wrong, all the defects were cured by the court by refusing to allow the plaintiff to prove his pecuniary standing or means.

There are a great many errors assigned by the appellant, but it seems to us that this case narrows itself down to the question of whether or not the defendant had exercised the proper degree of prudence in mending the break in the wharf which was brought to its knowledge, and which it attempted to mend. It is an elementary proposition, which does not call for citations of authority, that the master must furnish a safe place in which he requires his servants to work, and that he must furnish them safe appliances. He is, of course, not bound to insure the employé, but he is bound to use reasonable care in the selection and construction of the machinery and the appliances. It is conceded by the respondent that Mr. Fowle is the vice principal of the company. Mr. Fowle testifies that he examined the break made on the 24th of May, and that it was caused by a shake or pitch seam, and that it did not extend beyond the mended portion of the plank; that he examined the plank where it was sawed off, and that it was sound, and that these shakes or pitch seams, caused by the shaking of the tree while it was growing, were blind defects, which could not be seen or cured. If this testimony were undisputed, it is doubtful if such negligence could be attributed to the defendant as would warrant a recovery in

this case; but the overwhelming weight of testimony was to the contrary. Charles Terrill and Swan Johnson both testified that they examined the plank where it was broken the first time, and they found it, in the language of the witnesses, "rotten"; and witness Peterson testified that he examined the plank where it was broken the second time, and it was rotten at that place. It must be borne in mind that the second break occurred right at the end of the new piece of lumber which had been put in to mend the first break. This is testified to by Fowle on the part of the defense and by Lynn and Peterson, witnesses for the plaintiff. It seems that just as the car wheel left the new piece of lumber and passed onto the end of the old plank the break occurred, and that it occurred right next to a stringer. It seems to us from the whole testimony in this case that the jury were justified in coming to the conclusion that the plank was decayed at the place of the last break, and that that decayed condition existed or was a continuation of the decayed condition of the plank where it was first broken; and the fact that the attention of the defendant had been called to the defect in the plank by the first break, and that it repaired the break in such a careless and imprudent manner as it did, justifies the conclusion that it was guilty of culpable negligence; such negligence, at least, as renders it liable for any damages which legitimately flow from its act. This is about all that can be said in this case. We are satisfied from the testimony that the jury were at least warranted in concluding that the damages which this plaintiff suffered were caused by the negligence of the defendant in failing to furnish suitable instrumentalities for the performance of the work which it had instructed the plaintiff to do. From the testimony we do not feel justified in interfering with the verdict on the ground that the damages found were excessive. The judgment will therefore be affirmed.

HOYT, C. J., and SCOTT, J., concur.

ANDERS, J. I think the plaintiff was himself guilty of negligence which directly contributed to cause the injury complained of, and I therefore feel constrained to dissent from the conclusion reached in the foregoing opinion.

GORDON, J. I concur in what is said by Judge ANDERS.

#### SCOTT v. BOURN.

(Supreme Court of Washington. Jan. 13, 1896.)

APPEAL—STATEMENT OF FACTS—REVIEW—EVIDENCE—TRIAL BY COURT—FINDINGS.

1. That the court erred in amending the proposed statement of facts before settlement

will not enable the appellate court to consider it as though it had been settled without amendment.

2. A finding in a suit to cancel a note as executed without consideration, that the note was based on a sufficient consideration, will not be disturbed as against the evidence, the existence of a consideration being testified to by defendant and denied by plaintiff.

3. Where the consideration for a note sued on is alleged to be the settlement of an account between the parties involving numerous transactions, the court is not required at the request of plaintiff to find what items entered into the account.

Appeal from superior court, Pacific county; Richard K. Boney, Judge pro tem.

Action by Frank Scott against J. Frank Bourn. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Edward F. Hunter, for appellant. John H. Smith & Bro., for respondent.

HOYT, C. J. The record in this case is in such shape that it has been with great difficulty that the real controversy between the parties could be determined, and we would probably be justified in affirming the judgment for the reason that it does not sufficiently appear from the record what particular errors on the part of the trial court are relied upon for reversal. But since, by the aid of the brief of appellant, we have been able to discover what we deem to be the questions which were material to a correct determination of the controversy between the parties, we can overlook the imperfections in the record, and examine the rulings upon these questions.

The first complaint made by the appellant is that the trial court committed error in amending the proposed statement of facts before settlement, and he contends that we should consider it as though it had been settled without such amendment. This we cannot do. If the court wrongfully refused to settle a proper statement of facts, the remedy of appellant was by mandamus to compel it to do so. Until a statement has been settled by the judge, it cannot be considered upon appeal, however clear may have been the right of appellant to have it settled as proposed. From the pleadings and the undisputed proofs, it appeared that the plaintiff and defendant had numerous business transactions together, commencing some time in January, 1890, and continuing until about February 24, 1891; that on said 24th day of February the plaintiff made to the defendant a promissory note for the sum of \$8,000, payable one day after date, with interest at the rate of 10 per cent. per annum; and the material question upon which the rights of the parties depended was as to the force to be given to this note. On the part of the plaintiff it was contended that it was given without consideration, to enable the defendant to avail himself of an interest in certain moneys which were expected to be paid upon a contract held by the plain-

tiff and defendant against a third party, and that, if such money was not paid, and on that account the contract was forfeited, the note was to be of no force, and was to be canceled and surrendered. There was no dispute as to the fact that the money was not paid, and that the contract was canceled; hence plaintiff claimed that he was entitled to have the note canceled and delivered up. The defendant claimed that the promissory note was made upon the settlement between him and the plaintiff of the transactions in which they had been interested up to the time of the execution of the note; that upon such settlement it was agreed that, for moneys advanced and services rendered by him for the plaintiff, there was due to him the sum of \$6,000, and that the note was given in settlement of the amount so due. The proof offered by each of the parties to sustain these adverse contentions was almost entirely the evidence of himself as a witness, and unless that of the plaintiff was of such controlling force that it not only overcame that of the defendant, but also rebutted the presumption which arose from the production of the note, the finding of the trial court to the effect that the note was executed for a sufficient consideration, and was of force in the hands of the defendant, must be sustained; for, even in an equitable proceeding, a finding of fact by the trial court will not be set aside upon appeal unless there is a preponderance of evidence against it. The evidence of the plaintiff was not of this controlling force. On the contrary, the reasons which induced the execution of the note as testified to by him were most unsatisfactory. The money to be derived from the contract would, according to his testimony, have become the joint property of himself and the defendant, and it was in no manner explained why it was necessary that the defendant should have this note to enable him to get his share of it, if plaintiff was not indebted to the defendant, and it was not the understanding that the note should be paid out of plaintiff's share of the \$17,000 to be paid upon the contract; and if it was the intention that defendant should be paid out of such share, it must be presumed that the sum specified in the note was due from plaintiff to defendant. The presumption that a written instrument was executed for the purposes disclosed upon its face cannot be overcome except by satisfactory proof, and the transaction as testified to by the plaintiff was so unreasonable that it would be doubtful whether the presumptions flowing from the production of the note in the hands of the defendant would have been overcome even if no testimony in support thereof had been introduced by the defendant. But these presumptions were supported by the testimony of the defendant, whose statement as to the circumstances surrounding the execution of the note was reasonable, and consistent with

other proofs in the case. The finding of the trial court as to the force to be given to this note is fully sustained by the evidence.

The court refused to find in detail as to the state of the account between plaintiff and defendant at the time the note was executed, and it is claimed that by reason of this refusal the judgment should be reversed. But the evidence was of such a nature that it was impossible for the court to find just what items entered into the account between the parties, and, having found that there was a long unsettled account between them, and that on a certain day they had fully adjusted it, and that the note in question had been given in settlement of the amount found due from the plaintiff to the defendant upon such adjustment, such finding was sufficient upon which to found the legal conclusion that the defendant was entitled to have the note enforced against the plaintiff according to its terms.

Complaint is made as to other rulings during the progress of the trial, but, in the light of the finding as to the force to be given to the note, such rulings, even if erroneous, could not have affected adversely the rights of the plaintiff. The judgment will be affirmed.

DUNBAR, ANDERS, SCOTT, and GORDON, JJ., concur.

STATE ex rel. ABERNETHY v. MOSS,  
Mayor, et al.

(Supreme Court of Washington. Jan. 13,  
1896.)

JUDGMENT—RES JUDICATA.

Where, in an action against a town, the supreme court held that plaintiff had a valid claim against the town, and for that reason his remedy was in mandamus, in a subsequent mandamus proceeding by plaintiff the town cannot attack the validity of the claim on the ground that the claim has never been determined on its merits, the first action having been disposed of on demurrer to the complaint, especially where such ground for attack is raised for the first time on petition for rehearing.

On petition for rehearing. Denied.  
For original opinion, see 42 Pac. 622.

SCOTT, J. On November 11th, last, an opinion was filed in this case reversing the judgment of the lower court, and remanding it, with instructions to issue a peremptory writ of mandamus to compel payment of the relator's claim against the town of Medical Lake. This action was taken on the ground that the relator's claim against said town had been established in his favor in a prior action decided by this court on June 5, 1894. The respondents have petitioned for a rehearing, claiming that the merits of the matters in controversy have never been judicially passed upon, for the reason, as is claimed, that the prior action was decided upon a demurrer interposed by the respondents, and in

their favor. Whatever the fact may be in this particular, we think the respondents are precluded from raising the question. The basis of the disposition of the former cause was that the claim was a valid one, and that its validity had been established. Upon that basis it was held that the relator, in bringing the suit against the town upon said claim, had mistaken his remedy, and that he should have resorted to mandamus. The action of the lower court in dismissing his cause was affirmed, whereupon this second proceeding was instituted. No mention is made in the opinion rendered in that case that the cause had been disposed of in the superior court upon a demurrer to the complaint, and we will not at this time look into the record to determine the fact. If the respondents were dissatisfied with the facts as assumed by the court in that cause, they should then have applied for a correction or modification of the opinion in that particular, and not have allowed the same to become the law of the case. Not only was that not done, but the argument of the appeal in the present cause upon the part of the relator was based upon the ground that the legality of the claim had been established and settled in the prior proceeding. No claim was made by the respondents, in their brief, that said action had been disposed of upon a demurrer, leaving the merits of the controversy unsettled, and, even if such matters were available at that time, the failure of the respondents to present their claims in their brief would also preclude them from raising the point in a petition for a rehearing. Rehearing denied.

HOYT, C. J., and ANDERS, DUNBAR, and GORDON, JJ., concur.

#### BENEDIOT v. SCHMIEG et al.

(Supreme Court of Washington. Jan. 13, 1896.)

#### JOINT AND SEVERAL NOTE—DEMAND—NOTICE OF DISHONOR BY MAIL.

1. Failure to present a note with joint and several makers to each of the makers for payment will discharge the indorsees.

2. Where an indorsee and maker of a note live in the same city, depositing a notice of dishonor in the mail addressed to the indorsee at the city without the street and number of his residence, is not personal service of such notice.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by W. C. Benedict against Arthur Schmieg and Fremont Cole, as makers of, and J. A. and A. C. Freeborn, as indorsers on, a promissory note. From a judgment for plaintiff, defendant A. C. Freeborn appeals. Reversed.

Alex. B. Jones, for appellant. Condon & Wright, for respondent.

HOYT, C. J. Appellant was sued as an indorser of a note joint and several in form,

signed by two makers. The undisputed proof showed that no demand for payment had been made upon one of the makers at the time notice of dishonor was sought to be given to the indorser. It further appeared that all the parties to the note lived in the city of Seattle; that the appellant had a place of business therein, well known to the bank with which the note was left for collection; that no attempt was made by said bank acting for the owner of the note, or by any one else, to serve personally upon the appellant notice of the dishonor of the note. The only attempt to give such notice was to deposit it in the post office, directed to the appellant at Seattle, without giving, as a part of such direction, the street or number in said city to which it should be delivered. For the reason that it appeared from these undisputed facts that the necessary steps had not been taken to charge the appellant as an indorser of the note, he, at the close of the testimony, moved the court for a judgment in his favor. This motion was denied, and the cause submitted to the jury, under instructions which authorized a verdict for the plaintiff if it was found, among other facts, that presentment for payment to one of the makers was made upon the day the note fell due, and that notice of dishonor was deposited in the post office, addressed to the indorser, so that, in the ordinary course, it should have reached him on the day that the note was dishonored, or the day after. The verdict was for the plaintiff, and judgment was duly entered thereon.

If presentment to each of the makers of a joint and several promissory note was necessary, or if the deposit in the post office of a notice of dishonor, directed generally to the indorser living in the same city, was insufficient, the judgment must be reversed; and, if the judgment is reversed for either of these reasons, the action should be dismissed as to appellant, unless by some affirmative action on his part, shown by the proofs, he had made himself liable to pay the note. There was some testimony tending to show that, at the time the note was discounted, he said that he would see it paid; but there was nothing tending to show that, at any time after it became due, he made any promise in relation to its payment. Any statement that he may have made at the time he discounted the note which did not amount to an express waiver of demand and notice could add nothing to the contract which he entered into by indorsing it. That the note must be presented to each of the "joint" makers in order that an indorser may be charged is conceded by the respondent, but it is claimed that presentment to one of the makers of a note joint and several in form is sufficient. The ground of this contention is that the holder of such a note may, at his option, treat it as the several note of any one of the makers; that the indorsement must be presumed to

have been made in view of this right; and that, for that reason, the holder would bind the indorser by presenting it to any one of the makers whose several note he saw fit to consider it. It is doubtful whether the single contract of the indorser can be divided so as to, in fact, constitute as many separate contracts as there are makers to the note. It would be more reasonable to presume that the contract of indorsement was in reference to the note as an entirety, and was made upon the credit of all of the makers, and that the right of the holder to enforce it as the several contract of one of them does not include the right to divide the single contract of the indorser. It is suggested that, by reason of different places of residence, it is frequently impossible to present the note for payment to each of the several makers on the day the note becomes due. But this objection applies as well to joint makers as to those joint and several. If the makers are so situated that it is not reasonable to require a presentment to each of them, that fact will excuse such presentment.

The respondent has cited but one case which fully sustains his contention,—that of *Harris v. Clark*, 10 Ohio, 5,—and the reasoning of the court in that was upon grounds conceded to be untenable. The reason there given why a presentment to one maker was sufficient was that, by signing the note together, the several makers constituted themselves, so far as the making of the note was concerned, partners, and for that reason service upon one, under well-settled general rules, was a service upon all. Respondent also cites some of the text writers, but, with the single exception of Judge Story, there is no attempt by any of them to give any reason for their claim that presentment to one of several makers should be sufficient, and even that distinguished author and jurist does no more than refer to the case above cited, and say that, though the decision therein could not be sustained upon the ground stated in the opinion, it might be upon the theory that it was only necessary to make presentment to one of the makers of a note joint and several in form.

The appellant cites a large number of cases tending to establish the rule that presentment to each of the makers is necessary. The respondent claims that but one of these is in point, for the reason that it does not appear that the notes which were under consideration were joint and several in form. As to some of them, this is, no doubt, true; but the fact that in none was there any statement that tended to show that there was any difference in the presentment necessary to charge an indorser by reason of the "joint" or "joint and several" form of the note showed that no distinction on that account was recognized. In many of the cases in which from the facts it appears that the note was joint and several in form the court speaks of the makers as "joint," from which it is clear that, by the use of the

word "joint," it was not intended to refer to the nature of the liability of such makers, but only to the fact that they had joined in making the note. And, from a careful reading of the opinions in other cases, it is probable that the word "joint" was used in the same sense. Hence much force is taken from the argument to the effect that none of the cases which speak of "joint" makers, and hold that presentment must be made to all of them, are to be taken as authority in favor of the contention of appellant. It is conceded that in the case of *Shawts v. Fingar*, 100 N. Y. 539, 3 N. E. 586, the court was considering a note joint and several in form, and that the decision fully supports the contention of the appellant. The case of *Bank v. Willis*, 8 Metc. (Mass.) 504, not cited in the brief of appellant, is also directly in point. The principal question decided was as to whether one of the parties to the note was a maker or indorser. The court held that he was a maker; that he was one of the joint and several makers; and further held that, for the reason that no presentment had been made to him, the indorsers were discharged. The opinion concludes as follows: "To apply the law to the facts as proved in the case before us: Thompson and Mirick & Co. stand in the relation of joint and several promisors. Payment of the note was demanded of Thompson, but not of Mirick & Co. The defendant is an indorser, liable only upon legal notice of a demand upon the promisors and a refusal by them to pay the note; and we are of opinion that he has a right to avail himself of this neglect to make demand on Mirick & Co., to discharge himself from his liability as indorser."

Other cases might be cited which either expressly or by necessary intendment establish the rule contended for by appellant; but in view of the fact that but a single case has been found expressly holding to the contrary, and of the fact that the reasoning of that case has been criticised by every court which has referred to it, we do not think it necessary to cite them. It is true that respondent claims that the case of *McClelland v. Bishop*, 42 Ohio St. 113, affirms that of *Harris v. Clark*, supra; but an examination will show that the language relied upon was qualified, and was only used by way of argument upon a point not necessary to the decision of the case. So that the rule in Ohio must be held to depend upon the single case of *Harris v. Clark*; and that one has been in some degree discredited by the case of *Greenough v. Smead*, 3 Ohio St. 415. In this case, the question, as in the Massachusetts case above cited, was as to whether one of the parties to the note was a maker or an indorser; and the court, by one of the ablest jurists that ever graced the bench of that or any other state,—Rufus P. Ranney,—at considerable length, discussed that question, for the purpose of showing that he was an indorser, and that no presentment to him was

necessary to charge the defendant, who was also an indorser. Such discussion would have been entirely unnecessary if the court had been content to rely upon the law as announced in the case of *Harris v. Clark*. Under the law thus announced, no presentment to Greenough would have been necessary, for the form of the note which is set out in the opinion shows that, if he was a maker, he was jointly and severally liable with the other maker. The form of the note was identical with that of the one indorsed by the appellant, and was clearly such that those who signed it became liable jointly and severally, and not simply jointly. From the fact that such was the form of this note, the language of the court hereinafter set out furnishes a good example of the practice hereinbefore referred to, to speak of the joint makers of a note, not with reference to the character of their liability, but as to their having joined in its execution. The court, having, after a full discussion, come to the conclusion that Greenough was an indorser, and not a maker, of the note, proceeded as follows: "This view of the subject makes it unnecessary to pass upon the question made as to the sufficiency of the demand. It may not be improper, however, to say that, if Greenough could be treated as a joint maker, we should be of the opinion that the demand made, or rather the excuse for not making a demand, would be insufficient to charge the indorser. The question is not covered by the case of *Harris v. Clark*, 10 Ohio, 5; and we feel no hesitation in saying that the rule there adopted should be confined to the precise state of facts upon which the decision was made. A demand upon one of several partners in business is clearly sufficient, and the court in that case considered the several 'makers of a joint and several promissory note in the light of partners in that particular transaction.' But, assuredly, the principle could have no application after the death of one of the parties had terminated the implied agency of the survivor; and it could not be deemed due diligence in the holder to present the note at the residence of the deceased partner when the survivor was within his reach."

On the whole, the weight of authority is so strongly in favor of the rule that presentment to all of the makers must be made, not only when the note is joint in form, but also when it is joint and several, that we feel compelled to adopt it.

It is conceded by respondent that all of the older cases uphold the doctrine that service of notice of protest cannot be made by mail where the parties to whom the notice was to be given and the makers reside in the same city; but it is claimed that, since the inauguration of the carrier system in the larger cities, a new rule has grown up as to the service of notice in such cities, and some authorities are cited in support of this claim. They seem to be founded upon sound reason, but it is not

necessary that we should now determine as to whether or not the old rule has been changed by these modern conditions. If service by mail in such cities is sufficient, it is for the reason that it is the duty of the post-office officials to deliver it at the place of business or the residence of the person to be notified, so that it will be received by him in due course, at such a time as would make it sufficient if then personally served. But the notice in this case was not so directed as to make it the duty of the employés in the post office at Seattle to so deliver it. It is true that some testimony was introduced tending to show that a notice directed as this one was would, in due course, have been delivered the day it was deposited in the office, or the succeeding day; but the duty to so deliver it was not so clearly shown that the appellant could be thereby deprived of his right to have a proper service made upon him. It is a regulation or custom of the post-office department to require letters designed to be delivered by carrier to be directed to the street and number to which they are to be delivered; and, in the absence of such direction, letters are not sure of being placed in the hands of the carriers, but may, instead, go into the general delivery boxes of the office. Hence it was not so clearly the duty of the post-office officials to deliver a letter directed as was the one which contained this notice, at the place of business of the appellant, as to make the mailing of it equivalent to personal service. The judgment must be reversed, and the cause remanded, with instructions to dismiss the action as to the appellant.

DUNBAR, ANDERS, and GORDON, JJ., concur.

STATE ex rel. CARRAHER et al. v. GRAVES, Judge.

(Supreme Court of Washington. Jan. 13, 1896.)

CRIMINAL CASES—SUBPOENA FOR DEFENDANT'S WITNESSES—APPROVAL OF FEES—MANDAMUS.

1. Under Const. art. 1, § 22, giving accused the right to compulsory process to compel attendance of witnesses in his behalf, without advancing any fees therefor, and 2 Code, § 1363, providing that accused shall have the right to compulsory process to compel the attendance of witnesses in his behalf, accused is entitled to have only necessary or material witnesses subpoenaed for him at public expense, and subpoenas, in such case, should be issued only on an order of the court.

2. Under 1 Code, § 8049, providing that at the close of a term the clerk of court shall certify the amount which may be due witnesses attending from another county in a criminal case for their fees, which, when approved by the court, shall be a charge on the county to which the case belongs, the action of the court in passing on a cost bill is not ministerial, a discretion being vested; and, he having refused to approve such a bill, mandamus will not lie to compel approval.

3. The court's approval of a cost bill in a



criminal case, with fees of witnesses stricken out, amounts to a disapproval of such witness fees; and thereupon the right of action of the witnesses against the county for the fees accrues.

4. Where a cost bill in a criminal case, after being filed in the county where the case was tried, is sent to the prosecuting attorney of the county in which the case originated, for his inspection, he should not strike items therefrom, but submit a report specifying the items which in his opinion should be allowed, and those which should be disallowed.

Mandamus on the relation of M. M. Carraher and others against Carroll B. Graves, judge of the superior court, Yakima county. Writ denied.

Byers & Byers, for relators. James A. Haight and Richard H. Ormsbee, for respondent.

SCOTT, J. The relators are residents of King county, in this state, and were, by a subpoena issued from the superior court of Yakima county, required to attend upon said court on the trial of the cause of the state against one J. K. Edmiston. The prosecution resulted in the conviction of said Edmiston, and a cost bill was regularly filed, which included the fees of the relators as witnesses in said cause. This cost bill was sent to the prosecuting attorney of Walla Walla county, where said action had been originally brought, the same having been transferred to Yakima county upon a motion for a change of venue. The said prosecuting attorney, in passing upon said cost bill, erased the names of all of the relators, and refused to approve of the taxation of any witness fees for their attendance. Thereafter the respondent taxed the bill as approved by the prosecuting attorney, whereupon the relators instituted this proceeding for a writ of mandamus to compel the respondent to approve the cost bill as originally filed, in order that their fees might become a charge upon Walla Walla county.

Const. art. 1, § 22, provides that "the accused shall have the right \* \* \* to have compulsory process to compel the attendance of witnesses in his own behalf," and shall not "be compelled to advance money or fees to secure" the same. Section 1307, vol. 2, of the Code, provides that witnesses "may be compelled to attend and testify in open court, if they have been subpoenaed, without their fees being first paid or tendered, unless otherwise provided by law." This statute relates to the trial of criminal actions. Section 1363 provides that "the party accused shall have the right to produce witnesses and proofs in his favor, and have compulsory process to compel the attendance of witnesses in his behalf." Section 1655 provides a punishment for the failure of any witness to attend, without a reasonable excuse therefor, after having been duly served with a subpoena. Section 233, vol. 1, makes it the duty of prosecuting attorneys "to carefully tax all cost bills in criminal cases arising in their respective coun-

ties, and \* \* \* take care that no useless witness fees are taxed as part of such costs." Section 3049 provides that "at the close of each term of the district court the clerk shall \* \* \* also certify the amount which may be due witnesses attending from another county in a criminal case for their fees, which, when approved by the court or judge, shall be a charge upon the county to which the case belongs." Under these provisions, the accused is entitled to have compulsory process to compel the attendance of witnesses in his behalf, and without advancing any fees therefor. The manner of proceeding in such cases is not pointed out by the statute, but it is clear that the defendant is only entitled to have necessary and material witnesses subpoenaed for him at the expense of the state or county, and he cannot be held to have the right to decide upon the materiality of the testimony that he expects from witnesses desired. The decision of this question must rest with the court, and in such cases no subpoena should be issued in behalf of a defendant, to compel the attendance of witnesses, without an order of the court having been first obtained. We said as much in *State v. Grimes*, 7 Wash. 445, 35 Pac. 361. In this instance, however, the clerk of the court, upon the request of the attorney for the defendant, and without any order of the court, issued a subpoena for a large number of witnesses, nearly all of whom resided at a considerable distance from the place of the trial. This conduct upon the part of said attorney and the clerk of the court was, to say the least, censurable, in view of the plain direction given by this court in the case aforesaid; but the question which remains to be decided is, what effect did the same have upon the right of the witnesses to recover their fees? The witnesses had no means of knowing whether the court had ordered their attendance, the subpoena was regular upon its face, and they saw fit to obey its commands, as they were, in good faith, bound to do. None of the relators, however, were called upon to testify at the trial, and it seems to have been upon this ground that their fees were stricken from the cost bill. The relators contend that the action of the court in approving a cost bill in such cases is purely ministerial, and, in case the court refuses to approve a cost bill regular upon its face, that a mandamus will lie to compel such approval; and they further contend that they have no right of action for their fees, in the absence of an approval by the judge. We are of the opinion, however, that under this statute it cannot be held that the action of the court in passing upon the cost bill is ministerial, for a discretion seems to be vested in the court to approve or reject the same in whole or in part. We are furthermore of the opinion that the language of the statute which provides that said cost bill, when approved, shall be a charge upon the county

to which the case belongs, must be held to mean presented for approval; and in this case the action of the court in approving the bill with the fees of the relators stricken therefrom amounted to a disapproval of the items stricken, and their right of action therefor would accrue thereon. It cannot be contended that the action of the court in such a case is conclusive. The witnesses, in the first instance, have nothing to do with the taxation of the fees, and they have a right to be heard, and to their day in court. So, also, has the county or state the same right to a hearing. In this connection, also, we desire to express our disapproval of the course pursued by the prosecuting attorney in this action, as appears by the record presented. The cost bill, containing the fees of the relators as witnesses in said cause, was regularly filed, and then transmitted to said prosecuting attorney for his inspection; and it appears that said attorney, instead of submitting a report thereon as to what part of the same should be allowed, and what part should be disallowed, in his opinion, saw fit to strike the names of the relators from said bill by drawing a line across the same. The prosecuting attorney had no right to mutilate the cost bill in this particular. It was a part of the records of the court, and he had no more right to mutilate the same than he would have had to mutilate any other paper in the cause. The proper way of proceeding in such a case would be for said attorney to submit a report upon the cost bill, specifying the items which in his opinion should be allowed to the various parties, and those which should be disallowed, and in such case the court could properly act thereon. Otherwise, upon the presentment of the bill with these names stricken, the court would have no means of knowing whether the same had been stricken after the bill was filed, or prior thereto, or by whom.

We are of the opinion that the writ must be denied. The judge has returned that he has not refused to consider the application of the relators to have their fees taxed as witnesses in said cause. A supplemental cost bill was filed for that purpose, and it seems that this has never been called up for action. However, as we are of the opinion that the action of the court in approving the cost bill with the names of the relators stricken therefrom, as aforesaid, was, in effect, a disallowance of their claims, and was sufficient for them to base an action upon, in that view of the matter, also, the writ should not issue.

As to the question of the liability of the county or state for the witness fees of the relators, we do not undertake to decide in this proceeding, but leave that for future determination in an action brought to recover the same.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

### BARBRE v. GOODALE.<sup>1</sup>

(Supreme Court of Oregon. Jan. 27, 1906.)

PLEADING—DEMURRER—PAROL EVIDENCE—ADMISSIBILITY TO SHOW REAL PARTIES TO WRITTEN CONTRACT—PRINCIPAL AND AGENT—PROOF OF INTEREST TO EXPLAIN CONSIDERATION.

1. A demurrer to the whole complaint is properly overruled where one of the causes of action is well pleaded.

2. Parol evidence is admissible to show that a contract executed in the name of an agent was in fact the contract of the principal, and executed with the intention that he should secure the benefits thereof, though at the time the contract was executed the fact of agency was known to all parties, especially where the other party, at whose request the contract was so executed, has acquiesced in the part of the performance of the contract by the principal, and the contract shows on its face that part of the recited consideration moved from the principal.

3. Parol evidence is admissible in explanation of the consideration expressed in a written contract.

4. In an action by a principal on a contract executed in the name of his agent, plaintiff need only prove that he is the real party to the contract by a preponderance of the evidence. He need not show such fact by "clear and satisfactory" evidence.

Appeal from circuit court, Lane county; J. C. Fullerton, Judge.

Action by J. I. Barbre against J. C. Goodale. There was a judgment for plaintiff, and defendant appeals. Affirmed.

L. Bilyeu and J. M. Williams, for appellant. George B. Dorris, for respondent.

WOLVERTON, J. This is an action to recover upon two separate causes. The first is upon a written agreement which purports upon its face to be the agreement of one G. W. Handsaker, of the first part, and J. C. Goodale, of the second part. By its terms, in brief, the first party agrees to cut, haul, bank, and deliver to the second party, 2,000,000 feet of fir logs, and, if certain conditions of the lumber market continued to prevail, an additional 500,000 feet, at a certain point upon the McKenzie river, in Lane county, at the rate of \$3 per 1,000, to be paid by the second party as follows: \$1 per 1,000 when the logs were cut and banked, and \$1 per 1,000 when scaled and rolled in the river, and such balance as should be found due between the parties within 31 days thereafter. The last clause is as follows: "It is further understood and agreed, and is a part of the consideration of this agreement, that the second party reserves out of and deducts from the balance that may be due the first party, after making said first two payments, any sum or sums that may then be due or to become due to the second party from J. I. Barbre, or for which he is responsible, to pay J. I. Barbre not to exceed \$1,700, the obligations of which are now created." The contract purports to be under seal. The plaintiff having cut, hauled, and banked 1,442,000 feet of logs, and cut in the timber 332,000 feet more, and while proceeding with the performance of the contract, the defendant, on

March 1, 1892, notified and directed him to discontinue the work, as he would not pay for or take any more of such logs. Whereupon plaintiff commenced this action to recover under the contract for such logs as he had cut and banked, and also for such as he had cut in the timber. The complaint proceeds upon the theory that G. W. Handsaker was Barbre's agent in the execution of said contract, and that it was signed and executed in his name, instead of Barbre's, by consent of defendant, and hence that Barbre is entitled to sue upon the agreement solely and in his own name. The second cause of action is based upon the sale and delivery by plaintiff to defendant of 987,000 feet of other logs at \$3.25 per 1,000, upon which a balance of \$472.34 is claimed. To this complaint a general demurrer was filed, but as it goes to the whole complaint, and one of the separate causes of action being confessedly well set out, the demurrer was therefore properly overruled by the court below. Upon trial had before a jury, the verdict was for plaintiff in the sum of \$214, and from the judgment entered thereon defendant appeals.

At the trial, plaintiff, while a witness in his own behalf, was asked, and permitted to answer, over the objection of the defendant, the following questions: "Question. How did that clause about the \$1,700, which allows Goodale to deduct from last payment amount due him from Barbre, not to exceed \$1,700, come to be in the contract? Answer. I had been logging for Goodale, and he had paid me about \$1,700 on logs which were claimed by the O. & O. R. R. Co., and it sued, or threatened to sue, him to recover the value of the logs. If he had to pay the railroad company for the logs, this had to be deducted out of the contract price of those logs. Q. State what the conversation was, at the time of your entering into the contract, as to who the true parties to the contract should be. A. Mr. Goodale and I had a conversation about making the contract to get out some logs. I wanted to get out some logs for him,—about 2,000,000 feet. I had the teams and everything necessary to carry on logging. Mr. Goodale said that he would let me have a contract to get out 2,000,000, but did not want to have the contract made in my name; that the railroad company had sued, and he was afraid that if the contract was in my name the company would make trouble; and he said, 'Why not make it in the name of George?' (meaning G. W. Handsaker). I told him that I did not want to bother George. Goodale said it would not be any trouble to him; that I could go on and carry on the contract just the same. I said I could see George about it, and I did speak to George about it, and he said, so long as he would not be bothered in any way, he would assist me in the matter; and it was agreed between Mr. Goodale, Mr. Handsaker, and myself that the contract should be drawn up and signed by G. W.

Handsaker, and that I should carry it out, and that it should be my contract, and not the contract of G. W. Handsaker, and that Mr. Handsaker should not be bound by the contract. Under this agreement the contract was drawn up and signed by Mr. Handsaker and Goodale, and I did the work that was done under it." This, with other testimony of the same nature, all elicited over defendant's objection, forms the basis of the principal grounds of error relied upon for the reversal of the judgment below. The question is here presented whether it is competent to show by parol testimony that a contract executed by and in the name of an agent is the contract of the principal, where the principal was known to the other contracting party at the date of its execution. There are two opinions touching the question, among American authorities,—the one affirming, and the other denying; but the case is one of first impression here, and we feel constrained to adopt the rule which may seem the more compatible with the promotion of justice, and the exaction of honest and candid transactions between individuals. The English authorities are agreed that parol evidence is admissible to show that a written contract executed in the name of an agent is the contract of the principal, whether he was known or unknown; and the American authorities are a unit so far as the rule is applied to an unknown principal, but disagree where he was known at the time the contract was executed or entered into by the parties. All the authorities, both English and American, concur in holding that, as applied to such contracts executed when the principal was unknown, parol evidence which shows that the agent who made the contract in his own name was acting for the principal does not contradict the writing, but simply explains the transaction; for the effect is not to show that the person appearing to be bound is not bound, but to show that some other person is bound also. And those authorities which deny the application of the rule where the principal was known do not assert or maintain that such parol testimony tends to vary or contradict the written contract, but find support upon the doctrine of estoppel; it being maintained that a party thus dealing with an agent of a known principal elects to rely solely upon the agent's responsibility, and is therefore estopped to proceed against the principal. The underlying principle, therefore, upon which the authorities seem to diverge, is the presumption created by the execution of the contract in the name of the agent, and the acceptance thereof by a party, where the principal is known. Is this presumption conclusive, or is it disputable? Without attempting to reconcile the decisions, we believe the better rule to be that the presumption thus created is a disputable one, and that the intention of the party must be gathered from his words, and the various circum-

stances which surround the transaction, as its practical effect is to promote justice and fair dealing. The principal may have recourse to the same doctrine to bind the party thus entering into contract with his agent. Parol evidence, however, is not admissible to discharge the agent, as the party with whom he has dealt has his election as to whether he will hold him or the principal responsible. This doctrine must be limited to simple contracts, and may not be extended to negotiable instruments and specialties under seal, as they constitute an exception to the rule. As bearing upon these deductions, see 1 Am. & Eng. Enc. Law, 392; Briggs v. Partridge, 64 N. Y. 362, 363; Nicoll v. Burke, 78 N. Y. 533; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 380; Nash v. Towne, 5 Wall. 703; Stowell v. Eldred, 39 Wis. 626; Chandler v. Coe, 54 N. H. 561; Ford v. Williams, 21 How. 289; Hunter v. Giddings, 97 Mass. 41; Trueman v. Loder, 11 Adol. & E. 589; Higgins v. Senior, 8 Mees. & W. 843; Calder v. Dobell, L. R. 6 C. P. 486; Mechem, Ag. §§ 449, 698, 699. If an instrument is valid without a seal, although executed under seal, it is to be treated as written evidence of a simple contract; and the seal adds nothing, except, under our statute, it is made primary evidence of a consideration. Stowell v. Eldred, supra; Byington v. Simpson, 134 Mass. 169; Rector, etc., v. Wood, 24 Or. 404, 34 Pac. 18.

Now, looking to the contract which is the basis of the cause of action under consideration, we find that it was executed in manner and form as requested by the defendant, and to subserve a special purpose peculiar to his own interest, with the express avowal that it should be treated as the contract of plaintiff, although executed in the name of Handsaker, the agent. It is further disclosed that both the defendant and the plaintiff afterwards so treated it; the plaintiff proceeding under it, and in obedience with the terms and conditions thereof, in cutting, hauling, and banking the logs preparatory to delivery, and the defendant by making payments to him from time to time, sometimes directly, and sometimes through Handsaker, the agent. This is ratification, and constitutes a very significant feature of the inquiry. Aside from this, the contract discloses upon its face that a part of the consideration for these logs moved directly from defendant to plaintiff. Under these attendant circumstances, and others which might be alluded to, we think the court committed no error in admitting the testimony to show who were the real parties to the contract, as well as to explain how the clause touching the \$1,700 came to be placed therein. The admission of the parol evidence touching this clause may be upheld as being explanatory of the consideration which in part supports the contract.

The court instructed the jury, among other things, that "the plaintiff must make out

his case by a preponderance of the evidence; the defendant must make out his case by a preponderance of the evidence; that is, each must make out the better case on what he claims the other owes him." And the defendant requested the court to supplement said instruction with the following: "But, before plaintiff can recover on the first cause of action set up in his complaint, he must establish that he is the real party in interest by clear and satisfactory evidence." This request the court refused, and such refusal is assigned as error. We think the court's action in this regard is not open to objection. There is nothing in the case to take it out of the ordinary rule that each party must make out his case, whenever the burden of proof is cast upon him, by a preponderance of the testimony. To establish that a party to the action is the real party in interest requires no higher or superior proof than to establish any other fact in the case. The additional instruction asked would require this, and was therefore properly refused.

There are some other questions presented by defendant in his brief and at the argument. These we do not deem it necessary nor profitable to discuss in detail, but suffice it to say we have carefully examined all of them, and find no prejudicial error. The judgment of the court below will therefore be affirmed.

HUME, District Attorney, v. KELLY et al.  
(Supreme Court of Oregon. Jan. 27, 1896.)

COUNTY TREASURER—ACTION ON BOND—PARTIES  
—AMENDMENT.

1. The county in which taxes for county and state purposes are levied, being the owner thereof when collected, as well as of taxes levied for school purposes till apportioned to the several school districts, is a proper party to an action on the official bond of the tax collector of the county, though it runs in the name of the state; Hill's Ann. Laws, §§ 340, 341, providing that the undertaking of a public officer to the state or a county shall be a security to the state or county as the case may be, and that, when he forfeits his bond, any person injured by his misconduct, or who is by law entitled to the benefit of the security, may maintain an action thereon in his own name.

2. Where an action is commenced on the official bond of the treasurer of a county by the district attorney, who is law officer for the state and the counties composing his district, in his name as such attorney, to recover in behalf of the county, the county may be made a plaintiff by amendment, the cause of action not being changed thereby.

3. Under Hill's Ann. Laws, § 342, providing that action cannot be commenced on an official undertaking by another than the state or corporation in the name of which the undertaking runs, without leave of court, and that, unless it appears from the complaint that such leave was obtained, defendant shall be entitled to nonsuit, the complaint having, in an action by a district attorney, for a county, on a bond running in the name of the state, been demurred to because not alleging such leave, it is not error to refuse an amendment making the county a plaintiff, as the complaint would still be open to the objection of not alleging leave.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by W. T. Hume, district attorney, against Penumbra Kelly and others. Judgment for defendants. Plaintiff appeals. Affirmed.

J. H. Hall, for appellant. Zera Snow and J. W. Whalley, for respondents.

**WOLVERTON, J.** This action was instituted in the name of the district attorney to recover upon the official bond of the defendant Penumbra Kelly, given as sheriff and tax collector of Multnomah county, Or., with the defendants Markle and McFarland as sureties. The bond was given to the state of Oregon, in the penal sum of \$400,000, conditioned that, "if the said Penumbra Kelly shall well and truly and faithfully perform and execute his duties as such tax collector, according to law, and according to the requirements of any law to be hereafter enacted, and pay over to the county treasurer of said county all moneys collected by him as such tax collector for the said year 1892," then the obligation to become void; otherwise, to be and remain in full force and effect. The defendant McFarland moved the court to require the plaintiff to make the complaint more definite and certain, and the defendants Kelly and Markle severally demurred thereto, each assigning substantially the same grounds, namely: First, that plaintiff has not legal capacity to sue; second, that the complaint does not state facts sufficient to constitute a cause of action; and, third, that the plaintiff is not the real party in interest. The motion was overruled, and the demurrers sustained. Subsequently the plaintiff moved the court for leave to amend the complaint by adding the state of Oregon and county of Multnomah as parties plaintiff in said action, and the defendant Markle moved for a judgment of dismissal. These motions came on to be heard at the same time; but by consent of the parties the plaintiff's motion was amended by striking therefrom the state of Oregon as a proposed party, and upon this state of the record the court disallowed the former and sustained the latter motion, and thereupon rendered judgment against plaintiff, dismissing the complaint, with costs, from which judgment plaintiff appeals.

The corporations and persons entitled to sue and recover upon official undertakings of the nature of the one set out herein are appropriately and sufficiently designated by statute. Section 340, Hill's Ann. Laws, provides that "the official undertaking or other security of a public officer to the state, or to any county, city, or other municipal or public corporation of like character therein, shall be deemed a security to the state, or to such county, city, town, or other municipal or public corporation as the case may be, and also, to all persons severally for the official delin-

quencies, against which it is intended to provide." And section 341 provides that, "when a public officer, by official misconduct or neglect, shall forfeit his official undertaking or other security, or render his sureties therein liable upon such undertaking or other security, any person injured by such misconduct or neglect, or who is by law entitled to the benefit of the security, may maintain an action at law thereon in his own name, against the officer and his sureties, to recover the amount to which he may by reason thereof be entitled." These sections were intended to give a right of action upon the undertaking directly to the real party in interest, whether it be the state, a municipal or public corporation, or to a private individual. This construction is borne out by reading, in connection therewith, sections 343 and 344; and, indeed, such is the judicial interpretation thereof. See *Habersham v. Sears*, 11 Or. 436, 5 Pac. 206; *Howe v. Taylor*, 6 Or. 284; *Crook Co. v. Bushnell*, 15 Or. 169, 13 Pac. 886. Taxes levied for state and county purposes, when collected, belong to the county in which they are levied. The same may also be said of taxes levied for school purposes, until apportioned to the several school districts. The county becomes a debtor to the state to the extent of the state's levy apportioned to such county. *Board of Com'rs of Multnomah Co. v. State*, 1 Or. 359; *State v. Baker Co.*, 24 Or. 359, 33 Pac. 530. The purpose of the action upon the undertaking being to recover for taxes levied for state, county, and school purposes, and collected by the defendant Kelly as tax collector of Multnomah county, that county would be a proper party plaintiff therein, although the bond runs in the name of the state of Oregon. Of this there can be no doubt.

It is claimed that the court below committed error in disallowing plaintiff's motion for leave to amend the complaint by adding Multnomah county as a party plaintiff, and section 101, Hill's Ann. Laws Or., is invoked in support of the contention. It provides that "the court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party or other allegation material to the cause, and in like manner and for like reasons, it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party," etc. It has been settled by this court that, under the section quoted from, it is within the discretion of the trial court, at any stage of the case before the cause is submitted, to authorize such amendments as may be necessary to make the cause as intended by the original pleading, but not to insert a new and distinct cause of action or defense. *Foste v. Insurance Co.*, 26 Or. 449, 38 Pac. 617. So that it is not permissible to allow an amendment

which would substantially change the cause of action. We understand from the briefs of counsel, and are led to assume, that the court below disallowed the amendment, not in the exercise of its discretion, but solely upon the ground that it believed it had no power to grant the plaintiff leave to so amend. So that we will consider the question here as one of power in the court, and not as an abuse of its discretion in the premises. If the proposed amendment would substantially change the cause of action, it may be conceded that the court was without power to allow it; and the converse of the proposition may also be conceded. It seems the plaintiff instituted the action, in the exercise of his prerogative functions as the law officer of the state and of the several counties constituting his district, to recover in behalf of Multnomah county; not that he claimed an individual interest in the funds sought to be recovered, but for the reimbursement of the county for funds belonging to it collected by the defendant Kelly, and for which he failed to account. In reality it may be considered as an action brought by the law officer of the county to recover for its use and benefit. In this view of the matter, it is not conceived that the cause of action would be in any way changed by allowing the amendment. A general test as to whether a new cause of action would be introduced by a proposed amendment is to inquire if a recovery had upon the original complaint would bar a recovery under the complaint if the amendment was allowed, or if the same evidence would support both, or the same measure of damages is applicable, or both are subject to the same plea. 1 Enc. Pl. & Prac. 556; Liggett v. Ladd, 23 Or. 28, 31 Pac. 81; Lumpkin v. Collier, 69 Mo. 170. Many cases are to be found establishing the doctrine that the party for whose use the action is brought may be substituted for the nominal plaintiff, where the legal right of action is shown to be in the former. So, where a party sues in his own right, he may, if the facts warrant, amend his complaint so as to make the suit stand in a representative capacity; and, conversely, if he sues in a representative capacity, he may be allowed to amend by declaring in his individual capacity; and in neither instance is it considered a substantial change of the cause of action. Price v. Willey, 19 Tex. 142; Martel v. Somers, 26 Tex. 551; Wilson v. Church, 56 Ga. 554; Harris v. Plant & Co., 31 Ala. 639; Montague v. King, 37 Miss. 441; Wood v. Circuit Judge, 84 Mich. 521, 47 N. W. 1103; Morford v. Dieffenbacker, 54 Mich. 598, 20 N. W. 600; Lewis v. Austin, 144 Mass. 383, 11 N. E. 538; Buckland v. Green, 133 Mass. 421; Wells v. Stombeck, 59 Iowa, 376, 13 N. W. 339. In the last case cited the original petition was entitled "Washington Township, by W. B. Wells, Township Clerk, Kenedy, Lore, and Kingdon, Township Trustees," as plaintiff. A demurrer to this petition was sustained, upon the ground that plaintiff had

no legal capacity to sue. An amended petition was then filed, entitled "W. B. Wells, Clerk of Washington Township, as Plaintiff," and this, under a statute similar to ours, was allowed to stand. In deciding the case, Seavers, J., says: "We are asked 'whether the plaintiff, having commenced the suit in the name of Washington township, could amend the petition making the clerk plaintiff.' In Township of West Bend v. Munch, 52 Iowa, 132, 2 N. W. 1047, it was held a township did not have the legal capacity to sue. This being so, it is claimed there was no plaintiff named in the original petition, and, therefore, none could be substituted; that an amended petition could not be filed because there was nothing to amend. But we think, when there is an appearance to the action, and the defendant tests the right of the named plaintiff to maintain the action by a demurrer, and the latter is sustained, the names of the proper parties plaintiff may be substituted in the action, by an amended petition, subject, of course, to an apportionment of the costs, and the right of the defendant to a continuance if taken by surprise. If this is not the rule, the action must abate, and another be brought. This, under the statute, should not be the rule, unless substantial justice so demands. The statute, in terms, provides that the court, in furtherance of justice, may permit a party to amend any pleading 'by adding or striking out the name of a party, \* \* \* or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleadings or proceedings to the facts proved.' Code, § 2689. The defendants could make their defense in this action as well as in a new one, and they could not have been prejudicially affected by the amendment." So it is here. The defendants could make their defense, if the amendment was allowed, as well as now. In so far as it is apparent their defense would not be changed. The complaint, with the proposed amendment, discloses the same issuable facts as the one on file. The same evidence would support both, and the same measure of recovery is applicable. We think that, under these authorities, the court had the power to grant the amendment.

But it would appear, notwithstanding, that the motion was rightly and appropriately disallowed. As we are advised, one of the grounds for sustaining the demurrer to the original complaint was that the action was brought by the plaintiff, without having obtained leave of the court or judge thereof, where the action is triable as required by section 342, Hill's Ann. Laws Or. At least the complaint does not show that such leave had been obtained. The proposed amendment, if allowed, would leave the complaint subject to the same objection, as the county could not sue upon the undertaking without having obtained leave for that purpose, which fact must be alleged. Crook Co. v.

*Bushnell, supra.* Where the amendment, if allowed, would leave the complaint subject to objections that it was intended to obviate, it is proper to reject it. While courts are always liberal in allowing amendments in furtherance of justice, and that the real object of the dispute may be reached and finally determined, they will not do a vain thing. For these reasons the judgment of the court below will be affirmed.

### BRIGHAM v. HIBBARD.<sup>1</sup>

(Supreme Court of Oregon. Jan. 27, 1896.)

#### SALE—ACCEPTANCE—AGENT'S AUTHORITY.

1. Where a contract for sale of goods is valid, a delivery, pursuant to its terms, of goods conforming to the contract, entitles the seller to recover, though there was no formal acceptance.

2. Authority of a traveling salesman to solicit orders does not give him authority, after delivery of goods ordered through him, to cancel or change the contract.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by John W. Brigham against George L. Hibbard. Judgment for plaintiff. Defendant appeals. Affirmed.

G. G. Gammons, for appellant. A. C. Emmons, for respondent.

BEAN, C. J. This is an action brought by a manufacturer of boots and shoes in Boston, Mass., to recover for goods sold and delivered to the defendant. The defendant admits the delivery of the goods, but denies the sale, claiming that he gave an order for certain goods, to be manufactured and shipped from Boston, to one Wetmore,—an agent to solicit orders for plaintiff,—for which he was to pay \$503, but that the goods sent did not correspond with the order; that he examined them immediately after their receipt, and, finding that they did not conform to the order, notified Wetmore, who was in Portland at the time, that he would not accept the goods, and that, by an agreement between him and Wetmore, he retained the possession of them, to be sold on plaintiff's account. Judgment of the court below was in favor of plaintiff, and defendant appeals. There are numerous assignments of error in the record, but, for convenience, they may be grouped under two principal heads: First, error of the court in ruling—both in admitting testimony and instructing the jury—that, if the goods delivered to the defendant were of the kind and quality ordered, plaintiff could recover without proof of an actual acceptance by the defendant; second, error in refusing to allow defendant to detail the entire conversation between him and Wetmore at the time, or soon after, the goods were examined.

The first assignment of error is based on the contention that, in an action for goods

sold and delivered, the plaintiff must not only prove a sale and delivery, but an actual acceptance by the vendee. We do not so understand the law. When it is sought to give validity to a contract void under the statute of frauds, there must not only be a delivery, but an actual receipt and acceptance of the goods by the buyer. *Caulkins v. Hellman*, 47 N. Y. 449; *Remick v. Sandford*, 120 Mass. 309. But, where the contract itself is valid, a delivery, pursuant to its terms, at the place and in the manner agreed upon, if the goods conform to the contract, will sustain an action for goods sold and delivered, without any formal acceptance by the buyer. *Schneider v. Railroad Co.*, 20 Or. 172, 25 Pac. 391; *Ozark Lumber Co. v. Chicago Lumber Co.*, 51 Mo. App. 535; *Nichols v. Morse*, 100 Mass. 523; *Kelsea v. Manufacturing Co.*, 55 N. J. Law, 320, 26 Atl. 907; *Diversy v. Kellogg*, 44 Ill. 114; *Krulder v. Ellison*, 47 N. Y. 36; *Pacific Iron Works v. Long Island R. Co.*, 62 N. Y. 272; *Benj. Sales* (6th Ed.) §§ 699, 705; *Tied. Sales*, § 112. The buyer has a reasonable time after the delivery in which to examine the goods, and, if they are not of a kind and quality ordered, he may then refuse to accept them, and thereby rescind the contract; but this right does not prevent the title from passing, nor a recovery by the seller in an action for goods sold and delivered, if in fact they do conform to the terms of the contract. *Tied. Sales*, § 112.

The next assignment of error is not well taken, because it does not appear that Wetmore had authority to cancel the contract between plaintiff and defendant, or substitute a new one, or to bind the plaintiff by any agreement in reference to the future disposition of the goods. He was a traveling agent and solicitor of orders for his principal, but such authority did not give him power to rescind or change the contract after the receipt of the goods by defendant. *Diversy v. Kellogg*, 44 Ill. 114; *Stilwell v. Insurance Co.*, 72 N. Y. 385. In this connection the defendant was permitted to give evidence tending to show that the goods did not conform to the samples, and were not of the kind and quality ordered, and that immediately after their receipt he notified Wetmore of that fact, and refused to accept the goods, and the court held, and so instructed the jury, that if the goods were not of the kind and quality ordered, and immediately after the discovery of that fact the defendant tendered them back to Wetmore, and gave him notice that they were subject to plaintiff's order, such facts would be a sufficient rescission of the contract, and prevent a recovery in this action, and this was as favorable to the defendant as he could reasonably expect, under the showing as to Wetmore's authority to bind the plaintiff. The notice to Wetmore by defendant that he declined to accept the goods because they did not conform to the order was perhaps material, as part of the *res gestæ*, and as an act on his

<sup>1</sup> Rehearing pending.

part explaining and qualifying his conduct in allowing the goods to remain in his store. *Caulkins v. Hellman*, 47 N. Y. 449. But it was not within the scope of Wetmore's agency to make a new contract for the plaintiff in reference to such goods. Finding no error in the record, the judgment of the court below must be affirmed.

#### WILLS et al. v. LANCE.

(Supreme Court of Oregon. Jan. 27, 1896.)

##### STATEMENT OF COSTS—EXTENDING TIME TO FILE—SEPARATE FINDINGS.

1. The court may, in its discretion, extend the time to file an amended statement of costs where application therefor was made within the five days allowed by Hill's Ann. Laws, § 557, to file said amended statement.

2. A statement of costs alleging that a certain person necessarily attended as a witness, and that he was sworn and examined, need not further show the necessity and materiality of his testimony.

3. A party having objected to each item of a cost bill, the court, upon motion to retax costs, should make separate findings as to each item.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Wills Bros. against O. H. Lance. There was a judgment for defendant, and from an order affirming the taxation of costs as made by the clerk plaintiffs appeal. Reversed.

F. L. Keenan, for appellants. J. C. Caples and G. W. Allen, for respondent.

MOORE, J. This is an appeal from the action of the trial court on a motion for the retaxation of costs. The facts are: That on December 18, 1893, judgment having been rendered against the plaintiffs for costs and disbursements, defendant, on the following day, filed a cost bill, containing the names of his witnesses, the number of days each attended, the number of miles traveled, and the fees claimed by the officers of the court, amounting to \$354.70. That, on the 28th of said month, the plaintiffs filed objections to each item contained in the cost bill, and on January 4, 1894, the court having extended the time to that date, the defendant filed an amended verified statement thereof, which being considered by the clerk, that officer allowed and taxed the costs and disbursements at \$327.55. That the plaintiffs appealed from such taxation to the court, which affirmed the action of the clerk, and retaxed the costs and disbursements at the same amount, from which judgment the plaintiffs appeal, and contend that the trial court erred in extending the time to file the amended verified statement; that such statement is insufficient to support the judgment based thereon; that the clerk and stenographer not having filed an itemized statement of their fees, the court was powerless to award any judgment thereon; and that the court failed to make

findings upon the separate items of the cost bill objected to by plaintiffs.

1. The statute provides that, when objections are made to the claim for costs and disbursements, the party seeking to recover the same may, within five days after said objections are filed, file with the clerk an amended verified statement, showing the materiality and necessity of each item so objected to. Hill's Ann. Laws Or. § 557. The objections to the cost bill having been filed on December 28th, the defendant, on the 5th day thereafter, obtained an order extending the time for filing the amended verified statement to January 4th, on which day such statement was filed. The plaintiffs insist that the court had no authority to extend the time without a showing made for that purpose, and, in support thereof, cite the case of *Hislop v. Moldenhauer*, 24 Or. 106, 32 Pac. 1026, in which it was held that, where no objections to the cost bill had been filed within the two days allowed therefor, it was error to permit such objections to be subsequently made without a showing that the failure to so object within the prescribed time was through the party's mistake, inadvertence, surprise, or excusable neglect. In the case cited, no objections to the cost bill having been made within the time prescribed by law, the judgment had become final; and, the party being in apparent default, the court was powerless to set aside the judgment except upon such a showing. In the case under consideration, the defendant was not in default when the order was made extending the time; and, this being so, it was in the discretion of the trial court to enlarge the time. Hill's Ann. Laws Or. § 102.

2. The first item of the amended verified statement is as follows: "That the witness J. W. Purcell was necessarily in attendance upon said court on the first trial of said cause as a witness only, and for no other purpose, for two days, and necessarily traveled to and from his home in reaching said court five miles each way, making, as set forth in said original bill, the sum of \$5.00." Each item is substantially set forth in the preceding form, and the statement closes with the following: "That each of said witnesses was in attendance upon said court at my request, either by special promise to so attend, or by regular subpoena served upon them respectively, and the testimony of each one of said witnesses was material, and that each was sworn and testified in said action." The plaintiffs insist that this statement fails to show the materiality and necessity of each item thereof. In *Wilson v. Salem*, 3 Or. 482, the court, in defining the items of a cost bill, says: "The attendance of a witness is an item; the mileage of that witness is another; the necessity for his attendance a third; and to each the party charged may or may not object." When a witness has attended court by agreement with the prevailing party, or in obedience to the service of a subpoena at



his request, but has not been examined or sworn, a just reason exists for requiring a showing of materiality of the testimony expected from the witness in order to recover his fees (*Pugh v. Good*, 19 Or. 85, 23 Pac. 827); but, when a witness has been sworn and examined, the court must necessarily pass upon his competency and the materiality of his testimony; and, this being so, we fail to see the necessity of an averment even that his testimony was material to the issue. The same court that tried the cause must, upon appeal from the clerk's taxation, retax the costs and disbursements, but it cannot be expected that the court will retry the materiality of the testimony of a witness. A judgment of nonsuit may be given without calling a witness for the defendant, but in such case the prevailing party ought to recover his witness fees upon showing the materiality of their testimony; for the necessity of his witnesses being present is apparent, since he could not know that his motion would be granted until the court passed upon it, or that the plaintiff might not, by leave of the court, cure by amendment the infirmity in his pleading disclosed by the motion. So, too, the prevailing party may, out of an abundance of caution, procure the attendance of witnesses whom he does not call, in which case the materiality and necessity of their testimony become important questions for the consideration of the court upon a motion to retax. When a party, upon objection to his cost bill, states that a given person necessarily attended the court a given number of days as a witness only; that he necessarily traveled a certain number of miles in going from and returning to a given place; and that he was sworn and examined as a witness at the trial,—we think he has stated all the law requires, for, the necessity having been alleged, the materiality is implied from the fact that his testimony was received. Any other rule would require a statement of the substance of the testimony given by the witness, which is not necessary except in case he has not been called.

3. The record does not show that the stenographer or clerk itemized the statement of their fees. The findings of the clerk show that the official reporter performed  $2\frac{1}{2}$  days' services at the first trial, and 3 days' at the second, for which he was allowed \$55. The original claim for clerk's fees was \$31.05, which the clerk taxed at \$23.05, without enumerating in such taxation the items that constituted the claim. The clerk having given the items of the reporter's fees, and reduced his own, it may be inferred therefrom that such statements were filed by these officers. The statute provides that no officer's fees shall be recovered as disbursements, unless such officer shall file in said cause an itemized statement of all fees claimed by him therein. Section 557, *supra*. The manifest object of this provision is to bring into the record such facts as will enable the clerk

to tax, or the court, from its inspection, to retax, the fees of its officers. Every party has a right to know the items of disbursements proposed to be taxed against him, and, upon objecting to the cost bill, the fees of officers must be itemized if the prevailing party would seek to recover them. The clerk, in taxing the costs and disbursements, found the number of days' attendance, the number of miles traveled, and the amount due each witness, which, with the fees of the officers, amounted to \$327.55. The court, upon the motion to retax, failed to make findings upon each item objected to, but, affirming the findings of the clerk, gave judgment for the amount so found. The plaintiffs having objected to each item of the cost bill, the defendant tendered an issue thereon by filing an amended verified statement; thus making each item a separate cause of action, upon which the plaintiffs were entitled to a separate finding of fact and law by the court. Section 557, *supra*; *Thomas v. Thomas*, 24 Or. 251, 33 Pac. 565. No findings having been made by the court upon the several items of the amended cost bill, the judgment is reversed, and the cause remanded, with direction to the court below to make such findings, and retax the costs.

#### STATE ex rel. WILHELM v. THIRD JUDICIAL DISTRICT COURT.

(Supreme Court of Montana. Jan. 13, 1896.)

##### INSANITY—COMMITMENT—REVIEW BY CERTIORARI.

1. An order committing a person as insane will not be disturbed on certiorari because the record fails to show that an order was made fixing the time and place for the examination (*Comp. St. 1887, div. 5, § 1215*), where the record shows that a jury and witnesses were summoned for a certain time, and that relator was brought before the jury and examined at that time as to the question of his insanity; especially where the judge, in his return, certifies that the order was made.

2. In such proceedings, that the venire for the jury did not expressly direct that one of the jurors to be summoned should be a practicing physician (*Comp. St. 1887, div. 5, § 1215*) is not ground for reversal of the commitment on certiorari where a jury with the proper qualifications was in fact summoned.

3. Where, in proceedings for the commitment of a person as insane, the jury, acting under oath, give their verdict declaring the person insane, it is equivalent to their certifying under oath that the charge of insanity is correct. *Comp. St. 1887, div. 5, § 1215*.

Application, on the relation of Mrs. A. G. Wilhelm, for writ of certiorari, to rescind an order of the district court, Third judicial district, committing relator as an insane person. Denied.

F. E. Stranahan, for relator. E. Scharnikow, for respondent.

PER CURIAM. The petitioner, Mrs. Wilhelm, obtained from this court a writ of certiorari to review the action of the district

court<sup>a</sup> in adjudging her to be insane. Her contention is that the district court acted without jurisdiction. The statute under which the court proceeded provides that it shall be the duty of the district judge, upon the application of any person, under oath, setting forth that any person, by reason of insanity, is unsafe to be at large, or is suffering under mental derangement, to cause the said person to be brought before him, at such time and place as he may direct, and shall also cause to appear at the same time and place a jury of three citizens of his county, one of whom to be a licensed practicing physician, who shall proceed to examine the person alleged to be insane; and if such jury, after careful examination, shall certify upon oath that the charge is correct, and if the judge is satisfied that such person is unsafe to be at large, etc., such judge shall make out duplicate warrants reciting such facts. The rest of the section provides for the proper delivery of such insane person to the insane asylum. Comp. St. 1887, div. 5, § 1215.

The relator complains that the judge did not make an order fixing the time and place of the examination. It is true that the record of the proceedings does not contain such order, but the proceedings do show that a jury and witnesses were summoned for a given time and place, and that the relator was brought before the court at that time, and the question of her insanity examined into before the jury. Furthermore, the judge, in his return, himself certifies that he did make the order fixing the time and place. State v. District Court of Ninth Judicial District (Mont.) 42 Pac. 850. We think this is sufficient.

Complaint is also made that the judge did not cause a jury of three citizens, one of whom was a licensed physician, to appear. It is true that the venire for the jury did not, on its face, call for three citizens, one of whom was a licensed physician; but the fact is that jurors, with these qualifications, were summoned to appear and act as a jury. It furthermore appears by the records of the court that this jury were sworn and impaneled to try the matter of the insanity of the relator; that they heard evidence, and returned a verdict declaring relator to be of unsound mind, incapable of caring for herself, and unsafe to be at large. Relator contends that the jury did not make a certificate under oath that the charge of insanity was correct. But they did act under oath, for the record so states; and, so acting under oath,—that is, being sworn as a jury,—they gave their verdict in very clear language as to the insanity of relator. We think this was a sufficient certifying, under oath, that the charge of insanity was correct, to satisfy us that the court was not acting without jurisdiction.

We are also of opinion that the order of the judge sufficiently recites the jurisdiction-

al facts upon which the relator was committed as insane.

There are in the case some irregularities, but they were no more than irregularities, and do not make a showing that the court acted without jurisdiction. That being true, the writ must be dismissed, which is accordingly ordered. Dismissed.

**BUTLER v. ASHWORTH et al. (No. 15,984.)**

(Supreme Court of California. Jan. 29, 1896.)

**TORT—INDEPENDENT ACTS—SEPARATE ACTIONS—Costs.**

1. Where neglect of a city to repair a sewer, and of its officers to properly repair it, combine to cause sewage to overflow land, though the landowner can have but one satisfaction in damages, since she must sue each separately, she is not within Code Civ. Proc. § 1023, prohibiting recovery of costs in more than one action where defendants, sued separately, "might have been joined as defendants in the same action."

2. Where a single injury is caused by independent acts of different parties, though the injured party is entitled to but one satisfaction, he must sue each party separately.

For former opinion, see 43 Pac. 4.

**PER CURIAM.** The opinion and judgment heretofore rendered herein are modified by striking therefrom the two last paragraphs thereof, and inserting in lieu thereof the following:

It does not result from this, however, that the plaintiff is not entitled to her costs in the present action. While one may have a cause of action against two or more persons for the same act, it does not follow, necessarily, that he can sue them jointly. "There must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the single action." The injury suffered must be in some sense the result of their joint work. Pom. Rem. § 308. Here, while the injury was from one common cause, it cannot, we think, be said to have been produced by the same fault or act of the city and Ashworth. The act of the former which conduced to the cause of injury was the neglect to repair the broken sewer; while the act of the latter was the negligent repair and stopping up thereof. These two acts produced the cause from which plaintiff suffered, but they were not joint in a sense which would make the city and Ashworth joint tortfeasors, and liable to be sued in a common action. While plaintiff had a right of action therefor, against each separately, she could not sue them jointly; and, while she can have but one satisfaction in damages, the case is not within section 1023 of the Code of Civil Procedure, which prevents the recovery of costs in more than one action, where the defendants, sued separately, "might have been joined as defendants in the same action."

We think the order of the court below was right in both respects appealed from, and it follows that it should be affirmed, each appellant to pay his own costs on appeal. It is so ordered.

**BROKER v. TAYLOR.** (No. 19,429.)  
(Supreme Court of California. Jan. 24, 1896.)  
APPEAL—JUDGMENT ROLL.

Where an appeal from an order denying a new trial is dismissed for want of an undertaking, only such questions can be considered as arise upon the judgment roll.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge. Action by Henry Broker against John Taylor, administrator, etc. Plaintiff had judgment, and defendant appeals. Affirmed.

Paris & Allison, for appellant. Bledsoe & Hutchins and Rolfe & Rolfe, for respondent.

**PER CURIAM.** Defendant appealed from the judgment and an order denying a new trial. The appeal from the order was, on motion of respondent, dismissed, for want of an undertaking to support it. The questions subject to our review, therefore, are such only as arise upon the judgment roll. No such questions are presented in appellant's briefs, the points there discussed being such alone as would arise on an appeal from the order denying a new trial. We have examined the record, and are satisfied that the complaint states a cause of action, and that the findings are sufficient to support the judgment in favor of plaintiff. The suggestion made at the oral argument that the judgment should not have been against Papenhansen, as executor, is, we think, without substantial merit. The court found that he had the fund in his hands as executor; and the judgment was, in effect, that it be paid over to plaintiff in due course of administration. Technically, perhaps, the theory upon which the plaintiff recovered was that the property did not belong to the estate; but, being in defendant's hands, we cannot see wherein his rights are in any way prejudiced by the form of the judgment, and the objection may therefore be disregarded. The judgment appealed from is affirmed.

**HENRY v. MERGUIRE.** (Sac. 51.)<sup>1</sup>  
(Supreme Court of California. Jan. 10, 1896.)  
APPEAL—TIME OF TAKING.

The running of the year from entry of judgment, within which Code Civ. Proc. § 939, provides appeal from the judgment must be taken, is not suspended by an order granting a new trial, and appeal therefrom resulting in reversal of the order.

<sup>1</sup> Rehearing denied.

In bank. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by Henry against Merguire. Judgment for plaintiff. Defendant appeals. Dismissed.

J. M. Walling and W. H. Chickering, for appellant. Thos. S. Ford, for respondent.

**VAN FLEET, J.** Motion by respondent to dismiss appeal from the judgment. One of the grounds of the motion is that the appeal was not taken within one year from the entry of judgment, and is therefore too late. The judgment was entered November 2, 1893, and the appeal was taken April 27, 1895. Section 939 of the Code of Civil Procedure provides that an appeal from the judgment must be taken within one year from the entry of the judgment; and it has been uniformly held that an appeal taken after that time is ineffectual, and must be dismissed. To avoid the effect of the limitation in this case it is claimed by appellant that the time within which he was otherwise required by the statute to take his appeal was suspended by the fact that the lower court, on February 19, 1894, made an order granting a new trial, which order was appealed from, and such appeal not determined until February 25, 1895, when the order was reversed. The contention of appellant is that the effect of the order granting a new trial was to vacate the judgment, and that until the reversal of the order there was no judgment in existence from which to appeal; that by reason of that fact the time intervening the making of said order and the reversal thereof should be excluded in computing the year given by the statute in which to appeal from the judgment. This position is untenable. In the first place, the period fixed by the statute is an express and peremptory limitation within which the right given must be exercised, and is not a flexible rule to be varied by extrinsic circumstances. *Bornheimer v. Baldwin*, 42 Cal. 31. In the second place, it is held by this court in *Pierce v. Birkholm* (No. 15,464, this day decided) 43 Pac. 205, that, while the ultimate effect of the order granting a new trial is to vacate and set aside the judgment, an appeal from such order operates to suspend its functions, and leave the judgment subsisting, for the purposes of an appeal therefrom, pending the appeal from the order. There was, therefore, nothing to prevent appellant from taking his appeal from the judgment within the year given for the purpose. The motion is granted, and the appeal dismissed.

We concur: **BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; HENSHAW, J.; TEMPLE, J.**

POTTER v. AHRENS et ux. (L. A. 92.)<sup>1</sup>  
(Supreme Court of California. Jan. 11, 1896.)

SALE OF BUSINESS—COVENANT AGAINST ENGAGING  
IN BUSINESS—EVIDENCE OF OWNERSHIP—  
LIQUIDATED DAMAGES.

1. Evidence that a woman was assisting her husband to carry on a business, that they were apparently conducting it together, that the property had all been acquired after their marriage and with community funds, and that she joined her husband in executing a contract of sale thereof, is sufficient to sustain a finding, in an action on their covenants not to re-engage in such business, that she had an interest in the property and business.

2. A sum which a contract of sale of a business and good will provides the sellers shall pay "as liquidated damages," in case they re-engage in the business, cannot be held a penalty.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Anson H. Potter against Fred Ahrens and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry Bleecker and Anderson & Anderson, for appellants. Leon F. Moss, for respondent.

VAN LEET, J. The court found, substantially as alleged in the complaint, that on the 2d day of May, 1893, the defendants were engaged in the business of preparing, dealing in, and vending all kinds of foreign and domestic delicacies for the table, such as prepared meats, breads, cakes, pies, canned goods, and other household supplies of the kind, and were on said date the owners of a stock of such goods, together with furniture, ranges, etc., used by them in said business, at their place of business in the city of Los Angeles. That on said date defendants sold to plaintiff and one Andrew Wood their said stock of goods, furniture, etc., and the good will of the business, for the consideration of \$3,000. That upon the payment of said sum, and in consideration thereof, the defendants executed and delivered to said purchasers their certain contract in writing, wherein it was provided that "the said F. Ahrens and Cresence Ahrens covenant and agree with the said Anson H. Potter and Andrew Wood that neither of us will engage in or carry on a like business in the city of Los Angeles, nor work for or assist anyone to engage in or carry on a business of the same kind or like nature; and in case of a dissolution of the partnership of the said Potter & Wood, this covenant shall inure to the benefit of the remaining partner, with like effect as though there had been no dissolution of partnership; and this covenant shall, in case of a sale of the business by said Potter & Wood, inure to the benefit of their assigns, with the same like force and effect as it would be to the said Potter & Wood had no sale been made; and, in case of a violation of this covenant, the said F. Ahrens and Cresence Ahrens agree to pay to the said Potter & Wood, or to their as-

signs, the sum of three thousand dollars (\$3,000) as liquidated damages. This covenant shall be binding for the space of six years from the date of the consummation of the said sale." That plaintiff and said Wood carried on said business for a time, but thereafter, on June 10, 1893, they dissolved partnership, and Wood sold and delivered to plaintiff his interest in said stock, business, and good will, and the latter has since continued said business at the same place. That on November 28, 1894, the defendant Fred Ahrens, disregarding his said agreement, opened a store in said city, near plaintiff's place of business, and began conducting a like business to that referred to in said contract. That by reason of the premises plaintiff had suffered damages in the sum of \$3,000. The court further found against defendants upon a special defense, made by them, that said Cresence Ahrens had no interest, at the date of said sale, in said business, stock of goods, or good will, and that her signature to said agreement had been procured by fraud. Judgment was entered on the findings in favor of plaintiff in the sum of \$3,000, and defendants appeal therefrom, and from an order denying them a new trial.

1. It is contended that there is no evidence to support the findings, in so far as they are to the effect that the defendant Cresence Ahrens was interested in the sale of the business or good will; and that since a contract in restraint of trade can only be competently made by one who sells the good will of a business (Civ. Code, §§ 1673, 1674) the contract in question must be held void as to her. Independently of the question as to whether this defendant is estopped to deny her interest or title, by the written contract of sale executed by her, which we think she clearly is (2 Whart. Ev. § 1147), there is sufficient evidence in the record to sustain the findings of the court in this respect. It appeared that she was the wife of her codefendant, and assisted him in carrying on the business, that they were apparently conducting it together, and that the property in question had all been acquired during the married life of the defendants, and with community funds. Furthermore, the execution by Mrs. Ahrens with her husband of the contract of sale was in itself evidence of ownership in her. The testimony of the defendants, therefore, that she was not interested in the property or the sale, simply tended to raise a conflict upon the point, which it was the province of the trial court to determine.

2. It is further contended that plaintiff was not entitled to the amount of damages found by the court. No evidence was put in by plaintiff to establish any actual damages suffered, but, relying upon the stipulation on that subject contained in the contract of sale, plaintiff contented himself with showing a breach of the latter, and rested.

<sup>1</sup> Rehearing denied.

As we have seen, the contract provided that for a violation of their covenant to refrain from engaging in a like business the defendants agreed to pay to the purchasers, or to their assigns, "the sum of \$3,000 as liquidated damages." Defendants contend that this provision was in the nature of a penalty, notwithstanding the amount therein designated is termed "liquidated damages," and that plaintiff was required to prove the actual damage suffered by him, and be confined in his recovery to the amount so shown. This contention is clearly untenable. While the definition of the parties in contracts of this character is not the invariable and controlling guide for construction, the subject-matter of the contract in this case was such as, in its very nature, in case of a breach, to render the proof of damages extremely difficult, if not impossible, and to manifestly make a case for liquidated damages. *Norman v. Wells*, 17 Wend. 186; 1 Suth. Dam. p. 507. Indeed, the difficulty arising in fixing the actual damages in instances of this kind has been generally recognized in the law, and is so recognized by our Code, which makes provision by which parties may in such cases obviate the difficulty. By section 1871 of the Civil Code it is provided that "the parties to a contract may agree therein upon the amount which shall be presumed to be the amount of damages sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage." It is perfectly obvious, from the terms of the agreement here, that the parties, in making the stipulation in question, had in view the very obstacle above provided against, and intended to avoid it by fixing the amount of damages the purchasers should be deemed to have suffered in the event of a breach. This purpose is clear and unmistakable, and, the purpose being competent, the intention must be held effectual. *Streefer v. Rush*, 25 Cal. 68. In 1 Suth. Dam. p. 507, the author says: "The damages for breach of contract for the purchase of the good will of an established trade or business are so absolutely uncertain that courts have recognized the fullest liberty of parties to fix beforehand the amount of damages in that class of cases. In the decision of such cases the strongest expressions are to be found to the effect that the intention of the parties must govern, and that courts have no power to defeat that intention on the pretext of relieving from a bad bargain." In view of the subject-matter and terms of the contract under consideration, we would not be at liberty to put a construction upon the contract so absolutely at variance with the manifest intention of the parties thereto as to hold that the stipulation here was a mere penalty. None of the authorities relied upon by the defendants tend to support such a view. The plaintiff was therefore entitled to stand strictly upon the terms of the covenant, and,

having shown a breach, he was properly awarded the amount fixed by the parties as his just redress.

3. There is nothing in the point that plaintiff is not the proper party entitled, under the covenant, to recover the damages therein fixed for its breach. The only construction that provision of the contract will bear is that the damages are to be paid, in the event of breach, to the purchasers, or to either one remaining in the business in case of dissolution of their partnership, or to their assigns in the event they shall sell to third parties. The clause cannot be limited, as contended by defendants, to a stipulation to pay Potter & Wood, jointly, or the "assigns" of both of them. It inures by its terms to the remaining partner in case of dissolution of the firm, and plaintiff is clearly the "remaining partner" within the terms of the instrument.

4. The other points made are even less plausible of merit than the foregoing, and we deem it unnecessary to consider them separately or at length. It is sufficient to say that we have not overlooked them, and that they involve no error. The judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

ANDERSON v. HINSHAW. (No. 16,020.)  
(Supreme Court of California. Jan. 11, 1896.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

1. Where plaintiff sues for injuries received because of negligence of defendant in changing a guy rope to a derrick while plaintiff was on the mast, and there was evidence that he did undertake so to do, a verdict finding him guilty of negligence will not be disturbed.

2. Instructions not excepted to cannot be considered.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Hans Anderson against H. H. Hinshaw. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Chas. L. Weller, for appellant. Shadburne & Herrin, for respondent.

HAYNES, C. This action was brought to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant. A jury trial was had, and a verdict returned for the plaintiff, assessing his damages at \$1,000. Appellant contends for a reversal principally upon the ground that the evidence is insufficient to justify the verdict.

The plaintiff was employed by the defendant as a farm hand, and while so employed he ascended a derrick mast, used in hoisting hay, for the purpose of adjusting a block and tackle. While so engaged, the mast

fell, as plaintiff alleges and contends, through the careless and improper interference by the defendant and his foreman with the guy ropes by which the mast was kept in position; the fall resulting in breaking defendant's leg above the knee. The evidence is far from satisfactory as to the immediate cause of the fall of the mast. At the time the plaintiff ascended the mast it was supported by two guy ropes, a third rope hanging loose from the top of the mast. Mr. Albert, the defendant's foreman, directed the plaintiff to fasten the third guy rope to a stake before ascending; but defendant said it was not necessary, as the mast was supported by the other two ropes, and he wished to use the hanging rope to climb the mast. The plaintiff was a sailor, and had followed that occupation for six years, and found no difficulty in reaching the top of the mast. After doing some work at the top, he descended a few feet, and seated himself on the cross-arm, and sat there while Mr. Albert went to a building a hundred yards or more away, to obtain a small rope. The defendant was not present when he went up the mast, but returned with Mr. Albert. The plaintiff testified that the defendant and his foreman pulled over the derrick mast, causing it to fall; that Mr. Hinshaw went over to the loose rope that he had used in climbing the mast, and took it over to where one of the guy ropes was fastened to a post; that Hinshaw and the foreman both took hold of the loose rope, and pulled the mast right down; that both were pulling on the rope when the mast fell, but for what purpose they pulled the rope he did not know; and that Mr. Albert was trying to untie the knot from the stick that was down in the ground. The defendant and his foreman denied having pulled upon the rope, or that they did anything to cause the mast to fall; that Mr. Albert did not touch the taut part of the guy rope at any time; that he was engaged in untying a small rope from the end of the guy rope, and not interfering with the knot by which it was secured to the post. The defendant testified that he knelt down and held the guy rope that was fastened to a fence post, but did not pull it or work with it, and that he did not at any time take hold of the loose guy rope, or walk with it to the fastened guy near which he and his foreman were standing when it fell. They further testified that the mast fell away from the point where they were standing, and insist that, if the mast had fallen in consequence of their pulling upon the rope, it would have fallen towards them, instead of away from them. The evidence is by no means satisfactory as it appears in the record. It is not stated that either of the two guy ropes that sustained the mast when the plaintiff went up were either broken or untied. And it would appear that, if the mast was sufficiently supported to enable the

plaintiff to climb to the top, work there for some time, and then sit on the mast-arm for 10 or 20 minutes, that there must have been some cause operating at the time the mast fell to cause its fall, other than the plaintiff's position upon the mast. C. W. Jones, a witness for the plaintiff, but who was not present at the time of the accident, testified that he had a conversation with the defendant after the accident, and asked him how it happened; that the defendant said: "They concluded [meaning himself and foreman] to move a certain guy rope that was in the corral, and I asked him whether Joe, the plaintiff, objected to moving the rope, and he said that he did not know that Joe should talk to him and Horace about the rope, as they were supposed to know more about it than Joe did, as he was up there and they were down below; but said that they had concluded to move the rope that was in the corral. They were afraid that the mules would run against it. He did not say that they had moved the rope at all." The mast supported by the two guy ropes must have leaned in a direction opposite to the points at which the guy ropes were fastened. If these ropes remained fastened, and the fall of the mast was caused by pulling upon the loose rope in the direction of one of the guy ropes, the mast must have fallen across the line drawn between the points where the guy ropes were fastened. The fall of the mast in the opposite direction shows conclusively that the fall was not caused by pulling upon the loose rope in the direction that the plaintiff asserted; and it is equally clear that the mast could not have fallen in the opposite direction without one or both of the guy ropes breaking or being untied. The testimony of Jones tends strongly to show that the defendant and his foreman undertook to change one of the guy ropes, and that in doing so the mast fell.

The question, then, arises whether the defendant was negligent in attempting to change one of the two guy ropes by which the mast was sustained, and we think the jury were clearly justified in coming to the conclusion—if they found that the defendant did undertake to move one of the guy ropes in order to change its position, while the plaintiff was upon the mast, leaving it secured by but one rope, which could not hold it in position—that it was negligence. It is therefore the not unfrequent case of a conflict of testimony, which will not permit a verdict to be disturbed upon appeal. At the conclusion of the evidence defendant's counsel moved for a nonsuit, which was denied, and an exception taken. There was sufficient testimony to justify the court in overruling the motion and submitting the facts to the jury.

Appellant, in his brief, contends that certain instructions given by the court to the jury were erroneous. These instructions,

however, were not excepted to, and cannot, therefore, be considered.

Another point made by appellant is that the jury disregarded and violated the instructions given by the court upon the question of negligence. The instruction is long, and need not be stated. It was certainly favorable to the defendant, but at the same time fairly left the question for the jury to determine the cause of the fall of the mast, and whether the defendant and his foreman had negligently caused its fall. Under these instructions, if the jury believed the testimony of the plaintiff, they could properly render a verdict in his favor.

It is also argued by appellant that the evidence of the plaintiff was so contradictory and unsatisfactory that the court below erred in denying the defendant's motion for a new trial. It does not appear to us from the record that the court abused its discretion in denying said motion, though, if the motion had been granted, we could not have disapproved the order. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

#### McCARTHY v. MT. TECARTE LAND & WATER CO. (L. A. 84.)<sup>1</sup>

(Supreme Court of California. Jan. 13, 1896.)

PAYMENT—RECEIPTS—PRIOR ASSIGNMENT OF CLAIM—COPY OF ACCOUNT—DELIVERY TO ADVERSARY—BILL OF PARTICULARS—MOTION TO EXCLUDE.

1. Where an account for goods sold to defendant was assigned to plaintiff with defendant's knowledge, and afterwards the assignor, in a settlement with defendant, gave a receipt in full for other accounts which, by mistake, included the one previously assigned, such settlement did not relieve defendant from its liability to plaintiff.

2. Where a copy of an account sued on was delivered 6 days after demand, but 40 days before the trial, such delivery complied with Code Civ. Proc. § 454, requiring a party to deliver to his adversary such a copy within 5 days after demand, or be excluded from giving evidence thereof.

3. When a bill of particulars is objectionable, and defendant intends to object to the introduction of evidence, he must, before the trial, move for an order to exclude it.

Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by D. O. McCarthy against the Mt. Tecarte Land & Water Company to recover on an account for goods sold and delivered. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Jas. E. Wadham and F. W. Stearns, for appellant. McDonald & McDonald and Gibson & Titus, for respondent.

<sup>1</sup> Rehearing denied.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. Plaintiff averred that between the 21st day of August and the 24th day of November, 1891, the firm of J. Harvey McCarthy & Co. had, at the request of defendant, sold and delivered to it goods, wares, merchandise, and moneys of the value of \$2,500; that the interest of the firm in and to said claim and account had been assigned to plaintiff upon November 24, 1891; that thereafter defendant paid to plaintiff on said account the sum of \$250, and no more. Judgment was asked for the unpaid amount, with interest. Defendant answered, denying that it ever ordered or received the merchandise or moneys, or any part thereof. It also denied that it had paid \$250, or any other sum. The court found in accordance with the complaint that goods, etc., of the value of \$2,500 had been delivered to defendant, and this finding is not attacked. It found the payment by defendant to plaintiff of \$250, and no more. This finding is attacked. The basis of attack is evidence of a settlement had between defendant and J. Harvey McCarthy, a partner of the firm, which settlement, it is claimed, included all of the items, matters, and things here in controversy. It appears that J. Harvey McCarthy had an action pending against this defendant for goods and merchandise sold, in which he demanded judgment for \$1,200. A settlement was had between him and the company, and upon a bundle of accounts (some of which embrace the items here in litigation) he signed this receipt: "Payment and full satisfaction of balance due on within accounts, and also of all other demands included in the complaint in the action entitled 'J. Harvey McCarthy vs. Mt. Tecarte Land and Water Company, No. 6,811.'" But McCarthy testified that he did not examine the bills; that he thought the settlement embraced only the items in litigation in the action; and that he so expressed himself to the defendant's attorney, saying at the same time that he had previously assigned to his father (this plaintiff) a claim for \$2,500. The language of the receipt is not at variance with this evidence. Moreover, this settlement was had in 1892. The assignment to plaintiff was executed in 1891, and the directors of the defendant corporation were informed of it at one of their regular meetings shortly after it was made. Under these circumstances a settlement with J. Harvey McCarthy would not relieve defendant from its liability for the debt previously transferred to plaintiff. *Gilman v. Curtis*, 66 Cal. 116, 4 Pac. 1094; *Works v. Merritt*, 105 Cal. 467, 38 Pac. 1109. There is thus sufficient evidence to sustain the finding of the court.

On the 15th day of December, 1894, defendant made demand on plaintiff for a bill of particulars. Six days thereafter, on December 21st, the bill was served. More than 40 days thereafter trial was commenced. Upon

the trial, defendant, without objection then or previously made to the sufficiency of the account as furnished, opposed the reception of any evidence upon the ground that it had not been delivered within five days after demand. Section 454 of the Code of Civil Procedure provides that a party must deliver to his adversary within five days after demand a copy of an account sued upon, or be precluded from giving evidence thereof. It is for a rigid construction of this section that appellant contends, insisting that its provisions are mandatory, and leave the court no discretion in the matter. But this view finds no support in the reason which called the section into existence. In the simplification of pleadings it is designed to protect the adverse party from embarrassment upon the trial, by enabling him to demand and obtain in advance a detailed statement of the items charged against him. If the demand is not complied with then, for the refusal or gross neglect the prescribed penalty may be exacted. If the demandant receives the copy long enough before the trial to enable him to examine it and prepare his defense, so far as he is concerned the statute has fulfilled its usefulness. It would be to the last degree oppressive to hold that a plaintiff must lose his cause of action because, though he had furnished the copy of his account more than 40 days before the trial, he had served it upon the sixth, instead of the fifth, day after demand. The circumstances of this case will serve to illustrate the injustice and oppression which would follow so drastic a rule. The plaintiff delivered the copy of his account to defendant more than 40 days before the trial. No objection was made to its sufficiency. Defendant's secretary compared the account with plaintiff's books. At the trial no item of the account was attacked, no word of evidence offered in dispute of its correctness. The court found that \$2,250 was justly due to plaintiff, and yet defendant would seek to avoid payment because the copy was served, not so late as to embarrass his defense, but a day later than the statute contemplates. A court would be reluctant to adopt a construction which would lead to such results, and we are not compelled to do so. We are referred to no authority construing the provisions of such a statute as mandatory; but, upon the other hand, it is uniformly held that the language serves but to name a penalty, vesting the discretionary power of exacting it or not in the sound discretion of the trial judge. *Robbins v. Butler*, 13 Colo. 496, 22 Pac. 803. In *Graham v. Harmon*, 84 Cal. 185, 23 Pac. 1097, it is said that the penalty only applies where the party refuses to furnish the copy; and in *Conner v. Hutchinson*, 17 Cal. 279, it is held that, if the bill of particulars is for any reason objectionable, and the adverse party proposes to object to the introduction of evidence, he may not wait until the trial, but previous to the trial must move for and obtain an order

excluding the evidence. Such is also the rule laid down in *Kellogg v. Paine*, 8 How. Prac. 329, and in *Isham v. Parker*, 3 Wash. St. 774, 29 Pac. 835. This defendant failed to do, and for that additional reason his objection was properly overruled.

Objection was also made to the admission in evidence of certain original books of entry of the firm of J. Harvey McCarthy & Co. To set forth the evidence given as the foundation for their admission would be profitless. Suffice it to say that it was sufficient to warrant the court's ruling. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

#### MERCED COUNTY v. FLEMING. (Sac. 78.)

(Supreme Court of California. Jan. 21, 1896.)

ORDINANCE—VALIDITY—BURDEN OF PROOF—PROHIBITORY TAX—QUESTION OF LAW.

1. The introduction of the ordinance book, containing a certain ordinance, and showing its passage by the board, with the vote thereon, and the proper authentication thereof, together with evidence, as to its due publication, is *prima facie* proof of its validity, though the regularity of the proceedings was denied.

2. Whether an ordinance imposing a license tax on liquors is in fact prohibitory is a question for the court, to be determined from the ordinance itself; and evidence that it was prohibitive is not admissible.

Department 1. Appeal from superior court, Merced county.

Action by Merced county against C. E. Fleming to recover a liquor license tax. Plaintiff had judgment, and defendant appeals. Affirmed.

Geo. Baker and C. Michener, for appellant. F. G. Ostrander, for respondent.

VAN FLEET, J. This is an appeal from a judgment in favor of plaintiff, and an order denying a new trial, in an action to recover a liquor license imposed by an ordinance of the board of supervisors of the plaintiff county.

1. It is claimed that the court below erred in admitting in evidence the ordinance under which the action is prosecuted, and holding that it was regularly adopted, because it was not shown that it was adopted at a regular session of the board. The regular ordinance book of the board was produced from the custody of the clerk,—the official in whose keeping it belonged,—and duly identified, and the ordinance in question was found therein regularly and properly recorded. It contained the recital, at the end thereof: "The foregoing ordinance was passed and adopted by the board of supervisors of said Merced county, at a regular session of said board, this, the eleventh day of January, in the year of our Lord one thousand eight hundred and ninety-five, by the follow-



ing vote: Ayes: Supervisors O. C. Nelson, G. P. Kensey, J. H. Edwards. Noes: J. W. Haley, R. Shaffer." This was followed by a proper authentication by the signature of the chairman of the board and attestation of the clerk. Evidence was also introduced showing the due publication of the ordinance. This was sufficient to establish a prima facie case of regularity in the adoption of the ordinance, and entitle it to be admitted in evidence. That the ordinance was passed at a regular session was one of the presumptions afforded by the prima facie showing made, and, if defendant desired to overcome that presumption by showing that in fact it was not so passed, the burden was upon him. *San Diego Co. v. Selfert*, 97 Cal. 599, 32 Pac. 644; *Code Civ. Proc.* §§ 1963, subd. 15; *Id.* § 1918, subd. 5; *Id.* § 1920; *Dill Mun. Corp.* (3d Ed.) § 422. "Proof of the existence and identity of the ordinance offered should by rights be all that is required of the prosecution in any case, until some showing has been made that there was irregularity in the enactment of the ordinance, in which case it becomes necessary to prove that it was properly enacted, in order to sustain a conviction or judgment. If no such question is raised, the presumption that the ordinance was properly passed becomes conclusive." *Horr & B. Mun. Ord.* 161. No attempt was made to rebut or overcome the prima facie showing by plaintiff in this case. The regularity of the proceedings for the adoption of the ordinance was denied in the answer, but this did not shift the burden of proof in relation thereto, and no evidence was offered to establish any irregularity. The validity of the ordinance was therefore sufficiently shown. There is nothing in the case of *People v. Dunn*, 89 Cal. 228, 26 Pac. 761, contravening this doctrine. The foregoing suggestions and authorities answer alike the kindred objection that it was not made to appear that in passing the ordinance the ayes and noes were entered in the minutes of the board.

2. It is further objected that the court erred in excluding the evidence offered by defendant to show that the effect of the ordinance in question, if enforced, is virtually to prohibit the retail traffic in liquors in the county of Merced. It is perfectly true that the power to regulate for the purposes of revenue is not the power to prohibit, and that an attempt to accomplish the latter object under a pretense of regulation cannot be upheld. In other words, the right to prohibit the sale or traffic in intoxicating liquors is entirely separate and distinct from the power to regulate and impose a license tax thereon for revenue purposes; and an ordinance which in terms proceeds under the latter power, but in its effect amounts to an exercise of the former, will not stand. *Merced Co. v. Helm*, 102 Cal. 159, 36 Pac. 399; *Black, Intox. Liq.* § 227. But the question here is, how is such effect to be determined?

It cannot be that this question can be made to depend upon the effect of the regulation on the business of the defendant, as was the purport of the evidence offered in this case. That could afford no proper or reasonable test as to the general effect of the regulation. We think the answer is well stated in the opinion of the learned judge of the court below, wherein it is said: "There are many objections to the admission of such evidence. The discretion is committed to the board of supervisors, and they are presumed to act with good motive; and it is not to be supposed that, while pretending to fix the tax for revenue, they will make it so large as to prohibit the business. So soon as the courts hear evidence to decide whether a license tax be so high as to be prohibitory, they take upon themselves the exercise of a discretion which the laws have confided to the legislative body. If evidence is to be heard, the court might find the facts to be prohibitive to some dealers in the county by reason of the small amount of business done by them, and not prohibitive to their better patronized competitors. I find a practical unanimity of opinion that whether an ordinance be reasonable or not is a question for the court, and it seems that the same rule should apply to an ordinance claimed to be prohibitory." Such an objection is, like any other, directed to the reasonable character of the regulation,—a question to be determined from the face of the ordinance; and the provision must be upheld unless, as matter of law, the court can say that it is so unreasonable in character as to transcend the proper exercise of the right by the lawmaking power. It is not a question of fact, to be determined upon the varying circumstances of each particular case. In *re Guerrero*, 69 Cal. 88, 10 Pac. 261. "Whether an ordinance be reasonable and consistent with the law, or not, is a question for the court, and not the jury, and evidence to the latter on the subject is inadmissible." *Dill Mun. Corp.*, § 327. See, also, *Ex parte Frank*, 52 Cal. 610. We think the evidence was properly excluded. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

KAUFMAN v. SHAIN et al. (No. 16,006.)<sup>1</sup>  
(Supreme Court of California. Jan. 14, 1896.)

RECORD MINUTES—AMENDMENT AFTER JUDGMENT  
—DISCRETION OF COURT—VACATION OF JUDGMENT—EVIDENCE TO WARRANT.

1. It is within the discretion of the trial court, on satisfactory evidence, outside the record, that the record minutes incorrectly set forth its orders, to direct an amendment thereof at any time after judgment.

2. Where judgment is entered in conformity to record minutes incorrectly directing it, on amendment of the minutes to conform to the actual order of the court, the judgment must be set aside.

3. The record minutes, on hearing, in October, 1890, of one demurrer to a complaint, pending another, directed that the demurrer be sustained and the action dismissed, and judgment was accordingly entered March 14, 1894. On motion by the other demurrant, May 4, 1894, to amend the minutes, it appeared the neither his own nor plaintiff's counsel were present at the hearing on the demurrer, and, by the affidavit of the shorthand reporter, that the court, after sustaining the demurrer, on counsel requesting judgment, said: "The demurrer is sustained. I haven't allowed any amendment. If you desire it, let judgment be entered dismissing the action. I say that must follow as matter of course; but I simply sustain the demurrer here." In the calendar notes of the judge, following the title of the cause, appeared: "Demurrer sustained. Action dismissed, if counsel are present." The only evidence contravening this was the record itself. *Held*, that an amendment of the minutes, by elimination of the order directing judgment of dismissal, and setting aside the judgment, was proper.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by one Kaufman against Shain and others. In accordance with the record minutes, judgment dismissing the complaint on demurrer of defendants Herrlich and Hanlon, pending a demurrer of defendant Davis, was entered; and from an order sustaining a motion of defendant Davis to set aside this judgment, and to amend the minutes to conform to the order actually made by the court, plaintiff appeals. Affirmed.

Garber, Boalt & Bishop, for appellant.  
Frank Shay, for respondents.

HARRISON, J. An amended complaint was filed in this action May 16, 1890, to which a demurrer was filed by the defendants Herrlich and Hanlon May 23d, and by the defendant Davis June 4th. October 10, 1890, the demurrer of Herrlich and Hanlon came on for argument, and was sustained by the court; and thereupon the clerk made the following entry in his minutes, under the title of the cause: "In this case the demurrer of the defendants Julie Herrlich and John F. Hanlon to the second amended complaint coming on regularly this day to be heard, it is by the court ordered, on motion of counsel for said defendants, that said demurrer be, and the same is hereby, sustained. It is further ordered by the court that this cause be, and the same is hereby, dismissed." Thereafter, on the 14th of March, 1894, a judgment was entered by the clerk in accordance with said entry, dismissing the action, and in favor of the defendants for their costs. May 4, 1894, the defendant Davis, in accordance with a previous notice to the plaintiff therefor, moved the court for an order amending the above minute entry, by striking therefrom the clause, "It is further ordered by the court that this cause be, and the same is hereby, dismissed," upon the ground that said entry upon the minutes was not the order made by the court, and was not authorized or directed to be entered by the court, and also that the judgment be amend-

ed by limiting its effect to the defendants Herrlich and Hanlon; and in support of his motions presented the affidavit of the shorthand reporter of the court, setting forth what had transpired in court on the day the order sustaining the demurrer was made. After hearing the motions and the evidence offered in support thereof, the court made an order, August 20, 1894, directing that the minutes be amended by striking out the words, "It is further ordered by the court that this cause be, and the same is hereby, dismissed," and that the judgment entered on the 14th of March be set aside. From this order the plaintiff has appealed.

Every court of record has the inherent right and power to cause its acts and proceedings to be correctly set forth in its records. The clerk is but an instrument and assistant of the court, whose duty it is to make a correct memorial of its orders and directions; and whenever it is properly brought to the knowledge of the court that the record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted. In *re Wight*, 134 U. S. 136, 10 Sup. Ct. 487; *Balch v. Shaw*, 7 Cush. 282; *Fay v. Wenzell*, 8 Cush. 315; *Frink v. Frink*, 43 N. H. 508; *Crim v. Kessing*, 89 Cal. 486, 26 Pac. 1074. In the exercise of this power the court is not, however, authorized to do more than to make its records correspond to the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given. *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22. The power to change its judgment, as well as the time within which such change may be made, depend upon different principles; and it was held in this state, until a different rule was prescribed by statute, that this power could not be exercised after the adjournment of the term in which the judgment had been entered. *Baldwin v. Kramer*, 2 Cal. 582; *Morrison v. Dapman*, 3 Cal. 255; *Carpentier v. Hart*, 5 Cal. 406; *Lattimer v. Ryan*, 20 Cal. 628; *Willson v. McEvoy*, 25 Cal. 169; *Casement v. Ringgold*, 28 Cal. 335. The history and development of the procedure in this state upon this subject is set forth in *Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344. In *Branger v. Chevallier*, 9 Cal. 172, the same rule was applied to an order revoking the settlement of a statement, on the ground that, by being filed, the statement had become a part of the record. In *De Castro v. Richardson*, 25 Cal. 49, the rule was applied to an order amending a previous order granting time within which to prepare a statement on motion for a new trial. But in *Spanagel v. Dellinger*, 34 Cal. 476, the court held that it had erred in making such application; that, notwithstanding the adjournment of the term after judgment had been entered,

the court had jurisdiction to correct or amend orders made in proceedings for a new trial, for the reason that such orders did not form a part of the "record" which had become final by the adjournment. And in *Willson v. Cleaveland*, 30 Cal. 192, it was held that the adjournment for the term did not affect the jurisdiction of the court over its orders made during that term, unless final judgment in the case had been entered. The same question was argued by counsel in *Hegeler v. Henckell*, 27 Cal. 491, but, as it did not appear from the record that any order amending the minutes had been made, the point was not passed upon by the court.

Whether the clerk has correctly recorded an order made by the court, or whether an amendment of the entry shall be made, so that the minutes shall correctly express what was done or directed, is to be determined by the court in which the motion is made; and the evidence that may be offered in support of the motion must be satisfactory to the judge of that court. The motion to correct a minute entry is eminently addressed to the court in which the entry is made, and its determination upon any conflict of evidence concerning the order that it had made is not open to review. "The amount and kind of evidence requisite to satisfy that court as to what was the real order of the court, and what was the proper entry on the docket or extended record, must rest with that court." *Fay v. Wenzell*, supra. In acting upon the motion, the judge is in the exercise of one of the functions of his judicial office, and will not direct the amendment unless the evidence is such as will clearly satisfy him that the entry does not correctly express the order which was made. If the motion is made upon the day succeeding the entry, his own memory of what he had directed might be sufficient; whereas, if there had been a great lapse of time between the making of the entry and the motion for its amendment, he would naturally require more explicit evidence that the entry was incorrect. See *Porter v. Vaughan*, 22 Vt. 269.

The court is not precluded from correcting the entry merely because the "record" does not show that it is itself incorrect. The rule at common law, that the record can be amended only when there is something in the record to amend by, was applied when it was sought to amend a judgment at a term of the court subsequent to that in which it had been signed and enrolled; but it has no application to the amendment of matters that do not form a part of the judgment roll or "record." Until the entry of the judgment the record was in the breast of the court. Afterwards, it was in the roll. It was only the "record" thus made up which imported absolute verity. "The making up of the judgment roll is the equivalent, under our practice, of the entry of record at common law." *De Castro v. Richardson*, 25 Cal. 49. So long as the matters remained "in pa-

per,"—that is, before the record had been enrolled on parchment,—it was not a matter of record, but was subject to amendment upon mere suggestion. 1 Tidd. Prac. 697, 711. Mere entries in the minutes of the court are not, properly speaking, matters of record. *Weed v. Weed*, 25 Conn. 344. They become so only by being incorporated into bills of exception, and thus made a part of the judgment roll. In *Spanagel v. Dellinger*, supra, the original entry in the minutes of the court gave the appellant time within which to prepare a "statement on appeal," and after the adjournment of the term the court directed an amendment of the entry by causing it to read, "a statement on motion for new trial." There was no record or minute entry that such an order had been made, and the amendment was allowed upon a showing by the affidavit of the attorney that such was the order that had been made. In *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, an order, of which there was no entry in the minutes, was made and entered nunc pro tunc upon "proofs to the satisfaction of the court." In *Rousset v. Boyle*, 45 Cal. 64, after the judgment had been affirmed by the supreme court, it was amended in matter of substance, upon a showing, by matters outside of the record, that it did not conform to the judgment which had been in fact rendered. In *Weed v. Weed*, supra, it is said: "It is often the case that the court announces in open court the decision which it has made, without furnishing the clerk with any writing upon the subject. Were the latter to make a mistake in entering up the judgment, the injured party would be remediless, unless the mistake could be corrected upon the testimony of the judge who made the decision, and the counsel and others who were present and heard it announced." In *Frink v. Frink*, supra, the court said: "We think it clear, upon the authorities, that the court may make such amendments upon any competent, legal evidence, and that they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or actual proceeding before it,—what was the proper entry to be made upon the docket, and how the record should be extended." See, also, *Gillett v. Booth*, 95 Ill. 183; *Bank v. Seymour*, 14 Johns. 219; *Hunt v. Wallis*, 6 Paige, 375. This power of a court to amend its records so that they may correspond with the fact, and correctly express what was done by the court, may be exercised at any time. *Crim v. Kessing*, 89 Cal. 486, 26 Pac. 1074; *Egan v. Egan*, 90 Cal. 21, 27 Pac. 22; *Frink v. Frink*, 48 N. H. 508; *Balch v. Shaw*, 7 Cush. 282; *Fay v. Wenzell*, 8 Cush. 315; *Hart v. Reynolds*, 3 Cow. 42, note. "No lapse of time will divest the court of its power, or absolve it from its duty, to supply deficiencies in the records of its own proceedings, where justice and the truth of the case require it." *Lewis v. Ross*, 37 Me. 230. In

*Graddock v. Radford*, 4 Mod. 371, the court ordered the roll to be brought in and amended 20 years after the judgment had been signed. In *Frink v. Frink*, supra, the amendment was allowed after a lapse of 12 years, and in *Balch v. Shaw* a still longer time had intervened between the entry and the amendment. In *Crim v. Kessing*, supra, the court, in January, ordered a nunc pro tunc order to be made as of the previous March, prior to the trial of the cause. In *Rousset v. Boyle*, supra, the court permitted the amendment several years after the entry of the judgment, and after it had been affirmed in the supreme court.

In view of the foregoing principles the order of the superior court must be affirmed. From the affidavit of the shorthand reporter it appeared that, when the demurrer was called for argument, there was no appearance on behalf of the plaintiff, and that the demurrer was sustained, on the motion of the attorney for the demurring party, without argument; and that when, upon the direction of the court that the demurrer be sustained, the attorney asked for judgment, the court replied: "The demurrer is sustained. I haven't allowed any amendment. If you desire it, let judgment be entered dismissing the action. I say that must follow as a matter of course; but I simply sustain the demurrer here." It may be conceded that the remarks of the court are not entirely free from ambiguity; but, for the purpose of resolving this ambiguity, and determining what order was then made, the court was justified in holding that the final statement, "I simply sustain the demurrer here," was to be taken as qualifying the prior announcement to the attorney that judgment would be entered dismissing the action, if he desired it, and as declaring to him that, before such order would be entered, some additional motion must be made by him. In addition to this affidavit, there was before the judge, at the hearing of the present motion, the calendar and notebook kept by him, upon which was the following entry written by him: "*Kaufman vs. Shain et al.* Demurrer of J. F. Hanlon and Julie Herrlich to second amended complaint. Demurrer sustained. Action dismissed, if counsel are present." Through the words "if counsel are present" a pencil mark had been drawn, but it did not appear when or by whom it was drawn. There was another demurrer to the complaint in behalf of other defendants pending before the court, and none of the counsel for either the plaintiff or any other party to the action was present. This showing on behalf of the respondent was sufficient to sustain a finding by the judge that there had been no order made by him directing a dismissal of the action, and to authorize the minutes to be corrected accordingly. The plaintiff presented no evidence contravening the above showing, and introduced only the minute entry itself, and the judgment roll containing the judgment subsequently entered thereon.

That portion of the order setting aside the judgment must also be affirmed. Such an order necessarily followed the order amending the minute entry. The objection upon the ground of lapse of time has no application, for the reason that the motion to amend, as well as the order amending the judgment, were made within less than six months after the judgment was entered. It was not necessary that the minute entry should have been actually amended in accordance with the order therefor, before it was available upon the motion to amend the judgment. The direction for its amendment was, for the purpose of that motion, equivalent to its actual amendment. Upon the amendment of the minute entry, the premises upon which the judgment rested, and which were recited therein, fell; and, as it appeared to the court that a judgment had been entered by the clerk without any direction therefor, the court was authorized to set it aside at any time within six months after its entry, even upon its own motion, and without any request therefor. Whether the judgment had been entered at the request of the respondent, or not, was immaterial. If the clerk had no authority to enter it, it could not be binding upon him, even though it purported to be a judgment in his favor; and he was not precluded from seeking to have it set aside, even if it had been entered at his request. The order is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

#### CITY AND COUNTY OF SAN FRANCISCO v. BUCKMAN. (No. 15,897.)

(Supreme Court of California. Jan. 14, 1896.)

MUNICIPAL CORPORATIONS—RESOLUTIONS—PUBLICATION—OBSTRUCTION OF STREETS—NUISANCE—INJUNCTION BY CITY.

1. Under Worley's Consolidation Act, p. 16, § 68, requiring every resolution of the board of supervisors, granting any privilege, to be published in some newspaper five successive days before final action thereon, a resolution granting property holders the privilege of grading the street in front of their premises, which was never published, never became operative.

2. Digging into and tearing up a street, thereby obstructing free passage, without authority, is a nuisance, within Civ. Code, § 8479, providing that anything which unlawfully obstructs any public street is a nuisance.

3. A municipal corporation created by the state legislature has the same right as the people to pursue all ordinary civil remedies for enjoining a public nuisance in its streets.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the city and county of San Francisco against A. E. Buckman to restrain him from digging into, tearing up, or in any way obstructing, the roadway of Market street, in said city. From an order denying his motion for a new trial, defendant appeals. Affirmed.

Wm. H. Chapman, for appellant. H. T. Creswell, for respondent.

**BELCHER, C.** This is an appeal from an order denying the defendant's motion for a new trial. The action was brought to obtain a decree restraining the defendant, his agents, servants, and employes, from digging into, tearing up, or in any way interfering with, the roadway, roadbed, sidewalks, or grade of Market street, between the points of its junction with Valencia street and Seventeenth street, in the city and county of San Francisco. The defendant, by his answer, admitted that he had commenced, with a large force of men, to grade a portion of Market street between the points named; and, to justify his right to do so, he set up an order (No. 2,318) passed by the board of supervisors of said city and county in December, 1890, "changing and establishing grades on Market street, southwesterly from Valencia street," and a resolution (No. 4,498, third series) passed by the said board in January, 1891, granting permission to certain property owners on Market street, between Valencia and Seventeenth streets, to grade said street in front of their property to the center line thereof. And he alleged that under a contract with the said property owners, and a permission duly obtained from the superintendent of streets, he was proceeding to grade the street to the official grade, for and on behalf of the property owners, and was lawfully performing said work, when restrained by the order of the court below. The case was tried, and the court found that, at all the times mentioned, Market street was, and still is, one of the public streets of the city and county of San Francisco; that at the time of the commencement of the action the defendant was engaged, with a large force of men in his employment and under his control, in digging, tearing up, removing, and otherwise destroying and obstructing, the roadway of said street, between Valencia and Seventeenth streets, in such a manner as to obstruct the free passage and use of the same, and to destroy the roadway thereof for the use and purposes of a street and thoroughfare, and threatened to continue said acts; that all of said acts of defendant were done without the consent or permission of plaintiff, or any of its officers or agents, and contrary to the express commands of plaintiff; and, as conclusions of law, that the said acts of defendant constitute a public nuisance, and plaintiff is entitled to a writ of injunction to restrain the further continuance thereof. A decree was accordingly entered granting the plaintiff the relief prayed for.

The principal question presented for decision is, were the findings of the court justified by the evidence? It was proved on behalf of the plaintiff that on July 26, 1887, an order (No. 1,924) was passed by the board of supervisors establishing the grade of Market

street between Valencia and Seventeenth streets, and it was admitted by defendant that, prior to the passage of order No. 2,318, the said street had been graded to the official grade as so established. It was further proved that resolution No. 4,498 (third series) was never passed to print, but was introduced at a meeting of the board held on January 2, 1891, and was then and there, on a vote taken by the board, declared to be adopted, and no other or further action thereon was ever taken, and also that on February 2, 1891, a resolution (No. 4,672, third series) expressly repealing resolution No. 4,498 was adopted by the board. It was also proved that on January 19, 1891, an order (No. 2,388) expressly repealing order No. 2,318 was passed by the board. The general street law of 1885, as amended in 1889 (St. 1889, p. 157), contains very full and complete provisions for work upon public streets. The general rule is that the work is to be done by contract, and to be paid for by assessments of the expense upon the adjoining property owners, in the proportions fixed by the statute. The only exception to this rule is found in subdivision 10 of section 7 of the act, whereby it is provided that "it shall be lawful for the owner or owners of lots or lands fronting upon any street, the width and grade of which have been established by the city council, to perform at his or their own expense (after obtaining from the council permission so to do, but before said council has passed its resolution of intention to order grading inclusive of this) any grading upon said street to its full width, or the center line thereof, and to its grade as then established," etc. And in section 68 of the consolidation act it is provided that "every ordinance or resolution of the board of supervisors, providing for any specific improvement, the granting of any privilege \* \* \* shall, after its introduction in the board, be published, with the ayes and nays, in some city daily newspaper at least five successive days before final action by the board upon the same," etc. Worley's Consolidation Act, p. 16. From the foregoing provisions of the statutes, it is evident that the owners of lots fronting on Market street had no right to proceed to grade the street, or to contract with any one else to grade it, until after they had obtained permission from the board of supervisors to do so, and that such permission was a privilege, which could only be granted in the mode prescribed, namely, after publication for at least five days. It must follow, therefore, as resolution No. 4,498 was never published, that it never became operative, or authorized the lot owners to grade, or in any way to disturb, the street, in front of their premises, and that their contract with appellant to do work which they had no right to do was void and of no effect.

But, if this be so, it still is claimed for appellant that the "proof shows, at best, only

a naked trespass, and against such a trespass equity will not grant an injunction." This proposition cannot be maintained. The proofs show that appellant was committing more than a mere trespass. He was unlawfully obstructing the free passage or use, in the customary manner, of a public street of the city, and this, under the provisions of the Code, constituted a public nuisance. Civ. Code, §§ 3479, 3480. And the Code of Civil Procedure expressly provides that a nuisance may be enjoined or abated, and damages therefor recovered, in the same action. Section 731. In *People v. Holladay*, 93 Cal. 248, 29 Pac. 54, it is said: "The city and county of San Francisco is a municipal corporation created by the legislature of the state, and has conferred upon it by the state full power and jurisdiction over the public squares within its territorial limits, with the right to sue and be sued; and this necessarily includes the authority to maintain and defend all actions relating to its right to subject to the public use such squares or land claimed by it to have been dedicated for such purposes. \* \* \* A municipal corporation is, for many purposes, but a department of the state organized for the more convenient administration of certain powers belonging to the state [citing authorities]; and such corporations, in their management and control over streets and squares within their limits, and in actions for the vindication and preservation of the public rights therein, exercise a part of the sovereignty of the state. Accordingly, it has been held that a city has the same right to maintain an action to prevent the unlawful obstruction of a street as would the people of the state. [Citing authorities.]" It will be observed that the law seems to be settled that a city, as the representative of the state, has the right to pursue all the ordinary civil remedies for enjoining or abating a public nuisance upon its streets or squares; and the only question in this case is, does it appear that the defendant was justified in his action? We are satisfied that no sufficient justification was shown, and therefore advise that the order appealed from be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

LEWIS v. TERRY et al. (No. 15,934.)<sup>1</sup>  
(Supreme Court of California. Jan. 21, 1896.)

SALE OF DEFECTIVE ARTICLES—LIABILITY TO PERSON INJURED.

One who, knowing an article to be defectively constructed, represents it to be safe, and sells it to a person who has no knowledge of the defect, is liable in damages to one who, without fault on his part, was injured while lawfully using the same.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Grace E. Lewis against Joseph T. Terry and others for damages. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

H. M. Clement, for appellant. Geo. M. Lawrence, for respondents.

BRITT, C. It is alleged in the complaint in this case, among other things, that defendants were engaged as copartners in the business of selling household furniture, and that among the wares dealt in by them were certain folding beds, which were represented and warranted by defendants to their customers and the public to be safe for use; that defendants, in the course of said business, sold and delivered one of said beds to a Mr. Apperson and his wife, and expressly represented and warranted to them that such bed was so constructed that it would stand upright against the wall during the daytime, inclosing necessary bed furniture, and at night its front could, with little effort, be lowered to a horizontal position, by means of hinges at the bottom; that a solid piece of iron inclosed in framework at the back of the bed acted as a balance to the front part while being lowered, and rendered it easy to raise or lower the same with perfect safety; that, as soon as the front part was lowered, the legs of the same would automatically descend, and securely lock themselves, so that the outer end of the bed would be firmly supported in its horizontal position upon its said legs. It is further alleged that there was an inherent and latent defect in said bed, so that the said legs would sometimes fail to adjust and secure themselves, with the result that, if any weight should be placed on the bed, the heavy upright frame would be precipitated with such force upon the lowered portion of the bed as to crush, wound, and even kill anyone reclining thereon, and that such defect rendered the bed dangerous to all who might use it; that defendants, with full knowledge of such defect and of such danger, sold the bed to the Appersons, without warning them thereof, and assured them that it was perfectly safe; that plaintiff rented a room from the Appersons, and, on the day the bed was purchased from defendants by them, it was placed in such room for plaintiff to sleep on; that a few days later the plaintiff, being about to retire for the night, opened and let down the bed, and, the legs thereof being apparently secure, she, in the course of her preparations for retiring, leaned with her left arm upon the side of the bed; and, while she was in this attitude, the heavy upright framework of the bed fell forward and downward, upon the horizontal part, and upon the plaintiff, breaking her arm, and otherwise injuring her, to her damage, etc. A demurrer to this complaint, on

<sup>1</sup> Rehearing denied.

the ground that it fails to state facts sufficient to constitute a cause of action, was sustained, and judgment passed for defendants.

The complaint is faulty in not stating directly that the fall of the bed was caused by the latent defect described, but, as the argument of the parties has proceeded on the theory that such was the fact, we may join in that assumption. *Schubert v. J. R. Clark Co.*, 49 Minn. 335, 51 N. W. 1103. We agree that the action cannot be sustained on the ground of any privity of contract between plaintiff and defendants, for there was none. If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made. *Coughtry v. Woolen Co.*, 56 N. Y. 127; *Helzer v. Manufacturing Co.*, 110 Mo. 605, 19 S. W. 630; *Winterbottom v. Wright*, 10 Mees. & W. 109 (the leading case); *Shear & R. Neg.* § 116; 1 Bevan, Neg. p. 60 et seq. But when the seller, as in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous, because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts. "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other who is not himself in fault." *Wellington v. Oil Co.*, 104 Mass. 64, per Gray, J.; *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 51 N. W. 1103; *Elkins v. McKean*, 79 Pa. St. 493; *Shear. & R. Neg.* § 117. See Civ. Code, §§ 43, 1708. The liability of the willful wrongdoer in like instances is recognized in several cases cited in support of the judgment. *Longmeld v. Holliday*, 6 Exch. 765; *Helzer v. Manufacturing Co.*, 110 Mo. 605, 19 S. W. 630.

The fact insisted upon by respondents that a bed is not ordinarily a dangerous instrumentality is of no moment in this case. If mere nonfeasance or perhaps misfeasance were the extent of the wrong charged against defendants, that consideration would be important (*Thomas v. Winchester*, 6 N. Y. 397); but the fact that such articles are in general not dangerous would seem to enhance the wrong of representing one to be safe for use when known to be really unsafe, for the danger is thus rendered more insidious.

Nor is the further point that the chain of causation implicating defendants in the injury was broken by the intervention of the Appersons, as the persons who furnished the bed immediately to plaintiff, available to de-

fendants on this appeal. To have that effect, it must appear that the Appersons knew of the defect in the structure of the bed, and so were a culpable intervening cause, and this does not appear on the face of the complaint. *Pastene v. Adams*, 49 Cal. 87; 1 Bevan, Neg. 76. The judgment should be reversed, with instructions to the court below to overrule the demurrer.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with instructions to the court below to overrule the demurrer.

SHANKLIN v. GRAY et al. (No. 15,971.)  
(Supreme Court of California. Jan. 21, 1896.)

MINING CORPORATIONS—DIRECTORS' LIABILITY—  
FAILURE TO HAVE REPORTS VERIFIED.

1. Act April 23, 1880 ("An act for the better protection of stockholders of corporations formed for \* \* \* conducting the business of mining"), section 1, declares it the duty of the mine superintendent to file weekly and monthly accounts and reports, verified under oath, showing receipts, disbursements, number of employes, and wages paid, reports to be kept in the office of the company, open to inspection of stockholders. Section 3 declares that, in case of the failure of the directors to have the reports and accounts made and posted as provided in section 1, they shall be liable to an action by any stockholder, who, on proof of the failure, shall recover judgment for \$1,000 liquidated damages. Held that, the statute being remedial, and there being no ambiguity in it, recovery could be had of the directors for failure to have the accounts and reports of the superintendent verified by him, though they were full, true, and correct, and there was no one within many miles of the mine who could administer oaths, and the directors acted in good faith, and had been advised by counsel that it was not necessary to have them verified.

2. Under such statute, it is not necessary to prove damages. They will be implied from its violation.

3. Pendency of an action for violation of such statute will not prevent action for a violation thereof occurring after commencement of the first action, nor will recovery in the first action bar recovery in the second.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Edwin S. Shanklin against H. W. Gray and others. From an order granting plaintiff a new trial, defendants appeal. Reversed.

O. W. Cross and Jas. A. Hall, for appellants. Gear & Gear, for respondent.

HAYNES, C. This action was brought to recover the sum of \$1,000, liquidated damages, and costs of suit, under the provisions of an act of the legislature of this state, approved April 23, 1880 (St. 1880, p. 134; Deering's Civ. Code, pp. 148, 149), requiring the directors of mining corporations formed under the laws of this state to make, and cause

to be made and posted in the office of the company, certain statements and reports. The defendants were directors of the Gray Eagle Mining Company, a corporation, at the time the alleged cause of action arose, and the plaintiff was and is a stockholder in said corporation. The complaint alleges a failure of the directors to make and post in the office of the corporation, on the 1st Monday of November, 1892, a balance sheet, or itemized account, of the receipts and disbursements for the month of October, with other matters required by the statute, and also charging that they had failed and neglected to have or require the superintendent of the company to file with the secretary thereof an itemized account, verified under oath, showing all the receipts and disbursements made by him for the previous month, and that the superintendent had not made any such account verified under oath. The action was tried by the court without a jury, findings were filed, and judgment thereon entered for the defendants. Upon plaintiff's motion an order was made granting a new trial, and from that order defendants appeal.

The court found that the directors made the itemized account or balance sheet, required by the first section of said act, for the month of October; that it was duly verified; and that it was made at the time, and posted in the office, as required by said act. As to the account and reports of the superintendent, the court found they were made, and filed in the company's office, and were kept in a conspicuous place, as required by law, but that they were not verified by the superintendent, nor by any one; that they were full, true, and correct; that the company's mine was in a remote part of the country, many miles from any officer competent to administer an oath; that the duties of the superintendent require his presence at the mine, and for those reasons said reports were not verified; that the defendants acted in good faith; that the plaintiff and all stockholders had access to all the itemized accounts and reports, and the books and papers of the corporation, and had the means of knowledge of every fact pertaining to its receipts and disbursements, and its indebtedness and liabilities, as fully as could be known from any data in the possession or control of the corporation; and that neither the plaintiff nor any stockholder had been injured in any respect.

It was contended by the plaintiff that the account, made, verified, and posted by the president and secretary, was, on its face, a balance sheet for the period of 40 days, namely, from September 21 to October 31, 1892, and therefore did not comply with the law, and especially, as he contended, that it was impossible to tell therefrom what balance was on hand on October 1st, or what disbursements were made in either of those months. The good faith of the defendants in making this report was not impugned, and, as it appears upon its face to have been intended as

a compliance with the requirements of the statute in that regard, the defect, if it be such, would not justify the visitation of the statutory penalty upon them. The special grounds of objection to it, therefore, need not be further considered.

It was admitted in the answer that the statement of receipts and disbursements by the superintendent, and other reports made by him, were not sworn to by that officer; and the facts found by the court, as hereinbefore stated, were alleged in justification of his failure to make the required verification. If these facts were not sufficient to excuse the failure to verify said statements and reports, the findings were not sufficient to sustain the judgment in favor of the defendants, and the order granting plaintiff's motion for a new trial was right. The act in question is entitled "An act for the better protection of stockholders in corporations formed under the laws of the state of California for the purpose of carrying on and conducting the business of mining." Section 1, so far as it relates to the superintendent's reports in question here, is as follows: "It shall be the duty of the superintendent, on the first Monday of each month, to file with the secretary an itemized account, verified under oath, showing all receipts and disbursements made by him for the previous month, and for what said disbursements were made. It shall also be the duty of the superintendent to file with the secretary a weekly statement, under oath, showing the number of men employed under him and for what purpose, and the rate of wages paid to each one. \* \* \* All accounts, reports and correspondence from the superintendent shall be kept in some conspicuous place in the office of said company, and be open to the inspection of all stockholders." Reports of the discovery of ore were required to be made as they occurred. Section 3 of said act, among other things, provides: "In case of the failure of the directors to have the reports and accounts current made and posted as in the first section of this act provided, they shall be liable, either severally or jointly, to an action by any stockholder, in any court of competent jurisdiction, complaining thereof, and on proof of such refusal or failure such complaining stockholder shall recover judgment for one thousand dollars, liquidated damages, with costs of suit."

The only question is whether the facts alleged (and found to be true) were sufficient to excuse the failure of the superintendent to verify his reports; it appearing that the directors had informally instructed him that it was not essential, or, at least, they had not required him to make his reports under oath, and had received his previous reports without such verification, and without objection. It is doubtless true, and I assume that it is so, that the directors failed to make the positive requirement that the superintendent should verify all his reports, and had accepted them without such verification, without any evil



purpose, and because of the inconvenience it would impose upon the superintendent of going "many miles" to an officer competent to administer oaths, and because such absence interfered with the discharge of his duties at the mines. It was also shown, upon the trial, that the reports in question were in fact true, and hence furnished all the information as to the several matters contained in them required by the statute. It is contended, in effect, that, as the statute is penal, it must be strictly construed, and, inasmuch as the reports were made, and were in fact true, the penalty should not be inflicted upon the defendants. The statute, however, is remedial as well as penal (*Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779), and "where the intent is plain it will be carried into effect. It will not be evaded or defeated on the principle of strict construction. The principle will be adhered to that the case must be brought within the letter and spirit of the enactment; but the intent of a criminal statute may be ascertained from a consideration of all its provisions, and that intent will be carried into effect. Such statutes will not be construed so strictly as to defeat the obvious intention." *Suth. St. Const.* § 350, and cases cited in note 1, p. 439. In *Eyre v. Harmon*, 92 Cal. 589, 28 Pac. 779, in discussing the construction of this statute, it was said: "But it is a general rule, applicable to the construction of penal as well as other statutes, that no word is to be eliminated from a section by the court if a sensible meaning can be given to it, unless by giving such word its meaning the real object of the statute would be defeated. With much greater reason is the court required to give effect to each word in a sentence when not to do so is to deprive the law of the vitality necessary to secure respect for its commands."

Appellants' contention would eliminate from the statute the word "verified," as used in defining or qualifying the reports required to be made by the superintendent, unless the circumstances under which these reports were made were sufficient to justify the omission. If the legislature had no beneficial or remedial purpose in requiring them to be verified little would be required to excuse the omission, and courts would be slow to visit a severe penalty upon an omission to comply with an unessential requirement. At the time of the enactment of this statute it was matter of common report, if not of common knowledge, that concealments and false reports were resorted to to affect the value of mining stocks upon the market, and it was also not unfrequently charged that superintendents, for the purposes of private gain, made false reports of their receipts and expenditures, carried "dummies" on their pay rolls, obtained rebates or commissions upon supplies purchased for the corporation, and in other ways misappropriated the funds of the corporation; and it was for the purpose of compelling such reports to be made as would inform the stockholders of the finan-

cial condition of the corporation and its management, the development of its property, the discoveries made in its mines, and, generally, of all matters which would enable them to estimate the value of their stock, and to prevent false reports, and give assurance of reliability, these reports were all required to be verified by the oath of the superintendent; and, if this requirement may be voluntarily omitted, it is obvious that the whole purpose of the act might be defeated at the will of the directors.

But it is urged that the directors acted in good faith, and did not willfully or intentionally violate the law. If by this is meant that the omission to require the superintendent to verify his reports was not because they intended in any manner to withhold information from the stockholders, or injure them in any way, it is doubtless true. An evil intention is not essential to such violation of the statute as requires a visitation of the penalty. The statute imposes upon the directors the duty of requiring the superintendent to make his reports under oath, and an omission of that duty is necessarily willful and intentional, at least where it is shown that they considered the matter and concluded that it was not necessary. The mere inconvenience imposed upon the superintendent of going five miles to verify his report is not a sufficient excuse to justify the omission, and his ordinary duties at the mine could not excuse the performance of the duty imposed by the statute. His absence could be provided for by the temporary supervision of a foreman, or other person designated by himself or by the board. It is also urged that the advice of counsel that verification of these reports was not necessary should relieve the defendants. The advice so given was by a member of the board, and it may be doubted whether the opinion so expressed was not the opinion of a director merely, instead of the opinion of an attorney who had no personal interest, and whose duty and obligation was to carefully examine the question submitted to him, and advise according to his unbiased judgment. It is not necessary, however, to decide that question. If the statute were ambiguous, and its construction doubtful, the defendants would be entitled to the benefit of the doubt, without the plea that they acted upon the construction given it by counsel. In *Chase v. Railroad Co.*, 26 N. Y. 523, 525, a statute imposing a penalty for charging more than a certain rate per mile for carrying passengers was considered. The court said: "The great leading rule for the construction of statutes is to ascertain fairly the intention of the legislature in enacting the statute. In statutes giving a penalty, if there be a reasonable doubt of the case, made upon the trial or in the pleadings, coming within the statute, the party of whom the penalty is claimed is to have the benefit of such doubt." Or, as said by Sutherland, in his work on *Statutory Construction* (page 444): "If there is

such ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of the court not to inflict the penalty." None of the cases we have found go further. The intention of the legislature is to be collected from the words they employ, and where there is no ambiguity in the words there is no room for construction. Here there is no ambiguity, —no room to doubt that the statute requires these reports to be verified; and in such case an opinion of counsel to the contrary cannot relieve from the penalty. If the motives of the defendants in not requiring these reports to be verified were a material issue in the case, the advice of counsel might tend to show the absence of an evil intention; but such advice cannot raise a doubt as to the construction of the statute here involved. It is also urged that the recovery is not as a fine, or penalty, or forfeiture, but as liquidated damages, and that, therefore, some detriment or damage should be shown. As this statute is intended for the benefit of stockholders, its violation necessarily implies an injury.

Prior to the time when this cause of action accrued, the plaintiff commenced an action, under the statute here in question, against W. E. Lamb, A. Searles, and Martin Devereux, who were directors of said corporation prior to September 21, 1892, at which last-named date they ceased to be directors, and were succeeded by the defendants in this case. That action was commenced October 27, 1892, alleging the failure of the defendants to make and file similar reports for the months of May, June, July, and August, 1892. This action was commenced on November 11, 1892, for the failure to make the reports on the first Monday of November for the preceding month of October; and the defendants herein pleaded the pendency of the former action in bar. That plea is not good. It is true that but one recovery of \$1,000 can be had for any number of delinquencies occurring before the suit is brought; but neither the pendency of such action, nor a recovery therein, is a bar to an action for a delinquency occurring after the former action was commenced. This cause of action did not accrue until the first Monday in November, and therefore did not exist when the former action was commenced. That there can be but a single penalty for past delinquencies, see *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616; but that a recovery for past delinquencies is not a bar to an action for a delinquency occurring afterwards, see *Schofield v. Doray*, 89 Cal. 55, 28 Pac. 606. The fact that judgment in the former action had not been rendered does not operate to relieve them from delinquencies occurring during its pendency, as, otherwise, they would be relieved from any observance of the statute by the mere pendency of the action. Besides, the action is not against the corporation, but against the individual; and these defendants, who became directors after the delinquencies charged in the former suit, could not be made liable therefor, nor could persons who ceased

to be directors in September be held liable for the delinquencies of their successors. The order granting a new trial should be affirmed.

We concur: SMARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

PHILBROOK v. SUPERIOR COURT OF  
CITY AND COUNTY OF SAN  
FRANCISCO. (S. F. 267.)

(Supreme Court of California. Jan. 16, 1896.)  
DISBARRED ATTORNEY—RIGHT TO PROSECUTE ACTION.

Where, after an action had been commenced, the plaintiff therein assigned his claim in good faith to one who had been disbarred from practicing as an attorney at law, and an order was made continuing said action in the name of said plaintiff for the benefit of the assignee, the assignee may personally prosecute the claim.

In bank. Petition for mandamus by Horace W. Philbrook to the superior court of the city and county of San Francisco. Writ issued.

Horace W. Philbrook, in pro. per. S. O. Houghton, for respondent.

HENSHAW, J. Samuel W. Latz commenced an action in the superior court of the city and county of San Francisco against Louisa A. Greenhood, executrix, appearing therein in person, and not by attorney. After this action was at issue and ready for trial, Horace W. Philbrook, petitioner herein, presented to the judge of the court a written transfer and assignment by Latz to himself of Latz's interest and cause of action in said suit, and applied to the court for an order substituting himself in place of Latz as plaintiff therein. In response to this application, an order was made, as permitted by the Code, continuing said action in the name of Latz for the benefit of Philbrook. Code Civ. Proc. § 385. Thereafter, the cause coming on for trial, petitioner herein appeared in person, asserting the right in his own interest and on his own behalf to conduct the case of the plaintiff in the action so being prosecuted for his benefit. The court, upon objection made by defendant's attorney, refused to allow him to do so; and, the case coming thus to a standstill, it was continued to await a determination of the question. It is under these circumstances that application is made to this court for a writ of mandate. The refusal of the trial judge, as fully appears by the transcript of the proceedings had in his court, and here made a part of his answer, was based solely upon what he deemed to be his duty in the premises under the judgment of this court suspending said Philbrook from his office of attorney at law. In re Philbrook, 105 Cal. 471, 38 Pac.

511, 884. In making that refusal the judge said: "A few days ago you came here with a written assignment from Mr. Latz to yourself, from which it appears that you are the assignee and owner of the claim,—a claim for services on behalf of Mr. Latz originally. I accept that assignment as made to you, as I have stated before, in perfect good faith that you are the owner of that claim, and, in conformity with the Code of this state, upon your motion, I made an order that this action should be prosecuted under the name of Mr. Latz, but for your benefit as the assignee. Now, you attempt here to present this case on your own behalf, as you say; and the suggestion is made by Mr. Houghton, as an attorney of this court, \* \* \* that you cannot present this matter as an attorney. I think he is right about it. I think I should be in contempt of the supreme court myself if I allowed such an evasion of their judgment. If the action was in your own behalf, as I suggested a moment ago, if you had met with personal injury to yourself, say, a year ago, and you were suing the railroad company, for instance, you would have a right, and the disbarment proceedings would not affect you. If money was due you,—owing to you,—you would have a right to present the case. But I don't think that you have a right to buy claims that are in process of litigation, and come in here, and present before the court and jury a cause of action in that form. If that were so, it would enable you to do indirectly what the supreme court says you cannot do directly. In other words, you are evading the decision of the supreme court against you; and therefore I do not think that I should permit you to appear." It thus appears that the order of refusal was not based upon any finding in fact, or, in effect, that the assignment was not made in good faith, or that, as between the parties, it was a simulated transfer, not meant to carry title. Upon the contrary, it was made after declared recognition and acceptance by the court of the good faith and sufficiency of the assignment.

Under the facts thus presented, the court mistook the scope of the judgment of suspension. That judgment did not, and did not attempt to, limit petitioner in the exercise of any rights formerly enjoyed by him, saving those pertaining to the office of attorney at law. One acts as an attorney at law only when he represents another, not when he appears for himself. Petitioner, having the undoubted right lawfully to acquire any form of property, has equally the right to its perfect enjoyment, and, as a necessary incident to that right, the full power accorded to all of appearing in person to prosecute or defend all actions for its protection or preservation. And this power is not, as the court held, limited to the prosecution or defense in

person of property rights owned by this petitioner at the time of the commencement of any action affecting them. His right to acquire a chose in action, and to protect in person his property in it when acquired, is not cut off by the fact that it may, at the time of acquirement, be already the subject of litigation.

What has been said presupposes a bona fide transfer of the chose in action, such a transfer as the court assumed or found to exist. It by no means follows, however, that petitioner's right to appear in person would be determined, as he argues, by the fact that the transfer is such as to leave to defendant no valid ground of objection to the substitution. A defendant's right is to have a cause of action prosecuted against him by the real party in interest. But, as has been elsewhere pointed out, his concern ends when a judgment for or against the nominal plaintiff would protect him from any action upon the same demand by another, or when, as against the nominal plaintiff, he may assert all defenses and counterclaims available to him were the claim prosecuted by the real owner. *Giselman v. Starr*, 106 Cal. 651, 40 Pac. 8. It matters not to the defendant whether, in truth, the transfer be genuine or simulated, so long as in law it is sufficient to protect him. But the concern of the trial court, under the circumstances, is quite different. It is bound to give due effect to the judgment of this tribunal. Its duty, therefore, is not alone to determine whether or not the transfer is such as will protect the defendant, but equally to determine whether the transfer be genuine or simulated to evade the judgment of this court. To a genuine transfer, as has been said, the judgment of this court has no application. But a simulated transfer would carry no interest, and, under such circumstances, a party would be asking a substitution that he might prosecute or defend in person rights which in fact belonged not to him, but to another. In such a case, therefore, the trial court should satisfy itself—First, that the rights of the adverse party would be protected under the substitution asked; and, second, that the transfer is not simulated and in evasion of the judgment of this court; and only when so satisfied should it make its order permitting the substitution.

A writ of mandate should issue directing the superior court of the city and county of San Francisco, and the judge of department 7 thereof, to permit plaintiff herein to conduct personally, in his own interest and behalf, and on the part of the nominal plaintiff, Samuel W. Latz, the action in question.

We concur: BEATTY, C. J.; TEMPLE, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

**PEOPLE v. HAWLEY. (Cr. 20.)<sup>1</sup>**

(Supreme Court of California. Jan. 21, 1896.)

**BURGLARY—TRIAL—SEPARATION OF JURY—VERDICT—EVIDENCE—REVERSAL—VIEW—PRELIMINARY EXAMINATION—DEPOSITION—ADMISSIBLE ON TRIAL.**

1. On a trial for burglary, the jury, after several hours' deliberation, were brought in, towards night, and announced that an agreement could not be had without a view of the premises. The court, after consulting with counsel apart from the jury, over the objection of the prosecution, decided to allow the view, on defendant's request, and, with his consent, to dismiss the jury for the night, as no view could be had till morning. The next morning defendant's counsel privately told the court that he would move to dismiss because of the separation of the jury, at which the court became greatly indignant, and, when the counsel moved for the dismissal, denied the motion, and, in an indignant tone, told the jury that they had been dismissed the night before on the motion and with the consent of defendant and his counsel, but "defendant now prefers to move that all proceedings in this case be dismissed." The jury then retired, and, without a view, in five minutes, returned a verdict of guilty. *Held*, that the verdict must be set aside.

2. A motion to discharge defendant in a criminal case for separation of the jury, had on his motion and with his consent, is properly denied.

3. It is within the discretion of the court, on a trial for burglary, when informed by the jury that they cannot agree on a verdict without a view of the premises, to allow such view, with consent of defendant.

4. Pen. Code, § 1128, requires the jury, after retiring to deliberate, to be kept together. *Held*, that the requirement is mandatory, and a separation, though by order of court, with consent of the defendant, is a violation of the requirement, and vitiates a conviction.

5. In a criminal trial a deposition of the defendant, taken on his preliminary examination, is admissible to impeach his testimony as to the same facts, his attention having been first called to it, notwithstanding Pen. Code, § 686, provides that depositions or preliminary examinations can only be read on the trial where the witness is dead, or insane, or absent from the state.

**Commissioners' decision. Department 2.** Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

E. G. Hawley was convicted of burglary, and from the judgment and an order denying a new trial he appeals. Reversed.

H. A. Massey and August Tilden, for appellant. Atty. Gen. Fitzgerald, for the People.

**HAYNES, C.** Upon the trial of this case the defendant was found guilty of burglary in the second degree, and was sentenced to imprisonment in the state prison at Folsom for the term of three years; and from that judgment, and an order denying his motion for a new trial, he appeals.

Before the evidence was concluded, the defendant moved the court for an order permitting the jury to view the premises alleged to have been entered. This motion was denied, after an expression from the jury as to their wishes; nine of the jury responding that they did not wish to view the premises, two

expressing a desire to view them, and the twelfth juror remaining silent. Afterwards, the evidence having been concluded, the jury were instructed by the court, and retired, in charge of an officer, to consider their verdict. After several hours' deliberation, at the request of a juror, the court directed that the jury be brought in; and, having reported that they had not agreed upon a verdict, the following proceedings were had: "The Court: Gentlemen, I received a message from one of the jury with regard to viewing the premises. Do I understand that any of your number desires to view the premises before rendering a verdict. A Juror: Yes, sir. The Court: The message that reached me was that an agreement could not be arrived at without viewing the premises. A Juror: That is it. That is the way it stands now. The Court: I sent down to the premises, and was informed that the lady in possession had gone to Sausalito, and will not be back until to-morrow morning, and the premises are locked up. A Juror: It would be impossible to agree, without seeing the premises, the way it stands now." At this point a consultation was had between Mr. Massey, one of the attorneys for the defendant, and Messrs Hosmer & Dunn, for the prosecution, and the court, not in the hearing of the jury, which is essential to a clear understanding of the subsequent proceedings. The following condensed statement of said consultation will be sufficient for that purpose: The court expressed a desire to grant a view of the premises, and Mr. Massey asked the court to do so. Mr. Hosmer protested that to do so, or to allow new evidence or a separation of the jury, would be equivalent to an acquittal, whatever the verdict might be. The court suggested that if the defendant's attorney, and the defendant personally, would consent, a view might be had. It was then late in the evening, and the question arose whether the jury should be locked up all night, as a view could not be had until morning. The court was reluctant to lock them up, under the circumstances, and Mr. Massey stated that he would consent to the separation, and that the defendant would also. The court said that, with that understanding, he would allow the jury to go home for the night and reassemble for a view next morning; and it was arranged that Mr. Massey should make a motion to that effect, the court being of the opinion that defendant's consent would cure the irregularity. The conference being ended, Mr. Massey moved that the jury be allowed to separate, and meet again in the morning, and then visit the premises. Mr. Hosmer objected that it would operate as a dismissal of the charge, as it involved a constitutional right of the defendant. The defendant, being asked, personally joined in the request made by his attorney; and the court granted the motion, and gave the jury the usual admonition, and dismissed them until the next morning

<sup>1</sup> Rehearing denied.

No objection or exception was then taken by the defendant. When court opened next morning the jury appeared, and answered to their names. Mr. Massey then stated to the court, privately, that he disliked to do so, but his duty to his client compelled him to ask for a dismissal because of the separation of the jury. At this point Mr. Tilden, also counsel for defendant, entered the court room, and, being asked privately by the court, said he had advised the course stated by Mr. Massey. Thereupon the court grew indignant, and suggested that counsel were precluded from so contending; that the course proposed was self-stultifying and contemptuous; and, after a reply thereto by Mr. Tilden, the court turned angrily and abruptly from counsel, who thereupon took their seats. The next proceeding took place within the hearing of the jury, as follows: "Mr. Massey: If the court please, in this case I understand there was a virtual dismissal of it yesterday, and I ask that the defendant be discharged. The Court: Motion denied. Mr. Massey: Exception. The defendant objects to all further proceedings. The Court: Gentlemen of the jury: In your presence, last evening, the defendant and his counsel moved the court that you be sent to view the premises where the alleged burglary took place, and with that understanding, on his motion, you were excused until this morning. The defendant now prefers to move that all proceedings in this case be dismissed. The motion has been denied by the court, and you will now retire, in charge of the bailiff, to deliberate upon your verdict. (The above was said in a tone of great indignation.) Mr. Massey: I would like to say the defendant is perfectly willing they should go to view the premises. The Court: I cannot listen to you any further, unless you have motions to make." Further colloquies occurred between the court and counsel while the jury were leaving the court room, and after they had retired. After five minutes' absence the jury returned, with a verdict of guilty, and were then discharged. Thereupon counsel for defendant moved that all the proceedings be set aside, as irregular, and the defendant be discharged. This motion was denied, and defendant excepted.

It is clear that the judgment in this case must be reversed. The fact that, after several hours' deliberation, the jury were unable to agree without having a view of the premises, and that, without such view, they returned a verdict the next morning after a deliberation of only five minutes, justifies the conclusion that they were affected by something aside from the evidence, all of which had been heard before their retirement the day before. Not only may they have been influenced by the manner of the court, but the statement that the defendant, the evening before, moved the court that they be sent to view the premises, but that "now he prefers to move for a dismissal of the case," together with the fact that they were not

sent to view the premises, may be reasonably supposed to have led to the almost instantaneous agreement that the defendant was in fact guilty. They had not heard the colloquy between the court and counsel, and doubtless inferred from the language of the court that the defendant had not at any time really desired to have them view the premises, and that such view would have added to the evidence of his guilt.

The defendant's motion for a discharge, based upon the proceedings had after the jury had retired to consider of their verdict, resulting in their separation for the night, was properly denied.

No question is made by appellant based upon that part of the order of the court permitting a view of the premises after the case was submitted to the jury. Though such proceeding is an irregularity, I think it was within the discretion of the court to grant it, upon the request of the defendant. He had asked for such order at the proper time, before the close of the evidence, and it was then denied, and was afterwards asked for because of a statement by a juror that they were unable to agree without it. It was therefore presumably for the benefit of the defendant, and would have been nothing more than the exhibition of that which would elucidate the testimony of the witnesses already heard, and which the court in the exercise of its discretion, had excluded. It was within the spirit of section 1138, Pen. Code, which permits the jury, after they have retired for deliberation, if there be any disagreement between them as to the testimony, to be brought into court; and in such cases the practice is to have the reporter read such parts of the testimony as are involved in the disagreement. It was little, if anything, more than would have been the exhibition of a map which had been referred to in the evidence, but which had not been exhibited to the jury. The separation of the jury, however, was unnecessary. Section 1138, Pen. Code, provides, "While the jury are kept together, either during the progress of the trial or after retirement for deliberation, they must be provided by the sheriff at the expense of the county with suitable and sufficient food and lodgings." The separation of the jury after they are sworn, even during the trial, was never permitted, at common law, in cases of felony, and in many states is not now permitted in capital cases. Our statute permits such separation in all cases before the submission of the case, in the discretion of the court, but expressly provides that, after retiring to deliberate upon their verdict, they must be kept together. Pen. Code, § 1128. The court, therefore, had no authority, either under the statute or at common law, to permit the separation; nor could the consent of the defendant or his counsel operate to empower or excuse the violation of an express provision of the statute. In the state of Ohio the statute pro-

vided that "in the trial of felonies the jury shall not be permitted to separate after being sworn, until discharged by the court." In *Cantwell v. State*, 18 Ohio St. 477, 481, after the jury were sworn, they were permitted to separate from Saturday until Monday, with the defendant's consent, and it was contended that he could not complain of the action of the court. The supreme court said: "It is to be observed that the language of the statute is imperative, and that no provision is made for exceptional cases, nor for any discretionary action in the matter by the court, either with or without the consent of the parties. The statutory prohibition was not left to be so easily annulled. It may be considered an established principle in this state that the defendant cannot be prejudiced by his waiver of any statutory requisition in the prosecution of criminal offenses." Without entering upon or deciding any question other than the one before us, we may briefly say that we approve what was said by that court, above quoted, when applied to the facts of this case.

The motion made by counsel for defendant for his discharge, based upon the separation of the jury, was, however, properly denied. We are not referred to any case, nor do we find any, where such separation has been held to operate as an acquittal of the defendant, though it is, of itself, and without any showing of improper conduct on the part of the jury, or of any of them, during their separation, a sufficient ground for granting a new trial. The separation by leave of the court was not misconduct on the part of the jury, but a violation of an important and invariable rule existing at common law from the very inception of the jury system, as well as under the statute, and which has ever been regarded as important in securing the due administration of justice, and as a necessary safeguard against improper extraneous influences. In *Parker v. State*, 18 Ohio St. 88, the jury were permitted by the court, with the consent of defendant's counsel, to separate twice during their deliberations. The court said, "The plaintiff in error should not be prejudiced even by a personal consent given under circumstances when it could not be withheld except at the risk of exciting unkind feelings in the breasts of jurors who held his fate in their hands;" citing *Bish. Cr. Proc.* § 827. And it was held, on this ground alone, that a new trial should have been granted, and the judgment was reversed and a new trial ordered. In *State v. Populus*, 12 La. Ann. 710, it was held that in all criminal cases the separation of the jury, though by leave of the court, and with the consent of the accused and his counsel, will vitiate the verdict, if such separation takes place after the evidence has been closed and the charge given. In *Woods v. State*, 43 Miss. 364, it was held that the separation and dispersion of a jury in a capital case, though by the consent or even

at the request of the prisoner on trial, vitiates a conviction; that, where the jury were so exposed to intercourse with others that they "might have been subjected to corrupting or improper influences, that fact alone will nullify their verdict." To the same effect is *Wiley v. State*, 1 Swan, 256, and *Wesley v. State*, 11 Humph. 502, in both of which new trials were ordered. In *Peiffer v. Com.*, 15 Pa. St. 483, the jury, after being impaneled and sworn, were permitted to separate, with the consent of the prisoner. *Gibson, C. J.*, said: "Even the forms and usages of the law conduce to justice; but the common law, which forbids the separation of a jury in a capital case before they have been discharged of the prisoner, touches not matter of form, but matter of substance. It is not too much to say that, if it were abolished, few influential culprits would be convicted, and that few friendless ones, pursued by powerful prosecutors, would escape conviction. Jurors are open to persuasion, as other men, and neither convenience nor economy ought to be consulted in order to guard them against it."

The court did not err in receiving in evidence the portion of the deposition of the defendant taken upon his preliminary examination to impeach his testimony given upon the trial relating to the same facts, his attention having been first called to it. The provision of the Penal Code (section 686) permitting such depositions to be read upon the trial only where the witness is dead, or insane, or absent from the state, does not apply to its use to impeach a witness who is present, the deposition being properly certified by the shorthand reporter as required by the Code. No other questions need be noticed. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: *BELOHER, C.; BRITT, C.*

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

#### **BARFIELD v. SOUTH SIDE IRRIGATION CO. (Sac. 38.)**

(Supreme Court of California. Jan. 23, 1896.)

**APPEAL—BILL OF EXCEPTIONS—EQUITY—RESCISSION—EVIDENCE.**

1. No errors of law need be specified in the bill of exceptions to enable the appellate court to consider the same.

2. In a suit to cancel a grant of a right of way for an irrigation ditch, on the ground of breach of a representation that the ditch would be so located that the grantor could irrigate his land to the best advantage, evidence, merely, that if the ditch had been placed in one corner of the land it would have been upon higher land, does not entitle plaintiff to a rescission.

3. In a suit to cancel a grant of a right of way for an irrigation ditch, it having been the

grantor's object, in granting the right of way, to secure water for irrigating his land, parol evidence of false representation by the agent of the grantee as to the amount of water the grantee would be able to control is admissible.

Department 1. Appeal from superior court, Kings county; Justin Jacobs, Judge.

Action by Margaret Barfield against the South Side Irrigation Company, a corporation. There was a judgment for defendant, and plaintiff appeals. Reversed.

Rowen Irwin and Frank H. Farrar, for appellant. Lamberson & Middlecoff, for respondent.

GAROUTTE, J. Plaintiff brought an action to cancel a deed given by her to defendant for a right of way for a water ditch, upon the ground of false representations and failure of consideration; and the answer specifically denied all the allegations of the complaint. At the trial it was stipulated, in open court, that the parties intended the deed to transfer a mere right of way for ditch purposes, although the deed, in form, was a grant. At the conclusion of plaintiff's evidence a nonsuit was granted as to the relief asked in setting aside and canceling the deed, and a decree was also entered that the deed be reformed in accordance with the aforesaid stipulation. That portion of the judgment as to the matters covered by the nonsuit is appealed from, upon a bill of exceptions.

It is insisted, upon the part of respondent, that the bill of exceptions cannot be considered, because no specifications of errors of law are embodied therein. *Miller v. Wade*, 87 Cal. 410, 23 Pac. 487, is relied upon to support this position. But the doctrine there declared failed to receive the sanction of a majority of the court, and therefore is not authority. Upon an examination of the authorities there cited to support the principle announced in that case, it will be found that they fail to meet the test; and *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403, declares, to the contrary, that no errors of law need be specified in the bill of exceptions.

The motion for a nonsuit was made generally, and also specially, upon the ground that defendant made no representations to plaintiff as to the ownership by it of the waters of Lower Kings River Ditch Company sufficient to irrigate about 7,040 acres of land, or that it owned or controlled any amount of water sufficient to irrigate any portion of said land. The motion for a nonsuit was also based upon the further ground "that the plaintiff has not shown that the defendant agreed to construct a ditch, through the land in question, in such a manner, and upon such routes, and in such localities as to enable the plaintiff, in the easiest and most practicable manner, or to the best advantage, to irrigate all of said sections of land from the waters flowing in and through said ditch." Among other things, the complaint alleged that defendant represented itself to

be the owner of certain waters of Lower Kings River Ditch Company, upon which representations plaintiff relied, and which were false; and the complaint further alleged that defendant represented that, if plaintiff would execute a deed of right of way across her land, for ditch purposes, it (defendant) would locate a water ditch over and upon such right of way, which would enable her to the best advantage to irrigate her land, amounting to 1,240 acres. It is further alleged that defendant represented to plaintiff that it had so located the ditch, and that such representations were false, and that the ditch, as located, would not enable plaintiff to irrigate her said lands. There is no evidence whatever in the record that the ditch, as located, was not so placed but that water could be taken from it to and over any part of plaintiff's land, or that its location was not a good one, and advantageous for the irrigation of all of her said lands. Hence, it would seem unnecessary to enter into a consideration of the question as to whether or not the agreement in this respect was as alleged by the complaint. Conceding such to be the fact, still, if there was no evidence introduced at the trial of its violation, plaintiff failed to make out a cause of action in this regard. There was evidence to the effect that at a certain corner of her land the ditch could have been placed upon higher ground, but this evidence, of itself, only tended to establish the fact inferentially, and, we think, was too weak, remote, and unsatisfactory upon which to declare a noncompliance with the agreement. This evidence may all have been true, and still substantially the entire tract have been susceptible of irrigation from the ditch as located. Plaintiff should have made a stronger case upon this issue.

We think there can be no question but that there was a substantial showing that defendant represented itself to be the owner of the waters of the Lower Kings River Ditch Company. The preliminary written agreement, entered into by these parties some days prior to the execution of the deed, fairly indicates that fact. That agreement recites that it (defendant) was organized "for the purpose of constructing a ditch and irrigating a tract of land containing about 7,040 acres" (plaintiff's land being part of this tract); that it was to secure its water supply from the said Lower Kings River Ditch Company. It agreed to sell plaintiff water upon certain terms and conditions, and agreed that plaintiff should have her pro rata of all the water "now owned and proposed to be distributed on said 7,040 acres of land." Indeed, by the agreement, it assumes to own certain waters of the Lower Kings River Ditch Company, and contracts to dispose of them to plaintiff in certain amounts and under certain conditions, in consideration of her giving this deed of right of way. In addition to the recitals in the agreement, parol evidence was offered,

showing that one Heinlein, who was the agent of defendant, and engaged in securing this deed from plaintiff, represented to her agent that defendant was the owner of sufficient water to irrigate the entire tract of 7,040 acres. We think this parol evidence clearly admissible, and, taking all the evidence together upon this point, we are satisfied the court was not justified in holding that these representations as to the ownership of this water were not made to plaintiff, if the court so held. There is also evidence in the record to the effect that, at the time these representations were made, and at the time the deed was executed, defendant was not the owner of any of these waters, and that thereafter, and up to the date of the trial of this cause, never did own but six shares of the stock of the Lower Kings River Ditch Company, which interest was wholly insufficient to give plaintiff the proportion of the water to which she was entitled under the agreement. That the deed to defendant was given by reason of the representations made to plaintiff by it as to the ownership of water that could be used for the irrigation of her tract of land is plain. Indeed, her object in giving the deed was to secure from defendant water for the purpose of irrigating her land. Without pursuing the subject further, it is sufficient to say we think plaintiff, by her evidence, made a prima facie cause of action upon this branch of the case.

There is nothing in the point that the action was not begun in time. We think the judgment appealed from should be reversed. And the cause remanded. It is so ordered.

We concur: HARRISON, J.; VANFLEET, J.

ZILLMER v. GERICHTEN et al. (No. 15,920.)

(Supreme Court of California. Jan. 21, 1896.)

PROBATE COURT—JURISDICTION—ADMINISTRATOR'S DEED—COLLATERAL ATTACK—NONSUIT—EVIDENCE.

1. An order of sale in administration proceedings, reciting the due publication of an order to show cause why the sale should not be made, is sufficient proof of such publication to admit the administrator's deed as evidence of plaintiff's title, in ejectment, nothing appearing in the transcript to show that said order was not published.

2. Where it appears that a probate court, in ordering the sale of decedent's land, acquired jurisdiction of the subject-matter and all interested persons, the administrator's deed cannot be collaterally impeached for want of regularity in the subsequent proceedings.

3. Evidence of plaintiff's actual possession prior to that of defendants, who were in possession at the time of the commencement of the action, is sufficient proof of title as against a motion for nonsuit in an action of ejectment.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by John G. Zillmer against Louis Gerichten and another to recover a tract of

land. A motion for a nonsuit was sustained, and plaintiff appeals. Reversed.

Wm. T. Jeter and Chas. B. Younger, for appellant. W. D. Storey, for respondents.

VANCLIEF, C. Action to recover from the defendants the possession of a small piece of land, containing 2½ acres, to which the plaintiff claims ownership and the right of possession. The defendants deny the alleged ownership and right of possession, and allege that they own the demanded premises, and are rightfully in possession thereof. At the close of the evidence on the part of plaintiff, the defendants moved for judgment of nonsuit, and their motion was granted. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial, and contends that the court erred in granting the nonsuit, and also in rejecting evidence offered by the plaintiff. No brief has been filed in this court on behalf of respondents, and although I have endeavored to supply that deficiency, so far, at least, as the labor of counsel may be properly imposed upon the court, the result is, possibly, not so favorable to respondents as it might have been if such labor had been performed by their counsel.

Plaintiff put in evidence a United States patent, dated May 20, 1872, granting to F. E. Bailey lots Nos. 1, 2, and 3, section 31, township 10 S., range 1 W., M. D. M., and parol testimony tending to prove that the demanded premises were wholly within said lot No. 3; then introduced, without objection, a deed, dated December 8, 1882, from Henry C. Wheeler granting to plaintiff said lot No. 3. Plaintiff next offered a deed, dated July 8, 1873, from F. E. Bailey, as administrator of the estate of William Watson, deceased, to Henry C. Wheeler, for said lot No. 3, together with the record of proceedings in the probate court in the matter of the estate of Watson, by which it was claimed said administrator was authorized to sell said lot No. 3. Defendants objected to said administrator's deed to Wheeler on the alleged grounds—First, that it did not appear that the order to show cause why the sale should not be made was published as required by law; second, that the notice of sale was not published for the time required by law and the order of the court; third, that "no notice of hearing the report of said sale was given, and no order of court made fixing the date of said hearing." The court sustained the objection, and excluded the administrator's deed to Wheeler. Plaintiff also introduced evidence tending to prove that Wheeler was in possession of the demanded premises at the time he conveyed the same to plaintiff, and that plaintiff was in actual possession thereof, by having inclosed the same with his adjoining land, during the winter of



1892-93, prior to the commencement of this action; and there was no evidence tending to prove prior possession by the defendants, or that they had any kind of title to the demanded premises. On the evidence as above stated the plaintiff rested, and it does not appear in what respect it was claimed by defendants to be deficient when they moved for the nonsuit.

1. I think the court erred in sustaining defendants' objection to the administrator's deed to Wheeler. The petition of the administrator for the order of sale is in due form, stating all jurisdictional facts, and no objection to it is made. The order of sale, also, complies strictly with the requirements of the statute, and recites, among other things, that upon the filing of the petition on August 17, 1872, "an order was thereupon made directing all persons interested in said estate to appear before this court, at the court room thereof, on Saturday, the 28th day of September, A. D. 1872, at 10 o'clock a. m., to show cause why an order should not be granted to said administrator to sell so much of the real estate of the deceased as should be necessary, and ordering that a copy of said order to show cause be published at least four successive weeks in the Santa Cruz Sentinel, a newspaper printed and published in the city and county of Santa Cruz." Then, after reciting who were heirs of the deceased, that the minor heirs had no general guardian, the appointment of an attorney ad litem for them, and the appearance of said attorney for the minor heirs and the attorney for the administrator on the day appointed for the hearing (September 28, 1872), proceeds to recite that, "upon satisfactory proof by the affidavit of B. P. Kooser, a competent witness, of the publication of a copy of said order to show cause, in said newspaper, at least four successive weeks, and as often during said period of four weeks as said paper was regularly issued, this court proceeded to the hearing of said petition, and heard and examined the allegations and proofs of the petitioner; no person interested in said estate or otherwise appearing to oppose said application." It then recites that the court found all the allegations of the petition to be true, and "that all the proceedings upon this application have been in all respects strictly conducted in accordance with and as provided in the statute regulating the sales of real estate belonging to the estates of deceased persons." It does not appear in what respect the publication of the order to show cause was claimed to be defective, the affidavit of Kooser not appearing in the transcript; but it is not denied that the order was published as above recited, nor is there anything in the transcript

indicating that it was not so published. It therefore appears that the probate court acquired jurisdiction of the subject-matter of the petition, and of all persons interested in the estate of Watson; and it is not denied, but impliedly admitted, that the court confirmed the sale. Furthermore, the transcript contains no evidence that the probate court did not fix a time for hearing the report of the sale, and give proper notice thereof, nor that the notice of sale was not published as required by law and the order of the court. Conceding, however, that the proceeding for confirmation of the sale was irregular, as claimed, and that notice of the sale was not published for the time required by the order of court, yet these irregularities or errors in the exercise of unquestionable jurisdiction would not invalidate the sale nor the administrator's deed to the extent of making them vulnerable to the collateral attack, made upon them in the court below. *Dennis v. Winter*, 63 Cal. 16; *Smith v. Biscailuz*, 83 Cal. 359, 21 Pac. 15, and 23 Pac. 314; *Richardson v. Butler*, 82 Cal. 174, 23 Pac. 9; *Phelan v. Smith*, 100 Cal. 171, 34 Pac. 667. "Jurisdiction existing, any order or judgment is conclusive, in respect to its own validity, in a dispute concerning any right or title derived through it, or anything done by virtue of its authority." *Van Fleet*, Coll. Attack, p. 29, § 17. The deed was not objected to on the ground of irrelevancy, nor was it irrelevant; for, even if plaintiff had failed to connect it with the patent to Bailey, as he presumably intended, still he was entitled to connect his possession with that of Wheeler.

2. As above stated, the evidence for plaintiff tended to prove prior actual possession of the demanded premises by the plaintiff. As against the defendants, who were alleged to be wrongfully in possession when the action was commenced,—March 1, 1893,—the prior possession of plaintiff was prima facie evidence of his title. *Morton v. Folger*, 15 Cal. 175; *Leonard v. Flynn*, 89 Cal. 543, 26 Pac. 1099; *McGovern v. Mowry*, 91 Cal. 383, 27 Pac. 746. A nonsuit should be denied when there is any evidence tending to sustain plaintiff's case, without passing upon the question as to the sufficiency of such evidence. *Felton v. Millard*, 81 Cal. 540, 21 Pac. 533, and 22 Pac. 750. And for this reason, also, I think the nonsuit should have been denied. I conclude that the order and judgment should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are reversed, and the cause remanded for a new trial.

**MOUNTAIN TUNNEL GRAVEL MIN. CO.  
v. BRYAN et al. (No. 18,406.)**

(Supreme Court of California. Jan. 21, 1896.)

**APPEAL — DECISION — REVERSAL — NEW TRIAL —  
ORDER — FORM.**

1. Where, on appeal on the ground that the findings are not supported by the evidence, respondent fails to appear, and point out, by either oral or written arguments, where the evidence in support of the findings may be found, the record being voluminous, a new trial will be ordered.

2. An order granting a new trial does not, until such order is affirmed on appeal, or the time for appeal therefrom has expired, vacate the judgment, so as to prevent an appeal from being taken from the judgment. *Pierce v. Birkholm* (Cal.) 43 Pac. 205, followed.

3. Where a new trial is granted as to certain issues only, the order should state, in terms, the issues to be retried, instead of referring to such issues as those covered by certain findings of fact.

Department 1. Appeal from superior court, Placer county; W. H. Grant, Judge.

Action by the Mountain Tunnel Gravel Mining Company, a corporation, against Hamblin S. Bryan and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

Andrew Thorne, for appellant. Tuttle & Tuttle, John M. Fulweiler, and Hamilton & Hamilton, for respondents.

**GAROUTTE, J.** This is an action of ejectment brought against various defendants, each defendant being in possession, and claiming separate portions of the tract of land described in the complaint. Defendants answered separately, denying plaintiff's claims, and, as an affirmative defense and by way of cross complaint, set out equitable titles, and asked for a specific performance. The trial court found against the claims of plaintiff, and decreed specific performance. Plaintiff appealed from the judgment, and also moved for a new trial upon various grounds, which motion was granted by the court in part and denied in part. The court, after declaring that, in its opinion, certain findings of fact, enumerating them seriatim, were not supported by the evidence, made the following order: "It is ordered that a new trial be, and the same is hereby, granted as to the issue of fact involved in the said proceedings, the evidence at said new trial to be directed solely to the issues of fact therein involved;" and thereupon denied the new trial upon all other grounds. This appeal is by plaintiff from the order, upon the ground that a new trial should have been granted as to the entire action.

Appellant insists that findings numbered 33, 35, and 36 are not supported by the evidence. The facts covered by those findings relate solely to the rights and claims of defendant and respondent Bryan; and as he has not deemed the matter of sufficient importance to appear before this court, either by oral or written argument, and point out, in a somewhat voluminous record, where the evidence

may be found which supports these findings of fact, we will assume there is no such evidence; and for that reason will order a new trial of the entire case as to respondent Bryan. *Kelly v. Bradbury*, 104 Cal. 237, 37 Pac. 372, and cases there cited.

It is insisted that the findings do not support the judgment; and respondents Scherer and Clark urge as a bar to the consideration of that question that the judgment cannot now be attacked, for the reason that it was set aside by the order granting the new trial as to certain portions of the case; but this contention cannot be sustained. As to what effect an order granting a new trial by the trial court has upon the judgment, we refer to the very recent case of *Pierce v. Birkholm* (decided Jan. 10, 1896) 43 Pac. 205, where the question was directly involved, and carefully considered. The court there concluded that an order made by the trial court granting a motion for a new trial, until affirmed by this court, or until the time to appeal therefrom had expired, did not set aside and vacate the judgment; that during this time the judgment had such life that an appeal could be taken from it; and that, in effect, it was not dead but sleeping. Inasmuch as we think the case must be sent back for a new trial as to all the defendants, and in view of the fact that the respondents who have appeared in this court have not argued those matters upon their merits, relying solely upon the position that the order for a new trial set aside the judgment, we will not enter into a consideration of the points made by appellant that the cross complaints do not state causes of action, and that the judgment is not supported by the findings. Before another trial is had, we suggest that respondents look well to the sufficiency of their cross complaints, and amend them, if such course be deemed advisable.

In granting the new trial in this case, the court had in view the practice recognized and approved in *Land & Town Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437, and *Fallbrook Irr. Dist. v. Abila*, 106 Cal. 365, 39 Pac. 793; but, in granting a new trial as to certain particular issues only, the trial court should with great certainty recite the issues in terms upon which the new trial is to be had. This should be done in order that both counsel and the trial court, and this court upon appeal, may know exactly the questions involved within the scope of the order. The order in this case uses the word "proceedings" where probably the word "findings" was intended, and also the word "issue" where "issues" was contemplated. If these are not clerical errors,—and we have no way of determining the fact,—then the order is so indefinite that it should be held to be general in its terms; but, even conceding these things to be purely clerical mistakes, still, as a rule which we think should be invariably followed, an order granting a new trial pro tanto should not, as in this case.

grant the order as to the issues covered by certain numbered findings of fact; for such an order leaves the matter open as to what issues are really included within its scope, and often makes it difficult, if not impossible, for the trial court, or for this court, to say what issues the court had in mind when the order was made. As a striking illustration of the soundness of our position, we refer to finding of fact No. 29, found in this record. A new trial was ordered by the trial court as to the issue or issues involved therein; but, upon examination of that finding, we are entirely unable to ascertain the particular tract of land to which reference is there had. In the present case, by our construction of the order, it grants a new trial as to so many important questions raised by the pleadings that we deem it the better course that the whole case shall again be retried. We are especially firm in this conclusion when we take into consideration the defects appearing upon the face of the order, and the doubts which would probably arise in the minds of both court and counsel as to the exact issues which were required to be retried under the directions therein contained.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

**BEER v. CLIFTON et al.** (No. 15,958.)  
(Supreme Court of California. Jan. 21, 1896.)

#### ESTOPPEL IN PAIS.

In an action by the payee of a note against the makers, it appeared that plaintiff had indorsed to two of the makers other notes, but was not liable thereon, on account of their failure to make due demand, which, after maturity, were turned over to the other maker to secure him from liability on the note in suit, which, at his dictation, was executed in a nonnegotiable form: he having refused to sign it in its original, negotiable form, under the belief that thereby he would be able to set off the other notes against liability on it. *Held*, that plaintiff was not estopped, as against the latter maker, to deny her liability on the notes indorsed by her and turned over to him, so as to enable him to set them off against her claim.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by Jennie Beer against E. Clifton and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. H. Seawell and J. W. Oates, for appellants. T. L. Carothers and Crittenden Thornton, for respondent.

**HAYNES, C.** This is an action brought upon a promissory note dated at Covelo, Cal., March 29, 1890, made by the defendants to the plaintiff, for the sum of \$3,500, with interest at the rate of 10 per cent. per annum

from March 10, 1890. The case was tried before the court without a jury, and findings were filed and judgment entered for the plaintiff for the full amount of said note, with interest and costs,—in all, \$5,335.41; and this appeal is from the judgment and an order denying the defendants' motion for a new trial.

Upon a first trial of this case, the plaintiff had judgment for an amount much less than she claimed, and her motion for a new trial was granted, and the defendants appealed from the order granting said motion. The case upon the former appeal is reported in 98 Cal. 323, 33 Pac. 204, where will be found a general statement of the facts in the case. The question involved upon that appeal was as to the liability of the plaintiff upon her indorsement of 11 promissory notes, then overdue, and which were part of the assets sold by her to Clifton and Well, and which she indorsed in blank. It was there sought to hold her liable upon these notes, upon said indorsement; but this court held that, inasmuch as the defendants had not made due demand on the makers for payment, and notified her of nonpayment, within a reasonable time, she was not liable as an indorser. Upon this trial the defendants sought to fix her liability upon another ground. It was alleged in the answer that these 11 notes were each and all of them indorsed by plaintiff to Clifton and Well, "with a distinct agreement and understanding that the plaintiff would make them, and each of them, good, and would pay the same, and was and would remain bound to see the same paid and pay the same," and that Clifton and Well accepted said notes with that understanding. At the time the \$3,500 note here in suit was made, said 11 notes were turned over to White by Clifton and Well as collateral security against his liability upon said note, and, at his dictation, the words "or order," as it was first drawn, were stricken out, so as to make it a nonnegotiable note; and this circumstance, with others, is relied upon to sustain the defense that said 11 notes were taken under an agreement with the plaintiff that she would see the same paid. The court, however, found that said 11 notes were indorsed by the plaintiff for no other purpose than merely to transfer the title to said notes, and that it was not agreed between the plaintiff and the defendants, or either of them, that she was liable thereon for the payment of the same, and that defendant White knew at the time of the transaction the terms of said indorsement, and the reasons and considerations therefor. The principal question on this appeal is based upon appellants' contention that the evidence is insufficient to justify said findings.

So far as the original transaction between the plaintiff and Clifton and Well is concerned, the evidence fully sustains the finding that the plaintiff did not "agree or undertake" to become liable upon or for these

notes; but it was agreed that as to such part of these notes as Clifton and Well should fall to collect, after due diligence to collect the same, they be credited upon their seven notes of \$500 each, with the amount so uncollected. It was found, however, upon ample testimony, that due diligence had not been used to collect the same, and that the condition of plaintiff's liability was therefore not performed. At the time the note in suit was made and given to the plaintiff in exchange for the seven notes, of \$500 each, made by Clifton and Well, there was no direct personal interview between the plaintiff and the defendants, or either of them. This note was prepared in San Francisco, and sent to Covelo through Wells, Fargo & Co., and was presented to the defendants for execution by Mr. Brown, who was then and there the agent of Wells, Fargo & Co. As above stated, when this note was presented for execution it was negotiable in form, and Mr. White refused to sign it unless the words "or order" were stricken out, for the reason that he held a certain obligation against the plaintiff, and also because said 11 notes were to be delivered to him as collateral security; his purpose being to prevent the plaintiff from transferring said \$3,500 note to an innocent holder, thus enabling him, as he supposed, to set off her liability upon the said 11 notes against his liability upon the new note. Mr. Brown communicated with the plaintiff, and obtained her direction to have the note executed with the words "or order" stricken out. It is now claimed that Mr. Brown was the agent of the plaintiff in the transaction, ostensibly at least; that the whole matter was talked over before him by the defendants; and, because the note was accepted in its present form, that the plaintiff is estopped from asserting that she did not thereby agree to become liable for the payment of said 11 notes. Mr. Brown was not examined as a witness, nor is there any evidence tending to show that the reasons given by Mr. White for having the \$3,500 note made nonnegotiable were communicated to the plaintiff in any form whatever. The note was sent to Covelo by Wells, Fargo & Co.'s Express, and Mr. Brown, as the agent of the express company, presented the note for execution, but it does not appear that he was in any sense, or for any purpose, other than the presentation of the note for that purpose, the agent of the plaintiff; and being a special agent for a particular and definite purpose, which did not, upon the face of the transaction, imply any authority or discretion in him as agent, the burden was upon defendants to show that he communicated to the plaintiff all the facts stated by Mr. White, and that he was authorized to assent, and did assent, thereto. It cannot be assumed, in the absence of evidence, that the plaintiff was informed of any condition imposed or attempted to be imposed by Mr. White as a condition to his joining in the execution of

the note; nor did the plaintiff's consent to the change in the form of the note necessarily imply that the plaintiff had been so informed, or had assented to any of the reasons which led Mr. White to have the change made. Not only so, but the defendants all supposed at the time the \$3,500 note was given that the plaintiff was already liable upon said 11 notes, because of her indorsement, and it was because of that supposed liability that Mr. White insisted upon having the new note made nonnegotiable, and all that he said to Mr. Brown was based upon such supposed pre-existing liability; and, no question having been made as to such liability, we fail to see how all that was said by defendant White to Mr. Brown, if it had been communicated to the plaintiff, could in any manner have affected or increased her liability. The effect of her consent to the change in the form of the note was merely saying, "When this note becomes due, and I seek to enforce it, you shall have an opportunity to set off any legal demand you may then have against me." The findings are justified by the evidence, and the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELOHER, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

OSTERMAN v. DISTRICT GRAND  
LODGE NO. 4, I. O. B. B.  
(No. 15,974.)

(Supreme Court of California. Jan. 21, 1896.)

ENDOWMENT BENEFIT—PLEADING—BURDEN OF PROOF—FORFEITURE—PAYMENT—EVIDENCE—PARTIES.

1. A mutual endowment society, by alleging in its answer to an action to recover an endowment that the conditions of the contract, made by its law conditions precedent to recovery, have been fulfilled by the assured, "except as hereinafter set forth," assumes the burden of alleging and proving nonperformance of such conditions by the assured.

2. Where the laws of a mutual endowment association make suspension for nonpayment of dues a forfeiture of membership benefits, and provide a formal method for suspension in such case, nonpayment of dues will not, ipso facto, work a forfeiture, though the assured was secretary of the society, and formal proceedings for suspension have not been had because he failed, as required, to report his own delinquency.

3. In an action by a wife against a grand lodge—whose laws made membership in a subordinate lodge, and an election as member of the endowment fund, conditions precedent to a right to participate therein—to recover an endowment on her husband's membership, it appeared that, on report of the husband's death to the grand lodge by the subordinate lodge, the grand lodge sent the amount due to the subordinate lodge, to be paid, "through the trustees," to plaintiff; that the trustees, prior to its receipt, obtained from her an order to deduct from the amount due sufficient to make good defalcations of her husband, which, as one of them testified they told

her, would amount to at least \$1,000. The wife testified that they said it would be about \$500. The trustees subsequently obtained her receipt for the whole amount, on representations that it was necessary to procure the money from the defendant. Plaintiff, failing to receive the money, demanded it from defendant, and defendant, then first learning that plaintiff's husband was not in good standing at his death, directed the trustees of the subordinate lodge to return the amount sent to it. There was no evidence what became of this money, except that it was deposited in the bank by the trustees to whom it was delivered. *Held*, that a finding against defendant's plea of payment was warranted.

4. Under the above facts, the grand lodge, and not the subordinate lodge, was the proper party to be sued.

5. In an action for an endowment benefit, where defendant alleges in defense that plaintiff consented that the money due should be applied in paying a sum embezzled by the assured, and that it was so applied, an instruction placing the burden of proving such issue on defendant is proper.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Sarah Osterman against District Grand Lodge No. 4, Independent Order of B'nai B'rith, to recover an endowment benefit. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Marcus Rosenthal, for appellant. Joseph Rothschild, for respondent.

VANOLIEF, C. Action to recover an endowment benefit of \$2,000 alleged to be due the plaintiff from the defendant. The cause was tried by a jury, whose verdict was in favor of plaintiff for the sum demanded, and the judgment of the court was in accordance with the verdict. The defendant appealed from the judgment, and from an order denying its motion for a new trial. The pleadings and evidence justified the jury in finding the following facts: The defendant is a fraternal and beneficial society incorporated under the laws of this state, is governed by a written constitution, and, for certain general purposes, has jurisdiction over subordinate lodges within its district. Subject to the constitution of the defendant, each subordinate lodge adopts its own by-laws governing its own finances and local affairs. The defendant corporation maintains a special fund, called the "Widows' and Orphans' Beneficiary Fund," supported by assessments of all members of subordinate lodges who elect to become participants of the benefits of that fund, each of whom is required, by the law relating to that fund, to pay a monthly assessment of \$2.50, to be collected by the subordinate lodges, and transmitted to the District Grand Lodge; and, after so transmitted, the subordinate lodge has no power of control over it. Funds for the support and use of the subordinate lodges are supplied by fines and quarterly dues required to be paid by their members, over which funds the Grand Lodge

has no control. Only those members of subordinate lodges who elect to become participants in the widows' and orphans' beneficiary fund are assessed for contributions to that fund; and, after so electing, they are called "Members of the Widows' and Orphans' Fund." The laws of the District Grand Lodge governing the disposition of the widows' and orphans' fund, among other things, provide (section 15): "The sum of two thousand dollars shall be paid on the death of a member in good standing in the widow and orphan beneficiary fund of this district, to his widow; if there be no widow, then to his children; and, if there be no widow or children, then to any person, persons, or institutions which the deceased member may designate in the manner prescribed in the following sections." No endowment policy or certificate is issued to a member during his life. The benefit is to be paid upon due notice to the District Grand Lodge of the death of a member of the widows' and orphans' beneficiary fund. Upon such notice the Grand Lodge, by its secretary, ordinarily transmits the money, or a check for it, to the trustees of the subordinate lodge of which the deceased was a member, directing them to pay it to the beneficiary. Ophir Lodge, No. 21, is, and has been since 1880, a subordinate lodge of defendant Grand Lodge. In October, 1881, Monroe Osterman, the husband of the plaintiff, became a member of Ophir Lodge, and of the widows' and orphans' fund, and continue to be such until his death, on the 29th day of May, 1891, and, during the last three years of his life, was the secretary of said Ophir Lodge. As a member of said Ophir Lodge and of the widows' and orphans' branch of said District Grand Lodge, he was in good standing up to the time of his death, unless, for alleged reasons, to be hereinafter considered, he had lost his good standing, and had not been reinstated at the time of his death. Immediately after the death of Monroe Osterman, Ophir Lodge duly notified the Grand Lodge of the fact. Thereafter, on June 30, 1891, the treasurer of the Grand Lodge drew a check on the Bank of California for \$2,000, payable to the order of the trustees of Ophir Lodge, which was sent to them by the grand secretary, inclosed in the following letter, dated July 1, 1891: "To the Secretary of Ophir Lodge, No. 21, I. O. B. B.: Worthy Sirs and Brothers: We herewith transmit check for the sum \$2,000 in payment of the amount due the late brother, Monroe Osterman. This amount is to be paid to the widow, through the trustees. This is accompanied by an original and duplicate receipt. Fraternally, yours, Louis Blank, Grand Secretary." The trustees received the check, and on July 8, 1891, deposited it with the California Safe-Deposit & Trust Company. On August 12, 1891, the plaintiff, claiming that her benefit had not been paid, made a written demand of the

Grand Lodge for payment thereof, to which demand that lodge answered, in substance, that she was not entitled to any benefit, for the reason that her husband was not at the time of his death a member in good standing of either the Ophir Lodge or of the widows' and orphans' fund, because of his failure to pay certain dues to the Ophir Lodge, and certain assessments for the widows' and orphans' fund, and thereafter, on September 4, 1891, directed the Ophir Lodge, by the following letter, to return the money: "September 4, 1891. Ophir Lodge, No. 21: Brothers: Information has reached the general committee of the Grand Lodge No. 4 that Brother Monroe Osterman, of Ophir Lodge, died May 27, 1891; was in arrears to the widows' fund at the time of his death, and therefore not entitled to the benefits of the widows' fund. As the Grand Lodge transmitted to you a check for the sum of \$2,000, to be paid to the widow of said Brother Osterman, and as, under our laws, the said widow would not be entitled to the benefits of the widows' fund, and said money was transmitted to your lodge while we were ignorant of the fact of his delinquency; and therefore the money was improperly paid, we now herewith direct your lodge to at once return to the grand secretary, Louis Blank, \$2,000. Yours, fraternally, Louis Blank, Grand Secretary." Such additional facts as may be considered pertinent will be stated in considering the points to which they relate. The defendant lodge pleaded two distinct defenses—First, that by reason of nonpayment of dues to the Ophir Lodge, and assessments for the widows' and orphans' fund, Monroe Osterman was not in good standing, as a member of the Ophir Lodge, at the time he died; and, second, that the defendant, nevertheless, paid the full amount of her benefit to the plaintiff.

1. It was admitted by defendant, at the trial, that Monroe Osterman was ostensibly in good standing, as a member and the secretary of the Ophir Lodge, up to the time of his death, and that there was not even a suspicion that he was delinquent in payment of his dues or assessments until after the Grand Lodge had transmitted to Ophir Lodge \$2,000 to pay his widow's benefit, and also that he was never expelled nor suspended from membership in Ophir Lodge or the widows' and orphans' beneficiary fund by any action of the Ophir or Grand Lodge. But counsel for appellant contends that his delinquencies, ipso facto, deprived him of his good standing as a member of the widows' and orphans' fund, without any formal act of suspension or expulsion by either lodge, and consequently deprived the plaintiff of the right to any benefit from that fund. As above remarked, there was no certificate or policy issued to Monroe Osterman, or to his wife, evidencing her right to benefits from the widows' and orphans' fund. The conditions upon which the right to benefits from that fund depend

are fully expressed in the constitution or laws of the District Grand Lodge; and, whenever such right accrues, it is the direct effect of self-executing provisions of such constitution or laws. Of course, the first condition is that, being a member of a subordinate lodge, he must have elected to become a member of the widows' and orphans' beneficiary fund; and it is alleged in the complaint, and not denied, that Monroe Osterman became a member of Ophir Lodge, and a participant in the widows' and orphans' beneficiary fund, on October 19, 1881, and the answer of defendant affirmatively alleges "that, at the time said Osterman became a member of said Ophir Lodge, he also became a beneficiary or participating member of said widows' and orphans' beneficiary fund, and remained such member, except as hereinafter set forth, down to the time of his death." The only other condition is that expressed in section 15, above set out, namely, that he must have been at the time of his death "in good standing in the widow and orphan beneficiary fund." Therefore, if Monroe Osterman was a member in good standing of Ophir Lodge and of the widows' and orphans' fund at the time of his death, the plaintiff was entitled to the benefit of \$2,000. The express admission in defendant's answer that Osterman "remained such member down to the time of his death, except as hereinafter set forth," is sufficient prima facie evidence that he remained in good standing down to the time of his death, and cast upon the defendant the burden of pleading and proving that Osterman was not in good standing at the time of his death. *Siebert v. Chosen Friends*, 28 Mo. App. 268; *Stewart v. Supreme Council*, 36 Mo. App. 319; *Supreme Lodge v. Johnson*, 78 Ind. 110; *Mills v. Rebstock*, 29 Minn. 380, 13 N. W. 162; *Elmer v. Association* (Sup.) 19 N. Y. Supp. 289; *Black, Ben. & Ins. Soc.* § 454. This burden the defendant properly assumed, both in pleading and proof, and the only question for consideration is whether the evidence was sufficient to justify the jury in finding that Monroe Osterman was in good standing at the time of his death. The evidence introduced by defendant on this issue tended to prove only that Osterman was delinquent in payment of dues to Ophir Lodge amounting to \$11.50, and in payment of assessments for the endowment fund amounting to \$12.50, which were not even suspected until long after his death, and long after Ophir Lodge had certified to the Grand Lodge that he died in good standing, and nearly a month after the Grand Lodge had remitted to the trustees of Ophir Lodge the \$2,000, with direction to pay it to plaintiff. It appeared that Osterman's salary as secretary of Ophir Lodge was \$200 a year, and that a portion of it more than equal to the delinquent dues and assessments was unpaid at the time of his death; but it is claimed by appellant that the unpaid salary should have been

applied to certain defalcations of the secretary, which were not discovered until after his death, and after Ophir Lodge had certified to his good standing at the time of his death, and which will be considered in connection with the plea of payment.

That the failure of a member of the widows' and orphans' beneficiary fund to pay an assessment within the time required by the laws of the society does not, ipso facto, operate to suspend him, or to affect his good standing, is apparent from the following extracts from those laws: Article 9 of the by-laws of Ophir Lodge provides: "Whenever an assessment is levied by District Grand Lodge No. 4, to pay an endowment, such assessment shall be paid by the members as provided by the general laws of this district." Section 25 of the general laws of the district provides: "A beneficiary member who fails to pay his assessments to the lodge within thirty days after the same has been levied by the secretary shall be suspended, without notice, from the benefits of the widow and orphan beneficiary fund, of which suspension the grand secretary must at once be notified. After the member becomes delinquent in two consecutive assessments, the amounts accruing therefrom, and from every subsequent assessment, shall be charged to his account as lodge dues." This implies that a member may be suspended from the widows' and orphans' fund, and still remain a member of the subordinate lodge. A by-law of Ophir Lodge requires each member thereof to pay, as dues to that lodge, quarter-yearly, \$3.50; and section 1, art. 8, of the general laws of the district, applicable to subordinate lodges, provides: "It shall be the duty of the secretary to report to the lodge at the first meeting of each month the names of all those brothers who owe for dues, fines, and assessment an amount equal to the amount of dues for one year. After the secretary has reported delinquents, he shall give legal notice to those in arrears to appear, at the latest, in the second regular meeting thereafter, and show cause why they should not be suspended. If they fail to do so, the president shall put the question: 'Does any brother know a reason why Bro. — shall not be suspended?' If no satisfactory reason be presented to the lodge, then the president shall declare the brother suspended." This covers the whole subject of suspensions for nonpayments of assessments for the endowment fund and dues to the subordinate lodges, and shows that suspension for these delinquencies requires action by the lodge, and prescribes the mode of such action. The statement on motion for new trial contains the following admission by defendant's attorney: "Mr. Rosenthal: We admit that there never was a formal suspension of Monroe Osterman, either from membership, or from the benefits of the widows' and orphans' fund; that he never was formally suspended. No record of Ophir Lodge shows the suspension of said

Osterman for nonpayment of dues or assessments, and no notice was ever issued by or from Ophir Lodge to the defendant showing nonpayment of his dues or of his suspension." It is well-settled law that, in cases of the character of this, the only competent evidence of suspension or expulsion of a member, or that a member lacked good standing in the lodge, is some authorized resolution or act of the lodge, by which such member was expelled, suspended, or degraded. Order of Foresters v. Zak (Ill. Sup.) 26 N. E. 593; Surgical Soc. v. Weatherly, 75 Ala. 248; Hawkshaw v. Supreme Lodge, 29 Fed. 773.

The learned counsel for appellant concedes that "ordinarily, under such laws as those of the defendant, which do not make the nonpayment of assessments or dues, ipso facto, operate as a suspension from benefits or membership, there must be a formal suspension before the right to benefits is forfeited." But he contends that this case is extraordinary, in that it was the duty of Osterman, as secretary of Ophir Lodge, to report all members who were delinquent in payment of dues or assessments, and that he failed to report to the lodge his own delinquency, for which he might have been suspended. In answer to this, it is enough to say that plaintiff's right to recover is not conditioned upon the performance by her husband of his duties as an officer of the lodge, nor upon his payment of dues or assessments within the periods of time limited by the laws of the lodge, for the nonpayment of which he might have been, but was not, suspended, or otherwise deprived of his good standing. In this respect this case is materially different from that of Hogins v. Supreme Council, 78 Cal. 109, 18 Pac. 125, cited by appellant. In that case the defendant was a fraternity organized to promote temperance, and issued policies or certificates of insurance on the lives of its members, according to the mutual benefit system, upon their applications therefor. The rules of the order required total abstinence of its members from the use of intoxicating liquors as a beverage. In his application for insurance, Hogins agreed "that a compliance with all the laws, regulations, and requirements \* \* \* enacted by our said order is the express condition upon which I am to be entitled to participate in the mutual benefit life system." The certificate issued to him on such application declared, "This certificate is issued upon the express condition that said Daniel Hogins shall, in every particular, while a member of our said order, comply with all the laws, rules, and requirements thereof." The court found that Hogins had violated the agreement expressed in his application, and the laws of the order, by drinking whisky, brandy, and other alcoholic stimulants, as a beverage, and that his death was hastened thereby, but had never been suspended from the order, as he might have been, and gave judgment in favor of de-

fendant. This court affirmed the judgment on the ground that the abstention of the insured from the use of intoxicating liquor as a beverage was made by the contract a condition precedent to defendant's liability to pay. But in the case at bar I think the contract will not bear the construction that payment of dues or assessments by Monroe Osterman, as required by the laws of the Grand Lodge or of Ophir Lodge, was a condition precedent to the liability of the Grand Lodge to pay plaintiff the benefit of \$2,000. Such a construction of numerous similar contracts has been refused, as in cases above cited, and has been given in no case more nearly similar to this than that of *Hogins v. Supreme Council*, supra. It is claimed that to permit plaintiff to recover in this action would violate the maxim that "no one can take advantage of his own wrong." But it is not perceived that plaintiff is seeking any advantage from her own wrong. If this maxim is applicable to her case, why would it not be equally so, even if Monroe Osterman had not been secretary of Ophir Lodge, and had merely refused to pay his dues and assessments? The subtraction of his official delinquency would only reduce the degree of the wrong. Yet this maxim has never been applied to this class of cases. Besides, it cannot be assumed that Osterman would have been suspended, or otherwise degraded from his good standing, even if he had promptly reported to the lodge his alleged delinquencies; and whether he ought to have been suspended depended upon the determination of the lodge, based upon a state of facts which may have been materially different from that proved on the trial of this case. The most that should be assumed is that he might have been suspended. No effective retroactive sentence of suspension or expulsion could have been pronounced against the deceased, Osterman, in this action. Nor does the maxim that "equity regards as done that which ought to be done" apply to this case, as counsel contends. Surely, counsel would not be understood to mean that the dues and assessments of Osterman should be regarded as paid when they ought to have been paid, but only that Osterman should be regarded as having been suspended before he died, thus assuming that he ought to have been suspended; yet, as above shown, it can be assumed only that he might have been suspended in case he had not successfully defended or excused himself, and the lodge had so determined; and such a case is not within the maxim. *Pom. Eq. Jur.* § 365, and notes. Besides, this maxim does not authorize a court to assume, without evidence, that a penalty for any kind of delinquency or wrong has been inflicted by any tribunal.

2. The contention that defendant paid the benefit of \$2,000 to plaintiff is founded on the following facts and evidence: Twenty days after the death of Osterman, viz. on June 18, 1891, two members of Ophir Lodge—Messrs.

Saalburg and D'Ancona (Mr. Saalburg then being a trustee of Ophir Lodge)—called on the plaintiff, at her home, and informed her that, since the death of her husband, they had discovered that, as secretary of the lodge, he had in his hands at the time of his death a considerable sum of money, which he had received from members for dues, etc., the exact amount of which they did not then know. Mr. D'Ancona testified that he told her that the amount was \$1,000, at least. Plaintiff testified that she understood them to say it would amount to only about \$500. Omitting the further conflicting evidence as to the representations they made to her on that occasion, it appears that Mr. D'Ancona then drew, and plaintiff signed, the following instrument in writing:

"Mr. William Saalburg, Trustee Ophir Lodge, No. 21: You are hereby authorized to pay to Ophir Lodge, No. 21, all moneys in the hands of my late husband, Monroe Osterman, belonging to said lodge, and to deduct the same from the endowment of \$2,000 which you hold for me under the laws of District Grand Lodge No. 4. Mrs Monroe Osterman, 1527 Geary street. Witness: A. D'Ancona."

At the time this instrument was executed, there was no money in the hands of Mr. Saalburg, nor in the hands of the trustees of Ophir Lodge, applicable to payment of plaintiff's endowment, though application for it had been made before that time; and about three weeks thereafter it was remitted by the Grand Lodge to the trustees of Ophir Lodge, as above stated. Without regard to the conflicting evidence as to whether the facts were truly represented to plaintiff before she signed the order, and whether she understood its purport, it is sufficient to say that it is properly admitted that the order was revocable at any time before the money was paid by Saalburg to the Ophir Lodge; plaintiff being under no obligation to make good her husband's defalcations, and there being therefore no consideration for the order to pay them. Yet the evidence was sufficient to justify the jury in finding that she did not understand the contents or purport of the order when she signed it. A few days after the receipt of the check of defendant, and the deposit thereof in bank, by Mr. Saalburg, as hereinbefore stated, to wit, July 13, 1891, Mr. Saalburg, with Mr. Marcus Levy, then secretary of Ophir Lodge, again called upon plaintiff, at San Rafael, where she then resided, and procured from her the following receipt:

"San Francisco, July 13, 1891. Received from District Grand Lodge No. 4, Independent Order of B'nai B'rith, and of Ophir Lodge, No. 21, Independent Order of B'nai B'rith, the sum of two thousand dollars (\$2,000), in United States gold coin, in full payment of my claim against said District Grand Lodge No. 4, and said Lodge, No. 21, as the widow of the late Monroe Osterman, a member of said Ophir Lodge.



No. 21, of the Independent Order of B'nai B'rith.

"\_\_\_\_ Sarah Osterman,  
 "\_\_\_\_ Trustees. Beneficiary.  
 "\_\_\_\_ Wm. Saalburg,  
 "Attest: Chas. Grosslicht,  
 "Marcus Levy, L. Levy.  
 "[Seal] Secretary."

As to the means used to procure this receipt, and plaintiff's understanding of the transaction, the evidence is conflicting, yet sufficient to justify the jury in finding: That Messrs. Saalburg and Levy did not inform plaintiff that the Grand Lodge had transmitted the money to the trustees of Ophir Lodge, with which to pay her benefit, but represented to her that, in order to procure that money from the Grand Lodge, it was necessary that she should sign that receipt; that, to save her trouble, they would attend to the matter for her,—and that she thereupon signed the receipt without reading it, believing that they would get the money and deliver it to her. That, receiving no further communication from them, and failing to receive the money, she demanded it of the Grand Lodge. That after this demand the Grand Lodge, for the first time, professed to have discovered that Monroe Osterman was not in good standing, as a member of the widows' and orphans' department, at the time of his death, and for that reason refused payment, and ordered the trustees of Ophir Lodge to return the money which it had transmitted to them as above stated. There is no evidence that Mr. Saalburg or the trustees of Ophir Lodge ever paid any part of the money to Ophir Lodge. On the contrary, Mr. Saalburg testified that, on the expiration of his term of office as trustee, the money was still in bank, where he first deposited it; that he delivered the evidence of the deposit to his successor in office, and, for aught he knew, the deposit had not been withdrawn or changed at the time of the trial. Nor is there any evidence as to whether Ophir Lodge returned the money to the Grand Lodge in obedience to the order of the latter lodge, nor any evidence that Ophir Lodge ever claimed the money, or denied the right of defendant to demand a return thereof. If the money has not been returned, it is in the hands of defendant's agents, and therefore legally in its possession. The check for the money was sent to the secretary of Ophir Lodge, with instruction that it be paid to plaintiff "through the trustees" of that lodge. Surely this constituted those trustees agents of defendant for that special service. It follows that the jury was fully justified in finding for the plaintiff, against the plea of payment, notwithstanding her receipt.

3. It is contended for appellant that "the  
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court erred in charging the jury that the burden of proving the charge that the plaintiff consented that the money due upon the endowment should be applied toward the payment of the sum embezzled by Osterman was upon the defendant." This charge that plaintiff consented, etc., is a material part of affirmative new matter pleaded by defendant as a defense. The other part of the plea is that, pursuant to such consent, the money was actually applied to the payment of the sum embezzled. Of the issues thus tendered, the defendant undoubtedly held the affirmative, and, as to them, would have been defeated if no evidence had been given on either side. Therefore, as to each of those issues, the burden of proof was on the defendant (Code Civ. Proc. § 1981), and the court did not err in so instructing the jury.

4. The court charged the jury, in substance, that, unless they found that Osterman had been suspended by some act of the lodge, his indebtedness to the lodge for dues, assessments, or money received by him, and not accounted for, constitutes no defense to the action. That this instruction was not erroneous is apparent from the foregoing considerations and authorities cited.

5. There is nothing worthy of serious additional consideration in the point that "the action has not been brought against the proper party," but that it should have been brought against Saalburg, or Ophir Lodge, if at all. To answer this point requires only a repetition of foregoing discussion as to the liability of the defendant, it being there shown that there is no evidence that Ophir Lodge ever received, or even claimed, the money; but it is proved that the trustees of Ophir Lodge received the money as mere agents of defendant, with direction to pay it to plaintiff, and that defendant afterwards ordered them to return to it, etc. It is stated and reiterated by counsel for appellant that the District Grand Lodge alone is responsible for the payment of endowments, and that subordinate lodges have no control over the endowment department of the Grand Lodge. The action of Saalburg in his endeavor to divert the money from the plaintiff to Ophir Lodge was wholly unauthorized by either the Grand Lodge or Ophir Lodge; and it effected nothing which could make him responsible to plaintiff for the payment of the money. I think the judgment and order should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

McGOWAN v. McDONALD et al. (No. 16,034.)

(Supreme Court of California. Jan. 21, 1896.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS—LEGISLATIVE POWERS—WITNESS—COMPETENT EVIDENCE—INTEREST—PLEADING—ADMISSIONS.

1. Laws 1862, § 27, providing that corporations organized thereunder, and their members, shall not be subject to the conditions and liabilities contained in, and shall be exempt from, the corporation act, Laws 1850, p. 347, is unconstitutional so far as it was intended to declare that the stockholders of a corporation formed under its provisions should not be individually and personally liable for any portion of its debts, within Const. 1849, art. 4, § 36, which was given practical effect by Laws 1850, § 32, and Laws 1853, § 16, each providing substantially that each stockholder of a corporation shall be individually liable for its indebtedness in an amount proportioned to his shares of stock.

2. Laws 1862, § 27, is an independent provision, which did not enter into the general object and purpose of the act; and therefore, while in itself unconstitutional, it did not vitiate the other provisions of the act, nor affect the validity of corporations formed under them.

3. Civ. Code, § 288, provided that no corporation formed or existing before the Code took effect should be affected by its provisions unless such corporation should elect to continue its existence thereunder. *Held*, that the provisions which did not affect such corporation without its election were such only as related to the formation and existence of corporations.

4. Const. 1849, art. 4, § 31, provided that "corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed." *Held*, that thereunder liability of stockholders may be so changed as to impose obligations for which they were not liable when they became stockholders.

5. The constitutions of 1849 and 1879, making stockholders individually liable for corporate debts, applied to all corporations; and the legislature has no power to exempt savings banks from their provisions.

6. Code Civ. Proc. § 2047, providing that a witness "may refresh his memory of a fact by anything written by himself or under his direction at the time when the fact occurred," authorizes the use of a bank book in which entries of deposit were made in witness' presence.

7. The liability of a stockholder for corporate debts is primary, and evidence competent and sufficient to show the liability of the corporation is competent against the stockholder.

8. When a pass book is balanced, and the bank then suspends business, and refuses to pay its depositors, it detains moneys received to their use, within Civ. Code, § 1917, providing that interest is payable on moneys received to the use of another and detained from him.

9. Where an allegation that defendant is the owner of certain shares of stock of a corporation is undenied by him, it is admitted that he is a stockholder.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Matthew McGowan against R. H. McDonald and others, as stockholders of the Pacific Bank, to recover from them their respective proportions of certain debts and liabilities of said bank. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Sawyer & Burnett, Rosenbaum & Sheeline, and Dunn & McPike, for appellants. Roger Johnson, for respondent.

BELCHER, C. This action was brought to recover from the defendants, as stockholders of the Pacific Bank, their respective proportions of certain debts and liabilities of the bank, alleged to have been due and owing to depositors therein, and to have been assigned to the plaintiff. The court below gave judgment for the plaintiff as prayed for, from which, and from an order denying a new trial, the defendants appeal.

It appears from the record that the Pacific Bank was incorporated in February, 1863, by the name of the "Pacific Accumulation Loan Company," and with a capital stock of \$5,000,000, divided into 50,000 shares, of the par value of \$100 each, under the provision of an act of the legislature of this state entitled "An act to provide for the formation of corporations for the accumulation and investment of funds and savings," passed April 11, 1862 (St. 1862, p. 199). By this act, corporations organized under it were authorized "to loan and invest the funds of the corporation, to receive deposits of money, and to loan and invest the same." In March, 1866, an act was passed by the legislature entitled "An act to authorize the Pacific Accumulation Loan Company to change its name" (St. 1865-66, p. 620); and thereafter, in April of that year, and in accordance with the provisions of the said act, the corporation changed its name to that of Pacific Bank. In February, 1872, an act was passed by the legislature amending the act of April 11, 1862 (St. 1871-72, p. 132); and, under and in pursuance of its provisions, such proceedings were taken by the stockholders of the said corporation that the capital stock thereof was reduced to the sum of \$1,000,000, and its shares to the number of 10,000, which said capital stock had theretofore been subscribed and paid up, and thereafter remained as the capital stock of the said corporation. The Pacific Bank never elected to continue its existence under the provisions of the Civil Code, which took effect January 1, 1873, but continued to do business as a bank under the act of April 11, 1862, and subsequent acts amendatory thereof and supplementary thereto, until June 23, 1893, when, being insolvent, it closed its doors, and suspended all business.

1. At common law no individual liability was imposed upon the members of a corporation, but article 4 of the constitution of 1849 contained the following provisions:

"Sec. 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law."

"Sec. 36. Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities."

On the 22d of April, 1850, "An act concerning corporations" was passed by the legislature, which provided, in section 32: "Each stockholder of any corporation shall be individually and personally liable for a portion of all its debts and liabilities, proportioned to the amount of stock owned by him." St. 1850, p. 347. In 1853 an act "to provide for the formation of corporations for certain purposes" was passed, which provided, in section 16: "Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions may be instituted and prosecuted." In *French v. Teschemacher*, 24 Cal. 518, it was held that section 36 of the constitution, above quoted, was not self-executing, and that legislation was necessary to give it effect. It was also held that neither of the statutory provisions above quoted was sufficient of itself to impose a liability; "yet, although neither by itself affords a perfect rule, the two combined contain what is omitted in the thirty-sixth section of the constitution, and is needed to give it a practical operation." Section 322 of the Civil Code contains very full and complete provisions as to the liability of the stockholders of all corporations formed or doing business in this state for debts incurred while they were such stockholders, and as to the method of enforcing such liability. And section 3 of article 12 of the constitution of 1879 provides: "Each stockholder of a corporation, or joint stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association."

Appellants contend that they are not liable to the plaintiff in this case for any portion of the debts of the corporation, for the reason (1) that, by terms of the statute under which the Pacific Accumulation Loan Company was organized, the stockholders of the corporation were expressly exempted from such liability; and (2) that, as the Pacific Bank never elected to continue its existence under the provisions of the Civil Code, the corporation was not affected by the provisions of the Code in regard to corporations, and hence no liability was thereby imposed upon appellants.

The provision of the act of April 11, 1862, relied upon in support of the first point, is as follows: "Sec. 27. Corporations formed under this act, and the members and stockholders thereof, shall not be subject to the conditions and liabilities contained in, and shall be exempt from, the operation of an act concerning corporations, passed April twenty-second, A. D. eighteen hundred and fifty." But if, by this section, it was intended to declare that the stockholders of a corporation formed under the provisions of the act should not be in-

dividually and personally liable for any portion of its debts and liabilities, then the section was in plain conflict with section 36 of article 4 of the Constitution of 1849, and must be held to have had no validity or effect; for, as said in *French v. Teschemacher*, supra: "The individual liability of the stockholder is a constituent element in the artificial life of a corporation, made so by the author of its creation, and that life can no more exist under the constitution without the element than a natural person can exist when deprived of an element made indispensable to his existence by the laws of nature. Hence an act of the legislature authorizing the formation of corporations without attaching to the corporations an individual liability would be as obnoxious to the constitution as would be the creation of a corporation by special act."

If, however, this be so, it is claimed that the whole act was rendered unconstitutional, and hence that the bank never had any corporate existence. But this does not follow. In *People v. Hill*, 7 Cal. 103, it was said that, "if some of the provisions of the bill are unconstitutional, this will not vitiate the whole act, unless they enter so entirely into the scope and design of the law that it would be impossible to maintain it without such obnoxious provisions." And in *Robinson v. Bidwell*, 22 Cal. 379, it was held that, where a provision of a statute is of such a nature and has such a connection with the other parts as to be essential to the law, its unconstitutionality vitiates the whole enactment. But if an independent provision, not in its nature and connections essential to the law, be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand as valid. See, also, *French v. Teschemacher*, supra, and *Ex parte Frazer*, 54 Cal. 94, where the same doctrine is announced. It is quite evident that the section of the act in question was an independent provision, which did not enter into the general object and purpose of the act, and which might be stricken out without prejudice to the other portion thereof. It therefore did not vitiate the other portions of the act or affect the validity of corporations formed under its provisions.

The provision of the Civil Code relied upon in support of the second point is as follows: "Sec. 288. No corporation formed or existing before twelve o'clock noon of the day upon which this Code takes effect is affected by the provisions of part iv. of division first of this Code, unless, such corporation elects to continue its existence under it as provided in section 287; but the laws under which such corporations were formed and exist are applicable to all such corporations, and are repealed subject to the provisions of this section." By the constitution of 1849 each stockholder of a corporation was made personally liable for his proportion of all its debts and liabilities, but, to enforce such liability, legislation was necessary. It was not, however, necessary that every act providing

for the formation of corporations should also provide for the liability of their stockholders. A general law making such provisions would have subversed all the purposes required. And while the liability of the stockholder was a constituent element in the life of the corporation, and necessary to its existence, it was still only a burden imposed on the stockholder, and had otherwise nothing to do with the formation or existence of the corporation. In *Railway Co. v. Hellman* (Cal.) 42 Pac. 225, it was held that the provisions of the Civil Code relating to corporations which did not affect and were not applicable to such corporations as were formed before the Code took effect, and had not elected to continue their existence under it, were such only as related to the formation and existence of the corporations. Under this rule, we think it must be held that section 322 of that Code applies to the stockholders of corporations formed or doing business in this state before or after the adoption of the Codes. Besides, our present constitution imposes the same liability; for, as said in *Bidwell v. Babcock*, 87 Cal. 32, 25 Pac. 752, section 322 of the Civil Code and section 3 of article 12 of the constitution have "substantially the same meaning and effect."

It is objected, however, that, if the provisions of the Code and constitution are applicable, they impose obligations upon appellants for which they were not liable when they became stockholders, and are in conflict with that provision of the constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts, and are therefore 'as to them unconstitutional and of no effect. The answer to this objection is that the constitution of 1849 provided: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." Article 4, § 31. Under the authority thus conferred, both the legislature and the people had power to change the law in regard to the liability of stockholders, without violating any provision of the constitution of the United States. In *Re Empire City Bank*, 18 N. Y. 199, a similar question arose. That was a proceeding to enforce a personal liability of stockholders for the debts of the bank under an act passed after the bank was incorporated. The court, by Denio, J., said: "The statute under which the proceedings were had was challenged as being a violation of the constitution of the United States and of this state. By the federal constitution, no state can rightfully enact a law impairing the obligation of contracts. It is argued that, by the general banking law, the associations which it authorizes are alone responsible for its contracts, the shareholders being wholly exempt from liability; and it is insisted that this is in the nature of a contract between the

state and the shareholders, and that the constitutional guaranty of the integrity of contracts, in the national constitution, would be illusory if a state could, by changing its constitution, subvert all existing engagements, and hence that the guaranty applies as well to state constitutions as to other state laws. Without denying or affirming the soundness of these positions, it is enough to say that the general banking law expressly reserves to the legislature the power to alter or repeal it, so that any changes which it or the people think proper to make are fully authorized by the provisions of the supposed contract itself." See, also, the following cases, which are to the same effect: In *re Oliver Lee & Co.'s Bank*, 21 N. Y. 9; In *re Reciprocity Bank*, 22 N. Y. 9; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335; *Tomlinson v. Jessup*, 15 Wall. 454; *Dam Co. v. Gray*, 30 Me. 551.

It is also objected that the Pacific Bank was originally organized for the purpose of doing business as a savings bank, and that the stockholders of such a bank cannot be held liable for its debts. But the provisions of the constitution of 1849 applied to the stockholders of all corporations, without regard to the character of the business to be transacted; and the same is true of the constitution of 1879. It is not therefore within the power of the legislature or the courts to declare any such exemption as that here claimed. And see *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110, and *Kennedy v. Bank*, 101 Cal. 495, 35 Pac. 1039, where liability for deposits in savings banks was enforced. If, however, the law were as it is interpreted by appellants, the objection could not be sustained, for the reason that it is alleged in the complaint, and not denied by the answer, that, at all the times mentioned therein (within two years prior to the commencement of the action), "said bank was receiving deposits and doing a general banking business." And it was proved that since 1886 the bank had been advertising itself as a commercial bank by a printed statement, on the front page of its by-laws, that it is "the oldest chartered commercial bank in California."

2. Appellants contend that the court committed several errors of law in its rulings upon the admission of evidence offered to establish the indebtedness of the Pacific Bank to the assignors of the plaintiff. There were three such assignors, and each had a bank book. The left-hand page of these books showed the date and amount of each deposit, and the right-hand page showed the amount of each check paid by the bank, the number of checks returned, and the balance remaining due and unpaid to the depositor on each occasion when the balances were struck. The last balances were entered on the 22d day of June, 1893, and the amounts shown thereby to be then due to the depositors were the same as those alleged in the complaint.

It was proved that all the entries on the left-hand page were made by the teller of the bank when the moneys were deposited, and in the presence of the depositor, and were correct, and that all the entries on the right-hand page were made by a clerk of the bank when the books were handed in by the depositors from time to time to be balanced. It was also proved by each of the three depositors that, when he received back his books, he verified the entries made by comparing them with his own accounts, and in every instance found them correct; and each one therefore testified that he knew of his own knowledge that the balance shown by the book was the correct amount due him. Neither of the witnesses could, however, state the amounts of his deposits or of his drafts, or the balance due, without refreshing his memory by looking at his bank book; and this, against the objection of defendants, he was permitted to do. The books were also offered, and, against the objection of defendants, admitted in evidence to prove the same facts. Section 2047 of the Code of Civil Procedure provides: "A witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing." It is claimed that this section did not authorize the witnesses to refresh their memories by looking at the books, but we think it did. The entries of his deposits were admittedly made in the presence of the witness, and under his direction, and he knew at the time that they were correct. There can be no question, therefore, that as to them he could refresh his memory from the book. And the entries of the amounts drawn out were clearly made under the direction of the witness, for he handed in his book to have such entries made and the balance struck; and, when the book was returned to him, he checked it up from his own books, and knew that the balance stated was correct. This was at a time when the matter was fresh in his memory, and when he knew that the same was correctly stated. In our opinion, therefore, the case comes fairly within the rule declared by the Code, and there was no error in the ruling complained of.

It is also claimed that the pass books were not admissible in evidence against the defendants, and, in support of this position, *Nelson v. Crawford*, 52 Cal. 248, is cited. It is well settled by numerous decisions of this court that, by the constitution and statutes of this state, the stockholders of a corporation organized therein are made personally liable for their respective proportions of all its debts and liabilities contracted while they are such stockholders. Such liability arises when the debt is incurred, and is primary, and not secondary. In a suit

against a stockholder to enforce his liability, the first fact to be established is the indebtedness of the corporation; and, when that is established, the liability of the stockholder results as a necessary sequence. It would seem, therefore, that any evidence which is competent and sufficient to show the liability of the corporation must be competent and sufficient to show the liability of the stockholder. In *Borland v. Haven*, 37 Fed. 304, a case decided by the United States circuit court for California (Sawyer, J.), the question arose as to the admissibility and effect of evidence in a case like this, and on page 414 it was said "that any evidence that is competent to establish the liability, as against the corporation, must be competent to establish the liability of the stockholders; for, the liability of the corporation being established, the liability of the stockholder for his share follows as an inevitable legal consequence, by the express terms of the constitution and statute." The case of *Nelson v. Crawford*, supra, relied on by appellants, was an action to enforce the liability of the defendants for their portion of the indebtedness of a corporation of which they were stockholders. At the trial, to prove such indebtedness, the plaintiff offered in evidence the books of the corporation,—its ledger, journal, book of resolutions and transfers. It was held on appeal that while in an action against the corporation for the recovery of a debt its books of account, showing the existence of the indebtedness alleged, would be admissible, because they are the admissions of the corporation entered by its servants, still they were inadmissible in an action against the stockholders. And the court said: "If an admission of indebtedness, made by a corporation, be evidence of indebtedness in an action against a stockholder, it is not perceived why a similar admission made by a stockholder should not be evidence in an action brought against the corporation, nor why an estoppel against the corporation—for instance, a judgment rendered—should not equally estop a stockholder to deny the fact of indebtedness in an action brought against him to enforce his proportionate liability." That case is not in point here, for the reason that in this case the books of the bank were not offered, and the objection urged is only to the admissibility of the pass books of depositors. But the pass books were the books of the depositors, and not of the bank. They showed the indebtedness of the bank as certificates of deposit would have shown it. Now, suppose the assignors of plaintiff had held certificates of deposit, instead of pass books; can there be any doubt that they would have been admissible? We think not. Besides, in *Kennedy v. Bank*, 97 Cal. 93, 31 Pac. 846, it was held that the legal effect of the condition prescribed by section 3 of article 12 of the constitution of this state, regulating the individual liability of stockholders for debts contracted and liabilities incurred by the cor-

poration, is that a corporation, when created, becomes the agent of its stockholders to make such contracts and incur such liabilities as are authorized by law and its articles of incorporation, and the contracts which it thus makes bind the stockholders to the extent named. If this be so, then the rule that the admissions of an agent which are made while in the performance of his duty, and are a part of the *res gestæ*, may be proved against the principal, must be applicable here. And see *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110, where it was held that there was no error in admitting in evidence a judgment against the corporation for the purpose of establishing its indebtedness and the liability therefor of its stockholders. We conclude, therefore, that the court below did not err in admitting the pass books in evidence.

3. Some of the appellants object to the allowance of interest against them from the time of the suspension of the bank. But, as before stated, the pass books were balanced and the accounts stated on the day before the suspension. Section 1917 of the Civil Code provides that interest is payable on all moneys "due on any settlement of accounts, from the day on which the balance is ascertained, and on moneys received to the use of another and detained from him." Ordinarily, of course, interest is not payable on the amount found due when a pass book is balanced; but when a bank suspends business, and refuses to pay its depositors, it thereafter clearly detains moneys which it received to their use, and, under the provisions of the Code, must be held liable for interest thereon.

4. The point is made that the evidence does not show that appellant Wood was a stockholder when the deposits were made. But the complaint alleges that Wood was the owner of 212 shares of stock of the bank at all the times mentioned therein, and this allegation is not denied in his answer. His ownership of the stock was therefore admitted, and no evidence as to it was required.

The other points discussed by counsel do not require special notice. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

#### HUGHES v. LAZARD.

(Supreme Court of Arizona. Jan. 11, 1896.)  
CONSTITUTIONAL LAW—LOCAL ACTS—RULINGS ON EVIDENCE—REVIEW.

1. The provision of the revenue act that judgment for a delinquent tax may be entered without service of a summons or other notice on the taxpayer other than by publication is

not in conflict with the act of congress of 1886, known as the "Harrison Act," providing that a territory shall not pass local or special laws regulating the practice in courts of justice.

2. Error in the admission of parol evidence will not be considered on appeal where the facts proved thereby are not shown by the bill of exceptions or by a statement of facts in the record.

Appeal from district court, Pima county; before Justice J. D. Bethune.

Ejectment by A. Lazard against Fred G. Hughes. Judgment for plaintiff, and defendant appeals. Affirmed.

W. M. Lovell, for appellant. S. M. Franklin, for appellee.

ROUSE, J. This is an action in ejectment for the north  $\frac{1}{2}$  of lot 4 in block 223 in the city of Tucson. The said lot had been sold to the territory for the taxes for the year 1890, which had become delinquent. The time for redemption having expired, a tax deed was duly executed to the territory for said lot. Thereafter the board of supervisors of Pima county sold said lot to plaintiff, and executed its deed to him therefor. Plaintiff bases his right of action for the possession of said lot on the title created by said tax deeds. Defendant contends that the tax deed to the territory is void, because the territorial revenue law, relating to bringing suits and obtaining judgments against property for delinquent taxes, is a special law, "regulating the practice in courts of justice," and violates the provisions of the act of congress, 1886, commonly called the "Harrison Act."

No question is presented by the record as to the regularity of all the proceedings under the revenue law of the territory. Therefore, if the said revenue law is not in conflict with the provisions of the act of congress commonly called the "Harrison Act," by reason of the fact that it is a special law "regulating the practice in courts of justice," the title of plaintiff to said lot is valid. The said act of congress contains the following: "That the legislatures of the territories of the United States, now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases, that is to say: Granting divorces. Changing the name of persons or places. Laying out, opening, altering and working roads or highways. Vacating roads, town plats, streets, alleys and public grounds. Locating and changing county seats. Regulating county and township affairs. Regulating the practice in courts of justice. Regulating the jurisdiction and duties of justices of the peace, police magistrates and constables. Providing for change of venue in civil and criminal cases. \* \* \* Providing for the management of common schools. Regulating the rate of interest on money. \* \* \* The sale or mortgaging of real estate belonging to minors or others under disability. \* \* \* In all other cases where a

general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial legislatures thereof." The purpose of said act is to prevent local or special laws in the cases enumerated. The distinction between a special and a general law may not be capable of being formulated in a definition which will be exhaustive of the subject, and applicable to every case; and the question may be better determined upon a consideration of each particular case presented for its application by taking into view the purpose and character of the law, as well as the individuals upon whom it is to operate. *People v. Central Pac. R. Co.* (Cal.) 38 Pac. 905. The further purpose of said act is to prevent special laws from being made in other cases where a general law can be made applicable. First. The act prohibits the making of a law "granting divorces." That cannot be construed to mean that a law by which divorces may be granted cannot be enacted. If that should be the construction of said act, there could be no more divorces granted in this territory. The proper construction to be placed thereon is that divorces cannot be granted by an act of the legislature. Second. "Laying out, opening, altering and working roads or highways." This provision cannot be construed to mean that a law cannot be made providing for the establishing of roads and for working them. Third. "Providing for change of venue in civil and criminal cases." This provision must certainly be construed to mean that changes of venue may be provided for, and may be had, but that a law with reference thereto must contain provisions which would enable all parties who can comply with the conditions imposed to have the benefit thereof. So, by examining each class enumerated in the act, it will not be difficult to understand the purpose thereof. The provision of said act to which attention is called, and on which appellant relies, is as follows: "Regulating the practice in courts of justice." It is contended that as the revenue law provides that judgment may be entered in the district courts for the delinquent taxes, and that no summons or notice thereof is served upon the owners of the property on which the taxes are delinquent, other than by publication, such law "regulates the practice in courts of justice," and is in conflict with the provisions of said act of congress, and for that reason void. In support of that view, the case of *People v. Central Pac. R. Co.* (Cal.) 23 Pac. 803, is cited. The case cited involved the construction of a statute of California, which specified the mode to be pursued in the assessment and collection of taxes from railroads which were constructed through two or more counties of the state. The act did not apply to all railroads. Though, in the opinion in that case, it was stated that said law was in conflict with that provision of the constitution of California

prohibiting the making of a law "regulating the practice in courts of justice," the same court declared in the case of *People v. Central Pac. R. Co.*, 38 Pac. 805, that said statement "must be regarded as obiter dicta," and in said last case sustained said law. The tax is an obligation from the citizen to the territory. It is not of the same character of obligations as exist between citizens; and, for the purposes of its collection, the territory is not limited to the mode or to the same procedure which it prescribes for individuals in the collection of obligations between themselves. The collection of taxes is not the mere collection of a debt, but it is the sovereign act of the territory, to be exercised as may be prescribed by the legislature. The territory, through its legislature, can avail itself of the judicial power as the means by which it will collect the taxes; and in such proceedings it may prescribe such procedure as may best avail for that purpose, irrespective of the mode of procedure provided for the determination of controversies between individuals. *People v. Central Pac. R. Co.* (Cal.) 38 Pac. 905.

Appellant contends that the district court erred in admitting parol evidence to show some things which had been done by the board of supervisors with reference to steps taken for the collection of the taxes due on the property in question, which could only be established by the records of the board of supervisors. As the facts are not presented by the bill of exceptions, nor by a statement of the facts in the record, we cannot consider that point. The judgment is affirmed.

HAWKINS, J., concurs. BAKER, C. J., concurs in the judgment.

#### SEWARD, County Treasurer, et al. v. RHEINER.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 17, 1896.)

FINDINGS BY COURT — NECESSITY — WEIGHT — SCHOOL TAX — REDUCTION OF LEVY — VALIDITY — MUNICIPAL CORPORATIONS — EXTENSION OF LIMITS — TAXATION — FINALITY OF ORDINANCE — INJUNCTION.

1. It is a right that either party to a suit has when the case is tried by the court without a jury, upon request, to have all or any of the issuable facts involved in the pleadings, and upon which there is any evidence, found separately from the conclusions of law, based thereon, so that he may have his exceptions to the separate findings and conclusions.

2. Findings of facts made by the court cannot overcome a fact agreed to by the parties. Upon the trial of a case the court is bound by the facts as agreed to by the parties, and, if the finding of a fact ignores the facts as agreed to, it is erroneous.

3. The inhabitants qualified to vote at an annual school-district meeting, lawfully assembled, have power to vote a tax not exceeding 2 per cent. on the taxable property in the district, as the meeting shall deem sufficient for the various school purposes; and, when so

voted, it is the duty of the district clerk to certify the same to the county clerk of the county on or before the 25th day of August; and, when so certified, it is the duty of the county clerk to place the taxes so voted against all the property of the school district. And the board of county commissioners have no authority to reduce the levy made by the school district, and an order of the board of county commissioners reducing the levy is void; and where the county clerk, under the order of the board of county commissioners, enters the tax against the property at a less per cent. than that levied by the vote of the inhabitants of the school district, it does not render the taxes void, and does not relieve property of the district from liability to any school tax whatever.

4. Where territory adjacent to a city of the third class is subdivided into lots or parcels of five acres or less, the city council of such city have power to add such territory to the city by ordinance; and, when such territory has been added to the city by ordinance, the same becomes liable to taxation for city purposes; and where the city limits have been extended by ordinance so as to include platted grounds, and the owners and residents in such territory, with full knowledge of the proceedings had in extending the limits, acquiesce therein, and vote at elections for city officers thereafter, and vote to issue bonds of the city for city improvements, and sign petitions for bond elections, and bonds are issued by the city upon the adoption of the proposition voted upon, and improvements are made in the added territory by the city, the resident property holders of such added territory are estopped from denying the liability of the property in such territory to taxation for city purposes.

5. Cities of the third class have power to open and improve streets, avenues, and alleys, and make sidewalks, build bridges, culverts, and sewers within the city, and make assessments on all lots or pieces of ground abutting on the sidewalk according to the front foot thereof, to pay for building the same. And where the mayor and council have determined, by ordinance, that a sidewalk is necessary, and, by ordinance, provide for the removal of old walks and the building of new ones, designating the material and providing the dimensions of the walk, their determination is final; and, where the walk is afterwards built according to the provisions of such ordinance, the abutting lots are chargeable with the cost of building the same.

6. A court of equity will not interfere by injunction to prevent the collection of taxes on the grounds that the assessment and levy thereof are irregular or invalid, unless in cases where the property was exempt from taxation, or the taxes were levied by persons not authorized to make the same.

(Syllabus by the Court.)

Error from district court, Rice county; John N. Ives, Judge pro tem.

Action by Edward Rheiner against J. C. Seward, treasurer of Rice county, Kan., and others, to enjoin the collection of taxes. There was a judgment for plaintiff, and defendants bring error. Reversed.

This suit was originally commenced by Edward Rheiner in the district court of Rice county, Kan., to enjoin the treasurer and county clerk of said county, and the city of Lyons and school district No. 69 of Rice county, Kan., from collecting certain taxes assessed and levied on certain property belonging to him. Part of the property charged with the tax sought to be enjoined was situated in the original city of Lyons, part in Workman's addition, part in White's addition, and portions

in the addition known as Purdyville. The separate lots or parcels of land were charged separately with the different kinds of taxes levied thereon. The particular taxes sought to be enjoined were the taxes levied for city purposes, and to pay interest on city bonds, sidewalk taxes, and school-district taxes, and the penalties charged upon these different taxes. Some of these taxes are alleged to be illegal for one reason, and others for different reasons. A temporary restraining order was granted by the judge of the district court, at chambers; and, after the issues were joined, the case was tried before the court, by judge pro tem., without a jury. The principal facts in the case were agreed to between the parties, and the facts agreed to were reduced to writing, and signed by the attorneys for each party. At the conclusion of the evidence, the defendants below submitted, in writing, a request to the court to find the facts and conclusions of law separately, so they could except to the separate findings of fact and conclusions of law. The written request set out 31 questions upon which the court was asked to find the facts. The court took the whole matter under advisement for several weeks, and afterwards found certain facts, and made its conclusions of law based upon the facts as found, and rendered judgment enjoining the defendants from the collection of the taxes complained of, and refused to find on the most of the questions submitted; and, to the refusal to find the facts as requested, defendants below duly excepted, made case, and filed the same in the supreme court for review, which was duly certified to this court by order of the supreme court.

Samuel Jones and J. W. Brinckerhoff, for plaintiffs in error.

JOHNSON, P. J. (after stating the facts). Edward Rheiner commenced a suit in the district court of Rice county, Kan., to enjoin the treasurer and county clerk of said county and the city of Lyons and school district No. 69 of Rice county, Kan., from collecting certain taxes assessed and levied on certain property of his. Part of the property charged with the taxes sought to be enjoined was situated in the original city of Lyons, part in Workman's addition, part in White's addition, and a part in Purdy's addition, commonly known as Purdyville. The separate lots or parcels of land are charged separately with the several different kinds of taxes thereon. The particular taxes sought to be enjoined consist of city of Lyons general and interest taxes, sidewalk assessments, and school-district taxes, and the penalties on all of these different taxes. Some of these taxes are alleged to be illegal for one reason, and others for different reasons.

On the filing of the petition duly verified, the judge of the district court, at chambers, granted a temporary restraining order; and the action was afterwards tried before the



court without a jury, John N. Ives presiding as judge, and the collection of taxes complained of enjoined. The court was requested in writing to make special findings of fact on the issuable facts involved in the case, and his conclusions of law separate. The court made findings of fact on part of the questions submitted, and refused to find the facts on other propositions submitted, and the defendants below duly excepted to the refusal of the court to find the facts on certain issuable questions. The court overruled the objections of the defendants below, and entered up a judgment on such of the findings as it made, and its conclusions therefrom; and the defendants below filed their motion for a new trial, which was overruled, and defendants duly excepted thereto, and made case for the supreme court, which was duly settled and signed, and plaintiffs in error filed their petition in error with the made case attached in the supreme court, which was duly certified to this court for review. On the conclusion of the evidence, the defendants below submitted in writing 31 questions of fact to the court, and requested findings thereon. The court took the whole case under advisement for several weeks, and afterwards made what is designated as "findings of fact," by the court, to part of the questions submitted, and refused to find on any of the other questions requested, and assigns as a reason for not finding on the other propositions that the findings as already made, in the opinion of the court, contain all the facts involved in the issues. The court declined to make findings submitted by the defendants' attorney, except as included in the findings as made by the court. The refusal of the court to find the facts as submitted by the defendants below is the first error complained of in this court.

Section 290 of the Code of Civil Procedure reads: "Upon the trial of questions of facts by the court, it shall not be necessary for the court to state its findings, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state, in writing the conclusions of fact found, separate from the conclusions of law." It is a right that either party to a suit has where the case is tried by the court without a jury, upon request, to have all or any of the issuable facts involved in the pleadings, and upon which there is any evidence, found separately from the conclusions of law based thereon, so that he may have his exceptions to the findings and conclusions; and a refusal of the court upon a request made to find all facts submitted which are material is error, and the facts should be found separate from the conclusions of law, so that the reviewing court may determine whether the judgment based on the facts as found is erroneous or not. It is shown in the evidence that Purdyville, which

is now claimed to be a part of the city of Lyons, was originally surveyed, platted, and the plat thereof recorded in the office of the register of deeds of Rice county, as a town, with streets, alleys, public grounds, and divided into lots and blocks. It was claimed that the town was afterwards vacated, and all the property reverted to the original proprietors; and that the separate parcels or lots of land were thereby again united into one solid body of land, and the title all reinvested in the owners of the lots and blocks; and that the attempt of the city of Lyons and the board of county commissioners of Rice county to extend the limits of said city so as to include this territory were unauthorized and void, for the reason that it included more land in the area belonging to one person than could be taken in by ordinance, without the consent of the owner. The regularity of these proceedings and the legality of the action of the officers in their attempt to make Purdyville a part of the city of Lyons were facts; and if the necessary facts existed, and the officers followed the law in their effort to extend the limits of the city, and they were authorized to extend the boundaries of the city and take in this territory, then it became a part of the city, and was subject to taxation for city purposes. The findings made by the court in the fourth finding are mixed findings of fact and conclusions of law. The court does not find the fact upon which it bases the following conclusion: "That block four and five constitute one body of land, and contain about six acres of land, with a vacated street between these two blocks; that vacated street and other lands owned by the plaintiff contained 10½ acres, and, for the purpose of this case, there are no streets, alleys, or public grounds contained within or upon said 10½ acres." This statement is a mere conclusion, without the facts; and the whole finding is so indefinite that it is hard to understand from the so-called "finding" what the court really did find as a fact, and is not a compliance with the requirements of the law, and is prejudicial to the rights of the defendants below.

The defendants, in their written request, ask the court in propositions Nos. 22 to 29, both inclusive, to find the facts in relation to the plaintiff's residence on blocks 4 and 5 in Purdyville, and whether he voted in the city of Lyons after the passage of the ordinance by the city council attempting to take him into the corporate limits; at what election he did vote; whether he voted at bond elections in the city; what petitions he signed to the city council representing he was a citizen and resident of the city; did he object to being taken into the city limits; was he taken in without his consent; and to find fully what petition he signed representing he was a citizen, resident, and taxpayer of the city of Lyons; how much land was there of plaintiff's in blocks when the same was originally platted, in blocks 4 and 5; how

much land was there in the streets vacated, or attempted to be vacated, by the county commissioners; how much land was there in the unplatted portion of plaintiff's ground which the county commissioners ordered to be incorporated as a part of the city of Lyons; did plaintiff have notice by publication of the application to the county commissioners to take his unplatted lands, and make the same a part of the corporate property of the city of Lyons, and did he make any objection to being taken in by the order of the board of county commissioners; set forth fully all the steps taken before the county commissioners to take into the corporate limits the lands of the plaintiff. "If you find that the plaintiff's land on which he resides, being blocks four and five of Purdyville, as originally platted, was vacated and ceased to be platted grounds, then set forth fully when and how the same was vacated." These facts were all material under the issues in the case, and the court should have found substantially these facts. It was not necessary that the court should have answered all of these questions in the form presented in the request, but it should have found the substance of the proposition submitted, as the plaintiff was seeking to avoid the payment of all taxes for city purposes on the property in the original town of Purdyville, claiming that the order of the county commissioners and the ordinance extending the limits of the city of Lyons were unauthorized and void. All the facts in relation to the platting, recording, and attempts to vacate the streets, alleys, and public grounds, and the proceedings of the board of county commissioners in such attempt, and the order of the board of county commissioners extending the limits of the city to include the unplatted ground, the city ordinance extending the limits of the city so as to include the platted ground, the manner of its passage, its publication, and all the facts in relation to the proceedings, were in evidence before the court, and the court should have found the facts in relation to these matters, and then made the proper conclusions of law based upon the facts as it found them to be. The court nowhere in its findings finds any of these facts, and it was prejudicial error. *Briggs v. Eggan*, 17 Kan. 589.

There were various other questions submitted to the court with request to find upon them, and which were involved in the issues, and were material facts, and the evidence and agreed statement of facts were directed to them, but the court refused to find upon them, which are unnecessary to be stated herein, as the judgment must be reversed. There are other errors complained of that are of more importance, that require the consideration of this court, which are decisive of the whole case, and which we will consider in the order discussed in brief of counsel.

Upon the trial of the case, certain facts were agreed to between the parties, stated in

writing, and constitute a part of the record before this court; but the court seems to have entirely ignored the facts as agreed to by the written stipulation of the parties, and to have found facts directly contrary to the agreed facts. The following facts were agreed to by the written stipulation between the parties in relation to the levy of tax for school district No. 69: "(18) At the annual meeting of school district No. 69, which was held on the 28th day of June, 1888, it was, by the legal voters at said school district meeting, voted and ordered 'that a tax of 10 mills for teachers' wages and 10 mills for incidentals be levied for the ensuing year,' which action of said school district meeting was duly certified to the county clerk, to be placed upon the tax rolls, against the property of and in said school district. And afterwards, and on August 6, 1888, proceedings were had before and by the county commissioners of said Rice county, as appears upon the journal of proceedings of the said board at page 243 (a true copy of which is marked 'Exhibit F,' and attached to plaintiff's petition); and, as per said proceedings of said board of county commissioners, the tax levy against said school district was made as appears in said Exhibit F, and it was carried upon the tax rolls of said county, and against the property in said school district, according to the said action of said board of county commissioners, and in no other manner and by no other authority. (19) That, after the levy of said tax by said school meeting, there were oral complaints among many of the voters, citizens, and taxpayers in the said city of Lyons and school district No. 69 as to said levy being excessive and higher than was needed to carry on the school in said district, which complaints were made to the said school board. That after said complaints were made, and after the said taxes so levied at said school meeting and certified to the county clerk of said Rice county, one Abe Young, the president of said school board, with the consent of the other members of the school board, and in company with ten or twelve of the electors of said district, went before the said board of county commissioners, and made complaint and showing that said levy was excessive, and more than was needed to carry on the school in said district, and asked that the same be reduced to the amount as shown in the action and resolution of the said commissioners, attached to plaintiff's petition as Exhibit F; and that thereupon the said county commissioners made the said order as set forth in said Exhibit. That there was in said school district at said time about 800 voters. (20) That the amount of the taxable property of school district No. 69, as per its assessed valuation for the year 1888, amounted to \$788,987.14, on which two per cent. was levied by the school meeting held June 28, 1888. That it cost to carry on and run the schools in district No. 69, teach-

ers' wages and incidental expenses inclusive, for the school year beginning September, 1888, and ending 1889, the sum of \$8,875.02, and no more." Notwithstanding these facts, the court says in its finding No. 6: "(6) The court finds further that the item of school tax, to wit, 13½ mills, extended against all the property described in plaintiff's petition in school district No. 69, was not levied by any person, board, or officers legally authorized to levy the same, and was extended upon the tax roll of the county of Rice without any legal authority whatever, and is void in law." The agreed facts were that at the annual meeting of the school district, held at the proper time, and conducted as required by law, the school district voted a tax of 20 mills upon the taxable property of said district; and that the levy so made was properly certified to the county clerk, to be extended upon the tax roll for that year; and that, upon the application of certain inhabitants of the school district and of the school board, this levy was reduced by the county commissioners to 12 mills, and the tax charged up in district No. 69 was 13½ mills. It is only claimed in the petition of the plaintiff below that 12 mills of this levy was illegal. It is conceded that 1½ mills was legal tax. We assume that the 1½ mills was for interest due on district-school bonds, and was levied by the board of county commissioners at their meeting, as required by law.

Section 5761, Gen. St. 1889, reads: "It shall be the duty of the board of county commissioners of each county to levy annually upon all taxable property in each district in such county a tax sufficient to pay the interest accruing upon any bond issued by such district and to provide a sinking fund for the final redemption of such bond, such levy to be made with the annual levy of the county. \* \* \* The so-called "finding No. 6" is in direct conflict with this statute. As to the 1½ mills, finding No. 6 says: "The court finds that the item of 13½ mills for school tax was not levied by authority of law." The petition contains no complaint except as to 12 mills of such tax. It did not ask to have the 13½ mills enjoined, but only 12 mills of that sum, which was levied by the school district, and reduced by the order of the board of county commissioners. The finding of a fact by the court cannot overcome an agreed fact. Upon the trial of a case, the court, in its findings of fact, is bound by the fact as agreed on. But the court finds the whole school tax charged void, and renders a judgment and decree enjoining the officers from collecting any school tax whatever. It is admitted that all of the plaintiff's property is situated in school district No. 69, and, by the findings of fact and the conclusions of the court, he is relieved from the payment of any school tax whatever, either to carry on the school or pay any expense of the school district. The agreed facts show that the annual district school meeting for 1888

legally voted and levied a tax of 20 mills on all the taxable property in the school district; that the levy was properly certified to the county clerk to be extended upon the tax rolls against the property of each taxpayer in the district; that, at the request of certain persons of the school board and taxpayers of the district, the board of county commissioners reduced this levy to 12 mills, by the following order: "The matter of tax levy of school district No. 69, was presented by Abe Young, director, and several other resident taxpayers in said district, setting forth that the tax levy made at the annual meeting of said district held June 28, 1888, was too high, it being voted without reference to the valuation of said district,—said meeting voted and levied twenty mills,—and asking the board of county commissioners to reduce said levy to twelve mills, to be levied as follows: For building and fuel, four mills; teachers' wages, eight mills. After considering the matter, and being of the opinion that the reduction asked for would raise a sufficient fund to run said district school, the same was hereby granted, as above asked for. John Howard, Chairman." The board of county commissioners did not make the levy for school-district purposes, but merely reduced the levy made by the district itself, through the duly-qualified electors thereof. It is true, the board of county commissioners have no authority to levy taxes for school-district purposes, and have no authority to reduce the amount levied by the qualified electors. This order of the board was void, and the county clerk was not authorized to reduce the levy certified to him by the district clerk; but the reducing of the per cent. of the levy for school purposes was not a matter of which the plaintiff below could complain of. It was to his interest. It reduced his district-school taxes almost one-half. This would not relieve him, in equity, from the payment of all taxes for school purposes. It is well settled that equity will not interfere to prevent the collection of taxes on the ground that the assessments levied thereon are irregular or invalid, unless they are clearly inequitable, and the enforcement thereof would be against conscience. *Railroad Co. v. Russell*, 8 Kan. 558; *Parker v. Challiss*, 9 Kan. 155; *Smith v. Commissioners*, 9 Kan. 296; *Adams v. Beman*, 10 Kan. 37; *Ryan v. Commissioners*, 30 Kan. 135, 2 Pac. 156; *Dutton v. Bank*, 53 Kan. 440, 36 Pac. 719; *High, Inj. § 485*; *Railway Co. v. Frary*, 22 Ill. 34. In the case of *Association v. Hill*, 51 Kan. 643, 33 Pac. 300, the supreme court says: "It is well settled in the state that injunctions cannot be maintained to restrain the collection of taxes which the plaintiff justly ought to pay, because of error or irregularity in the proceedings of the taxing officers." In the case of *Munson v. Miller*, 66 Ill. 383, the supreme court of Illinois says: "It is only in rare cases that the courts will enjoin a tax. This court has

repeatedly said they will not unless the property is exempt from taxation, or where a tax is levied which is not authorized by law, and in the absence of all legal power, or where the persons imposing it have no power conferred upon them by law to levy such tax; but where the property is liable to the burden under the law, and the law has authorized the tax to be imposed, and it is levied by persons or officers designated by the law to levy such tax, equity will not interfere, but will leave the parties to their legal remedies."

There can be no question but what all the property covered by the assessment and levy of taxes in this case was subject to taxation for school-district purposes in school district No. 69 for the year 1888. There is no question made on the assessment of this property for taxation for said year, and the agreed facts show that the levy was legally made in the first instance by the qualified voters of said district, as provided in section 28, c. 94, Gen. St. 1889. It is not claimed that the levy made by the voters of the school district at their annual meeting was not legal, nor that the qualified voters did not possess the authority to vote the tax they did, or that such levy was void or invalid for any reason; but the complaint is that the per cent. levied by the school district was not charged up against the property, but was reduced by a power unauthorized, and hence the whole school tax became void, and that it would be inequitable to require the plaintiff below to pay 12 mills when he ought to pay 20 mills on the assessed value of his property as levied by the district. The plaintiff below, not having offered to pay any portion of school-district tax, was not entitled to relief as against the tax charged against his property, and his suit should have been dismissed for want of equity.

The plaintiff below complains of certain sidewalk taxes that had been assessed against his lots for the cost of building such walks. The sidewalks were all built along in front of lots owned by plaintiff below, and the cost of building the walks along such lots was paid by the city of Lyons, and charged up as a tax against such lots. The lots of the plaintiff below which are charged with the sidewalk tax are each situated within the corporate limits of the city of Lyons, and the lots are each located along a public street, where walks are required for the safety and convenience of the travelers on the public street of said city, and were all built under the provisions of city ordinances providing for the construction of sidewalks, and each of said ordinances was legally passed and published, as shown by the agreed statements of facts. The plaintiff below had knowledge of the building of each of said sidewalks at the time they were severally commenced, and made no objection to the construction of the same; but the court made the following findings, and designated them as "findings of fact": "Ninth. The court further finds that Ordinance No. 99,

a copy of which is attached to plaintiff's petition as Exhibit H, is void—First, because it attempts to confer legislative power on the city marshal; and, second, because of uncertainty in the description of the amount of sidewalk required to be built by its terms. Tenth. The court further finds that Ordinance No. 102, a copy of which is attached to plaintiff's petition, is void, because it attempts to confer legislative power upon the city marshal." "Eighth. The court further finds that, at the time of building the sidewalk in front of lots 6 and 7 in block 5 in the city of Lyons, there was in front of said lots a good and sufficient plank sidewalk built in accordance with Ordinance No. 23 of said city of Lyons, which had never been condemned by the city authorities, and that the order requiring the building of said sidewalks was unnecessary, and without authority, and void." The court says that Ordinances 99 and 102 are void, because they attempt to confer legislative power on the city marshal. The ordinances provide for the construction of sidewalks along the side of certain streets, designating the streets, giving the point of beginning and the termination, the dimensions, the material to be used, and then provide that the building of the walks shall be under the supervision of the city marshal, and he shall direct the grade upon which the walks shall be constructed. There is nothing in the ordinances that can be construed into legislative power in the city marshal. He is simply to carry into effect the provisions of the city ordinances by superintending the construction of the walks, the leveling up of the grounds, so that the top of the walks will be smooth and correspond to the street crossing, to make the walk conform to a uniform grade. "The court further finds that, at the time of the building of said walk in front of lots 6 and 7 in block 5 in the city of Lyons, there was in front of said lots a good and sufficient plank sidewalk built in accordance with Ordinance No. 23 of said city of Lyons, which had never been condemned by the city authorities, and that the order requiring the building of said walk was unnecessary, and without authority, and void." The old walk was required to be removed, and a stone walk to be put in, by the provisions of Ordinance No. 134, which provides for the removal of the old walk, and that there should be built a flagstone walk, 12 feet in width, and not less than 3 inches in thickness, evenly and smoothly laid in sand, the inside of said walk to begin at lot line in each of the blocks, and provides for a suitable curbing to be placed at the outer edge of the walk, and describes particularly how the curbstone shall be set. Section 3 of the ordinance requires the removal of the old sidewalk, and the building of new ones, in accordance with the terms of the ordinance, before the 1st of January, 1888, or the same will be done by the city marshal of the city, and the expense thereof be taxed against the lots, and collected as other taxes.

As against the findings made by the court are the following facts, that were agreed to in writing, and signed by the attorneys for each of the parties, and were stipulated to be the facts on the trial of the case, which are as follows: "(24) It is agreed that the ordinances mentioned in plaintiff's petition were published at the time mentioned in said ordinances; that said walks were built by the city of Lyons, after the time mentioned in said ordinances, and not before; that plaintiff knew of the construction and building of said walks at the time of the commencement of the building of said walks. (25) It is agreed that at the time of the passage of each of said ordinances mentioned in plaintiff's petition, that there was quorum present at the said council, and that the vote on said ordinances was duly and properly and legally passed, provided said city council had power to pass said ordinances, or any of them." "(28) It is agreed that the sidewalk taxes mentioned in plaintiff's petition are taxed (sought to be levied) for the building of sidewalks built along a side and adjacent to property owned by plaintiff; that the defendant the city of Lyons has never attempted to levy any taxes as sidewalk taxes against the property of plaintiff, except the sidewalk along and abutting to lots owned by plaintiff." "(32) It is agreed that the city of Lyons actually constructed the sidewalk in question, to wit, those mentioned in Ordinances Nos. 99, 102, 134; that said city has paid for the construction of the same; and that the amount sought to be assessed against each of said lots is the amount it was reasonably worth to build said sidewalk in front of each of said lots, and the amount which the city has actually paid out for the same. (33) It is agreed that the cost of the substructures of the walks built under Ordinances Nos. 99 and 102 is not sought to be taxed against the said lots."

The agreed facts should be controlling as to the matters agreed to. They were established facts, and the court was bound by them. The agreed facts show beyond controversy that the ordinances mentioned in the petition of the plaintiff below were legally passed and published as required by law; that the walks were built by the city of Lyons after the passage and publication of the ordinances; that the plaintiff below knew of the construction and building of the walks at the time of the commencement thereof; that said walks for which sidewalk taxes are charged were built along a side and adjacent to the lots owned by the plaintiff below; that the city of Lyons has never levied any tax as sidewalk tax, except for sidewalks built along the front of the lots owned by plaintiff below, and the taxes are charged up to the lots along which the said walks are built; that the city of Lyons actually constructed the sidewalks along the lots charged with the sidewalk taxes, and they were built under Ordinances Nos. 99, 102, and 134; that the city has paid for the construction of the same. The validity of these side-

walk taxes depends upon the power of the city of Lyons as a city of the third class to build the sidewalks along its streets, and charge the cost thereof to the owners of the abutting lots. Section 36, cl. 2, of the act concerning cities of the third class (chapter 19a, Gen. St. 1889), gives the cities of the third class power "to open and improve streets, avenues and alleys, make sidewalks and build bridges, culverts and sewers within the city; and for the purposes of paying for the same, shall have power to make assessments in the following manner, to wit: First. For opening, widening and grading all streets and avenues, and for all improvements of the squares and areas formed by the crossing of streets, and for building bridges, culverts and sewers, and footwalks across streets, the assessments shall be made on all taxable real estate within the corporate limits of the city, not exceeding ten mills on the dollar, for these purposes, in any one year. Second. For making and repairing sidewalks, macadamizing, curbing, paving and guttering the assessments shall be made on all lots and pieces of ground abutting on the improvements, according to the front foot thereof." Cities of the third class are vested with absolute power to make sidewalks along the streets within the city limits, and are given full discretion to determine when and where they shall be built and the kind of walks to be built, and, for the purpose of paying for the same, have power to make assessments on all lots and pieces of ground abutting on said improvements, according to the front foot thereof; and when the mayor and council have determined upon what street or streets sidewalks are to be constructed, and the kind of walks that are necessary, their determination is final. The mayor and city council of the city of Lyons having determined upon the matter of building sidewalks on the streets of the city, and duly passed and published ordinances for that purpose, by such ordinances gave the lot owners along said streets ample time to build a walk in front of their property; but they, failing to avail themselves of the opportunity of doing so, are not in a condition to complain of the assessment against the property to pay for the improvements made by the city.

The foregoing observations are, perhaps, sufficient to a final determination of this case; but as the plaintiff below commenced his suit in a court of equitable jurisdiction, asking for equitable relief, and alleging certain reasons why he should be relieved from the payment of certain city taxes, it will be but proper for this court to determine the further questions as to the liability of the plaintiff below to pay said taxes on his property located in the old town of Purdyville, which is claimed to have become a part of the incorporated city of Lyons by reason of the ordinances passed by the mayor and council of said city extending the limits thereof so as to take in all the portions of the platted grounds in Purdyville, and also by the pro-

ceedings had by the board of county commissioners of Rice county extending the city limits of the city of Lyons so as to include the unplatted grounds in Purdyville.

We do not think the order of the board of county commissioners of Rice county in vacating Rheiner and Reed streets, in Purdyville, was valid. The proceedings to vacate the streets and alleys were had under section 3, c. 115, Gen. St. 1889, which requires that the notice to be given by the persons desiring such vacation be advertised for four consecutive weeks in a weekly newspaper of general circulation in said town; that, at the next regular session of the county commissioners of the county in which the town is located, a petition would be presented to the commissioners praying for the vacation of such part of the town as desired, describing the same properly. The record of this case shows that the notice upon which the county commissioners based their order attempting to vacate the streets of Purdyville was only published for three consecutive weeks in a newspaper of general circulation in said town. The giving of notice by publication in a newspaper of general circulation in the town of Purdyville was essential to the jurisdiction of the board of county commissioners to vacate the streets of the town; and, notice not having been given as required by law, the order of the board of county commissioners was void, and the town of Purdyville remained platted grounds, and could be properly taken into the city limits by ordinance. Gen. St. 1889, c. 19, § 94.

The mayor and council passed and published an ordinance to extend the city limits so as to include all the territory in Purdyville that had been platted in said town. The territory sought to be annexed was subdivided into lots and blocks, and did not exceed five acres in area. The city council also presented a petition to the board of county commissioners of Rice county to have the corporate limits extended over the same territory, and the board of county commissioners made an order extending the corporate limits also. We think the action of the mayor and council was such that the limits of the city were properly and legally extended so as to take into the corporate limits all the platted portion of the town of Purdyville. Such seems to have been the understanding of the plaintiff below at the time and for several years thereafter, as he voted at the several city and general elections held in the city for the election of city officers, for the election of state, county, and township officers, and all officers voted for in said city during the years of 1887, 1888, and 1889; that he voted at special elections in the city to vote bonds to aid railroads, to build waterworks, to establish salt plants, and to develop the mineral resources of the city. He signed petitions to the city council asking that said council call an election to vote aid to the Kansas & Midland Railroad, in which

petition he represented and set forth he was a citizen, resident, and taxpayer of the city of Lyons; that an election was called and held for the purposes stated in the petition; that he voted at said election, and bonds were voted on the property within the corporate limits to the amount of \$35,000. He also signed a petition to the city council, in which he set forth that he was a resident, citizen, and taxpayer within said city, praying for the calling of an election to vote the sum of \$3,000 in bonds of the city to be subscribed and given for stock for the purpose of natural gas, oils, and minerals, which was acted upon, and election was held. He voted at said election. Bonds were voted, issued, and sold. He also signed a petition, which was presented to the council of said city, praying for the calling of an election to vote \$5,000 of the bonds of the city to aid in the erection of a salt plant in said city. Said election was held, and he voted thereat, and the proposition carried. Street crossings have been put in and built by the city of Lyons leading up to the property of the plaintiff below; crossings along Purdy and Reed streets, in Purdyville. Plaintiff has registered twice in his ward as a legal voter therein; received a certificate from the city clerk of the city of Lyons so certifying. His property was assessed for city purposes in 1887, and he paid the taxes that year without objection. It was also agreed in the stipulation signed in this case that Edward Rheiner signed the following petition, which was presented to the city council: "It is agreed that the plaintiff, Edward Rheiner signed the following petition, which was presented to the city council, the one marked 'Exhibit 4' being in plaintiff's handwriting, and that the same was presented to the city council, which petition is as follows: 'To the City Council of the City of Lyons, Rice County, Kansas: Your petitioners, being the immediate and adjoining property owners, residents, and persons mostly interested, do petition your honorable body to pass and enact a law or ordinance providing for the building of a sidewalk along and over the following lands, to wit: Along the south side of Commercial street, commencing and running from the west side of Reed street due east, along the south side of Commercial street, to the east side of Purdy street; from thence, due south, 150 feet, along the east side of Purdy street,—being in Purdyville, in Rice county, Kansas, and in the corporate limits of the city of Lyons. [Signed] Edward Rheiner.'" On the 1st day of November, 1888, the city of Lyons became a city of the second class, and all of the original town of Purdyville was included in the city of Lyons as a city of the second class, as described by metes and bounds in the governor's proclamation; and plaintiff below voted at the first election after said proclamation was issued, and has ever since voted at the city elections for the election of city of-

ficera. The plaintiff's own conduct in acceptance of the action of the city council and the board of county commissioners in extending the limits of said city, and in receiving all the benefits growing out of the improvements made at his request and with his acquiescence, estops him from denying his obligation to pay his part of the burden thus imposed.

The judgment is reversed, and the case remanded to the district court of Rice county, with direction to set aside the injunction, and render judgment against the plaintiff below for costs of suit. All the judges concurring.

### CONKLIN v. DUST.

(Court of Appeals of Kansas, Southern Department, E. D. Jan. 11, 1896.)

#### JUDGMENT BY DEFAULT—VACATING—PARTITION FENCES.

1. Where a judgment is taken against a defendant by default, without other service than by publication in a newspaper, and the defendant appears within three years after the rendition of the judgment, and gives notice to the plaintiff of his intention to make an application to open up such judgment, and files a full answer to the petition, and offers to pay all costs required by the court, and makes it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense, the court should open up the judgment, and allow the defendant to make his defense to such action.

2. Where a quarter section of land is owned by two persons, one owning the east half thereof and the other owning the west half, and the party owning the west half lives upon it and occupies it, and builds a stone fence, wholly on his own land, and four feet west of the line separating said tracts of land, and there is no agreement, either expressed or implied, between the landowners, that said wall is to be used or treated as a partition fence, and a tenant occupying the lands of the party owning the east half of said quarter section, without the knowledge or consent of the owner, runs the side lines of fence across said four-foot strip, and connects them with a stone wall, and the owner immediately, upon being informed of such fact, repudiates the act of the tenant, and refuses to accept such stone wall as a partition fence, and the tenant had no authority whatever to connect said line fences and the stone wall, the owner of the west half of such quarter section cannot compel the owner of the east half to accept the wall as a partition fence and pay the value of one-half thereof, and to keep one-half of such fence in repair.

(Syllabus by the Court.)

Error from district court, Elk county; M. G. Troup, Judge.

This suit was commenced in the district court of Elk county, Kan., to recover the award of fence viewers for the assignment to each party of a certain portion of fence to be kept up by each, and awarding a certain amount to be paid to the plaintiff below. The suit was commenced by attachment, and the lands of defendant attached. Judgment rendered by default, on publication notice in a newspaper. Defendant filed motion, answer, and affidavit to set aside the judgment, under section 77 of the Code of

Civil Procedure. On hearing, the application to open up judgment and permit defendant below to defend against said action was denied. Defendant excepted, made case, and brings the matter to this court for its determination. Reversed.

Beardsley, Gregory & Flannelly, for plaintiff in error. L. Scott, for defendant in error.

JOHNSON, P. J. J. E. Dust and R. R. Conklin were the owners of a certain quarter section of land, situated in Elk county, Kan. Conklin owned the east half of the quarter, and Dust the west half. In 1888 Dust erected a stone fence along the east side of his tract of land, and about four feet west of the line dividing said tracts of land. Dust resided upon his tract of land, and inclosed and cultivated the same. Conklin resided in Kansas City, Mo. His half of said quarter section was occupied and cultivated by a tenant named Marion Crews. Some time in 1890 Marion Crews run down the said line fences and across the four-foot strip on the east edge of Dust's farm, and connected the said line fences to the stone fence, and was cultivating the land of Conklin on the east side, being the east half of the quarter section, and was in fact using the stone fence as a partition fence. Conklin first learned of these facts in August, 1890, by a letter written by Dust to a mortgage company of which Conklin was president. Dust, in the letter, demanded payment for one-half of the cost of the fence. Conklin immediately instituted an investigation of the matter, and found the fence was wholly on the land of Dust, about four feet west of the line, and refused to recognize the stone wall as a partition fence. He bought material, and immediately began the construction of a fence wholly on his own land, along near the line between the east and west 80-acre tracts, and within 60 days had his own fence completed. He repudiated all acts of Marion Crews, his tenant, done in connection with the stone fence, declaring the same to have been done without his knowledge or consent, and that said Marion Crews had no right or authority to make such connection, or to do any act in the premises that would be obligatory on him. Dust gave notice that he would appear before the fence viewers of the township in which the land was situated to have them determine under the law what part of the stone fence Conklin should pay for,—whether one-half the same,—declaring it to be a partition fence. Dust applied to two of the fence viewers, who met and made their award in writing, awarding to Dust the sum of \$120, the amount that Conklin should pay for one-half of the fence, and assigning a certain portion of the fence to be kept up and maintained by Conklin. Conklin refused to recognize the stone wall as a partition fence, or to pay the award of the fence viewers. On the 22d day of August, 1891, Dust began a suit in attachment against



Conklin to recover the award of the fence viewers. Suit was brought in the district court of Elk county, and an attachment was levied upon the 80 acres of land owned by Conklin, being the east half of said quarter section. Upon the filing of the petition and affidavit in attachment, an affidavit of non-residence of Conklin was also filed, and notice by publication in a newspaper was made, fixing the answer day on the 9th day of October, 1891. On the 12th day of October, 1891, proof of publication was filed, and the publication notice was approved by the court; and on the same day judgment was rendered against Conklin by default, and the attached property was ordered to be sold to satisfy said judgment and costs of suit. Execution was issued on said judgment and levied upon Conklin's land, which had theretofore been taken in attachment, and the sheriff was proceeding under said execution to sell the same; and after the land had been advertised for sale under said execution, Conklin, on the 22d day of December, 1891, filed in said court an answer to plaintiff's said petition, and at the same time filed his motion, duly verified by affidavit, to set aside the judgment for the reason that no service other than publication in a newspaper had been made on him; that during the pendency of this action he had no actual notice thereof to appear in court and defend against said action; and that he had no actual knowledge at all of the proceedings of said action until his attention was called to the advertisement of the sheriff's sale, which was to take place on the 4th of January, 1892. On the said 22d day of December, 1891, Conklin also gave notice in writing, to the said Dust and his attorneys of record, that he intended on the first day of the next term of the district court of Elk county, Kan., to make application to said court to have the judgment theretofore rendered in said cause vacated; that his motion for that purpose was duly verified, and a full answer to the petition in said cause had been by him filed. Conklin, at the same time, offered to pay all of such costs, to the time of filing the answer and motion, as the court might require.

The answer of Conklin, filed, is as follows: "Now comes the defendant, and for answer to the petition of the plaintiff, filed herein, denies each and every allegation herein contained, except such as are hereinafter specifically admitted. Further answering, this defendant admits that he is now the owner of the east half of the northeast quarter of section twenty-four (24), township thirty (30), range ten (10), Elk county, Kansas; that at the time when defendant became the owner of said real estate there was a stone fence built near the west line of the defendant's said land, but built wholly upon the west half of said half section, which was, as this defendant is informed and believes, and upon information and belief al-

leges the fact to be, at that time owned by the plaintiff herein; that said stone fence was at least four feet to the west of the dividing line between the said lands of the plaintiff and defendant; that this defendant did not make use of or in any way treat the stone fence as a partition fence, and that there was never any agreement between this defendant and plaintiff that such fence should be so treated; that this defendant had no knowledge whatever that said fence was being used as a partition fence between said two tracts of land until some time in the month of September or in the month of October, 1890; that at that time, and for some time prior thereto, defendant's said land had been in possession of one Marion Crews, who was during all such time the tenant of this defendant, and that defendant neither gave to said tenant any authority or right to use or treat such fence as a partition fence; that the first advice or knowledge which came to defendant that there had been an attempt on the part of this tenant to so use said stone fence was given through a letter dated August 28, 1890, written by J. R. Dust to the Jarvis-Conklin Mortgage Trust Company (which was at that time the agent of the defendant in the leasing of said land), at its office in Kansas City, Mo.; that in and by said letter said Dust advised the said company that the said stone fence was built wholly upon his land, and that the tenant of this defendant had built across the four feet, and joined to the said stone fence without any knowledge on the part of the said Dust until the tenant had his crop in the ground. Defendant further says that, as soon as he received this letter, he at once investigated the matter, and, finding that the said stone fence was, as represented, wholly upon the land of the plaintiff, at once notified the plaintiff that he refused to recognize said fence as a partition fence; that he had not and would not authorize his tenant to treat the same as a partition fence, but that he (the defendant) would place a fence along the whole of the west line of his (the defendant's) said land; and thereupon this defendant ordered posts and wire for the making of said fence. Nevertheless, knowing all these facts, said J. R. Dust attempted to compel this defendant to buy the half of said stone fence, although the same was not a partition fence; and, after defendant had so commenced to build his own fence, the said Dust caused proceedings to be instituted before two of the fence viewers of said township to compel this defendant to pay the one-half value of said stone fence. This defendant admits the making of the finding by said fence viewers, as shown by Exhibit A, attached to the plaintiff's petition. This defendant was represented at the hearing of the said fence viewers, and they were informed, at that time, of the facts as hereinbefore set forth, and that this defendant proposed to build



a fence as herein alleged upon his own land, along the west line thereof, and not in any way to use said stone fence for a partition fence, and that said viewers nevertheless made the findings as shown by said Exhibit A. Defendant further says that after such finding he proceeded with diligence to complete the fence proposed by him to be built along the said west line of his land, and within 60 days from the time of the making of such findings the defendant had wholly completed said fence. Wherefore this defendant asks judgment for his costs."

On the 1st day of February, 1892, being the first day of the term of court after giving notice and filing the motion and answer, the application of the defendant below to open up the judgment and for leave to plead came on before the court for a hearing, and the following proceedings were had and entered of record: "Now, on this 1st day of February, 1892, this cause came on to be heard on the application of the defendant to open up the judgment heretofore rendered in this action, and be permitted to defend in the same, as provided by section 77 of the Code; and comes the plaintiff in person, and by his attorney, A. M. Bowen, and the defendant comes by his attorneys, Beardsley & Gregory and Douthitt & Ayers. Thereupon the defendant, the applicant, shows to the court that he has given notice to the plaintiff of his intention to make such application; that he has filed a full answer to the petition; that he offered to pay all costs if the court required them to be paid; that during the pendency of this action he had no actual notice thereof in time to appear in court and make his defense; and that said judgment was rendered upon no other service than that of publication. Thereupon the plaintiff objects to the opening up of said judgment because the answer of said defendant, so filed, states no defense to the petition of plaintiff. Whereupon the court, being fully advised in the premises, finds that said answer of said defendant does not state a defense to the petition of plaintiff, and it is thereupon ordered and adjudged that said application for the opening up of said judgment be overruled. To which ruling of the court the defendant excepted." Within the time allowed by law the defendant below filed his motion to set aside the order refusing to open up the judgment, which motion was, on the 4th day of February, 1892, overruled, and defendant below then and there duly excepted, and made case for the supreme court, and brings the matter to this court for its consideration.

There is only one question involved in this case for the consideration of this court, and that is, does the answer of Conklin, filed to open up the judgment, state facts sufficient to constitute a defense to the petition of plaintiff below? To solve this question involves an examination of the statute in rela-

tion to partition fences between adjacent landowners. Section 8 of chapter 40 of the General Statutes of 1889 reads: "The owners of adjoining lands shall keep up and maintain in good repair all partition fences between them, in equal shares, so long as both parties continue to occupy or improve such farms, unless otherwise agreed upon. Section 22 reads: "The word 'owner,' under the provisions of this act, shall be held to include and apply to occupants or tenants, when the owner does not reside within the county; and no proceedings under this act shall bind owner, unless he shall be notified; but he shall be liable to the occupant or tenant for the cost and expense of erecting and maintaining, under the provisions of this chapter, any partition fence upon the line of his land, unless there is a special agreement to the contrary." Section 23: "A person building a fence may lay the same upon the line between his own land and the lands adjacent, so that, the fence may be partly on one side of such line and partly on the other; and the owner shall have the same right to remove it as if it were wholly on his land." Section 24: "The foregoing provisions concerning partition fences shall apply to all fences standing wholly upon one side of the division line and used as a partition fence." The statute in relation to partition or division fences does not undertake to define what shall constitute a partition fence, except in those cases where a fence is in use as a partition fence, and so treated by the parties. The word "partition" signifies parting or dividing; to divide into distinct parts by line or walls. Can a wall or fence built by the owner of land, four feet distant from the line separating his lands from that of another, without any agreement, either expressed or implied, be treated as a partition fence or wall, against the protest of the owner of the land next adjacent? We do not think that a fence, built four feet from the line dividing the land of adjacent properties, where the same is not built under some agreement or understanding between the parties that it is to be a partition fence, or has been used by the parties as a partition fence, can be treated as a partition fence under the provisions of our statute. We think the answer filed by Conklin contained a full and complete defense to the plaintiff's petition, and the court erred in refusing to vacate the judgment of the court below. The defendant below had complied fully with section 77 of the Code of Civil Procedure, and the judgment should have been set aside, and the defendant below allowed to make his defense to the action of the plaintiff below. The judgment is reversed, with direction to the district court to set aside the judgment, and allow the defendant below to file his pleadings, and defend against the action of the plaintiff below. All the judges concurring.

**ST. LOUIS & S. F. RY. CO. v. STEVENS et al.**

(Court of Appeals of Kansas, Southern Department, El. D. Jan. 11, 1896.)

**NEW TRIAL—SERVING CASE—EXTENSION OF TIME—FIRES SET BY LOCOMOTIVES—EVIDENCE—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.**

1. Where a motion for a new trial is overruled on May 21st and 60 days' time is given to make and serve a case for the supreme court, and on July 18th the time is again extended for 90 days, and on the 12th of October the court makes the following order, "It is hereby ordered that the time heretofore allowed for making and serving a case be, and the same is hereby, extended 30 days from and after the 18th day of October," and the case is made and served on the 12th of November, *hdd*, that the court had jurisdiction of the matter, and the case was served within the time allowed by the court.

2. Where it is alleged, in a petition, that a certain building and contents were destroyed by fire communicated to it by a railway company in the operation of its road, and the allegations of the petition are denied, and defendant alleges contributory negligence as an affirmative defense, and on the trial of the case the evidence shows the location of the building; its proximity to the railway track; the condition of the weather; course of the wind; that it was blowing hard from the southwest; that the railway employes were engaged in switching upon the side track within a few feet from the building; the making of flying switches with a number of loaded cars; the manner in which it was done; the discovery of fire almost immediately after the passage of the engine; that there was no fire in or about the building, and had not been for a week previous to the time the fire occurred,—it presents such facts as were proper for the jury to pass upon, as to whether the fire that consumed the property was communicated to it by the engine of the defendant below, and the testimony was such that the jury were justified in finding that the fire was communicated to the building by the engine of such road.

3. Where special instructions are prepared in writing and presented to the court, the court is not bound to give them in the exact form or language in which the instructions are prepared. If the court gives substantially the same instructions in the general charge to the jury, it is not error to refuse to give the instructions as requested.

4. It is not error for the court to refuse to give instructions where there is no evidence to justify the giving of the same.

5. A person owning property along the right of way of a railway has a right to occupy such property and erect such buildings as he may have occasion to place thereon, so that he does not occupy it with such buildings as are known to be unsafe and dangerously exposed. He is the owner of the land, and has a right to its occupancy, and has a right to occupy it and use it for all legitimate uses. He is only required to use such care and diligence in the erection of buildings and protection of his property against damage by fire as an ordinarily prudent person would under all the surrounding circumstances. He is no more bound to guard his property against fire than the railway company is to guard against permitting the escape of fire from its engines. Each are held to ordinary care and prudence in the use of their property.

6. It is error for the court to instruct the jury that a plaintiff may recover damages for negligence in the destruction of property by fire, even if his negligence is but slight, or the remote cause of the injury. Such instructions are seldom proper under the evidence on the trial of a case, and should not be given, as they are generally erroneous, and they are but the state-

ment of the rule of comparative negligence. The correct rule is that one who, by his negligence, has brought an injury upon himself, cannot recover damages for it, and the plaintiff in such case is entitled to no relief; but where the defendant has been guilty of negligence, also, in the same connection, the result depends upon facts. The question in such case is: (1) Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence, or want of ordinary care and caution, that but for such negligence, or want of care and caution, on his part, the misfortune would not have happened.

(Syllabus by the Court.)

Error from district court, Wilson county: L. Stillwell, Judge.

This suit was commenced in the district court of Wilson county by J. C. Stevens and Eveline Stevens, to recover damages alleged to have been sustained by reason of the destruction of a certain building, owned and used by them as a pottery and tile factory, together with material, machinery, and manufactured articles therein, by fire communicated thereto by an engine of the St. Louis & San Francisco Railway Company in the operation of its road. Trial by the court and jury. Verdict and special findings. Motion of defendant for judgment on special findings of fact, notwithstanding the verdict of the jury, overruled; and judgment for plaintiffs below on the general verdict. Defendant excepts, makes case, and brings the matters to this court for review. Affirmed.

A. A. Hurd and J. L. Denison, for plaintiff in error. J. W. Sutherland and P. O. Young, for defendants in error.

JOHNSON, P. J. (after stating the facts). On the 30th day of October, 1890, J. C. Stevens and Eveline Stevens commenced an action in the district court of Wilson county against the St. Louis & San Francisco Railway Company to recover damages which they sustained by reason of the destruction of a certain building used as a pottery at Neodesha, together with the machinery and material in and about the pottery building, and the manufactured articles in said building. It is alleged in the amended petition of the plaintiffs below that such building, machinery, and contents were destroyed by fire communicated thereto by the railway company, by reason of negligence of said railway company and its employes in the management of its engines while operating said railway. The amended petition of plaintiffs below sets out certain specific acts of negligence on the part of the railway company as follows: "(1) In operating the same with torn, loose, and defective and improperly located netting; (2) in having large quantities of wood and wood embers in a coal-burner engine, and burning wood in the same; (3) making too sudden and heavy draught upon said engine by pulling too many cars at once, for the purpose of acquiring a rapid motion in a

short space of time; (4) in making too sudden and heavy draught upon said engine while the furnace contained large quantities of wood and wood embers; (5) making a fly switch, especially with a large number of cars, and especially while the engine's furnace contained large quantities of wood and wood embers; (6) in using the blower close to plaintiff's building." The defendant below, in answer to the amended petition, sets up in its answer—First, a general denial of all the allegations of said amended petition; and, second, alleges contributory negligence on the part of the plaintiffs. The plaintiffs below reply to the answer of defendant, and deny that they were guilty of negligence contributory to such injury. Upon these issues the case was tried before the court and jury. The jury returned a verdict for the plaintiffs below, and made special findings of facts. Defendant below filed motion for judgment against the plaintiffs for costs on the special findings of facts, notwithstanding the general verdict of the jury. Motion overruled, and excepted to. Defendant below also filed motion for a new trial, which was overruled, and excepted to. Judgment on verdict for the plaintiffs, and excepted to. Defendant made case, and brings the matter to this court for review.

Defendants in error insist that the petition in error be dismissed for the reason that the case was not made and settled within the time allowed by the court, and that at the time of the settlement and signing of the case the judge of the district court had lost jurisdiction. The record shows that on the 21st day of May, 1891, the motion for a new trial was overruled, and defendant excepted; and the court, for good cause, extended the time to make and serve a case 60 days; and on the 18th day of July the judge of said court, for good cause shown, further extended the time in which to make and serve case 90 days from the date of making such order; and on the 12th day of October the court again made the further order and entered it upon its records as follows: "It is hereby ordered that the time allowed for making and serving a case be, and the same is hereby, extended 30 days from and after the 18th day of October, 1891." The case was made and served on the attorneys for the plaintiffs below on the 12th day of November, 1891, and settled and signed on the 10th day of December, upon proper notice to the attorneys for plaintiffs below, and the record states: "On this 10th day of December, 1891, upon presentation of this case for signing and settlement, plaintiffs appeared by attorneys and objected to the signing and settlement of the same, for the reason that the judge had lost all jurisdiction of the same. Objection overruled. Plaintiffs took exceptions to the ruling." The particular reason assigned why the judge had lost jurisdiction is that the order of the judge extend-

ing the time to make and serve a case on the 18th day of July would expire on October 16th, and that under the order made by the court on the 12th day of October, extending the time 30 days from and after the 18th day of October, the 30 days would begin to run after the time formerly given had expired. Consequently, during the interval, the court lost jurisdiction. We do not think this position tenable. The order of October 12th was during the time that the court had jurisdiction, and was within the time the judge had extended the time to make and serve a case; and, while the court or judge had jurisdiction, the time to make and serve a case for the reviewing court could be extended for good cause shown, and any order made for the extension of time to make and serve a case, while the court or judge still retained jurisdiction, would be valid, and the court or judge could specify the day upon which the case should be served, or could order that the time be extended for so many days from the day upon which the order was made, or from some other period in the future. The case was made, served, and settled in all respects as required by the order of the court, and the case is properly before this court for review.

The first error complained of by plaintiff in error is, "was it negligent on the part of the company to use an engine in its switch yards in which there may have been remnants of a wood fire?" It also claims that there is no direct evidence that the fire which destroyed the property of the plaintiffs below was communicated by the engine used on the road of defendant below; that "the plaintiffs below seek to recover in this action upon a mere theory,—that is, the engine upon the defendant's road was engaged in switching cars, and shortly after passing the building of plaintiffs fire was discovered in the building. It has frequently been held that a theory cannot be said to be established by circumstantial evidence." We think the plaintiffs sought to recover upon facts. The plaintiffs allege that their property was destroyed by fire communicated to it by an engine of the railway company in the operation of its road, and allege negligence on the part of the railway company which resulted in the destruction of their property; and to support these allegations they introduced evidence to prove the location of the property destroyed; the close proximity of the track of the railway company to their property; the condition of the weather; the course of the wind; that it was blowing hard from the southwest; that the defendant below was engaged in switching cars upon the side track, within a few feet of this property; the making of a flying switch with a number of loaded cars; the manner in which it was done; that the engine was a coal burner, and that it was burning wood for fuel at the time the

fire occurred; that the burning of wood in a coal burner is dangerous; that barrel staves saturated with oil had been used to get up steam quickly, and that the engine was run out of the roundhouse hurriedly after being fired up before the wood embers had time to burn out; the great number of sparks that were emitted from the engine while being thus used in switching; that it threw out sparks and oil over and upon a small child, several feet away from the track, and burned it so that it cried; and that the sparks were thrown over other children so thickly that they had to turn their backs to the engine; that large quantities of sparks and live coals were thrown against the window glass of buildings at some distance, with such force that it made the glass rattle; that the engine made unusual loud noise; that there was no fire in or about the building, and had not been for more than a week prior to this time; that, within from 5 to 10 minutes after the engine passed the building, it was discovered to be on fire on the side of the roof next to the railroad track, on the outside; that it was just beginning to send forth a small volume of smoke when first discovered; that the fire was all on the outside of the roof when discovered. We think that these facts were such that the case was proper for a jury to pass upon, as to whether the fire that consumed this property was communicated to it by the engine on the track of the defendant below, and the testimony was such that the jury were justified in finding that the fire was communicated to the building by the engine on the railroad.

The second error complained of is that the court refused to instruct the jury as requested by the defendant below on the question of contributory negligence. The instructions requested by the defendant below are as follows: "(1) In order to entitle the plaintiffs to recover in this action, you must be satisfied, by a preponderance of the evidence, of the following propositions: First, that the fire which destroyed the plaintiffs' property was caused by fire thrown from the engine of defendant; second, that the same was caused by the negligence of the defendant's servants in running and operating the engine of defendant, or on account of some defect in the construction or condition of the engine at the time of the fire; and, third, that the plaintiffs did not, by their own negligence or carelessness, contribute to the loss or destruction of their property. (2) It is a circumstance the jury may consider, as going to prove contributory negligence, that the plaintiffs erected or purchased buildings which had been erected, near the railroad track of defendant, at a point where said track was used in switching cars and trains, without guarding it in any way from fire. Persons who have property near railroads, and especially where the company at that point uses its track for the purpose of switching its cars and trains,

are bound to take notice of the increased danger to their property from fire, and to exercise a proportionate amount of care to protect it. Therefore, if you find from the evidence that, at the time the plaintiffs' property was destroyed by fire, to wit, on the 23d day of March, 1890, its said engine No. 214 was in good repair, and provided with all the most approved appliances then in use for the prevention of injuries by fire, and was in charge of competent and skillful men as engineer and fireman, and was managed in a proper and skillful manner, then the plaintiffs cannot recover, notwithstanding you may find the fire was caused by sparks of fire from said engine. (4) The court further instructs you that, in case you should find from the evidence that plaintiffs' property was burned as in their petition alleged, and the evidence as to the origin of the fire is purely circumstantial, and it is further shown by the evidence that said property was situated equally near and in the same direction from a railroad other than that of defendant, upon which trains drawn by locomotive engines were being run at or about the time the fire originated, and there should be doubt in your minds as to which engine communicated the fire, then and in that event the plaintiffs cannot recover in this action." The court gave, in its general charge, all of the matters set out in paragraph 1 of the instructions presented by the defendant. The second paragraph of instructions requested was properly refused, for the reason that there was no evidence to justify the same. The evidence did not show when plaintiffs' house was built,—as to whether it was built before or after the railway. A person owning property along the right of way of a railway has a right to occupy such property and erect such buildings as he may have occasion to place thereon, so that he does not occupy it with such as are known to be unsafe or dangerously exposed. He is the owner of the land, and has a right to its occupancy and to use it for all legitimate uses. The rule is to so use your own property as to do no damage to that of others. He is only required to use such care and diligence in the erection of buildings and the protection of his property against damage by fire as an ordinarily prudent person would under all of the surrounding circumstances. He is no more bound to guard his property against fire than the railway company to guard against permitting the escape of fire from its engine. Each are held to ordinary care and prudence in the use of their property; and if either suffers injury through the negligence of the other, he is entitled to damages for such injuries. If the engine used was in good repair, provided with all the most approved mechanical appliances then in use for the prevention of the escape of fire, and in charge of competent and skillful employes as engineer and fireman, and they used proper care and caution in the operation of the engine, and fire

escaped and destroyed the property of the plaintiffs below, it is a mere accident or misfortune, for which the railway company would not be liable in damages. There was no error in refusing to give the instructions as requested. All that part of the instructions that was proper was given by the court in its general charge to the jury. There was no evidence to authorize the giving of the fourth paragraph of the instructions requested, as the evidence showed, clearly, that the train on the other railroad had passed over its track some three-quarters of an hour before the fire that destroyed plaintiffs' property originated.

It is claimed that the court erred in the general instructions to the jury; that instruction No. 3 by the court was, in the light of the pleadings and evidence, prejudicial to the defendant below, as this instruction wholly ignored the question of contributory negligence raised by the pleadings. In instruction No. 3 the court charged the jury as follows: "(3) Under this statute, it is simply necessary for the plaintiffs to prove, in the first instance, that the fire which consumed their property was communicated by the engine attached to defendant's cars, while being used in the operation of the railroad, and the amount of their (plaintiffs') damages by reason of said fire. When they have done this (and if they have is for you to say from the evidence), then they have established what in law is called a 'prima facie case,'—that is, a case that will entitle them to recover in the absence of evidence to the contrary. The plaintiffs are not required, in the first instance, to prove that the alleged fire occurred by reason of the negligence of the defendant. It is sufficient to prove, on that head, that said defendant caused the fire in the operating of its railroad; and the burden of showing that said fire did not occur by reason of the negligence of said defendant is shifted to the defendant company. But after the defendant company has introduced testimony on its behalf tending to rebut this presumption of negligence that arises by reason of the alleged communicating of the fire, it then becomes and is a question of fact, for you to say, from all the evidence, facts, and circumstances in the case, whether the fire complained of resulted from the negligence of the defendant, or whether it was simply an accident, incident to the operation of the railroad, and for which the defendant, if that is the case, would not be responsible." This instruction is not subject to the criticism sought to be placed upon it by counsel for plaintiff in error. This follows an instruction in which the court had called the attention of the jury to paragraph 1321 of the General Statutes of 1889, in relation to the liability of railway companies for damages by reason of setting out fire in the operation of the road, and changing the burden of proof on the question of negligence from the party suffering the injury to the railway

company; and this instruction was in explanation of this statute, and the burden of proof in the first instance, and contained the correct directions to the jury under the statute. In instruction No. 9 the court stated to the jury the correct rule in relation to contributory negligence, as follows: "(9) In the event that you are not satisfied, by a preponderance of the evidence, that the injury complained of occurred in consequence of the failure of the defendant company or its employees to exercise ordinary care and prudence in the matters complained of as being the cause of the fire, then your verdict should be for the defendant. In case, however, you are so satisfied, from the evidence, that the fire was communicated by the engine of the defendant company, and that it occurred by reason of the failure of the defendant company or its employees to exercise ordinary care and prudence in the matters complained of, then the plaintiff will be entitled to recover in this action, unless you should find, from the evidence, that the plaintiffs themselves were guilty of ordinary negligence which contributed directly to the injury complained of, in which event the plaintiffs would not be entitled to recover."

The instructions of the court are clear and concise, and contain the law applicable to the facts as developed on the trial of this case. The court stated to the jury the issues involved, and what the law was if they found certain facts from the evidence. The instructions contain, correctly, the duties of parties owning property along the line of the railway exposed to damage by fire, and the duty of the railway company in the operation of its road with its engines and other machinery. But, after giving the jury the correct instructions, the court gave them the following as instruction No. 10: "(10) It is the duty of persons who live along the line of railroad, and close to the point where the switch yards of the railroad are, and where the company has frequent occasion to use its engines, to take notice of the increased danger to their property from fire, and to exercise a proportionate amount of care to protect it. That is the statement of a general rule of law. The court cannot say, as a matter of law, whether or not the plaintiffs, in anything they did or failed to do, were guilty of negligence which contributed to the injury complained of; but that is a question of fact for you to determine, from all the evidence, facts, and circumstances in the case. It is also a rule of law, in this regard, that where the plaintiffs' negligence is only slight, or the remote cause of injury, they may still recover, if otherwise entitled to a verdict, notwithstanding such slight negligence or remote cause." This instruction is faulty, so far as it says to the jury: "It is also a rule of law, in this regard, that where the plaintiffs' negligence is only slight, or the remote cause of the injury, they may still recover, if otherwise entitled to a verdict, notwith-

standing such slight negligence or remote cause." This clause lays down the doctrine of comparative negligence, and is contrary to the established rule of contributory negligence of all the states in this country except Illinois and Georgia. The court, however, in this instruction, followed the language used by the supreme court of this state in some of the earlier cases, which are referred to by Justice Valentine, in the case of *Railway Co. v. Peavey*, 29 Kan. 180, in which he says: "While it is settled in this state that a party may recover for injuries done to him or his property, caused by the negligence of others, even if his negligence is but slight, nevertheless this court has not adopted what is generally called the 'rule of comparative negligence.'" And from these expressions of the supreme court in its earlier decisions has grown up a practice that judges of the district courts throughout the state, in most cases of negligence charged against railway companies, instruct the jury that a plaintiff may recover for the negligence, even if his negligence is but slight or the remote cause of the injury. Such instructions are seldom proper under the evidence in the trial of a case, and we think should not be given, as they are generally erroneous and are but the statement of the rule of comparative negligence. The correct rule is laid down in the case of *Railroad Co. v. Jones*, 95 U. S. 442, in which it is held: "One who, by his negligence, has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and common law, and plaintiff in such case is entitled to no relief. But where the defendant has been guilty of negligence, also, in the same connection, the result depends upon the facts. The question in such case is (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that, but for such negligence or want of care and caution on his part, the misfortune would not have happened. In the former case the plaintiff is entitled to recover; in the latter, he is not." Beach, in his work on *Contributory Negligence* (section 26) says: "The doctrine of comparative negligence, being so entirely at variance with the accepted rule of law concerning contributory negligence, has naturally provoked much sharp criticism, and the courts of other states repudiate it with emphasis." In the case of *O'Keefe v. Railway Co.*, 82 Iowa, 467, *Cole, J.*, delivering the opinion of the court, says: "The well-established law of this state is that in an action to recover damages for the negligent act of the defendant, the plaintiff will not be entitled to recover if his own negligence contributed directly to the injury. In other words, this court recognizes and applies the doctrine of contributory negligence, and not the doctrine of comparative negli-

gence. The latter doctrine obtains only in Illinois and Georgia, while the former obtains in the other states." The supreme court of this state has repeatedly repudiated the doctrine of comparative negligence. *Railway Co. v. Peavey*, 29 Kan. 180; *Railway Co. v. Plunkett*, 25 Kan. 188; *Howard v. Railway Co.*, 41 Kan. 408, 21 Pac. 267; *Railway Co. v. Morgan*, 31 Kan. 77, 1 Pac. 298.

While this instruction was erroneous, and ought not to have been given, we do not think that it was prejudicial to the defendant below, as the court, in other parts of the instructions, had given the jury the correct rule in relation to contributory negligence, and had instructed them that, if they should find from the evidence that the plaintiffs themselves were guilty of ordinary negligence, which contributed directly to the injury complained of, in such event they would not be entitled to recover, and as there was no evidence on the trial of the case that tended to prove negligence on the part of the plaintiffs below. Their building was 80 feet from the track of the railway, and had been there for a number of years, and was not shown to be in a dangerous condition as to fire. It was a wooden building, constructed of pine lumber, with a pine shingle roof. The fire was communicated to the roof, and there was nothing in the evidence to show that the roof was unsafe so far as fire was concerned. The only pretense of negligence on the part of the plaintiffs was that the building was an old one and unpainted. The mere fact that the building was old or unpainted would not be evidence of negligence, as men do not usually paint the roof of their buildings. It is a fact, known to every one, that the railway companies themselves usually build their station houses, and other buildings used in connection with their operation of the road, within a few feet of the track, and of pine lumber, with pine shingle roofs, and the roofs unpainted, and they are seldom ever burned by engines emitting sparks. The jury find that the building was 80 feet from the railway track; that it was composed of wood, constructed about 10 years ago, and that no part of the building was painted; that plaintiffs had not taken any measures to protect the building against fire from passing trains. These were all the findings made by the jury, under the evidence, in regard to the condition of the house, or its liability to be injured from fire communicated from engines on the railway. The jury also find that the engineer and fireman were competent and skillful, and that the engine was in good repair, and provided with all the most approved mechanical appliances then in use for the prevention of injuries by the escape of fire and sparks therefrom in the use of coal, but not for wood; that the engine was deficient as a wood burner; that the engine was not properly managed by reason of not having proper fuel; that the defendant was negligent by burning wood in-

stead of coal, and starting out too soon after the engine was fired up. The whole question of negligence on the part of the railway company and of the plaintiffs was properly submitted to the jury for their determination, and their verdict, being supported by sufficient evidence, is decisive of all issues in this case. We think this case was fairly tried, and that the jury was properly instructed on the law. The judgment of the district court is affirmed. All the judges concurring.

**STEVENS et al. v. MILLER et al.**

(Court of Appeals of Kansas, Southern Department, E. D. Jan. 11, 1896.)

**MANDAMUS—LEVY OF TAX—PAYMENT OF JUDGMENT—BOND FOR COSTS—AMENDMENT—PROCEDURE.**

1. Mandamus to a municipal corporation to levy a tax for the purpose of paying a judgment against such corporation is in the nature of an execution to enforce such judgment, and does not require a bond for costs where such has already been given in the original action.

2. It is within the discretion of the trial court to permit an amendment to an alternative writ of mandamus; and, where such amendment is allowed with notice to the opposite party, there is no abuse of such discretion.

3. The validity of the original judgment and all supplementary proceedings thereon cannot be inquired into upon mandamus proceedings to enforce the same.

4. A party on whom an alternative writ of mandamus is served must set up in his answer to the same all reasons relied upon for noncompliance with the commands of the writ, and cannot be heard to urge any defense in this court not alleged in such answer.

5. The district court has the power to compel, by mandamus, the mayor and council of a city of the second class to levy a tax for the payment of a judgment rendered against such city.

(Syllabus by the Court.)

Error from district court, Labette county; J. D. McCue, Judge.

Application of William Miller and John H. Lyles, guardian of Rose E. Miller, for writ of mandamus against E. B. Stevens, mayor of the city of Parsons, and others. Writ granted. Defendants bring error. Affirmed.

W. D. Atkinson, for plaintiffs in error. M. Byrne, for defendants in error.

**COLE, J.** On October 19, 1888, Ida L. Miller recovered a judgment against the city of Parsons for injuries received upon a defective sidewalk in said city. On November 19, 1888, said Ida L. Miller died, intestate, leaving as her heirs at law her husband and one child. On March 4, 1889, the action was revived in the names of William C. Miller, husband of Ida L. Miller, deceased, and J. H. Lyles, guardian of said minor child. Said revivor was had upon due notice to the defendant and appearance by its attorney, and without objection upon the part of the defendant. Thereupon the city of Parsons made a case for the supreme court, which was on March 29, 1890, dismissed by said

court. On May 6, 1890, a petition was presented to the district court of Labette county for an alternative writ of mandamus to compel the levy of a tax for the payment of said judgment. The alternative writ was granted on said date, and on the 22d of May the city of Parsons appeared in the district court, and filed a motion to quash said writ, for reasons contained in the motion; and thereupon, on the 25th of May, the district court, upon motion of the plaintiffs below, allowed the said writ to be amended, the defendant being present by its attorney, and having notice of said amendment. The defendant then filed its answer and return, which consisted of a general denial and an allegation that the revivor proceedings were had without notice to the defendant city of Parsons; that the same were void; that plaintiffs had no interest in the said judgment; and that the said city did not owe, and could not safely pay, any part of the same to them. Upon the hearing of said cause, a peremptory writ was allowed, and from the order allowing the same the city of Parsons brings the case here for review.

The first ruling complained of is the refusal of the trial court to quash the alternative writ of mandamus, for the reason that no poverty affidavit, bond for costs, or security of any kind for payment of costs had been given in said action. The ruling of the trial court was correct. Mandamus to a municipal corporation to levy a tax for the purpose of paying a judgment rendered against such corporation is in the nature of an execution to enforce such judgment; and, where the requirements of the statute have been met in the main action, no separate bond for costs or poverty affidavit are necessary in the mandamus proceedings, which are a part thereof. Dill. Mun. Corp. (4th Ed.) § 861.

The next assignment of error is the ruling of the court permitting the plaintiffs below to amend said alternative writ, and proceed upon the same without service of the amended writ upon the pleadings in error. Paragraph 4810, Gen. St. 1889, provides that the pleadings in mandamus proceedings are to be considered and are to be amended in the same manner as pleadings in a civil action. The amendment permitted, then, would be the same as an amendment to a petition in an original action, which is clearly within the discretion of the court; and having been made in this case, with notice to the defendants below, there was no abuse of such discretion. The record does not disclose that any further time was asked by the city to answer the amended writ. Had there been, the court would undoubtedly have granted such request.

The next ruling complained of is the overruling of the objection to the introduction of evidence under the amended writ, for the reason that the writ recited that the judgment obtained against the city had been revived in the names of the heirs at law, and



not the personal representative. The record discloses that on the 7th of May, which was the day following the issuing of the alternative writ, proceedings had been taken for the appointment of an administrator of the estate of Ida L. Miller, deceased. This, however, was some time after the revivor had been had in the names of the heirs at law upon notice to the defendant below, and at a time when the city was represented at the hearing, and offered no objection to the revivor in the manner requested. Under such circumstances as these, we are of the opinion that the city was in no position to question either the validity of the judgment rendered or the order of revivor. As to the former, they had had their day in court, and the judgment had become final by the decision of the supreme court; and, as to the latter, they had been present upon notice, and permitted, without objection, the said order of revivor; and those proceedings were res adjudicata in this hearing, and could not be inquired into.

Counsel for plaintiffs in error urges that evidence should not have been permitted to be introduced under said writ, for the reason that said writ nowhere showed any legal obligation on the part of the plaintiffs in error to either appropriate money or levy a tax; that the writ does not recite that execution had been issued and returned unsatisfied, or that there was money in the treasury with which to pay the same, needing only an appropriation therefor, or that a levy of a tax within the limits provided by law would raise money that could be applied towards the payment of this judgment. The writ recites the rendition of the judgment, and its revivor in the name of the plaintiffs below, a request on the part of said plaintiffs to the mayor and council of the city of Parsons to pass an ordinance for the appropriation of money for the payment of said judgment, and the refusal upon the part of said mayor and council to comply with such request, and asks that the mayor and council be commanded to meet in their official capacity, to levy a tax upon the taxable property of the city sufficient to pay said judgment and costs, and to cause the same to be collected and paid in satisfaction of said judgment, according to the direction of the statute in such case made and provided. We are of the opinion that the allegations of the writ were sufficient. They stated the rendition of a judgment in due form against said city, which judgment had become final, and a demand upon the proper authorities that they perform their duties as public officials, in order that this indebtedness of the city might be paid. It appears to us that, if the objections now raised to the writ were good in law, and were sufficient reasons for non-compliance with the commands of the writ, they should have been set up in the answer of the city as an excuse and a defense. The city does not allege in its answer that the mayor and the council have no authority at law to

do the act which is commanded; neither do they allege that the city had property which can be reached by execution for the payment of this judgment. As a rule, a city owns no property subject to execution, but only such as is necessary for the protection and welfare of its citizens. And, as a rule, the manner of collecting money for the payment of a city's indebtedness is by taxation; and we know of no other method in this state for the collection of such indebtedness from a city of the second class; and, while it has been held in some states that execution may issue, we believe it is the doctrine of most states and the best text writers that the only proper means is by taxation. We have also in mind the opinion of the court delivered by Valentine, J., in the case of *City of Independence v. Trouville*, 15 Kan. 70, and shall consider that opinion further hereafter. In any event, we consider that the objections now raised were such as should have been stated in answer to the writ, and cannot be here urged for the first time. In the case of *State v. City of Milwaukee*, 20 Wis. 87, the court say: "It appears to us that a sufficient demand and refusal is alleged by the relator; and it does not appear from any law or the charter of the city that the common council have not the power to raise, by tax, money to pay judgment of the relator. If they have not, they can show this by way of answer." See, also, 2 Beach, Pub. Corp. § 1420.

We come now to the important question involved in this case, and that is: Can the district court compel, by writ of mandamus, the levying of a tax by the mayor and council of a city of the second class to provide the necessary funds for the payment of a judgment rendered against said city in an action for damages occasioned by the negligence of said city? While we are of the opinion in this case that plaintiffs in error are hardly in position, under their answer to the writ, to raise this question, we are not willing to decide that they are not, and the question is one of considerable importance to the state at large, and ought to be squarely considered. It is claimed by counsel for plaintiffs in error that the only method of collecting such a judgment against a city of the second class in this state is by execution, and counsel relies to support that proposition upon the case of *City of Independence v. Trouville*, supra. In that case an action was brought against the city for services performed by the marshal under an ordinance relating to the killing of dogs, and a judgment was obtained against the city, and execution awarded. The question of the right to issue execution was not the main point in issue, although it was argued in the supreme court. Valentine, J., in delivering the opinion of the court, says: "There seems to be no provision made by statute for the collection of judgments against cities of the second class. If this is so, then we suppose an execution may issue on such judgments." It does not appear to be fully



decided by this case whether there are any provisions of our statute for the collection of judgments, or whether the issuing of an execution is necessary or proper in such a case. Both questions seem to be left in doubt. But in the later cases of *Switzer v. City of Wellington*, 40 Kan. 250, 19 Pac. 620, and *National Bank of Ottawa v. City of Ottawa*, 23 Pac. 485, our supreme court has held that a city of the second class was not liable as garnishee, which is in the nature of an execution.

The usual method of collecting a judgment against a municipality being by taxation, it must be assumed in this case that the only way, if any, is by the proper officials levying a tax for that purpose. Our constitution provides (article 11, § 4): "No tax shall be levied except in pursuance of law, which shall distinctly state the object of the same; to which object only such tax shall be applied." Any authority, therefore, relied upon to support the position that the levy of a tax is authorized for that purpose, must be either express or so clearly implied as not to conflict with this constitutional provision. In his work on *Public Corporations* (volume 2, § 1418), Mr. Beach lays down the rule as follows: "Though a municipality cannot exceed a limitation imposed by the legislature, and can only be compelled to exercise the powers conferred upon it by the laws of the state, yet a creditor is entitled to have the whole power of the corporation exerted for the payment of a judgment; and, where a city council has a discretion as to the amount of tax which it is authorized to levy for ordinary purposes, it must, if necessary, exercise all the power which it has to pay a judgment obtained against the municipality." In support of this doctrine are the cases of *Butz v. City of Muscatine*, 8 Wall. 575; *Coy v. City Council*, 17 Iowa, 1; *Com. v. City of Pittsburgh*, 34 Pa. St. 496; *Iowa R. Land Co. v. Sac Co.*, 39 Iowa, 124. It is a violent presumption that our constitution and statutes have left a person without remedy for the collection of a judgment obtained against a municipality where, as in this case, there is no showing that it has any property out of which such judgment can be made. In the light of the above authorities, it would seem, in the absence of a showing that the council has already levied the full amount permitted by law for general revenue purposes, that a levy for this purpose might be made under paragraph 788, Gen. St. 1889, which, so far as it is applicable, reads as follows: "To levy and collect tax for general revenue purposes not to exceed ten mills on the dollar in any one year, on all the real, mixed and personal property within the limits of said cities, taxable according to the laws of the state. The words "general revenue purposes" certainly mean the same as "ordinary purposes." Again, paragraph 793, Gen. St. 1889, provides as follows: "The council may appropriate money and provide for the payment of the debts and expenses of the city,

and when necessary may provide for issuing bonds for the purpose of funding any and all indebtedness now existing or hereafter created: provided, that said bonds shall be payable in not less than ten years, nor more than twenty years from the date of their issue, and that said bonds shall bear interest at a rate not exceeding ten per cent. per annum, with interest coupons attached, payable annually or semi-annually: and provided further, that said bonds shall not be issued for the purpose of funding said indebtedness of the city, unless for every dollar of the outstanding script, orders, bonds, coupons, judgments or other evidence of indebtedness, the city shall issue in exchange therefor such bonds at dollar for dollar. The council shall levy taxes on all the property in the city in addition to other taxes for the payment of said coupons as they become due, and the taxes levied to pay the same shall be payable only in cash." It seems clear to us that the greater power certainly includes the lesser, and that under this section, which expressly provides that the council may appropriate money for the payment of the debts and the expenses of the city including judgments, and, in so doing, may even issue bonds of said city, and then levy a tax upon all the property in the city for the purpose of paying said bonds issued to pay a judgment, they would certainly have the power to levy the tax in the first instance to pay the same judgment. In this case the amount of the demand against the city has been conclusively fixed by judgment, and its proper authorities have refused to provide any means for the payment thereof. We are of the opinion that mandamus, which, after judgment, is wholly in the nature of an execution, was the proper remedy, and that, under the facts admitted and established in this case, the ruling of the district court granting a peremptory writ was right, and should therefore be upheld. The judgment of the district court is affirmed. All the justices concurring.

#### MORRISON et al. v. STATE BANK OF CHANUTE.

(Court of Appeals of Kansas, Southern Department, E. D. Jan. 11, 1896.)

#### USURIOUS INTEREST—WHEN ALLOWED AS A SET-OFF.

Where a party has dealings with a bank covering a period of two years, and during such time borrows various sums of money, paying thereon usurious interest, and afterwards borrows other money from the bank, giving a note with surety therefor, and a suit is afterwards brought on such note, held, that the party cannot offset such note by usurious interest paid on former loans.

(Syllabus by the Court.)

Error from district court, Neosho county; L. Stillwell, Judge.

This was a suit on a promissory note executed and delivered by R. O. Rawlings and H. T. Morrison to the State Bank of Chanute,

dated October 9, 1889. The defendants admitted the execution and delivery of the note, but alleged that the note was given without consideration; that the note was given for and on account of usurious interest which had accumulated on other notes given for loans at plaintiff's bank prior to the execution of this note. Trial by court and jury. Judgment and verdict for plaintiff below. Exceptions by defendants. Case made and filed in the supreme court, and duly certified to this court for review. Affirmed.

O. A. Cox, for plaintiffs in error. H. P. Farrelly, for defendant in error.

JOHNSON, P. J. This suit was commenced before a justice of the peace of the city of Chanute, Neosho county, Kan. The plaintiff below, in its bill of particulars, alleged that on the 9th day of October, 1889, H. T. Morrison and R. C. Rawlings executed and delivered to the said State Bank of Chanute, plaintiff, their promissory note in writing of that date, and thereby promised to pay to the plaintiff, in 90 days after date, the sum of \$450, with interest thereon from maturity at 10 per cent. per annum until paid. A copy of the note is attached to the bill of particulars, showing certain credits indorsed upon the note. After deducting the credits, the plaintiff alleges that there is a balance still due and owing from defendants to the plaintiff upon said note, the sum of \$295.13, together with interest thereon from February 27, 1891, at the rate of 10 per cent. per annum. In defense of the allegations set out in the bill of particulars of the plaintiff below, the defendants below, in answer, deny all the allegations in the bill of particulars, except they admit the execution and delivery of the promissory note, and allege that said note was given without any consideration therefor; that they were not indebted to the plaintiff in any sum whatever; and allege specifically that said note was given by defendants in payment of usurious interest on notes formerly made, and upon which 12 per cent. was laid, and 15 per cent. charged; that said note is for the excess interest over and above the legal rate of 12 per cent. agreed upon by the parties thereto. This is substantially the defense relied upon, but the answer is very prolix, and sets out that plaintiff, in October, 1887, was engaged in the banking business in Chanute, Neosho county, Kan., and that R. C. Rawlings was then engaged in general mercantile business in the same place, and that, to carry on his business, it required large amounts of money, and he had been borrowing money from the Chanute National Bank to carry on his business, and that said Chanute National Bank was located near to his business house; that said Rawlings' place of business was on the east side of the railroad track, and that the Chanute State Bank was located on the west side of the railroad track, and that the offi-

cers of said bank made certain promises to loan him all the money that he might require to carry on his business, and, by reason of such promises and other inducements, caused Rawlings to remove his place of business from where he had formerly been carrying on business to the west side of the railroad track, and said plaintiff agreed that by reason thereof it would loan him all the money necessary to carry on his business successfully, at 15 per cent. per annum, and that he entered into an agreement with the officers of the plaintiff to let him have all the money that he might require, at 15 per cent. per annum, and that from time to time he borrowed large sums of money from plaintiff, paying therefor interest at 15 per cent. per annum, as per his agreement, and that the note in suit was for interest in excess of legal interest; that he had paid the plaintiff more money than he owed, with legal rate of interest; and that this note was for usurious interest exclusively. There is attached to the answer of defendants below an itemized statement of the various sums of money borrowed, giving date, amount, discount, number of the loan, and the amount of interest on each loan. This statement covers a period of time extending from October, 1887, to October, 1889. It is insisted that all these loans, discounts, and all the transactions connected with the borrowing of money, giving of notes, and renewals thereof, were in pursuance to and under the original agreement to loan him all the money that he might require in his business, and that he would pay for the loans of such money 15 per cent. per annum. This is the theory upon which the defendants below claimed the right to try said case; the plaintiff holding to the theory that each loan was a separate transaction, and that upon each loan there was a specific agreement as to discount and interest. The record in this case is very indefinite, but we gather from it that this case was tried before the justice of the peace, and resulted in a judgment for one or the other of the parties, and was taken to the district court by appeal, and there tried before the court and a jury, and resulted in a verdict and judgment for the plaintiff below for the sum of \$258, to which the defendants excepted, made case, and come into this court for a review.

On the trial of the case in the district court, R. C. Rawlings was a witness for the defense, and testified fully as to all the transactions between himself and the State Bank of Chanute, plaintiff, in the borrowing money, the discounts on each note, the rate of interest paid on each, the giving of chattel mortgages on his stock of goods to secure the payment of loans, and shows that the aggregate amount borrowed of the plaintiff was the sum of \$11,600, and that the plaintiff below held a first lien on his stock, by chattel mortgage, and that some time in May, 1889, Lynn and Alexander, of Illinois, each held a chattel mortgage on said stock

of goods, being the second and third liens on said goods, and said Lynn and Alexander came out here, and took possession of the goods, and paid the State Bank of Chanute the amount due on its chattel mortgage, which was a first lien on the stock, and had said chattel mortgage duly assigned to them by said bank. On the 8th day of June, 1889, R. C. Rawlings and H. T. Morrison executed and delivered to the plaintiff bank their certain promissory note for \$500, and another note for the sum of \$1,200. On the trial of said case the following questions were put to Rawlings touching the consideration of this \$500 note, and his answers thereto are as follows: "Q. Now, at that time, did you get the money, or was it a loan? A. I could not say which it was, sir; and I judge by your books, which I have looked at, and which you showed up on the other trial, that I must have got the money. I didn't think, until I saw them, that I did. I cannot remember these things two years. Q. The note that was executed on June 8th, what was that for,—the five hundred dollars? A. That, according to the books, was for money. Q. You know it was for money, don't you? A. No further than that. I didn't know by my own knowledge. According to the records, your books, I guess it was for money. They showed there was money paid out that day. I will admit, to avoid argument, it was money, according to your books." The attorney for the defendants below, Mr. Fisher, here said: "It is not disputed that the note for five hundred dollars and twelve hundred dollars was for money. The five hundred dollar note was numbered 1,368, and was executed June 8th. That note was renewed by note numbered 1,496, for four hundred and fifty dollars." Examination of the witness continued as follows: "Q. Now, the next note,—the renewal of this note,—however, is a note on which this suit is based? A. Yes, sir; the renewal of that note is the note; yes, sir. Q. The next note executed by you and Morrison, on June 8th, for five hundred dollars, was renewed August 10th by note No. 1,496, for four hundred and fifty dollars? A. Yes, sir. Q. Then, again, a renewal October 9th for four hundred and fifty dollars? A. Yes, sir. Q. And these three notes are the only notes Morrison has ever signed as security for you at the State Bank? A. Yes, sir. Q. And this note is the note upon which this suit is based, dated October 9th? A. That is the note. Yes, sir." The witness also testified that on the 8th day of June, 1889, when the loan of \$500 was made, the conversation between Daniels, the cashier of the plaintiff bank, and himself, was that he would let Rawlings have money at the old rate. Witness here, in answer to question, said: "I says, 'What interest will you let me have it at?' He says, 'The old rate.'" And this note was afterwards renewed in August and October, and the note sued on was the last renewal note for this loan. Rawlings

was the principal witness who testified on the trial of this case on behalf of the defendants, and upon this testimony, at the close of defendants' evidence, the court announced to the plaintiff's attorney that, in the light of the evidence, no other note could be investigated, except the note in suit, and directed the plaintiff's attorney to confine his evidence as to what the contract was with reference to the note of June 8, 1889, and the renewal notes thereof; and this is the real complaint in this case, for which a reversal of this judgment is sought.

The instructions of the court directed the attention of the jury to this particular note, and the court refused to charge the jury, as requested by the defendants below, respecting the dealings and transactions between Rawlings and the State Bank of Chanute, covering a period of over two years. We think the court did not err in his direction to counsel for plaintiff below to confine his evidence to the investigation of the note of June 8th, and the renewals of that note. The evidence on behalf of the defendants, by the person who had the transactions with the bank, and the main party in interest in this suit, shows clearly and conclusively that the transactions had between himself and the bank, out of which this indebtedness grew, were after the defendant Rawlings had ceased to carry on mercantile business at Chanute, and after parties holding the second and third chattel mortgages, in order to protect their liens, had taken the stock of goods, and paid the State Bank of Chanute the amount of its chattel mortgage, and taken an assignment of said mortgage, and the loan for which the note of June 8th was given was a separate and independent transaction; and defendants could not claim that money paid out on either of the former transactions that had been tainted with usurious interest could be set off against a separate and distinct transaction had subsequent to such usurious transaction. The court gave the jury the following instructions: "(2) The defense interposed by the defendant is that of usury. He claims, in substance, that an illegal amount of interest was exacted of him at the time he gave this note, and interposes that as a defense to the case, so far as it goes. The provisions of the statute in regard to the note sued on in this action read: 'All payments of money or property made by way of usurious interest or inducements to contract for more than ten per cent. per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal and ten per cent. per annum, and the court shall not render judgment for any greater amount than the balance found due after deducting the payments of money or property made as aforesaid. The parties to any bond, bill, promissory note, or other instrument of writing for the payment or furtherance of money, may stipulate therein for interest recover-

able upon the amount of such bond, bill, note or other instrument of writing, a rate not to exceed ten per cent. per annum; provided that any person so contracting for a greater rate of interest than ten per cent. per annum shall forfeit all interest so contracted for in excess of such ten per cent., and in addition thereto shall forfeit a sum of money to be deducted from the amount due for principal and legal interest equal to the amount of interest contracted for in excess of ten per cent. per annum.' (3) There is no dispute that this note that is sued on here is a renewal of an original note of five hundred dollars that was given on the 8th day of June, 1889, and afterwards the sum of fifty dollars was paid on that note, and the note in suit, of October 9, 1889, is a renewal of the note,—the first mentioned, as I stated it a moment ago. The defendant claims, from his standpoint, that at the time he gave this original note, on June 8, 1889, the plaintiff exacted from him interest at the rate of fifteen per cent. per annum." "(5) Now, if you find that should be the case, the result will be that plaintiff will forfeit from this note an amount that will equal the excess of 10 per cent. interest. (6) That is to say, in order to get at the amount that it will forfeit by reason of that unlawful act, you will compute interest at the rate of 5 per cent. per annum on the sum of \$500, the amount of the original loan. You will compute that from June 8, 1889, to this date, and you will deduct that sum from whatever is now due upon the note, and return a verdict for the plaintiff for the balance. In the event you are not satisfied by a preponderance of the evidence that usury had been established against the plaintiff, in that event it will be entitled to recover the sum of \$295.13, with ten per cent. from February 27, 1891, down to this date: provided, of course, that in no event can you return a verdict for the plaintiff for a sum in excess of \$300. I have not computed it myself, and I do not know whether interest at that rate, from that time, would run it over \$300 or not, but in no event can the plaintiff recover a sum over \$300."

Payment made on former loans by way of usurious interest, or inducement to contract for more than 10 per cent. per annum, cannot be deemed and held to be a payment made on account of the principal in a subsequent contract, and cannot be made the subject of set-off to an action on a note made subsequent to the usurious transaction. Where a party has already received a greater rate of interest than 10 per cent., as allowed by law, or has incorporated the same into negotiable paper, and the same has been negotiated and paid, the party paying the same may recover double the amount of the excess above 10 per cent., by action against the party originally exacting the usury, in any court of competent jurisdiction; but this is in the nature of a pen-

alty, and not on contract that may be made the subject of a set-off to some other debt than the one in which usury is charged. The case of *Fraker v. Cullum*, 24 Kan. 679, is decisive of this question. Brewer, J., speaking for the court, says: "Two other matters are presented: First. The defendant, plaintiff in error, alleges that he paid usurious interest to the bank on notes other than those sued on, and claims the right to set off and recover double such interest in this action. The national banking law, after providing that national banks may take the interest allowed by the laws of the state in which they are located, contains this provision (Rev. St. U. S. § 5198): 'The taking, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note \* \* \* carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid \* \* \* may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid,' etc. Can this claim for usurious interest be set off? This depends on the nature of the cause of action, for, unless it is one arising upon contract, it cannot, under our statute, be made a matter of set-off. The cause of action is clearly not founded upon express contract. The bank never promised to pay Fraker double the usurious interest it had received from him. The only express contract was the other way, and that contract had been performed. Is it founded upon an implied contract? The authorities say not. *Hade v. McVay*, 31 Ohio St. 231; *Lucas v. Bank*, 78 Pa. St. 228; *Wiley v. Starbuck*, 44 Ind. 298. The section creates a forfeiture, and, in case the party wronged has actually parted with his money, allows him to recover double damages. Usury, says the statute, forfeits all interest. That is the penalty for the forbidden act. It is in the nature of punishment for an infraction of the law. If no interest has been paid, but only contracted to be paid, that is the only effect of the statute. It thus far nullifies the contract, and forbids the recovery of such interest; but, if it has been paid, the party may recover it back, and as much more. The forfeiture is not avoided by the fact that the contract has been performed, but, as though performance had increased the wrong, the damages are doubled. The cause of action is really one to enforce a forfeiture, but a forfeiture implies no contract. Generally, where there is an express contract, the law will not imply one. Here there was an express contract,—a contract forbidden by the statute,—and the penalty for the breach of which is this cause of action. That the penalty goes to the party suffering the wrong, rather than to the government, does not change the nature of the

action. The statutes of the various states show many instances in which part or all of the penalty goes to the party specially injured by the wrong, or to the informer. Still the nature of the action is not changed thereby. It cannot justly be said that an action to enforce a forfeiture or recover a penalty is one founded on contract, no matter who is the party chiefly benefited by the recovery. *Bank of Chambersburg v. Com.*, 2 Grant, Cas. 384. There is, to be sure, an implied obligation resting upon every member of society to break no law, and do no wrong to his neighbor, but this obligation is not the implied contract of which the law books speak as one whose breach gives a cause of action upon contract. The authorities cited correctly construe the section, and the court did not err in ruling out the set-off." The jury, in their verdict, have found the amount due on this note, from all the evidence, under the instructions of the court, and we think that it is supported by the evidence, and in accordance with the law as laid down by the court. The judgment of the district court is affirmed. All the judges concurring.

JOHNSON v. KOUNTZE et al.<sup>1</sup>

(Supreme Court of Colorado. Nov. 6, 1895.)

APPEAL—ERROR—REVIEW.

A finding on conflicting evidence will not on appeal be disturbed, unless manifestly against the weight of the evidence.

Appeal from district court, Fremont county.

Action by Charles B. Kountze and another against the Denver & Rio Grande Railroad Company and others to quiet title. William E. Johnson intervened. From a judgment for plaintiffs, the intervener appeals. Affirmed.

On the 24th day of December, 1890, the appellees commenced an action in the district court of Fremont county against the Denver & Rio Grande Railroad Company and several others, to quiet title to a certain tract of land, predicated their right to such relief upon the following facts, to wit: That, in the year 1883, John H. Terry, the owner of said tract of land, conveyed the same to the Denver & Rio Grande Railroad Company, for the purpose of building and operating its line of railroad over and upon the same, with the express provision and condition that in case the said railroad company failed to build, and use the said tract of land for such purpose, then the same should revert, and become the property of the said Terry; that the said railroad company failed, neglected, and refused to build, operate, and maintain any tracks thereon; and that the title to said land had thereby reverted to, and become the property of, said Terry, who duly conveyed to appellees, by a sufficient deed, said tract of land, on the 12th day of April, 1890. Upon being duly

served with summons, the Denver & Rio Grande Railroad Company made default, and thereupon the appellant, William E. Johnson, filed his petition in intervention, claiming said tract of land, and, in support of his claim, alleged the following facts, to wit: That in the year 1883 the said John H. Terry was the lawful owner of said tract of land, together with about 10 acres of land adjoining said tract. Said Johnson then and there purchased said land, together with the tract of land in controversy, taking a deed for the 10 acres, but, for convenience, the legal title to the tract in controversy was retained by Terry. Afterwards, on or about the 3d day of November, 1883, while said Terry was holding the legal title to the said tract, for the use of the intervener, Johnson, said Johnson ordered and directed Terry to convey the same to the Denver & Rio Grande Railroad Company by deed, with the reservations and upon the conditions hereinbefore mentioned; and that said Terry, in pursuance of said order, did so convey said tract of land to said railroad company; and that the sole consideration for the making and delivery of said deed by Terry to the railroad company was the promise to build, operate, and maintain a railroad track over the same, for the convenience of the intervener and his assigns. That, by reason of the failure of the company to build and maintain the railroad thereon, the title to said tract of land reverted to said Terry; and that, by and in consideration of the premises, said Terry became a trustee for the intervener, and holds the title to said tract of land in trust for him. Said intervener further alleged that said Terry and his wife, Lydia Terry, were necessary parties to the action, and prayed that they should be made parties defendant, which was accordingly done. Thereupon said Terry and his wife made answer to the complaint in intervention, admitting that he (Terry) conveyed about 10 acres of land to said Johnson, but denied the remaining averments of the petition in intervention, as to the sale by said Terry of the tract of land in controversy to the intervener, Johnson, and the payment of the purchase price therefor to Terry, as follows: "Respondents deny that the said John H. Terry ever conveyed, by deed or otherwise, or held the legal title in trust for said Johnson, or for any other person, the said tract of land described in the petition of said Johnson. \* \* \* That, as to said tract of land, said Johnson never had any right, title, or interest, either legal or equitable." Their answer admitted that the land in controversy was conveyed to the railroad company, with the conditions as alleged, and that the railroad company had failed to comply with the conditions upon which the land was conveyed, and that the land had reverted to said Terry, and disclaimed all right or interest in said tract of land. The appellees also filed an answer to the petition in intervention, in which they deny all right in Johnson, and aver that they purchased said tract

<sup>1</sup> Rehearing denied.

of land without any notice of the claims of Johnson. Thereafter, on the 27th day of April, 1892, the cause was tried to the court, and judgment rendered in favor of appellees, as against the intervener, and dismissing his petition of intervention. To reverse this judgment, intervener prosecutes this appeal.

James T. Locke and Augustus Macon, for appellant. Waldo & Dawson, for appellees.

GODDARD, J. (after stating the facts). The important and essential question of fact in controversy before the trial court, and upon the maintenance of which the right of the intervener to the relief sought necessarily depends, was whether the tract of land in dispute was included with the 10 acres in his purchase from Terry, and the existence of the verbal contract between them, in pursuance of which he alleges the land was conveyed to the railroad company for his use and benefit. Upon this question there were but two witnesses,—the intervener, Johnson, and John H. Terry. Johnson testified that he purchased from Terry 11½ acres of land, and also the tract of land in dispute (designating it as the "right of way tract"), for the sum of \$1,500; that, at his suggestion and by his direction, the right of way tract was conveyed to the railroad company. Terry testified that he did not sell to Johnson the right of way tract; and that there was no agreement of any sort, written or oral, that he should have this tract of land as a part of the consideration of \$1,500; and that, for the \$1,500 paid, he gave him 10 acres of land only.

It is insisted by counsel for appellant that, notwithstanding this conflict of testimony and the finding of the court below against the intervener, an examination and consideration of the entire testimony of these two witnesses shows a preponderance in favor of intervener, and that we should review their testimony, and determine its weight and preponderance. The rule is well settled by the repeated decisions of this court that the finding of the trial court or the verdict of a jury upon conflicting testimony will not be disturbed, unless manifestly against the weight of evidence. As was said in *Green v. Taney*, 7 Colo. 278, 3 Pac. 423: "This court will only interfere where, upon the whole record, it appears that the jury acted so unreasonably in weighing testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of awarding impartial justice to the contending parties." *Barker v. Hawley*, 4 Colo. 316; *Dickson v. Moffat*, 5 Colo. 115; *Kinney v. Wood*, 10 Colo. 270, 15 Pac. 402; *Ziegler v. Cole*, 15 Colo. 295, 25 Pac. 300. The court below, therefore, being the exclusive judge of the credibility of the witnesses and the weight to be given to the testimony of each, respectively, as there appears an irreconcilable conflict between them, its finding in favor of ap-

pellees cannot be interfered with; and, since the adverse determination upon this question of fact is fatal to the intervener's right to recover, it becomes unnecessary to consider the questions of law so ably and exhaustively discussed in the briefs of the respective counsel. For the reasons given, the judgment must be affirmed. Affirmed.

#### PATRICK et al. v. WESTON.

(Supreme Court of Colorado. Dec. 4, 1895.)

MINING PARTNERSHIP—PARTNERSHIP PROPERTY—LIABILITY OF INCOMING PARTNER—POWER OF MAJORITY OF MEMBERS—APPEAL—MODIFICATION OF JUDGMENT.

1. Where tenants in common in a mine form a partnership for the operation of the mine, without the mining property being brought into the partnership as a portion of its capital stock, the property does not, for payment of partnership debts, become partnership property, as between a purchaser of one partner's interest in the mine and the remaining partners.

2. In such a case the purchaser, as incoming partner, does not become liable for debts contracted by the partnership prior to the time he became a member.

3. Members of a partnership, acting in concert in the appropriation of partnership property in payment of debts for which the partners so acting were alone liable, are jointly and severally liable to the other partner for his share of the funds so appropriated.

4. A member of a mining partnership is liable, as between the parties, for his proportionate share of the salary of an employé appointed by a majority of the members over his objection, such partner having reaped the benefit of his employment.

5. The appellate court will correct, on a cross assignment of error, a clerical error in computation, without granting a new trial.

Error to district court, Lake county.

Action by A. S. Weston against W. F. Patrick and others. There was a judgment for plaintiff, and defendants bring error. Affirmed as corrected.

This is an action for an accounting, brought by A. S. Weston, one of the owners of the Col. Sellers and Accident lode mining claims, against the other owners therein. The undisputed facts are that, in the year 1883, W. F. Patrick and John Livezey, Jr., with a number of others, were the owners, as tenants in common, of the Col. Sellers and the Accident lode mining claims, situate in Lake county, Colo. In that year the owners entered into a mining partnership, under the firm name and style of the Col. Sellers Mine, for the purpose of mining said claims and extracting the valuable minerals therefrom. These mining claims were connected by underground workings, and were worked together, it being agreed, among the members of the mining partnership, that all dividends should be declared on the basis of the ownership in the Col. Sellers lode, and that the profits and losses should be shared according to such ownership. This copartnership continued until November 29, 1888, at which last-mentioned date the defendant in error, Weston, suc-

ceeded to the interest of John Livezey, Jr., as an owner in the mines, and as a member of the mining partnership. Mr. Weston, at the time of entering into the copartnership, had full knowledge of the agreement under which the mines were being worked, and he made no objection thereto, but permitted the work to be continued as theretofore. It appears that, during the time that Livezey was an owner of said mining claims, and while he was a member of the mining partnership, the company trespassed beyond the side lines of the claims into the adjoining territory, and extracted ore from claims known as the "A. Y." and "Minnie," to the amount of about \$30,000. The owners of these claims commenced suit to recover the value of the ore thus extracted. This suit was commenced and prosecuted to judgment in the district court before Weston became interested in the mining property or in the mining partnership. The suit was prosecuted from court to court until it reached the supreme court of the United States, in which court a judgment was affirmed against the Col. Sellers Mine for the sum of \$30,000. This judgment was afterwards paid from the profits derived from working the mine under the mining partnership of which defendant in error, Weston, was a member, and dividends were withheld to the amount of such judgment. This was against the objection and protest of defendant in error, and constitutes one of the principal causes of complaint at this time. It also appears that, at a meeting of the copartners, on December 17, 1887, one W. F. Patrick was made financial agent of the partnership, and Charles L. Hill general manager; that shortly after this time Hill resigned, and W. F. Patrick acted for a time, by appointment, both as financial agent and general manager, receiving in these two capacities the sum of \$500 per month. Defendant in error protested against the appointment of Mr. Patrick as manager, and now claims that he is not responsible for any part of his salary as such manager. It further appears that about \$8,000 of the company's funds were paid out in attorneys' fees during the time that Weston was a member of the partnership, but that these sums were for services in connection with the Minnie suit and other matters that arose before Weston became interested in the properties. Among these matters was a suit instituted by the Colorado Smelting Company against W. F. Patrick et al., and another suit instituted by one McLean. The former arose out of a contract between the Col. Sellers Mine and the Colorado Smelting Company, by the terms of which the Col. Sellers Mine was to deliver 12,000 tons of ore in a certain year to the Colorado Smelting Company. Only a part of this ore was delivered, and the suit was for damages for the nondelivery of the balance. The transaction occurred prior to the time at which the

plaintiff, Weston, became interested in the property. The McLean suit grew out of a contract or option given McLean for the sale of the property. McLean failed to make the sale, and alleged that such failure was due to the misrepresentations by the owners concerning the value of the property, and instituted suit for damages. This, also, occurred before Weston became interested in the property. A trial to the court resulted in findings and judgment as follows: "(1) That the plaintiff is not entitled to dividend No. 31. (2) That the plaintiff is liable for his proportionate share of the pay of the manager, W. F. Patrick, as manager of the mines. (3) That the plaintiff is not liable for any of the Minnie judgment, or any of the money paid thereon. (4) That the plaintiff is not liable for any portion of the judgment rendered in the suit of the Colorado Smelting Company against W. F. Patrick et al. (5) That the plaintiff is not liable for any portion of the expense paid in the McLean suit. (6) That the plaintiff is not liable for any portion of the amount paid as attorney fees by the management. (7) That the plaintiff is entitled to recover from the defendants  $\frac{5}{64}$  of the amounts withheld and paid out for these several purposes, together with interest thereon, at the rate of 8 per cent. per annum, from the date that dividends should have been declared therefor. (8) That the amount so withheld from the plaintiff by the defendants is \$4,054.90, and that the interest thereon amounts to the further sum of \$650.95. Therefore, it is ordered, adjudged, and decreed by the court that the plaintiff have and recover of and from the defendants the sum of \$5,305.85, together with his costs in this behalf expended, to be taxed, and that he have execution therefor." To reverse this judgment, this writ of error is sued out.

O. C. Parsons and F. L. Baldwin, for plaintiffs in error. A. S. Weston and John A. Ewing, for defendant in error.

HAYT, O. J. (after stating the facts). With a few well-understood exceptions, the law of mining partnerships is quite similar to the law governing ordinary trading partnerships. Among these exceptions is one which allows one member of a mining partnership to convey his interest in the mine and business to a stranger without dissolving the copartnership. This exception has grown out of the necessities of the case, which require the continuous working of mines in order that the same may be made profitable. So, likewise, it has been held that neither assignment, nor death, nor bankruptcy of the owner of an interest in a mining concern should operate to dissolve a copartnership existing for the purpose of working the mine. Another difference between a mining partnership and an ordinary trading partnership is that the for-

mer is not founded upon the delectus personae, while the latter is. Hence, one mining partner has not the right to bind his associates to the same extent as a member of a trading partnership. *Charles v. Eshleman*, 5 Colo. 114; *Manville v. Parks*, 7 Colo. 128, 2 Pac. 212; *Higgins v. Armstrong*, 9 Colo. 47; 10 Pac. 232; *Meagher v. Reed*, 14 Colo. 335, 24 Pac. 681. In the case at bar the real estate was held by the individual members of the copartnership as tenants in common, while the business of extracting the ores, etc., was conducted by the mining partnership; the undisputed evidence being that the parties were tenants in common in the ownership of the mines. Although the facts are undisputed plaintiffs in error quoted extensively from the case of *Duryea v. Burt*, 28 Cal. 569, and relied upon this and other California cases for the purpose of showing that the mining property belonged to the partnership; the contention being that mining ground belonging to and worked by a mining partnership, if acquired for mining purposes, and purchased with partnership funds, or brought into the concern by individual members as a portion of the capital stock, is, in equity, for the purpose of the partnership debts, to be treated as partnership property. But, in this case, the mining claims were not purchased by partnership funds, were not brought into the concern by the individual members as a portion of its capital stock, and hence did not belong to the mining partnership. Aside from the foregoing, this is not a suit instituted by outsiders to collect a partnership debt. The existence of a mining partnership for the purpose of working the mines, although the ownership of the real estate may be in the individual members of the copartnership, as tenants in common, is clearly recognized in the case of *Duryea v. Burt*, supra, as will be seen from the concurring opinion of Mr. Justice Sawyer: "It may be that the claims before owned and purchased in severalty in individual interests were held by them, throughout their connection, as tenants in common. Whether they were or were not is not distinctly found as a fact, and we should not be justified in determining the question from the facts found. Those interests were, doubtless, originally purchased as tenancies in common; but whether, from the evidence before the court, and the manner in which the parties blended their interests in those claims with their subsequent purchases, and in working the whole, the court would be justified in finding that they put in the claims originally held with the new purchases as partnership property, it is not our province now to determine. This will be a fact to be determined on the new trial. If so, it became partnership property, and subject to all the incidents of such property. If not, and it was originally held, and still continues to be held, as a tenancy in common, then it was not partnership prop-

erty; and the plaintiff has no claim to have the sum due him from his cotenant or copartner in other matters charged upon it."

The contention of plaintiffs in error is that, when defendant in error, Weston, became an owner of and interested in the real estate, and a member of the mining partnership, he became such owner cum onere, subject to the settlement of the partnership accounts, and subject to the payment of the partnership debts, of which the Minnie judgment, the expenses of the suit of the Colorado Smelting Company against Patrick et al., and the costs of the McLean suit, with attorney's fees and expenses, were a part. This contention of counsel is not supported by any adjudicated case, and, upon principle, we think that an incoming partner ought not to be liable for debts contracted prior to his acquiring an interest in the property, and prior to his becoming a member of the mining partnership. Cases in which the incoming partner has been held liable may all be resolved into instances in which the real estate was either purchased by the partnership with partnership funds, or was brought into the firm as a part of the capital stock by the individual members of the copartnership. In the case at bar, as we have seen, there is no evidence of a partnership in the ownership of the mines; the evidence being to the effect that an ordinary mining partnership was formed for the purpose of prospecting and working the properties. We are not concerned in this case, nor do we decide, as to what the rights of partnership creditors may be, in equity, to enforce their claims against the property of the firm or individual members thereof. We are only concerned with the law governing partners inter sese; and, certainly, in the absence of an agreement to the contrary, the general rule is that an incoming partner does not become liable for debts contracted prior to the time he became a member of the partnership. This principle is elementary, and there is nothing in this case to bring the plaintiff, Weston, within any exception to the rule; and we therefore hold that he was not liable for any part of the Minnie judgment, or any part of the claim of the Colorado Smelting Company, or of McLean, or of the expenses of any of these suits. It is contended, however, that the court below erred in rendering a joint judgment against the defendants. It sufficiently appears, from the evidence in this case, that the defendants acted in concert in reference to these matters, and by their joint action caused the funds of the company to be used in the payment of obligations for which they were jointly and severally liable, and for which Weston was not liable. Under these circumstances, by a familiar principle, they became jointly and severally liable to him for the amounts thus diverted.

There are a number of cross errors assigned. The first of these challenges the cor-



rectness of the judgment of the court below, denying the right of plaintiff to share in dividend No. 31. The evidence in regard to the condition of the company at the time this dividend was declared is quite uncertain. It appears, however, from this evidence, that at the time this dividend was declared the company had no available funds with which to pay the same, but that, on the contrary, it had overdrawn its bank account to a large amount, and that this sum was needed to pay this overdraft, and pay the current expenses of the mine for the preceding month. Under these circumstances, we think the trial court was justified in holding that plaintiff was not entitled to participate in this dividend. The second assignment of cross error challenges the correctness of the finding of the district court, whereby the plaintiff was held liable for his proportionate share of the pay of W. F. Patrick as manager of the mine, and including his salary as financial manager. It is established by the evidence, beyond controversy, that Patrick discharged the duties of the two positions designated; that plaintiff had the advantage of his services, and reaped, in the nature of dividends, the benefits of Mr. Patrick's management. Under these circumstances, the trial court was justified in holding plaintiff liable for his proportionate share of Mr. Patrick's salary, as manager of the mine, and also as financial manager. Moreover, the right of the majority to conduct the business of the copartnership must be upheld. The third assignment of cross error challenges the amount found due the plaintiff, and the amount of the judgment. By a clerical error the amount of the judgment is \$600 less than it should have been, as will appear from the following statement:

Paid on Minnie judgment.....	\$29,247 00
Costs in same.....	490 48
Costs and attorney's fees in McLean suit .....	5,566 90
Reserve fund Colorado Smelting Company suit .....	15,000 00
Interest paid to bank on same....	1,133 35
Costs in same suit.....	743 95
General attorney's fees.....	7,399 74
	<hr/>
	\$59,581 42
Five sixty-fourths of which is.....	\$4,654 80
Interest, as found.....	650 95
	<hr/>
	\$5,305 75

This error as to the amount does not entitle plaintiffs in error to a new trial, as there can be no dispute, upon the evidence, as to the correct amount, and defendant in error makes no claim to additional interest by reason of the increase. The larger amount would increase the allowance for interest, and, this being waived, is to the benefit, and not to the injury, of plaintiffs in error. The finding and judgment of the court below will be corrected in accordance with the foregoing statement, and, as thus corrected, it will stand affirmed. Affirmed.

v.43P.no.3—29

CAMPBELL v. POUDRE VAL. BANK.  
(Court of Appeals of Colorado. Jan. 13, 1896.)  
GARNISHMENT — ASSIGNMENT OF CLAIM—BONA FIDES.

The assignee of a money claim having testified, without contradiction, in garnishment proceedings, that he purchased the claim in good faith from defendant before the garnishment, and gave notice thereof to the garnishee, and had no knowledge of his assignor's insolvency, or of the debt due from his assignor to plaintiff, a verdict for plaintiff should be set aside.

Appeal from district court, Larimer county. Action by the Poudre Valley Bank against Frank R. Campbell, defendant, and the Union Pacific Railroad Company, garnishee. George B. Campbell intervened, claiming the funds garnished by virtue of an assignment from defendant. There was a judgment against the intervener, and he appeals. Reversed.

Geo. B. Campbell, for appellant. Robinson & Love, for appellee.

THOMSON, J. This controversy concerns the ownership of a claim against the Union Pacific Railway Company. A matter of difference between Frank R. Campbell and the company, growing out of a failure of title to land, was settled and adjusted between them by the allowance of \$1,150 to Campbell. The appellee brought suit against Campbell and others, and garnished the company. The latter answered, setting forth the settlement with Campbell and the allowance to him, but averred that a notice had been served upon it of the assignment of the indebtedness by Frank R. Campbell to the appellant, George B. Campbell. Upon petition of the plaintiff (appellee), the appellant was brought into court to disclose his title to the claim. He thereupon filed a paper, in the nature of a petition in intervention, alleging the assignment of the claim to him by Frank R. Campbell, for a valuable and adequate consideration, a considerable time before the garnishment, without knowledge on his part of any indebtedness from Frank R. to the plaintiff. The testimony of the intervener at the hearing sustained the averments of his petition in every particular. It showed that he made the purchase in good faith and for value; that he knew nothing of the claim of the plaintiff against Frank R., and supposed that the latter was solvent; and that he had notified the railway company of the assignment before the garnishment process was served. This testimony was not shaken in the least degree, and its contradiction was not even attempted. The court, instead of directing a verdict for the intervener, instructed the jury that if they believed the transaction was entered into for the purpose of defrauding the plaintiff, or if there was an arrangement between the intervener and Frank R. Campbell whereby the latter was to receive back any portion of the money, they should find for the plaintiff.

The verdict was in the plaintiff's favor, and, after a refusal by the court to set it aside, was followed by a corresponding judgment, from which the intervenor has appealed. No error is assigned upon the instructions. We shall, therefore, refrain from comment upon them. The verdict and judgment are properly before us, but there is not much to be said about them. The verdict passes our understanding. We cannot find in the record the slightest justification for it. There is an utter want of evidence of any kind from which even a remote inference favorable to it might be drawn. There was a motion to set it aside, which, instead of being denied, should have been promptly sustained. The judgment will be reversed. Reversed.

**DENVER & R. G. R. CO. v. WHEATLEY.**  
(Court of Appeals of Colorado. Jan. 13, 1896.)

**STOCK-KILLING CASE—ABANDONMENT OF COUNT.**

1. A count expressly abandoned cannot thereafter be considered in the case.

2. The "Stock-Killing Act," making railroads absolutely liable for stock killed, being unconstitutional, judgment against a railroad for killing cattle cannot be sustained, there being nothing, apart from the fact of the killing, to show negligence, and the train being shown to have been run in the usual way, on a down grade, without steam, under the air brake, 25 miles an hour, and the engineer having applied the brakes as soon as the presence of cattle on the track was disclosed by the headlight.

Appeal from district court, Pitkin county.

Action by John E. Wheatley against the Denver & Rio Grande Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Wolcott & Valle and Wm. W. Field, for appellant.

**BISSELL, J.** A train, operated by the Denver & Rio Grande Railroad Company, in the latter part of January, 1892, near Woody, in Pitkin county, killed a couple of cows belonging to the appellee, Wheatley. This action resulted. It was brought in the county court, and, as originally begun, there was an attempt to state two causes of action springing out of the same transaction. The first was an action against the company, based on the negligent operation of the train, whereby they became liable for the damage. The second was stated as one given by the statute, commonly called the "Stock-Killing Act." Various proceedings were had in the county court, and during the progress of the litigation the plaintiff abandoned his first cause of action, and by leave of court withdrew it from consideration. The case was thus left to stand on the second count, which was under the statute. The case was put at issue, and ultimately tried. Judgment went against the railroad company, which took it to the district court, where it was again tried before a jury, and a verdict ren-

dered against them. The only evidence which bore on the main question of the circumstances of the accident was that of Wheatley and the engineer in charge of the train. Wheatley testified as to the value of the animals, and put the two at \$155. No other witness spoke on this subject. There was no statement respecting the management or operation of the train, except that given by the engineer. According to this, the train was pursuing its usual way on a down grade, without steam, and running, under the air brake, at the rate of 25 miles an hour, which was the usual speed of that kind of a train in this locality. The accident happened about 11 o'clock at night, and the engine, of course, was running with a headlight, which rendered objects visible some 200 or 300 feet ahead. The engineer discovered something on the track, but was unable to determine definitely what it was, applied the brakes, and as nearly as he could checked the train before it struck the cows. According to his estimate, the train was running about 15 miles an hour when the animals were struck and killed. There was nothing whatever to show negligence on the part of the company in running the train in that locality at that rate of speed, and nothing even tending to disclose a want of necessary care in the management or operation of the motive power. On this testimony the jury rendered a verdict for \$133.33%,—manifestly a compromise verdict of some kind; but they did not find the value to be according to the evidence, as it ought to have been either for \$155 or nothing.

A number of questions are suggested on the appeal, but we shall only dispose of one or two, which will necessarily reverse the case, and send it back for a new trial. For some time it has been well settled in this state that the stock-killing act is unconstitutional, and no action can be maintained which was conceived under the act and does not contain the elements requisite to sustain a common-law action of negligence. *Railway Co. v. Outcalt*, 2 Colo. App. 395, 31 Pac. 177; *Wadsworth v. Railway Co.*, 18 Colo. 600, 33 Pac. 515. We are not required to determine whether the complaint in this suit contains what would be necessary to sustain this kind of an action, because the plaintiff precluded himself from insisting on that proposition by especially abandoning the count which stated such a cause. The express abandonment must be taken as a waiver of any right, and the abandoned count as being without the record. *Brown v. Railroad Co.*, 18 N. Y. 495; *Wheelock v. Lee*, 74 N. Y. 495. It is perhaps wholly unnecessary to put the case on this basis, because one quite as satisfactory, and much more conclusive against the plaintiff, is to be found in the evidence which he offered to maintain his case. If we should concede the second count contained enough to state a cause based on negligence, the plaintiff in no manner sustained it. There

was nothing to show negligence on the part of the company, aside from the simple fact that one of its trains killed the animals. The train was shown to have been running in the usual way, and, so far as we can see, in a manner entirely justified by the situation, the locality, and the possible danger to either passengers or wandering stock. The verdict, then, could only be justified on the basis of an absolute liability arising from the enforcement of an act which has been adjudged unconstitutional. This is impossible, and the plaintiff, consequently, was without the right to recover.

Error has been assigned on the instructions of the court, and some matters suggested which would require consideration, if what has already been said did not absolutely dispose of the case as it now stands. Subsequent to the decision in the Outcalt Case, the legislature passed an act making the fact that stock was killed prima facie evidence of negligence, and requiring the company to take the burden of showing due care in the management and operation of its trains. The court charged the jury on this hypothesis, and the railroad company complains that this is error. Their contention is on the hypothesis that, since the accident occurred prior to the passage of the act, the shifting of the burden is an infringement of their constitutional rights, and gives the statute a retrospective effect, which is not permissible. This question is simply suggested, but will be left undecided. We shall only suggest, as was mentioned in the Outcalt Case, that matters of evidence and of procedure are usually entirely within the legislative control, and the rules affecting either can be changed at pleasure, and will be applicable to existing as well as future controversies. This is the general rule; but whether this is a proper case in which to apply it we do not determine, for the question was not so presented in the court below as to compel us to decide it. The case must go back for another trial, and, should the company raise the question, and preserve it in the record, the matter would then, of necessity, go to the supreme court, which must ultimately decide questions of this description. We are inclined to concede to the appellee the right to present his case on such evidence as he may be able to offer of the negligence of the company, if any is at his command, and shall therefore give him the right to apply to the court below for leave to amend his complaint and state an action based on negligence. Of course, it will remain true, unless the proof is in some manner changed from its present status, that the plaintiff can never be entitled to judgment against the company for the value of his stock. This, however, must be a matter for the determination of the trial court, who will be guided by our intimations respecting the form and effect of the case as it has already been made.

The plaintiff was not entitled to a judgment, and the one which he obtained must be reversed, and the cause remanded. Reversed:

SILVER STATE COUNCIL NO. 1 OF  
AMERICAN ORDER OF STEAM  
ENGINEERS v. RHODES et al.<sup>1</sup>

(Court of Appeals of Colorado. Nov. 11, 1895.)

INJUNCTION—RIGHT OF CORPORATION.

A corporation cannot have persons or organizations enjoined because they have conspired to exterminate it by compelling its members to leave it.

Error to district court, Arapahoe county.

Action by the Silver State Council No. 1 of the American Order of Steam Engineers against C. W. Rhodes and others for injunction. Judgment for defendants. Plaintiff brings error. Affirmed.

Allen & McAndrew, for plaintiff in error.  
I. N. Stevens and Thos. D. Adams, for defendants in error.

THOMSON, J. The purpose for which this proceeding was instituted is set forth in the prayer of the complaint, which we quote: "That an injunction issue out of this honorable court, enjoining, restraining, and prohibiting the above-named defendants, each and all of them, and their said organizations, their servants, agents, and employes, both as individuals and organizations, in any manner interfering with or trying by threats, boycotts, strikes, or intimidations to break up and destroy, or cause the resignation of any member by threats, boycotts, strikes, or intimidations, of Silver State Council No. 1, American Order of Steam Engineers, plaintiff herein, or by strikes, boycotts, or any other threats to compel it or its members to throw up its certificate, articles, or charter of incorporation or organization, or to in any manner interfere with the rights and privileges of Silver State Council No. 1 of the American Order of Steam Engineers, plaintiff herein, or its right to exist and enjoy its rights, privileges, and freedom under the laws under which it was created; for costs herein expended, and will ever pray." The complaint avers the capacity in which the plaintiff sues, and the objects of its corporate existence, as follows: "That plaintiff is a corporation organized and existing by and under the laws of the state of Colorado, for the purpose of promoting a thorough knowledge in its members of theoretical and practical steam engineering, to help each other to obtain employment, bury the dead, extend the license law throughout the United States as well as the state of Colorado, and for the further purpose of helping its members according to the terms set forth in its certificate of incorporation, reference to which is

<sup>1</sup> Rehearing denied January 27, 1896.

hereto made." The complaint further states that the plaintiff is a "nonstriking labor organization"; that certain of the defendants are trustees of an organization called the "Trades and Labor Assembly," which is composed of various labor unions of Denver and vicinity, and was organized for the purpose (among other things) "of enforcing the rights of their several component parts by ordering a strike against all other organizations, employers, or individuals against whom it or they may have a grievance, and cannot enforce their rights upon which they base their demands"; that certain other defendants are officers and members of an organization known as "Steam Engineers' Protective Union No. 5,703 of the American Federation of Labor," whose objects are to compel all stationary steam engineers to join their order, "and to resort to force by boycotting any one who employs stationary steam engineers not members of said organization," or not subject to its orders or those of the Federation of Labor; and that the members of this organization are also members of the Trades and Labor Assembly. It is also alleged that in March, 1892, the plaintiff was admitted into, and became a member of, the Trades and Labor Assembly, and in April, 1893, was expelled from that body, because its charter, constitution, and by-laws disclosed that it was a "nonstriking" organization; and that its expulsion was in pursuance of a conspiracy among certain of the defendants, members of the assembly, who, together with the other defendants, have since its expulsion been constantly endeavoring "in all manner and ways, both openly and in secret, to destroy and exterminate" it. This purpose was proposed to be accomplished "by declaring boycotts and strikes and using other means of warfare known to striking labor organizations against any and all who would employ any stationary steam engineer who was a member or belonged to Silver State Council No. 1 of the American Order of Steam Engineers." Some instances are given in which it was attempted to compel engineers belonging to the plaintiff's organization to join the union, or procure their discharge from employment, by threatening to "boycott," and "levy strikes against," their employers.

The complaint containing an averment that the case was too urgent to admit of the delay incident to giving notice, a temporary injunction was granted *ex parte*, which was afterwards, on motion of the defendants, dissolved, on the ground that the case made by the complaint was not one of equitable cognizance. The motion admits the truth of the allegations of the complaint, and the question is whether, taken together, they constitute a cause of action. The plaintiff is a corporation, and, to entitle it to relief, it must appear that its corporate rights are threatened with some injury of a kind which may be made the subject of an action, and for

which courts have the power to afford redress. The complaint is that the defendants have banded together and conspired to "exterminate" the plaintiff; and that they propose to accomplish their purpose by compelling its members to leave it. Of course, when its members have all withdrawn, it will be extinct. We need not discuss the character of the means to be employed for its disintegration. Whether they are legal or illegal, they cannot be made the subject of an action in favor of the plaintiff. It has no property in its members, and, in losing them, it sustains no damage which the law recognizes as damage. It cannot compel its members to remain with it; and, if they are violently driven out of it,—if they are forced to relinquish their membership against their will,—the grievance is theirs, and not the plaintiff's. Or if, for the purpose of forcing their withdrawal, others, by means of "boycotts" or "strikes," are made to suffer, the latter must fight their own battles. The law does not make the plaintiff their champion. The disorganization and resulting extinction of the plaintiff would, doubtless, be a calamity; but it is one which the law is powerless to avert. We have cited no authorities because we can find none which are of any use. If a case bearing the remotest analogy to this was ever the subject of adjudication, our most diligent effort has failed to unearth any record of it. The judgment will be affirmed. Affirmed.

#### JENET et al. v. ALBERS.<sup>1</sup>

(Court of Appeals of Colorado. Dec. 9, 1895.)

CORPORATIONS—DIRECTORS' LIABILITY—ESTOPPEL.

1. Individuals assuming to act as directors of a corporation, and, as such, contracting debts, are estopped to deny their official position.

2. A corporation, by entering under a lease executed by one of its officers without authority, and paying the rent for a while, adopts and ratifies it.

Appeal from district court, Pitkin county.

Action by Theodore Albers against Louis Jenet and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Downing, Stimson & McNair, for appellants. G. I. Chittenden and Edwin M. Johnson, for appellee.

REED, P. J. The appellants, with others, claimed to have become incorporated as the "Aspen Leader Publishing Company," and were engaged in publishing a newspaper called the "Aspen Leader," during the year 1893, and, for the purpose of such publication, rented from appellee a part of a building known as the "Albers Block," in the city of Aspen, entered into the possession on the

<sup>1</sup> Rehearing denied January 27, 1896.

27th day of March, 1893 and continued to occupy it during the balance of the year, at a rental of \$110 a month. There was a written contract of lease executed on the part of the corporation by J. M. McMichael, as manager, who was also at the time assuming to be and acting as a director. Appellants were also acting as directors for the year. The corporation defaulted in the payment of rent, which was to be paid monthly, in advance. At the time of bringing the suit, the corporation was in default from June, 1893, to January, 1894, owing on that date \$880. The suit was instituted against the individuals acting as directors of the corporation, under the statute making them individually and jointly liable for a failure to file the certificates required by the statutes. The answer was a general denial of the allegations in the complaint. The second defense was as follows: "And, for a second and separate defense to the said action, these defendants allege: That the said lease in complaint herein mentioned is not the contract of the said Aspen Leader Publishing Company, and that the same was never authorized by the board of directors of the said company, or by any officer or agent of the said company having power to authorize the said lease, nor was the same ever executed or accepted by the said company, or by the authority of the said company, or by any officer or agent of the said company having power to execute or accept the same." Third, the nonjoinder of Henry Webber, one of the directors. A trial was had, resulting in a judgment for the plaintiff for \$880, from which this appeal was prosecuted.

This case is against the same parties as the case of *Jenet v. Nims* (recently decided in this court) 43 Pac. 147, the foundation of the action the same, the evidence to establish the liability the same, and the law applicable the same. That case must rule and control this.

The corporation, in the contracting of the debt, assuming to act as a corporation, and the individuals against whom the suit was brought, assuming to act as directors, and contracting the debt as officers, they are estopped to deny the official positions in which they pretended to act. See authorities cited in *Jenet v. Nims*. The defense that the making of the contract and execution of the lease by the manager and director McMichael was not the act of the corporation is untenable. Failing to disavow entering, using the building, and receiving the benefits of the contract, and recognizing its validity by the payment of rent for the first three months, even if the execution of the lease was unwarranted, it was such an adoption and ratification as to estop the company from denying its validity.

Counsel for appellant, in argument, urges that the nonjoinder of Henry Webber as a

defendant was fatal error; but no error is assigned upon it, unless it may be considered to have been embraced in the general one that the court refused to grant a nonsuit. The allegation in the answer, leaving out that portion which is argumentative, and stating the pleader's conclusion, is as follows: "These defendants allege that there is a nonjoinder of parties defendant in said action, in this, to wit: \* \* \* that Henry Webber, who was a director of said company at all the times mentioned in the said complaint, is not joined as a defendant in the said action." I fully agree with the learned counsel in his statements made in the former part of his brief, where he says: "These statutes give a right of action purely penal in its character;" then cites the following from *Gregory v. Bank*, 3 Colo. 334: "It prescribes a determinate penalty for neglect of duty imposed by law upon the trustees of companies organized under our general incorporation act. The amount of the forfeiture is measured by the aggregate debt contracted by the company." Counsel seems later to have lost sight of this well-defined distinction, and the well-settled rule in regard to parties in actions *ex contractu* and those *ex delicto*; for, when he comes to apply the statute and his authorities, he relies upon those only applicable to those actions based upon contract. It certainly is not based upon nor controlled by the law relating to contracts, and whether or not it partakes of the character of an action *ex delicto* we are not called upon to decide, although the authorities seem to hold that all liability imposed by statute for a failure to comply with the provisions of the statute is in its nature *ex delicto*, where the well-settled rule is that a plaintiff can sue one individual, each individually, or all collectively. But, as stated above, we are relieved of the necessity of deciding the nature of the action by the fact that the defendants offered no evidence in support of their answer whatever, while Henry Webber testified for the plaintiff that all of his connection with the corporation ceased in May or June, 1892; that he sold all of his stock, and resigned at that time, and had no connection with it after that date; consequently he had ceased to act as director a year before the debt in question commenced to be contracted.

Several minor questions are raised by the assignment of errors, upon the admission and exclusion of evidence. The defendants attempted to introduce evidence that the rental value of the property during the time the debt was being contracted was much less than the price named in the lease. This was properly excluded. The contract of lease fixed the price, and the term had not expired.

The other assignments are purely technical, and could not affect the result. The judgment will be affirmed. Affirmed.

**CHARLTON v. TOOMEY.**

(Court of Appeals of Colorado. Jan. 13, 1896.)

**TAX TITLE—SALE—IRREGULARITY.**

Under Mills' Ann. St. § 3888 (Gen. St. 1883, § 2918), providing that, on the day designated for the sale of land for delinquent taxes, the treasurer shall commence the sale, and continue the same until each parcel shall be sold, and if there shall be no bid for any tract offered, the treasurer shall pass it over for the time, and reoffer it at the beginning of the sale next day, until all the tracts are sold, or until the treasurer shall become satisfied that no more sales can be effected, when it shall be his duty to bid off for the county the lands remaining unsold, the lands, after being first offered without being sold, must be offered from day to day until the sale is concluded, and the county cannot become the purchaser except in default of bidders.

Appeal from Pitkin county court.

Suit in equity by James Toomey against Edward Charlton to establish plaintiff's right to redeem lands sold for delinquent taxes. Plaintiff had judgment, and defendant appeals. Affirmed.

Wm. Young, for appellant.

REED, P. J. From and after December, 1888, appellee was the owner of the west 25 feet of lot E, in block 90, in the city of Aspen. Appellant claimed to own the property in fee, by virtue of a deed executed by the county treasurer of Pitkin county, dated June 7, 1892. The taxes upon the property for the year 1888 were \$119.46, which were unpaid and delinquent, and, remaining so, the property was advertised to be sold at public sale. The sale was begun upon the 3d day of June, 1889. On the 6th day of June the property was offered for sale, and, there being no bid by others, it was bid off by the county treasurer for the county for the amount of the taxes, interest, and costs. On the 16th day of May, 1892, the county of Pitkin, by its clerk, assigned the certificate of purchase to the appellant. On June 7, 1892, a deed was made by the county treasurer to appellant. It was alleged and claimed that the sale made by the county treasurer on June 6, 1889, was irregular and void, for failure to comply with the statutes. This suit was brought in equity to establish appellee's right to redeem, and to cancel the sale and conveyances under which appellant claimed title. After the hearing, a decree was entered holding the sale and conveyance void, and allowing appellee the right to redeem. This appeal was prosecuted from such decree.

No rule of law is better settled than that, in proceedings of the character out of which this controversy grew, the statute must be strictly followed. Any deviation from it, and attempted exercise of discretion on the part of the officer, vitiates the proceeding, and renders the conveyance void. Another rule, as well established, and equally as potent, is that, by recitals of the instrument by which

the attempt to convey is made, it must affirmatively appear that every preliminary step required to divest the title of the owner was regularly taken, as prescribed by law. The determination of the question requires a construction of a part of section 3888, Mills' Ann. St. (Gen. St. 1883, § 2918): "On the day designated in the notice of sale, the county treasurer shall commence the sale of those lands and town lots on which the taxes and charges have not been paid, and shall continue the same from day to day, Sundays excepted, until each parcel shall be sold, or so much of each parcel as shall be sufficient to pay the taxes and charges thereon, including all costs and penalties. If there shall be no bid for any tract offered, the treasurer shall pass it over for the time and shall re-offer it at the beginning of the sale next day, until all the tracts are sold, or until the treasurer shall become satisfied that no more sales can be effected, when it shall become his duty to bid off for the county the lands and town lots remaining unsold, for the amount of such taxes, interest and costs thereon." The statute is plain and unambiguous. It is clear that the intention of the legislature was—First, that the entire property should not be sold, if, by diligence and attention, a purchaser could be found who would bid the amount for a portion of it; second, that the county should in no case become the purchaser of the property except in default of bidders. We do not deem it essential that the property should be offered on the first day of sale, unless reached in its regular order; but, when so reached, our construction of the law is that it must be offered, and, if no outside bid is made, it must be so offered on the next and each succeeding day, until the close of the sale. It is true that the section contains the following, "Or until the treasurer shall become satisfied that no more sales can be effected." But this must be so construed as to harmonize with the balance of the section; otherwise, it would invest the treasurer with an arbitrary discretion, that he might exercise at any time, in contravention of the balance of the section. Our conclusion is that, after being first offered, it must be continually offered from day to day until the sale is concluded, that all efforts to effect a sale must be exhausted, that the treasurer can exercise no previous discretion, and that the county can only become a purchaser of the entire tract, in default of an outside bidder, after an opportunity has been offered each day. In *Dyke v. Whyte*, 17 Colo. 300, 29 Pac. 128, it is said: "The cash purchaser may buy the first time the land is offered for sale. But the treasurer cannot lawfully bid off the property for the county on the first day it is offered. The land must be offered without any bidder on the first day, and reoffered on the succeeding day or days without any bidder therefor, and until the treasurer becomes satisfied that the same cannot be sold at such sale, before it

can be lawfully bid off by the treasurer for the county. The statute will not uphold a county in taking the whole of any parcel of land for the nonpayment of the delinquent taxes thereon, except in a case where, after allowing full opportunity to cash purchasers, the amount of the taxes and other charges cannot be realized. A cash purchaser may be satisfied to take a part of the land for the amount of the taxes and charges. The law does not wantonly allow the whole of a debtor's estate to be sacrificed when a part may suffice." And, although it is not clearly said that the property must be offered from day to day until the close of the sale, it is fairly inferable from it. It is quite necessary that some clear construction should be given to guide the treasurer, and our construction seems to be clearly in harmony with the intention of the legislature and the decisions in our state courts. It is clear, from the conveyance of the treasurer and the record, that the sale was not conducted in accordance with our view of the law, as expressed above, and that the court properly decreed a right of redemption. The deed of the treasurer contained recitals showing that the requirements of the statute had not been complied with, as we construe it, and was not a valid deed. See *Mining Co. v. Rogers*, 8 Colo. 37, 5 Pac. 661; *Magill v. Martin*, 14 Kan. 80; *Cooley, Tax'n*, 355; *Morris v. Bank*, 17 Colo. 231, 29 Pac. 802; *Mitchell v. Arkell*, 3 Colo. App. 253, 32 Pac. 720. Counsel for appellant contends that the court erred in its decree in regard to costs and interest. The proceeding being in equity, and the allowance of those matters so much in the discretion of the court, we do not feel required to examine them. The decree should be affirmed. Affirmed.

#### CHARLTON v. KELLY.

(Court of Appeals of Colorado. Jan. 13, 1896.)

##### TAX SALES—PURCHASE BY COUNTY—COSTS.

1. That no bid was made for land at a tax sale on the first day it was put up, and that on the following day it was bid off by the county, does not sufficiently show that the property was reoffered on the second day, and only bid in by the county at the end of the sale; and therefore the sale is invalid.

2. In a suit to cancel a tax deed, the matter of costs rests largely within the discretion of the trial court.

Appeal from Pitkin county court.

Action by Mary Kelly against Edward Charlton. There was a judgment for plaintiff, and defendant appeals. Affirmed.

William Young, for appellant. William O'Brien, for appellee.

BISSELL, J. Mary Kelly, the appellee, had been for some years the owner of a lot in the city of Aspen. Taxes were assessed on it from time to time, until the assessment for the year 1888, which amounted to fifty odd

dollars, was levied and left unpaid. The following year the property was advertised for sale under the statute, and bought in by the county, which ultimately got a deed to it. The title, as acquired by the county, was conveyed to the appellant, who afterwards paid some \$30 of subsequent taxes; and the present suit was brought to set aside that sale, and cancel the deed, because of the invalidity of the tax sale.

Some question was made on the trial respecting the advertisement, and the proof of it, based on the appellant's failure to show one which conformed to the statute. The decision is put on another ground, and no further reference will be made to this matter. Assuming it was regular, and was begun in May, and continued for four weeks, and was sufficient to warrant the sale of property for nonpayment of taxes on the 3d of June, 1889, it may be said the treasurer then started to sell real property for delinquent taxes. Sales were made on the 3d, 4th, 5th, 6th, and 7th days of June, if not after. According to the evidence, this property was not offered until the 5th, when it was put up, and no bid was made for it. On the following day, according to the recital of the deed, the treasurer being satisfied that a sale could not be effected, bid it off for the county. This was on the 6th. Neither the recital in the deed, nor the evidence, really shows the property to have been reoffered on the 6th, although, perhaps, an inference of that sort might be drawn from the fact that the property was put up on the 6th and bid off by the county. Aside from this inference, there is no proof about it. The sales were further continued on that day, and other properties sold, which was true, also, of the succeeding day. Whether the 7th was the last day on which sales were made in that month is not made clear. The only thing absolutely certain is, the sale of this particular piece of property, and the purchase by the county, were not at the conclusion of the entire sale; nor was it shown to have been offered more than once, and thereby opened to the bids of other purchasers. The record discloses that an offer was made to pay the holder of the title the money which he had paid the county prior to the suit, though the extent and character of the offer is not shown. The purchaser paid \$61 and some cents to the county, and the subsequent taxes of \$30. And, on the conclusion of the trial, the court held Mrs. Kelly entitled to recover, set aside the tax deed as invalid, computed the interest which she was bound to pay, and divided the costs; the division being apparently on the basis of the refusal to accept the offer, and in the exercise of the equitable powers which the court possesses in this class of cases.

The errors assigned do not justify a reversal of the judgment. That the sale was void seems to have been clearly settled by the supreme court. *Dyke v. Whyte*, 17 Colo. 293, 29 Pac. 128; *Morris v. Bank*, 17 Colo. 231, 29

Pac. 802; *Mitchell v. Arkell*, 3 Colo. App. 253, 32 Pac. 720. The Dyke Case is put on the precise ground that since, under the statute, the county had a right to acquire title to all the property, subject to the tax, by simply bidding the amount levied on it, as contradistinguished from the right of the purchaser, who is only permitted to acquire a title to so much of it as will be taken by the bidder in satisfaction of the lien, it must exactly pursue the statute in order to acquire the title. The theory of the law is that full opportunity must be given to private bidders, since, if a sale can be effected to them, the rights of the taxpayers are more fully protected than in those cases where the county itself becomes the purchaser. Under these circumstances, it must appear the property was offered and re-offered, and only finally bid in by the county at the conclusion of the tax sale, when all bids have ceased, and there are no persons or parties willing to make an offer on the unsold property. This is, undoubtedly, the correct construction of the statute, and is, likewise, the law of the state. The court did not err, therefore, when it adjudged the sale invalid. We discover no error in the computation of the interest, which the owner was bound to pay in order to entitle her to be reinvested with the title, and to a removal of the cloud. Those sections which are referred to as providing means and methods of redemption are inapplicable to cases of this description. We cannot see that the court made a mistake in computing the interest, or determining the sum which the owner ought to pay. We are not inclined to disturb the judgment because of the distribution of costs, or the action which the court took in dismissing the case as to part of the defendants. The abstract is not full enough to enable us to reach a definite or satisfactory conclusion on the subject, and since, in equity cases, the matter of costs rests largely with the judge who tries the cause, we are not inclined to disturb the judgment where we are not clearly satisfied a radical error has been committed, and a wrong done to one or the other of the litigants. Perceiving no error in the record, we must affirm the judgment, which is accordingly done. Affirmed.

**DENVER & R. G. R. CO. v. ROSUCK.**  
(Court of Appeals of Colorado. Jan. 13, 1896.)

APPEAL—RECORD—OBJECTIONS WAIVED.

1. A variance between plaintiff's complaint and evidence cannot be first complained of on appeal.

2. Errors in instructions and rulings on evidence cannot be reviewed, the record not showing that complaint thereof was made below.

Appeal from district court, Mesa county. Action by Rebecca Rosuck against the Denver & Rio Grande Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

*Wolcott & Valle* and *Chas. F. Caswell*, for appellant. *Sullivan & Wheeler*, for appellee.

**BISSELL, J.** The reason for the prosecution of this appeal is not very evident. The record is in a condition which practically concludes the consideration of any questions which would furnish a basis to reverse the judgment, or on which there could be a discussion of any propositions of law. There is no bill of exceptions, and, without it, we are ignorant as to the proof which the plaintiff offered, or the defense which was made; and we are likewise unable to determine whether the court committed error in the admission or exclusion of testimony, or in giving and refusing instructions. The suit was brought to recover damages sustained by the alleged wrongful expulsion of the plaintiff by the conductor of a train, because she was without a ticket which entitled her to transportation. It appears she had bought a ticket of the agent at Grand Junction, from thence by Omaha to Des Moines. In some manner which we cannot understand, the agent failed to attach the proper coupon, and the passenger had no evidence of a right to ride when she started on her journey. The complaint charged that she was put off. The instructions would seem to indicate that, while she was not directly excluded from the train, her leaving was caused by the action of the conductor, and the question of the liability of the company for this act seems to have been submitted to the jury. There is a wide difference between the case put by the instructions and that made by the complaint; the one being, apparently, a suit where the plaintiff counted on a breach of contract, and the other, where she sought to recover for a tort. The company insists there was a variance between the allegations and the proof; and they contend, because we can inferentially determine from the instructions there was such a variance, the case must be reversed. We cannot so conclude. The evidence may have made out a case to which the instructions were entirely applicable; and if this testimony was admitted without objection, and the defendant did not complain, at the conclusion of the trial, because of the variance, the case was properly submitted to the jury on the hypothesis which the evidence justified. The company complains of the instructions. It is quite evident some of them are radically wrong, and it is scarcely possible to conceive of a case to which they could be correctly applied. The relative duties and responsibilities, rights and privileges, of company and passenger and of employé and passenger are not accurately stated, and the jury may have been misled. The appellant, however, may not complain, because the question is not saved in the record. It is quite possible objections were made to the instructions on



which error is now laid, and that the ruling of the court thereon would have appeared in the bill of exceptions. But none appear in the record as it is certified to us, and it is pretty well settled in this state that the complaining party must show that, in some way, and at the proper time, the court's attention was called to what is alleged to be error; otherwise, proceedings to reverse the judgment cannot be successfully prosecuted. *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *Sandstone Co. v. Skoman*, 1 Colo. App. 323, 29 Pac. 21; *Railroad Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79; *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 248; *McClellan v. Hurdle*, 3 Colo. App. 430, 33 Pac. 280; *Fugate v. Smith*, 4 Colo. App. 201, 35 Pac. 283. These are the only two considerations which it is worth while to examine. We are unable to find any manifest error which would permit us to interfere with the verdict and judgment, which will accordingly be affirmed. Affirmed.

# ELLIS v. DENVER, L. & G. R. CO.

(Court of Appeals of Colorado. Jan. 13, 1896.)

## STATUTE OF FRAUDS—CONTRACT FOR SALE OF RAILROAD TIES—MEMORANDUM.

1. A contract for the delivery of railroad ties of specified dimensions is within the statute of frauds, though it was contemplated by the parties that the ties were to be prepared from standing timber or from logs already cut.

2. A memorandum of a contract for the delivery of railroad ties, merely specifying the total number of ties to be delivered, without giving the number of ties of the various descriptions, is insufficient to take the contract out of the statute of frauds.

Appeal from district court, Arapahoe county.

Action by Daniel B. Ellis against the Denver, Lakewood & Golden Railroad Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Ellis, the appellant, as the assignee of one B. R. Dell, brought suit against the railroad company on the following contract: "December 17, 1890. The Denver, Lakewood & Golden Railroad Company, Denver, Colo.—Dear Sirs: I will deliver f. o. b. cars at Denver, Colo., you to pay the freight, and deduct it from purchase price, forty thousand (40,000) dry red spruce ties, 6½ to 8 inches thick, 6 to 9 inch face, 8 foot long, sawed ends, 15 per cent. to be 5 to 6 inch face, ties to be 60 cents each, and culls 40 cents each. Dry and green white spruce, same dimensions as above, 50 cents each. Red spruce ties in sets at \$20.00 per thousand foot, board measure. You to pay me for all ties and lumber delivered in Denver on the 15th day of each month for all delivered the preceding calendar month. You to send me word when to commence to ship. First shipment not to be later than the first of February next." We are not particularly

concerned with the pleadings, and the only thing important to state is the failure of the plaintiff to state the terms or the time or the occasion of his offer to fulfill, which is averred generally in the complaint. There were several defenses interposed, but the decision turns on none of them. When it came to the proof, the defendant waived the objections respecting the paper offered as evidence of the contract and any proof of the authority of the person who had assumed to act on behalf of the company. Its entire defense was grounded on the statute of frauds. There was no performance by either. There was a tender of proof of an offer by Dell to deliver. The trial court agreed with the defendant as to the applicability of the statute. The plaintiff made several other offers of proof. These embraced the number of red spruce ties cut, the number of white spruce, the number of culls, the refusal of the company to carry out the contract that 32,000 red spruce and 8,000 white spruce ties were to be cut. These are the only ones to which reference will be made, or which at all bear on the matters which will be discussed. Notwithstanding the evidence tendered, the court refused to receive it, adjudged the contract void under the statute of frauds, and a verdict was taken for the company, and from the judgment entered thereon an appeal was taken to this court.

Rogers, Cuthbert & Ellis, for appellant.  
Yeaman & Gove, for appellee.

BISSELL, J. This case legitimately proffers one or two phases of a most interesting and difficult question, which has been raised in many actions wherein the contract which was the subject of the suit was claimed to be within the statute of frauds. When the contract concerns the sale of goods and chattels, it has frequently been necessary to determine whether the character of the thing sold was to be ascertained by its form at the time fixed for delivery, or to be settled by its condition as it might have been at the date of the execution of the contract. This query has been subject to modification in certain classes of cases, wherein there was an agreement to perform work and labor on the chattel, or there was some necessity to do work whereby there would be a change in the essential nature or form of the material. We shall not enter on this discussion. We shall confine the case to very narrow limits. The true criterion by which to settle the applicability of the statute may possibly be found in the situation at the date fixed for delivery. Whether this be or be not true, there can be no doubt the present contract is in no sense brought within the precedents which hold the statute inoperative where work or labor is to be done to reduce the material to the form in which it is to be delivered to the vendee. *Cooke v. Millard*, 65

N. Y. 352; *Finney v. Apgar*, 31 N. J. Law, 266; *Downs v. Ross*, 23 Wend. 269; *Gardner v. Joy*, 9 Metc. (Mass.) 177; *Lamb v. Crafts*, 12 Metc. (Mass.) 353; *Bacon v. Parker*, 137 Mass. 309; *Edwards v. Railway Co.*, 48 Me. 379; *Brown v. Sanborn*, 21 Minn. 402; *Prescott v. Locke*, 51 N. H. 94. The present case is entirely analogous in all of its leading features to those which have been cited. Assuming it was within the contemplation of the parties that the ties should be prepared from standing timber, or from logs which had been cut, the work to be done was in no sense the personal labor of the contracting party; and, so far as it may be controlled by the terms of the contract, the agreement could as well have been fulfilled by the purchase and delivery of the ties specified as by their preparation from logs or the reduction of standing trees to the form of ties. It was not agreed between them that Dell should cut, manufacture, and deliver, but it was simply an agreement to deliver so many ties of fixed dimensions, and of certain descriptions, at a named price. The contract does not even approach what are sometimes called "border-line cases," to which it is exceedingly difficult to satisfactorily apply well-settled rules. No well-considered modern case has treated an agreement like this as outside the statute. We therefore conclude the agreement was within it, and subject to its provisions.

The circumstance that the number 40,000 is mentioned concurrently with the specification of red spruce ties does not operate to aid the contract and render it valid. The contract is to be taken as an entirety and indivisible, and whatever it contains must be taken to be parts of one and the same thing, and we must, from all its terms, be able to conclude what the parties had agreed respecting each mentioned item. *Scott v. Railway Co.*, 12 Mees. & W. 31; *Baker v. Higgins*, 21 N. Y. 397; *Clark v. Baker*, 5 Metc. (Mass.) 452. While we regard the memorandum as wanting in some of the essential elements of a valid contract, we do not place our conclusion as to its insufficiency on the neglect to state the time at which the material was to be delivered. The contract is so entirely defective that we do not care to enter into the discussion of this very troublesome question. Many well-considered cases hold the law will supply any omission to state the time within which goods are to be delivered, and hold a contract performable within what the law would adjudge to be a reasonable time after the goods are called for. The same rule might apply if goods were to be delivered at a particular place, and the offer of delivery was within what the law would term a reasonable time subsequent to the execution of the agreement. *Manufacturing Co. v. Goddard*, 14 How. 446. It is quite possible that this principle might not be applicable to the present case, and

that it is within the rule which requires a definite statement of the date of performance, because there is some mention made of the time of delivery in the memorandum. We prefer to leave this question unnoticed, because the other defects are more manifest and less troublesome. All agree that the terms of the bargain must be so stated as to render it possible therefrom to gather what the parties have agreed to. Tested by this very general rule, which is sufficient for our purpose, a simple inspection of the memorandum will demonstrate its insufficiency. We are unadvised by its terms what number of ties of the various descriptions were agreed to be delivered by the contracting party. If the 40,000 is referable only to the red spruce ties, then the agreement is absolutely silent as to what the parties contracted respecting the dry and green white spruce, and the culls or the sets or the lumber. If the number is to be taken as applicable to all the different varieties, we cannot ascertain what part of each the parties contracted for. There is the same difficulty with respect to the number of switch sets which were to be furnished, the number of culls which were to be delivered, and the amount of lumber which Dell was to supply. There was no agreement to supply a certain definite thing, or a certain number of articles of a particular description of the various sorts specified, nor did the railroad company agree to accept specific articles of a given number or quantity. If the company had brought suit against Dell for the specific performance of the contract, it would have found insuperable difficulty to furnish a basis on which the court could decree a performance. Under these circumstances, the other party must be subject to a like difficulty when he brings an action to recover damages for a failure to perform. The necessity to express the subject-matter of the contract in the memorandum, or some other writing to which reference is made, is pretty generally acknowledged. 1 *Reed*, St. Frauds, §§ 418, 216; *Bailey v. Ogden*, 3 Johns. 398; *Breid v. Munger*, 88 N. C. 297; *Cummer v. Butts*, 40 Mich. 322; *Ross v. Purse*, 17 Colo. 24, 28 Pac. 473; *Eppich v. Clifford*, 6 Colo. 493. There is considerable doubt whether this memorandum is a contract at all, or amounts to anything more than an offer to sell, which might or might not be accepted by the railroad company, as they should determine. The nature of the memorandum and many of its features would tend strongly to support the appellee's contention that such is its inherent character. Without deciding this precise question, we do hold the memorandum insufficient to take the case out of the operation of the statute, and the district court did not err in holding it void and unenforceable. The district court committed no error in the trial of the case, and its judgment will therefore be affirmed. Affirmed.

**BURCHINELL v. BUTTERS.**

(Court of Appeals of Colorado. Jan. 13, 1896.)

**REPLEVIN—OWNERSHIP—PROOF UNDER GENERAL DENIAL—HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—GIFT FROM HUSBAND—MEASURE OF DAMAGES.**

1. In replevin, to recover goods in the hands of an officer, seized on attachment against the plaintiff's husband, where plaintiff pleaded title generally, and supported the allegation by proof of a gift from her husband, evidence that the husband owed the debt, upon which the property was taken, when the alleged gift was made, and was then insolvent, was admissible, under a general denial.

2. The provisions of Gen. St. § 2266 (Mills' Ann. St. § 3007), specifying the property a wife may hold in her own right, free from the control or debts of her husband, exclude gifts from the husband, except certain articles enumerated; and a wife cannot establish title to household goods, as against creditors of her husband, by proving a gift from him.

3. A husband cannot invest his wife with title by gift to property owned by a former wife, who died intestate, leaving him as her only heir, as against the creditors of the deceased wife.

4. The measure of damages for goods converted is their actual value, and not what it would cost to replace them with new goods.

Error to district court, Arapahoe county.

Action by Lucia B. Butters against William K. Burchinell. Judgment for plaintiff. Defendant brings error. Reversed.

This was an action of replevin brought by the defendant in error against the plaintiff for the recovery of chattels (household furniture, a piano, etc.) taken by the plaintiff in error, as sheriff, by writ of attachment, in a suit against Sara L. Butters and Henry A. Butters, defendant in error (plaintiff) claiming to be the owner of the chattels. Henry A. Butters and Sara L. Butters were husband and wife, and while that relation existed bought a house. The title was made to the wife, and husband and wife jointly executed notes for the purchase money. The house was furnished with the goods in controversy in this suit, the property of the wife, Sara L. Husband and wife jointly occupied the house, and used the furniture, until the death of Sara L. Subsequently, the husband remained in possession and occupation, assisted by a housekeeper. Sara L., as far as appears by the record, died intestate, and no administration of her estate was had; the indebtedness upon the joint notes remaining unpaid. While affairs were in this condition, on July 6, 1891, Henry A. married defendant in error, installed her in the house, and attempted, as shown by the evidence, to invest her with the ownership of the goods in controversy. Although in some unimportant particulars the witnesses failed to agree, the evidence was substantially the same, as rehearsed by those present, and was that at the wedding breakfast the husband made the new wife a present of the household goods and the horse and phaeton. "He did not make a speech; just sat there, and said she should have the horse and buggy, and the household goods. That was all that was said

and done about that." In the language of another witness, Mr. Butters said "that he then and there gave her all the household effects, and the horse, Dick, and phaeton and harness. These were enumerated. They had been the property of the former Mrs. Butters." Butters and wife occupied the house, and used the furniture, horse, and phaeton, until November following, when the wife, as testified to, had to "go to a lower altitude," left Colorado, and has not since returned. Butters remained some time later, rented the house and furniture, collected the rent, used horse and phaeton, when he, too, left for a lower altitude, and has not since returned. On the 20th day of July, 1892, C. H. McLaughlin sued out an attachment on two overdue promissory notes of \$250 each, made by Sara L. and Henry A. Butters, which was levied upon the goods in controversy. At the time of the levy the goods were in the possession of McLaughlin, plaintiff in attachment. The case was tried to the court, finding and judgment for the plaintiff (defendant in error), and a writ of error sued out, and case brought to this court.

Bennet & Bennet, for plaintiff in error.

REED, P. J. (after stating the facts). Many errors are assigned, several of which it will not be necessary to discuss. Upon the trial defendant asked leave to amend his answer of general denial, after the plaintiff had offered the evidence in regard to title by gift from the husband, claiming surprise, and tendered a verified amendment, alleging, among others, the fact that, at the time of the alleged gift and pretended transfer of the property, and for some time before, C. H. McLaughlin was a bona fide creditor of the husband, H. A. Butters, and that he was insolvent at the time of the alleged gift. The amendment was denied. Upon the trial evidence to establish the insolvency was offered, and refused, on the ground that, the answer being a general denial, the evidence could not be received; that fraud must be specially pleaded, etc. The only allegation in the complaint, being that, on the date of the levy, plaintiff was the owner and entitled to the possession, was fully answered by the general denial. There was nothing to disclose the origin or source of title in the complaint. Consequently, it could not be traversed. Section 3007, Mill's Ann. St. (section 2266, Gen. St.), is as follows: "What Property of Married Woman Remains Her Own. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits and proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, including presents or gifts from her husband, as jewelry, silver, tableware, watches, money and wearing apparel, shall remain her sole and separate property, notwithstanding her

marriage, and not be subject to the disposal of her husband, or liable for his debts." The property in controversy, it will be seen, is not such that it can be made the sole and separate property of the wife by a gift from the husband; and, to maintain her right, some title known to the law must have been established. Where husband and wife are living together, the legal presumption is that such property as that in controversy is the property of the husband. *Allen v. Eldridge*, 1 Colo. 288. And where the wife goes to a lower altitude, leaves the property in the full possession of the husband, who exercises full control, and fails to assert title, the presumption is stronger. Any competent proof to show the pretended title invalid, or, in other words, to show that the plaintiff was not the owner, was admissible, under the pleadings; and, when the evidence disclosed a supposed title by gift of property, of a character not allowed by statute, the testimony of the insolvency of the husband prior to the gift, and at the time, was clearly admissible to establish want of title. It was not, as supposed by the learned judge, a question of fraud, that should have been specially pleaded. If, at the time of the attempted gift, the husband was insolvent, no title could pass by the gift, and the evidence under the issue. If the learned judge supposed or believed it to be inadmissible, the question of amendments being almost entirely in the discretion of the court, to refuse the amendment and proof was an abuse of discretion. A fundamental trouble was the lack of ownership of the property with which the husband attempted to endow the new wife at the wedding breakfast. It is shown by the evidence that it was the property of the former wife. The title to the house was in her, and remained so until sold out on the trust deed after her death. There was no will nor administration. The attachment was sued out on the joint notes of the husband and former wife, which, consequently, were the debts of the deceased wife. In the absence of children, the husband, as survivor, succeeds to the wife's estate; but such estate is what remains after paying the wife's debts,—the balance. If a wife dies owning separate and individual property, and also owing debts, the property, like that of any other individual, is liable for such debts as in this case, and the generosity of the husband unavailing, from the simple fact that he had no title.

Another error was in the measure of damage. The court gave judgment for \$1,500,—the whole amount claimed. The proper inquiry was the value of the property at the time of the seizure. Several witnesses fixed it at from \$700 to \$800. Witnesses for plaintiff put it at \$1,500,—not on the basis that the goods were worth that at a fair valuation, or would bring that, but upon the theory that it would cost that to replace them. The latter estimate was adopted by the court.

The cost of replacing them might, perhaps, have been one method of arriving at the value; but it must have been of the same kind of goods, that had been in use for the same length of time, and in the same condition, not of new goods. By reason of the error in regard to the proper measure of damage, the judgment was excessive. For the reasons given, the judgment must be reversed, and cause remanded. Reversed.

#### DENVER & R. G. R. CO. v. ROBERTS.

(Court of Appeals of Colorado. Jan. 13, 1896.)

PRACTICE IN CIVIL CASES—AGREEMENT OF COUNSEL—DUTY OF COURT TO OBSERVE.

By agreement of counsel in open court, an action was set down for trial on a certain date, with the condition that if, on account of the probable absence of defendant's attorney from the state, he was unable to be present on that date, there should be a postponement. The attorney was called away, as anticipated, and notified the judge before going. *Held*, that it was error to allow the action to be tried on the day set, in the absence of any counsel for defendant.

Error to Las Animas county court.

Action by James H. Roberts against the Denver & Rio Grande Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Morton E. Stevens, for plaintiff in error.  
John A. Gordon, for defendant in error.

REED, P. J. Defendant in error brought suit to recover the value of a Jersey cow alleged to have been killed by an engine of the plaintiff through negligence, and an answer of general denial and contributory negligence was filed. On August 13, 1894, the case was tried *ex parte* by the court, without a jury; the plaintiff appearing in person and by counsel, the defendant corporation not having been represented. The court found for the plaintiff in the sum of \$100, for which judgment was entered, from which error was prosecuted to this court.

The only ground urged for reversal is novel. I can find no precedent, and the conclusion of this court must be based upon grounds of right and justice, in the absence of decided cases. On the 26th of June, counsel for both parties being present, the case was set for trial on August 13th, with the understanding that if counsel for the defendant was necessarily absent from the county, and in Arizona or New Mexico, where he had business in settling an estate of which he was administrator, the case should on that date be reset for trial at some subsequent time. The judge of the court stated "that he knew it was necessary for counsel to be absent, to attend to the business of the estate"; and counsel for plaintiff said that, in case counsel "was necessarily absent, the case could be continued until such time as counsel could be present." Soon after that date, counsel went to Arizona on business

connected with the estate, also to New Mexico, returned to the city of Trinidad on August 7th, remained but one day, and left again for New Mexico. On that date (August 7th) he saw the judge of the court, and informed him "that it would be impossible to be present on the 13th day of August, at the time said cause was conditionally set for hearing, and then and there asked said county judge to continue said cause until such time as affiant could return and attend the trial thereof, and then and there asked said court if, under the agreement of counsel made in open court, defendant's rights would be protected. The said county judge then and there stated to affiant that it would be all right; that the interest of the defendant in said cause would be protected against a default, upon the grounds that affiant was necessarily absent on important business for said estate." Counsel did not see the opposing counsel nor notify him of his inability to try the case on August 13th, and he left for New Mexico on the evening of the 7th, and did not return until some time after the date of the trial. There was no controversy in regard to the facts. They were set up by verified motion to set aside the judgment, and supported by an additional affidavit. The motion alleged the contract made in open court with opposing counsel, the interview with the court on August 7th, and that by reason of the premises the defendant was not represented; alleging that defendant had good and sufficient defense to the action in law and fact, and deposited money in court to pay the accrued costs. The court denied the motion to vacate the judgment, but made the following certificate: "On or about the 26th day of June, Mr. Gordon, as attorney for plaintiff, and Mr. Stevens, as attorney for defendant, appeared in court, and agreed that this cause should be set down for the 13th day of August; Mr. Stevens stating at the time that he was compelled to be away from the state on account of business connected with his duties as administrator of the Sam Doss estate, but was perfectly willing to try the cause upon that day, if he would be in town. There was other conversation that passed between the plaintiff's and defendant's attorneys, that I cannot now recall. And that, on or about the 7th day of August, Mr. Stevens called on me, in my office, and stated that urgent business connected with the Doss estate would compel him to leave town upon that day, and that he would have to go down into New Mexico, and that it would be impossible for him to be in attendance on the trial of this cause, set for the 13th day of August, and requested me to see that no advantage was taken of him in his absence. I said to Mr. Stevens that I would protect him in all his rights in the matter, and I feel confident that I led him to believe that there would be no trial of the cause upon that day, in case of his absence. On the day of the trial,

—the 13th day of August,—Mr. Gordon appeared with his witnesses; and I stated to Mr. Gordon that Mr. Stevens had, on or about the 7th of the month, called upon me and stated that urgent business would compel him to be absent from the trial of this cause, and that I had promised Mr. Stevens that I would see that no advantage would be taken of him during his absence. Mr. Gordon insisted that Mr. Stevens had agreed with him that, in case he would not be present at the trial of the cause on the 13th, that he would give him notice; that he had left town without giving him any notice; that he had brought his witnesses here; and that he insisted upon a trial of this cause. The court, relying upon this statement as being true, felt that he could not deny the right of the trial of the cause. I said to Mr. Gordon to prepare this judgment, and to note Mr. Stevens' exceptions of it, and that the court would preserve any and all rights he would have to an appeal. This statement was made in open court, immediately after the trial of this cause, and in the presence of Mr. Gordon, and no objection was made thereto on the part of Mr. Gordon. I hereby certify that the above and foregoing is a true statement of all the facts connected with the sitting and trial of this cause not otherwise shown by the record herein, and not including the evidence of the witnesses produced at the said trial. Given under my hand and seal this the 1st day of September, 1894. W. G. Hines, County Judge. [Seal.]" Which fully corroborates the statement of counsel in the motion and affidavit.

It readily appears that the trial upon August 13th was to depend upon the ability of counsel for defendant to be present. In other words, the setting the case for trial on that date was not absolute, but conditional, and was so understood by the court and opposing counsel; and, although due courtesy might have required notice in advance of the inability of the defendant to try the case on that date, it was not a part of the stipulation or agreement, and the right of the defendant to a continuance could not be denied for want of such notice. The judge, in his certificate, says, "I feel confident that I led him to believe that there would be no trial of the cause upon that day, in case of his absence." Good faith required both opposing counsel and the court to respect the agreements made. The fact that plaintiff had his witnesses there, and was ready, was no reason for violating agreements. The court should have continued the case, and if counsel, for want of notice, had incurred expense, the continuance could have been made upon terms that would have covered such expense. In cases of this kind, dependent entirely upon questions of fact, defendant should not be precluded from making defense. That it was misled, and a judgment obtained against it through no

fault of counsel, is apparent. To set aside the judgment, and afford opportunity to defend, were clearly in the discretion of the court, and in the statement of the court it appears that, in justice to the defendant, the motion to vacate the judgment should have been granted, and a trial of the case had upon the merits. To refuse it was an abuse of discretion, for which the judgment will be reversed. Reversed.

### HODGSON v. FOWLER.

(Court of Appeals of Colorado. Jan. 13, 1896.)

MINING PARTNERSHIP—SUFFICIENCY OF PROOF—  
RESULTING TRUST—EVIDENCE.

1. Where it appeared, on an issue as to whether plaintiff and defendant were partners in working a mine, that the lease thereof was in the name of plaintiff and another person, because the latter would not have defendant's name in it; that an alleged written partnership agreement between plaintiff and defendant was lost, and the testimony relative thereto was vague and indefinite; and that it was not shown that defendant ever participated in the working of the mine, or shared the profits and losses thereof, but that plaintiff assumed ownership and control thereof,—there was no sufficient proof of a partnership, though plaintiff stated that he had borrowed money on alleged partnership property, and paid it out for partnership purposes.

2. Plaintiff's allegations that he held certain property in trust for himself and defendant, and mortgaged the same for a loan which he used for the benefit of himself and defendant as partners, and that defendant purchased said property at the mortgage foreclosure sale, and held it partly in trust for plaintiff, were not established, where it appeared that, while plaintiff held the property, he exercised ownership over it for eight years, that plaintiff failed to prove a partnership between himself and defendant, and that defendant denied having any interest in the property until his purchase at the mortgage sale.

Error to district court, Arapahoe county.

Suit in equity by Joseph Hodgson against Henry S. Fowler to establish a resulting trust in certain lands. There was a judgment for defendant, and plaintiff brings error. Affirmed.

S. E. Browne and G. C. Preston, for plaintiff in error. J. P. Heisler and Ben. Safely, for defendant in error.

REED, P. J. A suit in equity to compel the conveyance of a one-fourth interest in a number of lots, the title to one-half being in defendant in error. It was alleged in the complaint that one Eaton, the plaintiff in error, and defendant, Fowler, purchased the lots; that the conveyance was made to Eaton and the plaintiff, each one-half, but that the plaintiff held one-fourth in trust for the defendant; that plaintiff and defendant were partners in business, and the purchase made with partnership funds or property; that, the parties being in need of money for the business of the partnership, in November, 1885, plaintiff borrowed from one Ampter \$600, and gave a deed of trust upon the property to secure it, and that the money was

used for partnership purposes; that, default having been made in the payment of the Ampter debt, the property was sold under the trust deed on February 18, 1887, for \$635, bought by the defendant for the joint use of both parties; that the defendant denied the trust, refused to convey, and claimed to own the property individually; that in 1876 plaintiff and defendant owned one-half of the Carbon Coal Mine, and Eaton the other half, which was traded for the lots in controversy; that, up to the time of the sale of the lots, in 1887, plaintiff and defendant were, as partners, engaged in developing mines in Park county, the expenses to be equally borne by each; that, at the time of the sale of the lots, defendant owed plaintiff over \$630 for money advanced by the plaintiff in partnership affairs, in excess of his portion; that in 1889 defendant, upon several interviews, fully recognized the claim of the plaintiff, etc.,—asking that defendant be decreed to convey the interest claimed, and for an accounting. Defendant answered, denying every material allegation of the complaint; denied that he had interest in the coal mine or the lots until he purchased at the sale; denied partnership in the coal mine; alleged that Eaton and plaintiff were the owners, and that he contributed nothing to the purchase of the lots; denied that plaintiff held one-half in trust for him; denied that in 1885 he and plaintiff were jointly engaged in mining in Park county; denied that he and plaintiff needed money for partnership purposes; admitted that plaintiff made the loan from Ampter; denied that the money was obtained or used for their joint benefit, and that he ever received a dollar of it; plea of statute of limitations; that on the morning of sale plaintiff told him the lots were to be sold, advised him to purchase, as Ampter would get them if he did not; was no agreement to buy for the use of plaintiff or any one else. Replication, denying affirmative allegations in answer. A trial was had to the court. After plaintiff's evidence was in, defendant moved for a nonsuit, which was granted. The granting of the motion and refusal to grant a new trial are assigned as errors. In order to succeed in this case, plaintiff was compelled, upon the trial, to establish the following propositions: 1. "A partnership, as early as 1876, in leasing and working the Carbon Coal Mine, in which defendant was a partner. Plaintiff's testimony is to the effect that the lease was taken and mine worked in the name of Eaton & Hodgson, because Eaton would not have defendant's name in it." It is clear that defendant was not a general partner,—was not a partner with Eaton. It is not shown that defendant ever participated in working or management, paid losses, or received profits. The claim is that, by virtue of a written agreement, made between the plaintiff and defendant, the latter was to be an equal partner with the plaintiff in his half of the Eaton &

Hodgson lease. The agreement was not produced, and the testimony in regard to its provisions, witness never having seen it since, was, of necessity, after so many years, very vague and indefinite. The evidence was insufficient to establish the partnership alleged in the complaint. And, as to the lease, it stood in the names of Eaton & Hodgson, and a one-half interest in it was exchanged for the property in controversy. The conveyance was made to Eaton & Hodgson,—no conveyance to defendant by the grantors or plaintiff. No reason is given for not having conveyed. It also shows that, for several years, plaintiff assumed ownership, exercised control, and, to suit his own convenience or necessities, mortgaged it two or three times. True, he stated that the money so obtained was used for partnership purposes; but the evidence of a subsequent partnership in regard to working and development of mines is too indefinite and general to establish such relation, except for prospecting. No property is named, nor amount stated as expended. It rests, generally, upon the statement that he paid out for partnership purposes all that he obtained by mortgages. No decree of partnership can be based upon such evidence. The whole claim of right is based upon the fact of partnership. The right, if any, grew out of partnership transactions. And no rule of law is better established than that, to assert a right of that kind, the existence and character of the partnership must be established; and after such dissolution, and such a lapse of time, a statement and proof of the condition of accounts, as between them, must be established beyond question. Having failed to establish such a partnership as would stamp the realty in question with the character of partnership assets, and charge defendant with a resulting trust, the case falls from necessity.

2. In order to succeed, it was necessary to establish two trusts: First, that of the plaintiff, of a one-fourth interest for the benefit of defendant. It rests entirely upon the evidence of plaintiff, while the manner of acquiring it, the continued holding for eight years, acts of ownership, payment of all taxes, and making mortgages, contradict the existence of a title in trust for another. Defendant, in the verified answer, denied ever having any interest in the property until his purchase at public sale. No business partnership is alleged or shown to have existed in 1887, when defendant purchased the property. It was mortgaged by the plaintiff. He was unable to protect it. The property was to be sold. Defendant's attention was called to it, and he became the purchaser, borrowed \$300, by mortgaging other property, to make up the purchase money, and subsequently paid it. The whole purchase price was paid by the defendant, as shown by the evidence. To impress upon the property the legal character of a trust, resulting from partnership transactions, an existing partnership must

have been proved, and a purchase, also, by partnership funds. Neither was shown. The attempt was to show that, by reason of some former transaction as partners, defendant was indebted to the plaintiff in some undefined, indefinite amount, and that, by reason of such indebtedness, plaintiff was equitably entitled to one-half. This was insufficient. "Resulting trusts are trusts the courts presume to arise out of the transactions of the parties; as, if one man pays the purchase money for an estate, and the deed is taken in the name of another, courts presume that a trust is intended for the person who pays the money." 1 Perry, Trusts, § 26. "An agent for the purchase of property cannot be declared a trustee for his principal, when he repudiates the agency, and purchases the property with his own funds." Bank v. Bissell, 4 Fed. 694; Burden v. Sheridan, 36 Iowa, 125; 1 Perry, Trusts, § 135. "If one agrees to purchase land, and give another an interest in it, and he purchases, and pays his own money, and takes the title in his own name, no trust can result." 1 Perry, Trusts, § 134; Kistler v. Kistler, 2 Watts, 323; Willard v. Willard, 56 Pa. St. 119; Thorne v. Thorne, 18 Ind. 462; Rogers v. Simmons, 55 Ill. 76; Duffy v. Masterson, 44 N. Y. 557. Failing to prove a resulting trust from the relation of the parties, the use of partnership funds in the purchase of the property, or the money of the plaintiff, the plaintiff was compelled to rely upon oral admissions and declarations to establish a trust. Those attempted to be proved were very vague and indefinite, but their character was unimportant, made long subsequent to the transaction. Such testimony was inadmissible. Unless the transaction was tainted with either actual or constructive fraud, a trust could not be created by parol. See our statute of fraud (1 Mills' Ann. St. § 2019); Stewart v. Stevens, 10 Colo. 446, 15 Pac. 786; Von Trotha v. Bamberger, 15 Colo. 1, 24 Pac. 883; Kayser v. Maughan, 8 Colo. 239, 6 Pac. 803; Shaffner v. Shaffner, 145 Pa. St. 163, 22 Atl. 822; Acker v. Priest (Iowa) 61 N. W. 235. "A parol agreement, made by one to buy another's land at trustee's sale, and hold it for him, creates no trust." Kraft v. Smith, 117 Pa. St. 183, 11 Atl. 370; Salisbury v. Black, 119 Pa. St. 200, 13 Atl. 67; Minot v. Mitchell, 30 Ind. 228. A verbal agreement to purchase land for the benefit of another is void, under the statute of frauds, and cannot be enforced against the purchaser, who, in the absence of fraud, has paid for the land with his own money, and taken a conveyance in his own name. 1 Perry, Trusts, § 76; Von Trotha v. Bamberger, supra; Bohm v. Bohm, 9 Colo. 100, 10 Pac. 790; Stephenson v. Thompson, 13 Ill. 186; Perry v. McHenry, Id. 227; Bourke v. Callanan, 160 Mass. 195, 35 N. E. 460.

It follows that the district court committed no error in finding for the defendant, and the judgment will be affirmed. Affirmed.

## MENTZER et al. v. ELLISON et al.

(Court of Appeals of Colorado. Jan. 13, 1896.)

## ATTACHMENT—JURISDICTIONAL DEFECT IN AFFIDAVIT—COLLATERAL ATTACK—ENJOINING SALE UNDER VOID ATTACHMENT.

1. Under Code, § 92, providing that no writ of attachment shall issue unless an affidavit is filed setting forth that the defendant is indebted to the plaintiff, and alleging one or more of the enumerated causes for attachment, two averments in the affidavit (first, of defendant's indebtedness; and, second, of the existence of some cause for attachment) are essential to give a court jurisdiction; and, where there is an entire absence of either one of such averments, the omission cannot be cured by amendment, under section 117, as an informality or insufficiency.

2. All proceedings in an attachment of property based on an affidavit which fails to aver jurisdictional facts are void, and may be collaterally attacked.

3. An action in equity to enjoin the sale of property under a void attachment may be maintained by another creditor claiming a lien on the property.

4. Code, § 146, providing that an injunction shall be granted to stay any judgment at law for a greater sum than the complainant shall show himself equitably bound to pay, and that such injunction shall operate as a release of all errors in the proceedings enjoined, contemplates only an injunction in favor of a party who is liable for the payment of the judgment, and does not apply to a proceeding by third persons to enjoin the sale of property under an attachment, and which does not seek to interfere with the collection of the judgment against the defendant therein.

Reed, P. J., dissenting.

Appeal from district court, Arapahoe county.

Action by Ellison & Sons against O. F. Mentzer and others to enjoin the sale of property under proceedings in attachment brought by Mentzer against L. Filberg. From a judgment for plaintiffs, defendants appeal. Affirmed.

Norlin & McDuffie, for appellants. Charles M. Campbell, for appellees.

THOMSON, J. On the 3d day of January, 1893, O. F. Mentzer brought suit in the district court of Arapahoe county against L. Filberg to recover an alleged indebtedness of \$600, and caused a writ of attachment to be issued and levied upon the property and effects of the attachment defendant. On the same day the appellees, Ellison & Sons, commenced their action against L. Filberg, and sued out and levied an attachment upon the same property. The levy of the appellees was subsequent to that of Mentzer. The affidavit upon which the writ in Mentzer's case issued was as follows:

"State of Colorado, County of Arapahoe—ss.: In the District Court of Arapahoe County. O. F. Mentzer, Plaintiff, vs. L. Filberg, Defendant. Affidavit in Attachment. O. F. Mentzer, of said county, being duly sworn, doth depose and say that L. Filberg, against whom the said O. F. Mentzer is about to sue out an attachment, is indebted to him in the

sum of six hundred and nine dollars, and that the said demand is due and wholly unpaid. O. F. Mentzer.

"Sworn and subscribed to before me this third day of January, A. D. 1893. Matt Adams, Clerk, by G. S. Richards, Deputy."

On the 5th day of January, L. Filberg filed a verified answer to the complaint of Mentzer, admitting the indebtedness to him as stated, and authorizing judgment to be entered against her for the amount, with interest. The court, on the following day, on motion of Mentzer, sustained the attachment, and entered judgment according to the defendant's answer. Special execution was thereupon issued to the sheriff of Arapahoe county, by virtue of which he advertised the property taken, to be sold on the 31st day of January, 1893. This proceeding was instituted by the appellees, as plaintiffs, to set aside the judgment sustaining Mentzer's attachment, in so far as its effect was to give priority to that attachment over the attachment of the plaintiffs, and to enjoin the sale by the sheriff. The complaint sets forth the affidavit upon which the attachment was issued, averring that by reason of its insufficiency the attachment was void; alleging, also, that the pretended indebtedness was fictitious, that the note purporting to evidence it was not signed by L. Filberg, and that the suit was commenced, the attachment issued, and the judgment entered in pursuance of a fraudulent conspiracy among these defendants. From the admitted facts it appears that the defendant Adolph F. Filberg, who signed the name of L. Filberg to the note, had ample authority to do so; there was no proof or admission of fraud; and the court very properly found these issues against the plaintiffs. But the court further found that the affidavit was insufficient to authorize the issuance of the writ, and adjudged the attachment void as against the plaintiffs, awarding precedence to the plaintiffs' attachment. From this judgment the defendants appealed.

This question for determination is whether, as between these plaintiffs and these defendants, there was such an attachment of the property of L. Filberg, at the suit of Mentzer, as to give him the right to prior satisfaction of his claim out of the attached property. The attachment defendant, by waiving all objection to the proceeding, and consenting to judgment, could not afterwards, herself, attack the affidavit for insufficiency, and, as against her, the attachment would hold the property; but did her waiver of her own rights render the proceeding valid as against other attaching creditors? The following are sections 92 and 117 of the Code:

"Sec. 92. No writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of the court in which the action is brought, an affidavit setting forth that the defendant is indebted to such plaintiff, stating the nature and amount of such



indebtedness as near as may be, and alleging any one or more of the following causes for attachment, viz.:" (Here follow the grounds of attachment.)

"Sec. 117. No writ of attachment shall be quashed nor any garnishee discharged, nor any undertaking given by any person or persons under proceedings by attachment be rendered invalid, nor any rule entered against a sheriff discharged on account of any informality or insufficiency of the original affidavit, or of the original undertaking given for the attachment, if the plaintiff or the plaintiffs, or some credible person, or his or their agent, or attorney for him or them, shall file a sufficient affidavit in the cause; or if the plaintiff or plaintiffs or some credible person, or his or their agent or attorney for him or them, shall make with such security as is required by this act, an undertaking to be approved by the court in which said suit may be pending, and when a writ of attachment shall be held to be defective, the same shall be allowed by the court, to be amended in such time and manner as it may direct, and thenceforth the suit shall proceed as if such defective proceedings had been originally sufficient."

The question before us involves the consideration of the purpose of the affidavit, the conditions under which it may be amended, and the right of subsequent attaching creditors to question its validity. If, when property is attached, there is no service of summons upon the defendant, and no appearance by him to the action, the proceeding is purely in rem. The jurisdiction of the court is confined to the property attached, and, if the attachment fails, there is nothing for the court to adjudicate. It can render no judgment of any kind. If the defendant is served with summons, or appears to the action, the proceeding is both in personam and in rem. The court has jurisdiction of the person by virtue of service of its process or of appearance, and of the property by virtue of the attachment. But the court acquires no jurisdiction of the property merely by virtue of its jurisdiction of the person. *Waples, Attachm. 107, 332.* An affidavit is an essential prerequisite to the issuance of a writ of attachment. The statute is prohibitory in its terms. It provides that no writ shall issue except upon affidavit filed. The jurisdiction of the court in attachment proceedings depends upon the affidavit, and if none is filed the attachment writ and all proceedings under it are void. *Hargadine v. Van Horn, 72 Mo. 370; Wright v. Smith, 66 Ala. 545; Eads v. Pitkin, 3 G. Greene, 77; Manley v. Headley, 10 Kan. 88; Waples, Attachm. 76.* But the affidavit may, in essential particulars, fall so far short of the statutory requirements that it cannot be regarded as an affidavit for attachment. Two statements of fact are required in the affidavit, and each is indispensable: It must allege an indebtedness from the defendant

to the plaintiff. It must also aver the existence of one of the grounds upon which the statute authorizes an attachment. A mere indebtedness gives no right to an attachment, nor does the fact alone that the defendant has placed himself in some position which, by the terms of the statute, would authorize his creditors to proceed against him by attachment. A man to whom he owes nothing cannot attach, and neither can a man to whom he is indebted, when there is no statutory cause for attachment. The affidavit must combine the allegation of indebtedness with the allegation of cause. If either is entirely absent, there is no more power to issue the writ than if there were no affidavit at all. *Napton, J., in Bray v. McClury, 55 Mo. 135; Dickenson v. Cowley, 15 Kan. 269; Updyke v. Wheeler, 37 Mo. App. 680; Miller v. Brinkerhoff, 4 Denio, 118; Waples, Attachm. 104.*

Section 117 makes very liberal provision for amendments of informal or insufficient affidavits, and the contention is that this affidavit might have been amended, if it had been objected to by the attachment defendant, but that, she having failed to make the objection, the defect cannot be taken advantage of by these plaintiffs. Conceding that where the defect is a mere irregularity the attachment cannot be questioned by other creditors, or by persons who have become interested in the property after the attachment, an inquiry whether the defect in this affidavit is a mere irregularity, or whether the affidavit is a sufficient compliance with the law to be amendable, becomes pertinent. This section provides that no writ of attachment shall be quashed on account of any informality or insufficiency of the original affidavit, if the plaintiff shall file a sufficient one. The "original affidavit" mentioned is the affidavit required by section 92. In order that there may be an amendment, there must be an original affidavit to amend; and that affidavit must be, in some measure, a compliance with the section requiring it. It is not meant that an affidavit of any nature, or containing any sort of statement, may, by amendment, be converted into a sufficient affidavit for attachment. On its face, it must show at least an attempt to set forth the facts upon which an attachment is authorized. It is not to be supposed that the legislature intended by section 117 to override section 92, or impart validity to something which, by the terms of the latter section, is a nullity. The two sections must be construed together, and in harmony with each other, as parts of the same act, and we find nothing in the language of either which offers any serious impediment to so construing them. There must, before the writ can issue, be an affidavit filed, and it must set forth an indebtedness so as to bring the plaintiff within the class of persons in whose favor an attachment is allowed. It must also allege

the existence of some condition which the statute makes a ground of attachment, in order to show the right of the plaintiff to resort to this remedy for the collection of his debt. These statements may be imperfect. They may not be sufficiently full, or they may be ambiguous or obscure. Nevertheless, if the affidavit contains them, it is sufficient to invest the court with jurisdiction, and set its machinery in motion. Now, section 117 supposes that the court has acquired jurisdiction of the attachment proceeding. It supposes the original filing of an affidavit which, although defective, contains enough to authorize the writ. A court has no power to make any order in a matter of which it has no jurisdiction, and hence its authority to allow the amendment of an affidavit, or the replacing of an insufficient affidavit with a sufficient one, must be confined to cases in which the insufficiency is not jurisdictional. A want of completeness of statement, or a failure to aver directly that which may nevertheless be gathered from the entire affidavit, may be cured by amendment. 'Such defects pertain to form, rather than substance, and render the proceeding voidable, but not void. But the entire want of an essential jurisdictional fact cannot be supplied; and, liberal as the statute is, it was not intended to permit a party, under cover of an amendment, to interpose an affidavit where originally there was either none at all, or one so lacking in the statutory requirements as to be equivalent to none at all. See *Green-vault v. Bank*, 2 Doug. (Mich.) 498; *Lillard v. Carter*, 7 Helsk. 604; *Hall v. Brazleton*, 40 Ala. 406; *Whitney v. Brunette*, 15 Wis. 61; *Booth v. Rees*, 28 Ill. 46. The affidavit in this case sets forth no cause whatever for attachment. As a statement of indebtedness, it is defective in failing to give the nature of the indebtedness, but if the statement of indebtedness had been coupled with a ground of attachment, so as to be an affidavit for attachment, this defect might have been remedied by amendment. But, there being no cause for attachment alleged, the want could not be supplied by amendment. There was no authority to issue the writ, and no lien was obtained upon the goods by its service. It is true that the attachment defendant, by consenting to the attachment and confessing judgment, has precluded herself from making the objection; but, while the attachment would not now be set aside upon her motion, it is void as to these plaintiffs. The validity of their attachment is not disputed. Mentzer's attachment gave him no lien, as against them, and they are entitled to have the property subjected to the payment of their debt, unincumbered by his claim. *Bell v. Hall*, 2 Duv. 288; *Whitney v. Brunette*, supra; *Dickenson v. Cowley*, supra. We have been referred to some cases decided by the supreme court of California in which it was held

that proceedings in attachment could not be collaterally questioned, where, by proper amendment while in progress, they might have been made regular. We have examined these cases, and find no disharmony between them and the general current of authority. We find in them the same distinction as elsewhere between proceedings which are voidable, merely, and those which are absolutely void. The former cannot be avoided collaterally. A subsequent attachment creditor cannot avail himself of their irregularity. But the general doctrine that void proceedings can be assailed at any time, and at the suit of any person interested, is not questioned. In *Dixey v. Pollock*, 8 Cal. 570, the lien of an attaching creditor was adjudged of no effect, as against that of one who attached subsequently, on the ground that the first attachment was invalid for jurisdictional reasons. See, also, *Mudge v. Steinhart*, 78 Cal. 34, 20 Pac. 147.

It is further contended that the remedy of the plaintiffs is not in equity. Counsel have not advised us of any legal remedy at the plaintiffs' command, and none occurs to us. The attachment defendant hastened to confess judgment long before she was required to appear; leaving the plaintiffs no time to intervene in that action, even supposing that intervention by them would have been proper. We think the facts bring the case within the jurisdiction of a court of equity, and that the plaintiffs have not mistaken their remedy.

In conclusion, counsel say that the plaintiffs' injunction operated as a release of errors in the attachment proceedings. The rule sought to be invoked is statutory. Section 146 of the Code provides that an injunction shall be granted to stay any judgment at law for a greater sum than the complainant shall show himself not equitably bound to pay, and that such injunction, when granted, shall operate as a release of all errors in the proceedings at law that are prayed to be enjoined. This section contemplates only an injunction in favor of a party who is liable for the payment of the judgment, and is therefore inapplicable to these plaintiffs. Furthermore, the errors released by an injunction are those only which might be corrected on appeal or writ of error. The statute was not intended to apply to a proceeding which is absolutely void. A final answer to the objection is that this is not a suit to stay a judgment. It seeks to restrain the sale of certain articles of property, but does not in any manner propose to interfere with the judgment, or its collection by general execution. See *Railroad Co. v. Todd*, 40 Ill. 89. The judgment will be affirmed. Affirmed.

BISSELL, J., concurs.

REED, P. J. (dissenting). I regret that I am compelled to dissent from the majority

opinion in this case. A proper regard for the views of my learned associates requires me to state the grounds of such dissent:

1. I cannot adopt the construction of the statute as construed by my learned associate, nor the reasoning by which the conclusion is reached that the affidavit for the attachment was a nullity, and the affidavit void. He says, "There must, before the writ can issue, be an affidavit filed, and must set forth an indebtedness so as to bring the plaintiff within the class of persons in whose favor an attachment is allowed." It is not contended that the affidavit was not sufficiently full in this respect. Cursory examination will show that it was. He continues, "It must also allege the existence of some condition which the statute makes a ground for attachment, in order to show the right of the plaintiff to resort to this remedy for the collection of his debt." This, in different language, is but a reiteration of the requirements specified in section 92 of the statute. If the requirements of that section were complied with, there would be no use for section 117. He continues: "These statements may be imperfect. They may not be sufficiently full, or they may be ambiguous or obscure. Nevertheless, if the affidavit contains them, it is sufficient to invest the court with jurisdiction." Certainly, if the allegations in the affidavit "were imperfect, and not sufficiently full," that would be a substantial defect, a defect in substance, which, it is admitted, could be amended; but how could such amendment be made, if, as reasoned by the learned judge, by want of such statutory substance the court could acquire no jurisdiction? "Or, they may be ambiguous or obscure," and an amendment will be allowed. The latter clause must be separated from the former, which was a defect in substance, while the latter is only of form, which would be amendable without section 117. If the affidavit can be amended in both form and substance, that is all that I claim. I take it that section 117 means what it says: "No writ of attachment shall be quashed on account of any informality or insufficiency of the original affidavit," etc.; providing for both formal and substantial amendments. An insufficiency must, unquestionably, be some lack of a substantial statutory requirement. Yet it is urged that any such lack voids the writ, and the court had no jurisdiction. The reasoning and conclusion reached in the opinion, as I view them, abrogate section 117, and leave the plaintiff to strict compliance with section 92, or the quashing of his writ for want of jurisdiction. I have carefully examined the learned opinion to ascertain from it what, in the opinion of my associates, the affidavit lacked, but failed to find it. The affidavit states the indebtedness; the amount; that it is overdue and unpaid. The statute at that time made an overdue promissory note ground for attachment, the only allegation lacking was that it was evidenced by

a promissory note, and being the fact it was in no respect jurisdictional, and as it might have been added at any time on motion, they, certainly, could be covered by the word "insufficiency" in the statute. Hence, I conclude, that the proceeding was not void, but at most voidable, on motion of the defendant.

2. It is said in the opinion that the sole question for determination is the validity and consequent priority of the Mentzer attachment. The controversy in this case is entirely in regard to the goods attached, and the record discloses the fact that, by personal service of summons, the proceeding was in personam as well as in rem, and the attachment only auxiliary. This not being an attachment against a nonresident, I fail to see the relevancy and importance of the discussion in regard to proceedings in rem and in personam. It is said, "The jurisdiction of the court in attachment proceedings depends upon the affidavit, and, if none is filed, the attachment writ, and all proceedings under it, are void," and several authorities from other states are cited in support of the proposition. The fact is shown by the record that, by personal service of writ of attachment and summons, the proceeding was both in rem and in personam, and the attachment, as in all cases of that character, was only auxiliary. I can find nothing in the cases cited making them applicable to the question in controversy. As the proceeding by attachment is purely statutory, it would have been far more satisfactory had some authority been found, construing our statute, or a similar one, and holding the affidavit in this case void, and equivalent to none at all, but none such are presented. It is said, "The affidavit must combine the allegation of indebtedness with the allegation of cause," and several authorities are cited in support. Test the affidavit by this; we find the indebtedness stated definitely, and the cause, "overdue and unpaid,"—which was sufficient, under the statute. Here are both debt and cause stated. That the indebtedness was evidenced by a promissory note was not stated. In the entire discussion I can find no authority cited or referred to sustaining the position of the court, while section 117 explicitly declares that no writ shall be quashed "on account of any informality or insufficiency of the original affidavit."

3. Proceeding, the opinion says: "We have been referred to some cases decided by the supreme court of California in which it was held that proceedings in attachment could not be collaterally questioned when, by proper amendment while in progress, they might have been made regular. We have examined these cases, and find no disharmony between them and the general current of authority. We find in them the same distinction as elsewhere between proceedings which are voidable, merely, and those which are absolutely void," etc. It will be seen that the whole decision is based upon

the assumption that the proceeding was absolutely void. Our statute was bodily imported from California. Its construction by the court of that state is authoritative, if not conclusive. I fear, from the hasty generalization above given, that the examination of those decisions was too cursory, and that they cannot be so easily disposed of. It appears to be the well-settled law of that state that the sufficiency of the affidavit, and the regularity of the attachment proceedings, cannot be questioned and raised collaterally by one not a party to the proceeding. In *Porter v. Pico*, 55 Cal. 165, the court held: "This lien was not affected by any irregularities in the attachment itself, nor was it destroyed by the judgment rendered in the attachment suit. Any irregularities in obtaining it were waived by the defendant to the suit when he appeared and answered without taking advantage of them, by motion or otherwise, in the course of the proceedings. The process is merely auxiliary, and the judgment in the action covers all irregularities." In *Scrivener v. Dietz*, 68 Cal. 1, 8 Pac. 609, an almost identical question in regard to the irregularity of the affidavit, was presented. The court said: "Notwithstanding the infirmity, the attachment was not void. It was only voidable at the instance of the attachment defendant, and could not be assailed collaterally by a stranger." And see, also, *Moresi v. Swift*, 15 Nev. 215, where the same statute was construed. In the opinion, *Dixey v. Pollock*, 8 Cal. 570, and *Mudge v. Steinhart*, 78 Cal. 34, 20 Pac. 147, are cited; and, in regard to the first, it is said that the lien of the first attaching creditor was adjudged of no effect, as against that of a subsequent attaching creditor, on the ground that the first attachment was invalid for jurisdictional reasons. The citation and statement are liable to mislead, unless the case is examined. The learned judge who wrote the opinion seems mistaken. There were three attachments against the same defendant, in all of which plaintiffs had recovered judgment: First, *Adams v. Pollock*; second, *Pollock v. Pollock*; third, *Dixey v. Pollock*. In the first there was an irregularity in the papers. In the lower court it was held fatal, and judgment awarded to Pollock, plaintiff. *Dixey* (the third) appealed, and the supreme court held that the irregularity in the first papers (*Adams Case*) was not fatal, reversed the judgment in favor of Pollock (the second), and gave it to Adams (the first attaching creditor), using the following significant language: "When the contest is between creditors, all the equities are in favor of the most diligent. The subsequent execution or attachment creditor can claim no equitable relief. \* \* \* And it is well settled that a stranger cannot interfere upon the ground of irregularity." A case more fatal to, and at variance with, the conclusions reached, can hardly be found. An examination of

the case of *Mudge v. Steinhart*, 78 Cal. 34, 20 Pac. 147, cited, will show nothing in line or in common with the questions here presented. The defendant was a nonresident; the proceeding purely in rem, in an action of tort. The court held: First, that attachment was purely statutory, and could have no force except in the cases provided by the statute; second, "The existence of a contract, express or implied, is an essential basis, without which no writ of attachment can properly issue, and as in this case the action was founded, not upon contract, but upon the fraud and wrongful acts of the defendant," it was held void. Its want of applicability to the questions in this case is at once apparent. In support of my position here taken I will also respectfully call attention to *Cooper v. Reynolds*, 10 Wall. 319; *Pennoyer v. Neff*, 95 U. S. 714; *Carothers v. Click, Morris* (Iowa) 54; *Dunn v. Crocker*, 22 Ind. 324 (where it is said, "Objections to the regularity of attachment proceedings cannot be first raised in collateral suits"). See, also, *Drake, Attachm.* § 273; *McComb v. Reed*, 28 Cal. 285; *Morgan v. Avery*, 7 Barb. 657; *Newton v. Bank*, 14 Ark. 9; *Morse v. Smith*, 47 N. H. 477; *Sperling v. Levy*, 1 Daly, 95. It is said in the opinion, "The two sections [Code, §§ 92, 117] must be construed together, and in harmony with each other, as parts of the same act." I can see nothing incompatible in the two sections that needs construction, or requires the affidavit to be held void in order to harmonize the sections. Section 92 is a general statute, and sets forth what the affidavit shall contain in order to render the attachment effective against the chattels of the defendant. If the requirements are not complied with, defendant may move to quash. Then the special statute (section 117) declares that the proceedings shall not be quashed, by reason of irregularity and insufficiency, if plaintiff shall amend and reform the affidavit, and the authorities are conclusive that the matter is confined entirely to the parties. If the defendant overlooks or disregards the defects, he waives them, and can legally do so, as in case of any other waiver, and the judgment cannot be attacked by outsiders.

4. There was a fatal defect in proof, as well as in the complaint,—no allegation that the attachment of appellees was valid; that it was ever levied upon the goods in controversy, or upon anything else. Nor is there any such fact stipulated. The record shows that appellees made no proof nor offered any evidence, whatever, of any attachment proceedings, nor any judgment. The whole thing rests upon the allegation, "\* \* \* and caused to be issued a writ of attachment, which writ of attachment was directed to the sheriff of Arapahoe county, whereby the said sheriff was to attach the rights, credits, moneys, and effects, goods and chattels, of the said L. Filberg, wherever they might be

found." Absolutely nothing either in complaint or evidence to show any levy upon, or legal claim to, the goods in controversy. How could the court assume that the attachment proceedings were regular, and that the judgment was regular, and decree, without exhibits or evidence, a valid judgment, than by attachment of appellees, and that the "subsequent and junior attachments of plaintiffs \* \* \* shall have precedence over the defendant O. F. Mentzer's attachment and proceedings thereunder"? The court was compelled to assume that appellees' attachment and judgment were valid, that they were levied upon the goods in controversy, and that there was not other and different property out of which the money could be made. My learned associates assume the same facts, adopt them, and affirm the decree. I cannot so do. The complaint was fatally defective, and conferred no jurisdiction, and there was absolutely no proof on which the decree could be based.

5. The question of the jurisdiction of the court of equity to declare a judgment at law void, and substitute and give precedence and priority to another supposed judgment, alleged to exist, has not, in my opinion, received that careful attention that its importance requires. It briefly says: "Counsel have not advised us of any legal remedy at the plaintiffs' command, and none occurs to us. The attachment defendant hastened to confess judgment long before she was required to appear, leaving the plaintiffs no time to intervene in that action, even supposing that intervention by them would have been proper. We think the facts bring the case within the jurisdiction of a court of equity, and that the plaintiffs have not mistaken their remedy." What facts are referred to as bringing the case within the jurisdiction of a court of equity? Certainly not the haste of the defendant in recognizing the validity of the attachment and confessing judgment before the return day. Under our statutes, and numerous decisions, defendant could legally prefer one creditor, and exclude others. It is done on a large scale every month,—the entire stock and business transferred to a creditor,—and the first intimation to the other creditors is a change of sign, and the declaration of ownership. Yet it cannot be claimed, unless fraud is established, that such disposition of the entire stock confers jurisdiction on a court of equity. The defendant might, in the first instance, have made a full bill of sale, or confessed judgment; and a court of equity would have been powerless to review, or declare the transaction void, in the absence of fraud,—much less, decree the priority of another creditor. The entry of a judgment at law, and the issuing of an execution, and the declaring it void, and substituting another, were in the same court, by different judges, and afford a curious commentary on the administration of the law; and the fact,

as stated in the opinion, that appellees had no legal remedy, would not confer jurisdiction upon a court of equity. It is far from the fact that a court of equity has jurisdiction because the plaintiff may allege that he has no remedy at law. There are numerous cases like the present, where parties have no rights that can be enforced in either equity or at law. In reviewing actions at law, the court of chancery is confined in very narrow limits. The law is clearly and concisely stated in 2 Story, Eq. Jur. §§ 1570-1575, and is so at variance with the views of my associates that I cannot refrain from quoting from section 1573: "In matters where the jurisdiction of the courts of law and equity is entirely concurrent, the adjudication of the court of law is conclusive upon courts of equity. And a court of equity will not interfere to relieve a party from such adjudication, except upon the ground of newly-discovered matter since the trial, of fraud in obtaining the judgment, or of some inevitable accident or mistake." Section 1575: "It seems to be conclusively settled that a judgment can only be impeached in a court of equity for fraud in its concoction. It is said there is no case in which equity has ever undertaken to question a judgment for irregularity." See *Emerson v. Udall*, 13 Vt. 477; *Pettes v. Bank*, 17 Vt. 435; *Carrington v. Holabird*, 17 Conn. 530; *Shottenkirk v. Wheeler*, 3 Johns. Ch. 275; *Baker v. Morgan*, 2 Dow, 526; *Elliott v. Balcom*, 11 Gray, 286; *Boles v. Johnston*, 23 Cal. 226. In *Drake, Attachm.* § 262, it is said that, for irregularities in the proceedings, "other attaching creditors cannot make themselves parties to the proceedings for the purpose of defeating them on that account, nor will a bill in equity lie in favor of a junior attachor to set aside a senior attachment on the ground of insufficiency of the affidavit on which it was issued"; citing numerous authorities. And see *Fridenberg v. Pierson*, 18 Cal. 152; *Dixey v. Pollock*, 8 Cal. 570; *McPherson v. Snowden*, 19 Md. 197; *Buckley v. Lowry*, 2 Mich. 419; *Curtis v. Steever*, 36 N. J. Law, 304; *Thompson v. Meek*, 3 Sneed, 271; *Danaher v. Prentiss*, 22 Wis. 299; *Nelson v. Turner*, 2 Md. Ch. 73. The only allegations in the complaint that could confer jurisdiction on a court of equity were that the suit of Mentzer against Filberg "was commenced unjustly and without foundation," and that no indebtedness existed, and that, "for the purpose of defrauding her creditors and the plaintiff," etc., she colluded with plaintiff and others, and confessed judgment, etc. These charges were abandoned, and no proof offered in support of them, and the court below found the debt valid. After such finding, the court was, under the authorities, divested of jurisdiction for any purpose whatever,—powerless to afford injunctive relief, which was the only relief it could have granted, had the charges of fraud and collusion been sustained. I have been unable to find a case where

a court of equity, with concurrent jurisdiction, assumed the right to review and retry a case, and set aside a judgment at law, where either fraud, collusion, accident, or mistake was not alleged and established; and in this case the court below, without proof of any character whatever, had to assume that the second attachment was regular, and this court is required to indulge the same presumption, and to hold, first, that the alleged attachment was regular, and without even an allegation or proof that any judgment had been obtained, or any proof whatever of any indebtedness from Filberg to appellees, hold the judgment of Mentzer void, and the goods liable on the second, on the bare allegation that Filberg was indebted, and they "had caused to be issued a writ of attachment, which was directed to the sheriff of Arapahoe county," with no allegation or proof that the writ had ever been served. I cannot indulge in such presumption in a case even in equity. Leaving out all the legal questions above discussed, on the pleadings, and with no proof, the court was without jurisdiction or power to recognize the claim of appellees,—much less, subrogate a prior judgment to it.

STATE ex rel. CUTTING, Superintendent of Public Instruction, v. LA GRAVE, State Controller. (No. 1,458.)

(Supreme Court of Nevada. Feb. 3, 1896.)

STATE SUPERINTENDENT OF INSTRUCTION — COMPENSATION.

1. St. 1891, p. 104, provides that the superintendent of instruction shall receive a certain compensation as ex officio clerk of the supreme court, ex officio state librarian, ex officio curator of the state museum and secretary of the board of directors of the orphans' home, in addition to his salary as superintendent. By St. 1893, p. 32, the act making the superintendent ex officio librarian and clerk was repealed, and these positions were attached to the office of the secretary of state, but nothing was said in regard to the superintendent's salary as curator and secretary. *Held*, that the superintendent was not entitled to receive any of the compensation attached in solido to the four ex officio offices.

2. That the legislature, in making the appropriation for the salary of the superintendent for 1895 and 1896, appropriated a sum equal to his salary as superintendent and that attached to his former ex officio offices, is immaterial.

Original proceeding on the relation of H. C. Cutting, as superintendent of public instruction and ex officio curator of the state museum, against C. A. La Grave, state controller, for a writ of mandamus. Denied.

H. C. Cutting, in pro. per. Robt. M. Beatty, Atty. Gen., for respondent.

BIGELOW, C. J. The relator, as state superintendent of public instruction, applies for a writ of mandamus to compel the respondent, as state controller, to draw a warrant in his favor for the sum of \$200, salary due him for the month of November, 1895. He contends that he is entitled to a salary

of \$2,400 per year, while the respondent contends he is only entitled to \$1,000. This contention constitutes the question to be decided in this proceeding.

By St. 1891, p. 32, the legislature provided that after January 1, 1895, "the superintendent of public instruction shall be ex officio clerk of the supreme court, ex officio state librarian, and ex officio curator of the state museum." At the same session, in a general act fixing the salaries of state officials (St. 1891, p. 104), it was provided that after January 1, 1895, there should be paid "to the superintendent of public instruction, one thousand dollars, payable out of the general school fund; to the superintendent of public instruction, as ex officio clerk of the supreme court, ex officio state librarian, ex officio curator of the state museum, and secretary of the board of directors of the state orphans' home, fourteen hundred dollars." At the next session (St. 1893, p. 32) the act above referred to, making the superintendent ex officio clerk and ex officio librarian, was repealed, and those positions were attached to the office of secretary of state; but nothing was said concerning the superintendent's salary as ex officio curator, or ex officio secretary of the orphans' home board, offices conferred upon him by other statutes. The office of superintendent, and the various ex officio offices mentioned in these statutes, are each a separate and distinct office, and their being vested in the same person does not change their nature in this respect. *State v. Laughton*, 19 Nev. 202, 8 Pac. 344; *People v. Durick*, 20 Cal. 94; *Kinsey v. Kellogg*, 65 Cal. 111, 3 Pac. 405. It is very clear that the salary of \$1,400, which, by the act of 1891 was to be paid to the superintendent, was the salary attached to all four of those ex officio offices, and constitutes the compensation for discharging the duties of all of them. It was to be paid in solido, and no particular sum was fixed as the salary of any one of them. This, of course, did not matter, so long as all the offices were vested in one person; but now that that person is no longer clerk and librarian, it becomes highly important, for he certainly is not now entitled to the salary attached to those positions. The result is that the law fixing the salary has become inoperative. The superintendent is no more entitled to the whole salary, because of the two positions that he still holds, than is the secretary of state, because of the two now vested in him. But that, under the circumstances, no part of the salary can be paid to the secretary, was, in principle, decided in *State v. Hallock*, 19 Nev. 371, 12 Pac. 488, and the same principle is applicable here. In fact, that case is virtually decisive of this. There an appropriation had been made for the payment of the lieutenant governor, as such, and as ex officio librarian and adjutant general, of which he had lost the two latter positions by failing to give an official bond, and they

had become vested in another person. The court said: "The sum appropriated was set apart in solido for the payment of all the services to be rendered by that officer. Conditions have arisen which prevent the employment of the fund in this manner, and the appropriation has become inoperative." In the case at bar, so far as the present question is concerned, it is the statute fixing the salary that has become inoperative, but the principle is the same. *Kinsey v. Kellogg*, 65 Cal. 111, 3 Pac. 405, is a case squarely in support of the conclusion announced here; and to the same effect is *San Luis Obispo Co. v. Darke*, 76 Cal. 92, 18 Pac. 118. In the latter case the court said: "By the act of March 31, 1876, it was provided that the 'county clerk' should receive a certain annual salary, as his only compensation, in all three capacities, as county clerk, county auditor, and county recorder. After 1881, and while a different person was the incumbent of each of the three offices, the county clerk was entitled to receive no portion of the salary fixed by the law of 1876. The law became inoperative, because it was intended to be operative only while the three offices were filled by one person." The statute of 1891, fixing the relator's salary, having become inoperative, so far as the ex officio offices are concerned, there is no statute fixing any salary for the offices of curator, and secretary of the orphans' home board, and, without statutory authority for its payment, no compensation can be recovered by a public officer. *Mechem, Pub. Off. § 856*.

In the appropriation act of 1895 (St. 1895, p. 70) the legislature appropriated the sum of \$4,800 from the general school fund for the payment of the relator's salary as superintendent, and ex officio curator of the state museum, for the fiscal years of 1895 and 1896, and the relator argues that this indicates the intention of that body that he should be paid a salary of \$2,400 per year. It probably does indicate that the legislature of 1895 supposed his salary to be that amount, but, if so, it was a misapprehension, and it does not follow from the appropriation that the law becomes what they then supposed it was. *Suth. St. Const. § 402*; *Van Norman v. Jackson* Circuit Judge, 45 Mich. 204, 7 N. W. 796; *Davis v. Delpit*, 25 Miss. 445; *Byrd v. State*, 57 Miss. 243. In the latter case the court said (page 247), "An enactment of the legislature based on an evident misconception of what the law is will not have the effect, per se, of changing the law so as to make it accord with the misconception." The purpose of the general appropriation act is to provide funds for carrying on the state government. The mere fact that money is appropriated for an officer's salary, or for any other purpose, does not, of itself, make that money payable to any particular person. There must still be some authority of law to justify the controller in drawing a warrant for it, or the treasurer in

paying it out. *Gen. St. § 1811*. If more is appropriated than is sufficient for the particular purpose designated, it is to be covered back into the general fund at the end of the fiscal years (*State v. Hallock*, 20 Nev. 73, 15 Pac. 472); if less it does not repeal a former act fixing an officer's salary, unless such clearly appears to have been the intention (*Mechem, Pub. Off. § 857*; *State v. Steele*, 57 Tex. 200; *State v. Cook*, Id. 205). It may be, and very likely is, that both the legislatures of 1893 and of 1895 supposed the superintendent's salary was fixed at \$2,400 per year, and that they intended him to have that salary; but, if such is the case, they did not manifest that intention in such a manner that it has become law, and consequently it cannot be taken notice of by officers or courts. Application for the writ denied.

BELKNAP, J., concurs.

BONNIFIELD, J. (concurring). I concur in the above opinion, that the writ prayed for in this case must be denied, not on the ground that the \$1,400 provision of the salary act of 1891, relating to the salary of the superintendent of public instruction, has become inoperative,—for I do not consider that it has become so,—but upon the ground, in my opinion, that the general appropriation bill of 1895, in so far as it appropriates more than \$1,000 annually, out of the school fund, towards the payment of the superintendent's salary, never became operative. That part of the appropriation properly made out of the school fund having been exhausted, and no appropriation having been made out of the general state fund for the payment of the balance of his salary, he is subjected to the necessity of awaiting the proper action of the legislature for the balance of his salary. Although this is unfortunate and to be regretted, it is true and unavoidable.

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STATE ex rel. TAYLOR v. LORD et al.<sup>1</sup>  
(Supreme Court of Oregon. Jan. 27, 1896.)  
PUBLIC BUILDINGS—SITE—STATE EXECUTIVE OFFICERS—INJUNCTION.

1. The commissioners of public buildings will not be enjoined from erecting a branch insane asylum at a place remote from the seat of government, on the ground that if said commissioners were enjoined, and if the asylum were erected on a tract owned by the state, nearer to the government seat, the cost of the land, and the expenses for the erection of outbuildings and services of a superintendent and some assistants, would be saved to the state, where it does not appear that if the injunction issued the latter site would be selected.

2. Injunction will not lie, at the suit of a private person, whose complaint was signed by a district attorney, to enjoin the board of commissioners of public buildings, composed of the governor and other state officers, from executing the provisions of an act directing them to locate the site for a branch insane asylum in one of several counties named by the legislature, to

<sup>1</sup> Rehearing denied.

purchase a tract of land at the place selected, to hire a competent architect to prepare the plans for the buildings, and to perform other duties in connection herewith, though the law is alleged to be unconstitutional on the ground that it does not direct that the asylum be located at the seat of government.

Appeal from circuit court, Marion county; H. H. Hewitt, Judge.

Suit by the state of Oregon, upon the relation of A. C. Taylor, to enjoin William P. Lord and others, constituting the board of commissioners of public buildings, from executing the provisions of an act relative to the location and erection of a branch insane asylum. There was a judgment for plaintiff, and defendants appeal. Reversed.

This is a suit to enjoin the defendants, William P. Lord, H. R. Kincaid, and Phil Metschan, in their capacity as a state board of commissioners of public buildings, from carrying into effect certain acts of the legislative assembly providing for the construction of a branch asylum in the eastern portion of the state, and appropriating money therefor, because of the alleged unconstitutionality of the portions thereof locating such asylum in eastern Oregon. The amended complaint, omitting the caption and formal parts, is as follows:

"That the relator herein, in connection with other citizens of the state of Oregon, is a resident taxpayer within said state, and owns property within said state subject to taxation therein. That the defendants, Wm. P. Lord, H. R. Kincaid, and Phil Metschan, are, in the order in which their names appear in this amended complaint, the governor, secretary of state, and state treasurer of the state of Oregon, and as such constitute the board of commissioners of public buildings for said state of Oregon, and as such board are bound to expend large sums of the moneys of plaintiff, to be raised by taxation, for the purposes hereinafter more fully stated, which expenditures the plaintiff alleges are unlawful, and repugnant to the organic law of the state of Oregon, namely: The said board, by virtue of the powers vested in them as such board, are about to expend large sums of money belonging to the plaintiff in the purchase of lands at some point east of the Cascade mountains for the purpose of constructing what is alleged to be a branch asylum in the eastern portion of said state, as one of the public institutions of the state, which said acts of the defendants aforesaid they claim to exercise under and by virtue of a so-called act of the legislative assembly of the said state purporting to have been passed by said legislature at the 17th biennial session thereof, which said act was filed in the office of the secretary of state on the 21st day of February, 1893. That, of the aforesaid moneys of the plaintiff, said defendants propose to, and, unless restrained by this honorable court, will, expend of the moneys of the plaintiff then claimed to have

been appropriated, and also subsequently appropriated by the 18th biennial session of said legislature, the sum of \$165,000, in the construction of said buildings, and fitting the same for use, and for lands on which to erect said buildings. That the said defendants, as such board, threaten to, and are about to, appoint three citizens of the state of Oregon, to be known as supervisors of the work of constructing such buildings, in some of the counties east of the Cascade mountains, more than three hundred miles from the seat of the government of said state, which said alleged supervisors are to have charge of the work of constructing such buildings on lands to be purchased and paid for by them of the moneys of the plaintiff, and threaten to, and are about to, direct said supervisors to expend large sums of money belonging to the plaintiff aforesaid in advertising for plans and specifications for such buildings, and are about to proceed to construct, in pursuance of said so-called act of said legislature aforesaid, a branch insane asylum and a public institution, together with outbuildings, excavations, and appurtenances thereto which, in the judgment of said alleged supervisors, may be necessary, under the direction and supervisory control of the defendants hereinbefore named, and are about to expend, of moneys of the plaintiff aforesaid, the sum of \$1,500, to the said so-called supervisors, for their alleged services in the construction of said work. That the said defendants, as such board, propose to, and, unless restrained, will, if said buildings are permitted to be constructed and erected, employ a superintendent to conduct said institution, at a salary of \$2,500 per annum, and assistant physicians and attendants, all to be allowed the same compensation now fixed by law for like officers and attendants at the state insane asylum at Salem. That the said proposed expenditures of the plaintiff's moneys aforesaid, if permitted, would be contrary to law and the constitution of the state of Oregon, in that the said institution is not being constructed at the seat of government of the said state, but more than three hundred miles therefrom; that the expenditures extend to the equipping, furnishing, officering, and maintaining the same, and will greatly increase the burden of taxation, and require the expenditure of \$100,000 more than would be necessary to expend in the construction of like buildings at the seat of government. And the plaintiff further alleges: That the annual cost of maintaining the same after it is equipped and ready for use will be \$50,000 per annum more than would be necessary to be expended in maintaining like services for the unfortunate insane of said state, if the same facilities are provided therefor in connection with the institution now in operation at the seat of government. That, unless restrained by this honorable court, the



defendants will purchase and pay for the lands aforesaid; contract therefor, and build and pay for said building; appoint the supervisors, and employ superintendents, physicians, and attendants, upon salaries as aforesaid,—all to be paid out of the public funds of the state of Oregon, raised by taxation, thereby greatly increasing plaintiff's burden of taxation, to the great and irreparable injury of plaintiff. That plaintiff has no plain, speedy, or adequate remedy at law for the redress of the grievances herein complained of. Wherefore, plaintiff prays that an injunction may issue restraining the defendants, and their agents, servants, and attorneys, from using the moneys of the plaintiff for any of the purposes which they propose, as specified in the complaint, and that on final hearing said injunction be made perpetual, and for such further order or relief as may be meet with equity, and also for costs and disbursements. James McCain, District Attorney for the Third Judicial District. H. J. Bigger and W. H. Holmes, Attorneys for Plaintiff.

"State of Oregon, County of Marion—ss.: I, A. C. Taylor, being first duly sworn, say that I am the person commencing the above action as relator for and in behalf of the state of Oregon; that I have read the foregoing complaint, and know the contents thereof; that I believe said complaint to be true. A. C. Taylor.

"Subscribed and sworn to before me this 2nd day of March, 1895. Webster Holmes, Notary Public for Oregon. [Seal.]"

The defendants demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of suit, which demurrer being overruled, the defendants answered. A trial was had upon the issues thus joined, resulting in a decree in accordance with the prayer of the complaint, from which defendants appeal.

J. C. Moreland and Wm. P. Lord, for appellants. H. J. Bigger, for respondent.

WOLVERTON, J. (after stating the facts). When this case was here before (37 Pac. 906; 41 Pac. 1104), we held that a private individual could not have public officers enjoined from using public funds, unless it could be shown that some civil or property rights were being invaded, or, in other words, that the individual was going to get hurt by the transaction. Upon that principle it was decided that he should be required to show that the location and building of the branch asylum in eastern Oregon would be attended with greater cost and expense than if constructed at the capital, thereby increasing the burden of taxation which would be imposed upon him, with others, whose duty it is to contribute to the support of the government. It was also held that the state, suing in its corporate capacity for the protection of its property rights, stood in no different or bet-

ter position in this regard than an individual. This doctrine is supported by high authority. Allen, J., in *People v. Canal Board of New York*, 55 N. Y. 395, says: "When the state, as plaintiff, invokes the aid of a court of equity, it is not exempt from the rules applicable to ordinary suitors; that is, it must establish a case of equitable cognizance, and a right to the peculiar relief demanded." And as is said by the same eminent jurist in *People v. Ingersoll*, 58 N. Y. 14: "A distinction is to be observed between actions by the people or the state, in right of the prerogative incident to sovereignty, and those founded upon some pecuniary interest or proprietary right. The latter are governed by the ordinary rules of law by which rights are determined between individuals." To the same effect is the doctrine announced in *People v. Fields*, Id. 514. See, also, 2 High, Inj. § 1327. So that we then concluded the plaintiff herein occupied no better or superior position, from a legal standpoint, for enforcing the remedy sought to be invoked, than the plaintiff in *Sherman v. Bellows*, 24 Or. 553, 34 Pac. 549. From this position we see no sufficient reason for receding, as we believe it to be sound in law, and supported upon reason and authority. It is insisted that the decision in *White v. Commissioners*, 13 Or. 317, 10 Pac. 484, stands in the way of this position, but we do not think so. *White* had a private interest to subserve in bringing the suit. The increase of the burden of taxation consequent upon maintaining the machinery necessary to secure a registration of voters under the law was sufficient to give him a standing in court to restrain the invasion of a private right. See *Fletcher v. Tuttle and Blair v. Hinrichsen*, 151 Ill. 41, 37 N. E. 683. But the question touching the power of the court to interfere by injunction in restraint of the action of the county commissioners was not mooted at the hearing, and was not a point in controversy, although jurisdiction was necessarily assumed before the ultimate question in the case could have been decided. So the case is not in point, nor is it controlling here.

It is stoutly contended that it is shown by the evidence taken and submitted that the relator will be damaged by reason of the location and construction of the branch asylum at Union, under the rule above established. We have carefully examined all the testimony found in the record, and are unable to concur with this view. The whole theory of the relator, by which he seeks to establish injury, is based upon the assumption that the legislative and executive departments of the state will, in the event that the location and construction of the branch asylum is restrained, provide ways and means for the construction of such institution upon what is known as the "Cottage Farm,"—a tract of land now belonging to the state, and situate some six miles from the capital,—and thereby prevent the necessity of pur-

chasing and acquiring other lands upon which to establish and construct such buildings; that they will utilize in connection therewith certain outbuildings now in use by the state, and save the expense of constructing other like buildings; and that, by reason of the proximity of such location to the present state asylum, they could dispense with the cost of an additional superintendent and some additional physicians and assistants. But who can say that the legislature would be content to build the branch asylum at the Cottage Farm, or that it would see fit to utilize the outbuildings now in use in connection therewith, or that it would not, in any event, provide for the employment of an additional superintendent, and other physicians and assistants? The matter is of such vital and public concern, and attended with such diverse and dependent circumstances, and so wholly and peculiarly within the province of the legislature to devise the ways and means, that it would be but a conjecture, at best, to attempt to determine in advance the result of its deliberations in this respect. If the conditions assumed were established, then the question might possibly be capable of demonstration; but, where the establishment of these conditions is first left to a body with discretionary powers, the ultimate question for the court to pass upon becomes speculative, and too remote for practical solution and determination. So we are constrained to pass the point without further comment touching the evidence submitted.

But it is now contended for the first time that this is a suit by the state in the right of a prerogative incident to sovereignty; that it was instituted by the law officer of the state in the interest of the whole people, and, being so instituted, the high prerogative powers of government are set in motion, and that the courts of appropriate jurisdiction will take cognizance to control the officers of state from acting in violation of duties imposed upon them by law, and more especially where they sustain trust relations to the whole people,—not in the sense that a public office is a public trust, but as it pertains to the public funds of the people, raised by taxation, and intrusted to their management and control under the laws of the state. Under the common law, suit was instituted in behalf of the crown, or of those who partook of its prerogative, by the attorney general, who made his complaint to the court purely by way of information. A private person, having cause to complain in a court of equity, proceeded by written statement of his cause, which was called a "bill in chancery." In all cases of suits which immediately concerned the rights of the crown, its officers proceeded upon their own authority, without the intervention of any other person; but, where the suit did not immediately concern the rights of the crown, they generally depended upon the relation of some

person whose name was inserted in the information, and who was called the "relator." It sometimes happened that the relator had an individual interest in the matter in dispute, as where he was entitled to compensation for an injury. In such a case his personal complaint was joined to and incorporated with the information given to the court by the crown officer. These together comprised what is known and termed as an "information and bill." It was the general practice, where suits immediately concerned the right of the crown, for the crown officers to proceed without a relator; yet by reason of a prerogative of the crown not to pay costs to a subject, except in certain cases, sometimes, through the tenderness of the officers towards the defendant, the interposition of a relator was required, against whom the costs were taxed in case it appeared that the suit was improperly instituted or prosecuted. The introduction of a relator was a mere act of favor on the part of the crown and its officers. Story, Eq. Pl. (9th Ed.) §§ 7, 8; 1 Daniell, Ch. Prac. 2, 3, 7, 11, 12; State v. Dayton & S. E. R. Co., 36 Ohio St. 434; Attorney General v. Delaware & B. B. R. Co., 27 N. J. Eq. 631. In Attorney General v. Mayor, etc., of Dublin, 1 Bligh (N. S.) 312, Lord Redesdale says: "The relator is introduced properly by the attorney general, that there may be some person responsible for the costs of the proceedings, if finally there should be an opinion in the court that the information has been improperly instituted, or if, in the proceedings, it should be in any manner improperly conducted. It is for the benefit of the subject that the attorney general, in all those proceedings, provides persons to be responsible as relators in the information, that the court may award against them what the court cannot do against him." So that the relator, where the proceeding immediately concerned the rights of the crown, except so far as to stand sponsor for costs in case the crown officers were unsuccessful in the suit, had no personal right or authority to become a party to the proceeding, either by relation or otherwise. It was only in cases where he had some private or individual interest to subserve, either in conjunction with the rights of the crown, or wherein it was the province of the crown to protect the rights of its subjects, acquired from it by grant or otherwise, that he could, as a matter of right, interpose, as a relator, through the attorney general, to set in motion the machinery of the court.

The case stands different in mandamus proceedings. There a private person may, in behalf of the public, and without showing any individual or special interest to be subserved, become a relator, and, through the proper state officer, institute the proceeding. Although the authorities are much divided, it is settled in this state that "where the question is one of public right, and the object of the mandamus is to procure the en-

forcement of a public duty, the people are regarded as the real party, and the relator, at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result; it being sufficient to show that he is a citizen, and as such is interested in the execution of the law." *State v. Ware*, 13 Or. 383, 10 Pac. 885; *High, Extr. Rem.* § 431. But in equitable proceedings, where the immediate rights of the crown were alone concerned, we have seen that the attorney general only could invoke the action of the courts through the instrumentality of an information, and, if a relator was made a party, it was at his discretion that there be some one to stand responsible for the costs; the relator, as of right, having no interest in the proceeding, and no power or authority to direct or control the suit in any particular whatever.

The attorney general could, at common law, by information in chancery, enforce trusts, and prevent public nuisances and the abuse of trust powers. *People v. Miner*, 2 Lans. 396. His supervision, through equitable instrumentalities, of public trusts, and his authority to prevent the abuse of trust powers public in their nature, were apparently the outgrowth of equitable interposition regarding charitable uses. It was formerly held that it was the source from which the funds were derived, and not the purpose for which they were dedicated, that constituted the use charitable. *Attorney General v. Heells*, 2 Sim. & S. 77. But subsequently it was settled that the purpose to which the funds were dedicated was the real criterion by which the charitable use was to be determined. And this enlargement of the principle governing charitable uses extended equitable jurisdiction to public trusts involving all funds raised by taxation or otherwise for public purposes. *Attorney General v. Brown*, 1 Swanst. 265; *Attorney General v. Mayor, etc., of Dublin*, 1 Bligh (N. S.) 312; *Attorney General v. Eastlake*, 45 Eng. Ch. 218-221. In the latter case it was declared that the attorney general was the proper person to represent those who were interested in having these public funds faithfully applied to the general and public purposes for which they were provided and intended. *Allen, J.*, in *People v. Ingersoll*, supra, says: "It is well settled in England that, in right of the prerogative of the crown, the attorney general, in his name of office, may proceed, either by information or bill in equity, to establish and enforce the execution of trusts of property by public corporations, to prevent the misappropriation or misapplication of funds or property raised or held for public use, and the abuse of power by the governors of corporations or public officers, or the exercise of powers not conferred by law, and generally to call upon the courts to see that right is done the subjects of the crown who are incompetent to act for themselves. Ordinarily, the remedies sought have been preventive, but in some cases, as incident to the

preventive and prospective relief, a claim has been made for retrospective relief, especially when the misappropriated funds could be traced and reclaimed in specie. The jurisdiction has been sustained upon the general principles of the right and duty of the court to grant preventive relief, and the relief actually granted, if any, in addition and as incident to that, has depended upon circumstances." "But in all cases the court's action was invoked against faithless trustees to compel a proper execution of the trust, and the right use of trust funds, at the hands of those charged with its administration. A breach or violation of public duty enjoined upon those with whom the trust and the execution thereof is confided or committed, either actual or threatened or impending, is at the foundation of every action by the attorney general or of the crown, or the people as sovereign and essential to the right of either to maintain, as well as the right of a court of equity to entertain jurisdiction of, a suit by either touching property or funds held by public or municipal corporations for public use. These principles thus established in England have been affirmed to some extent by the courts of this country, and applied in like cases. In *People v. Ingersoll*, supra, it is further said: "Doubtless, the prerogatives of the crown, except as affected by constitutional limitations, exist in the people, as sovereign; but to what extent the exercise of this prerogative is committed to the public officials, either by the legislature or the common law, is a question worthy of grave consideration, and not to be lightly decided, and should only be determined when necessary to a judgment and decision.

\* \* \* If there were no other remedy for a great wrong, and public justice and individual rights were likely to suffer for want of a prosecutor capable of pursuing the wrongdoer and redressing the wrong, the courts would struggle hard to find authority for the attorney general to intervene in the name of the people." The doctrine is broadly asserted in *Missouri*, where it is held that it is competent for the state, through its authorized officers, to proceed in equity in restraint of public corporations doing acts in violation of the constitution and laws of the state. *State v. Saline Co.*, 51 Mo. 350. But the case made was for a misappropriation of public funds in subscriptions to a railroad company, which funds were to be raised by assessment and taxation of the people of Saline county. So that the case is authoritative only upon the power of a court of equity, through its injunctive process, to restrain public officers in the misapplication and misappropriation of public funds instituted at the instance of the executive or law officers of the state. The decision is, however, based, to a large extent, upon a statute providing that "the remedy by writ of injunction or prohibition shall exist in all cases where an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever, in the opinion

of the court, an adequate remedy cannot be afforded by an action for damages." 2 Wag. St. p. 1032. Bliss, J., in that case, admits that he found some difficulty in regard to the question whether injunction would lie at all, but concludes that, both upon reason and authority, "when the wrong is a public one, suit may be brought in the name of the state, by its proper representative, and under our statute that representative is the circuit attorney." See, also, *State v. Dayton & S. E. R. Co.*, supra; *State v. Curators State University*, 57 Mo. 178; *State v. McLaughlin*, 15 Kan. 228.

The Wisconsin cases, though not authority here, serve to illustrate the question touching sovereignty and prerogative appurtenant thereto, and the use of the extraordinary remedy by injunction, when it is invoked in the service of a sovereign state and in the interest of the whole people, as distinguished from its ordinary use, or coupled with ordinary equitable proceedings. It may be said here that injunction, in itself, is not prerogative or jurisdictional. It was issued in cases where the court had jurisdiction otherwise as preliminary or interlocutory to the final decree, or to give effect and permanency to such a decree. It was remedial, and in aid of jurisdiction already attached within the vast range of equitable cognizance. Not so with mandamus, habeas corpus, and quo warranto. They were common-law prerogative writs, which "appertain to, and are peculiarly the instruments of, the sovereign power, acting through its appropriate department; prerogatives of sovereignty, represented in England by the king, and in this country by the people in their corporate character, or, in other words, the state." *Attorney General v. Blossom*, 1 Wis. 278. It has been said that injunction and mandamus are correlative in their operation; that where the one commands the other forbids; that, where there is nonfeasance, mandamus compels the duty, and, where there is malfeasance, injunction will restrain. But this is so in manner only. Injunction is frequently mandatory, and mandamus sometimes operates as a restraint. Aside from this, the injunctive writ, not being jurisdictional, but remedial, in its operation, a case of well-established equitable cognizance must be presented before its use and adaptation would become appropriate, and it is not every restraint which may seem beneficial as a remedy that the writ will enforce. For instance, some civil or private right must be about to be invaded, or some matter of public trust or concern, of which equity takes cognizance, must be deleteriously involved or affected, before injunction can be brought into requisition. So that it is apparent that it is not every case wherein mandamus will command that injunction will, in contrast, restrain. By reason of a provision in the Wisconsin constitution conferring original jurisdiction upon the supreme court "to issue writs of

habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same," it has been there held that injunction is a quasi prerogative writ, and founds jurisdiction as if it were an original writ, whenever a question arises appropriate to its use, which "should be a question quod ad statum republicæ pertinet; one 'affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.'" *Attorney General v. Railroad Cos.*, 35 Wis. 513; *Attorney General v. City of Eau Claire*, 37 Wis. 425; *State v. Cunningham* (Wis.) 51 N. W. 724. Notwithstanding this constitutional provision, the earlier cases sought for equitable grounds in support of the injunctive writ. For instance, in *Attorney General v. Railroad Cos.*, supra, it was argued that courts of equity have no jurisdiction, at the suit of the attorney general, to enjoin usurpation, excess, or abuse of corporate franchise. The court, after a careful review of the authorities, both English and American, concluded that the jurisdiction exists in this country as well as in England, and says: "The equitable jurisdiction by injunction goes upon the ground of nuisance. As, indeed, any intrusion upon public right is in the realm of pourpresture. The ancient jurisdiction to restrain nuisance is perhaps the most direct ground of the modern jurisdiction under consideration. And the former is fully asserted as an American jurisdiction, as to remedies both by private persons, and by the attorney general for the public;" citing 2 Redf. R. R. 307, and 2 Story, Eq. Jur. §§ 920-923. And so in *Attorney General v. City of Eau Claire*, supra, which involved the damming of a public river by the city of Eau Claire, the court, considering such an encroachment as a pourpresture, and within equitable jurisdiction to enjoin, and as it concerned the sovereign prerogative of the state and the prerogative jurisdiction of the supreme court, declared it to be a fit case for the exercise of its original jurisdiction by the injunctive writ. But in *State v. Cunningham*, supra, which was a later case involving the constitutionality of the act of apportionment of the state into senatorial and assembly districts, the court placed its jurisdiction, as it had intimated might be done in *Attorney General v. Railroad Cos.*, supra, upon the single ground that the constitution had adapted the writ of injunction to prerogative uses. Pinney, J., says: "It may well be conceded that courts of equity would not, by reason of their original jurisdiction, have authority to interfere by injunction in a case such as this; but it is to be borne in mind that the writ of injunction, under our constitution, is put to prerogative uses, of a strictly judicial nature, as a remedy of a prerogative character in case of threatened public wrong to the sovereignty of the state, and affecting its prerogatives and franchises and the liberties of the people; their rights being protected in this court by information in the name

of the state, on relation of the attorney general." The learned judge spoke advisedly when he said "it may well be conceded that courts of equity would not, by reason of their original jurisdiction, have authority to interfere by injunction" in such a case, as indeed there is high authority in support of the concession. *Fletcher v. Tuttle* and *Blair v. Hinrichsen*, 151 Ill. 41, 37 N. E. 683, are cases involving similar questions, arising out of the passage of an act to apportion the state of Illinois into senatorial districts, claimed to be unconstitutional and void, but the suits were instituted by private individuals; and it was there decided that, wherever the established distinctions between equitable and common-law jurisdiction are observed, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases the remedy, if there is one, must be sought in a court of law. And the case of *State v. Cunningham*, supra, is distinguished. Doctrine of similar import is laid down by Chief Justice Fuller in *Green v. Mills*, 16 C. C. A. 516, 69 Fed. 852,—a very recent and well-considered case. But, whatever the true doctrine might be as to the right use of the injunctive writ in cases involving merely political rights, the question is not involved here. These cases operate, however, as powerful factors in determining equitable jurisdiction, and fixing the right use of the injunctive writ. Under the Wisconsin constitution, injunction being held to be a quasi prerogative writ, its operation becomes correlative with the common-law writ of mandamus, and will lie to restrain excess in the same class of cases that mandamus supplies defect, the use of the one writ or the other in each case turning solely on the accident of overaction or shortcoming of the defendant. But not so where the distinction between the equitable and common-law jurisdiction is still observed, as it is in this state. Hence, if jurisdiction to issue the injunctive writ is to be entertained, it must be based upon some well-defined equitable grounds to support it.

We have seen, however, that in England the equitable jurisdiction to enforce trusts, and prevent public nuisances and the abuse of trust powers, was invoked for prerogative purposes. Whenever necessary, an appropriate injunction was issued in aid of the jurisdiction, and became effective in its exercise. While the writ of injunction is not in itself a prerogative writ, it is put to prerogative purposes when used in aid of equitable jurisdiction invoked for such purposes. We have also seen that in this country the jurisdiction and the writ may be called into requisition for like purposes. Now, when so called into requisition, in cases appropriate for its adoption and use, is there any reason why the remedy thus invoked is not as effective for the accomplishment of like high purposes as the quasi prerogative writ

peculiar to the state of Wisconsin under her constitution? We think that none exists. So, therefore, the lawfully constituted authorities are not without an appropriate remedy in a case where public officials are proceeding in derogation of law in the application and use of public funds, wherever special injury cannot be predicated. The sovereign state, the whole people, have a right to see that the laws are duly executed. In most cases the common-law prerogative writs are appropriate for the accomplishment of such ends. Whether appropriately denominated "prerogative" in the states of the Union, it differs but little. They emanate from a like high source, pertain to sovereignty, and are adapted to like uses and purposes. But, wherever it is necessary to prevent the abuse of trust powers and the misapplication of trust or public funds, the equitable remedy is likewise appropriate, and likewise emanates from the like high source, and is attended with equivalent attributes of power. See *People v. Ingersoll* and *State v. Salline Co.*, supra. But the rule and the doctrine upon which it is based have their limitations. It is not every class of public officers that may be controlled in any event at the hands of the judiciary. This will become apparent in the further development of the opinion.

We have here to deal with matters not political, but with matters publici juris, and with the acts of public officers touching the administration of public funds, and affecting the whole people, or the state at large. And the question comes to this: Whether the governor, the executive officer of the state, can be enjoined while in the discharge of official duties. We speak of the governor, as it is, in effect, the act of the governor which this proceeding is intended to interdict. True, the act providing for the construction of a branch asylum at Union, and appropriating funds therefor, has empowered the board of commissioners of public buildings of the state of Oregon, consisting of the governor, secretary of state, and treasurer, to superintend the construction thereof; but, in the absence of such a commission, it would be the duty of the governor to see that the law was carried into effect. So that whether the duty is performed by the governor, or by a commission named by the legislature, of which he is a constituent part, and empowered to perform the service, the rules of law touching the interference of the courts with the performance of such duty must be the same, whether required to be performed by the one or the other. The purpose of the legislature was to construct and equip more commodious buildings and apartments for the accommodation of the insane and idiotic of the state. To provide for and take care of this unfortunate class of individuals, both for their own good and protection, as well as for the protection and security of all

citizens, is a matter purely of public concern, as it relates to the welfare of the whole people. The subject is one of governmental concern only, and relates entirely to the legislative and governmental departments of state. In pursuance of this purpose, the acts involved here were passed, and became law by the approval of the governor. That the legislature had the undoubted right to determine upon the necessity for such additional buildings, and the amount of funds necessary for their construction and equipment, as we have said in our former opinion, no one can dispute. Furthermore, it was entirely within its co-ordinate powers to pass an act locating the branch asylum in the eastern part of the state, and no power vesting in the government could prevent it from so doing, and yet its validity would be determined by the fundamental law, when properly invoked. The governor could prevent its becoming a law by the exercise of the veto power confided to him. But, as above stated, the measure became a law by the approval of the executive. It is the duty of the governor to see that all laws are faithfully executed, and it is now proposed to execute this law. The judicial department is called upon to prevent its execution. Is it competent for it to interpose in this proceeding, and restrain the executive department of the state? It may well be admitted that if the duty pertained to acts which are merely ministerial in their character,—which call for no exercise of judgment or discretion, and do not relate to political or governmental matters,—the governor of the state may, at the suit of interested parties, in a proceeding appropriate for the purpose, be compelled, at the hands of the judiciary, to perform them. *Land Co. v. Routt* (Colo. Sup.) 28 Pac. 1125; *Gainess v. Thompson*, 7 Wall. 347; *Mos. Mand.* 80; *Association v. Zumstein*, 15 C. C. A. 153, 67 Fed. 1000; *Board v. McComb*, 92 U. S. 541. But if it pertains to duties which require the exercise of judgment or discretion to perform, or to matters political or governmental in their nature, all the authorities agree that the executive is clearly independent of the other co-ordinate departments of government, and is not subject in any manner to their direct supervision or control. Chief Justice Taney, in *Mississippi v. Johnson*, 4 Wall. 498, says: "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." This definition of a "ministerial duty" is concurred in by Mr. Justice Miller in *Gainess v. Thompson*, supra. Now, what is the nature of the duties cast upon the governor by these acts? Are they purely ministerial, or do they belong to the domain of govern-

mental affairs? What is he, or the board of which he is a member, required to do? This latter question answered, the former is answered, also, without the necessity of comment. He shall, within 60 days, locate a site for a branch insane asylum at some point in one of the counties named, lying in the eastern part of the state. He shall contract for and purchase a tract of land at the place selected. He shall hire a competent architect, who shall, under the direction of the board, draw plans, prepare specifications, etc. When completed, the board shall approve, and thereupon shall give notice, and in due time let contracts, etc. In all these prescribed duties there is not a single item that partakes of a ministerial character. They all pertain to executive duties, and are wholly and entirely governmental in their nature and purport. The governor can execute them, or not, at his will, as they fall exclusively within his department of government. To test the question as to whether these enumerated duties are ministerial or governmental, suppose these acts of the legislature were entirely free from doubt touching their constitutional validity, and the governor, or the board acting in his aid, should refuse to execute the requirements thereof; would this court, by a mandamus proceeding, compel him to act? Undoubtedly not, and why? Because the acts required of him do not fall within the domain of those acts which are denominated "ministerial." On the contrary, they are governmental in their nature, pertain to matters publici juris, and affect the welfare of the people at large. Now, for the sake of the argument, concede that the law is unconstitutional, and that injunction is an appropriate remedy, and is competent to restrain where mandamus will compel; could this court with any more propriety or right interfere with the governmental and executive acts of the governor? No one will so contend. Chief Justice Marshall, in *Marbury v. Madison*, 1 Cranch, 170, says, "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." In *Sutherland v. Governor*, 29 Mich. 320, Judge Cooley says: "In many cases it is unquestionable that the head of an executive department may be required by judicial process to perform a legal duty, while in other cases, in our judgment, the courts would be entirely without jurisdiction; and, as regards such an officer, we should concede that the nature of the case and of the duty to be performed must determine the right of the court to interfere in each particular instance." So that, looking to the nature of the thing to be done and the duty to be performed by the governor under the requirements of these acts, there can be but one conclusion in respect to them. Whatever else may be said, they are not minist-

terial, and hence no judicial process of the courts can issue to compel or restrain, or in any manner affect or interfere with, the executive volition of the governor with respect thereto. The mere fact that a law is alleged to be unconstitutional does not confer jurisdiction upon courts to interfere with the acts of the executive officers while proceeding in pursuance of its requirements. *Mississippi v. Johnson*, *supra*. True, the board is empowered to make payment upon contracts as the work progresses, and it is contemplated that such payments and disbursements shall be made out of the public funds so appropriated by the legislature; but neither the governor nor the board can obtain a dollar of such funds without a warrant from the secretary of state, by the very terms of the acts themselves. There is no intimation anywhere that the secretary is about to or is intending to draw, or is contemplating the drawing of, any warrant against such fund, or any public fund of the state. Indeed, the secretary of state, acting in his capacity as such officer, is not a party to the suit.

The judiciary takes cognizance of such proceedings only, if at all, which operate incidentally as a check upon a co-ordinate branch of government. It may, in a proper case, proceed against an officer engaged in the discharge of purely ministerial functions, which may indirectly or incidentally affect the acts of a co-ordinate branch, and even nullify and render them inoperative; but directly, as against officers acting in a political, governmental, or discretionary capacity, it never has and never will, so long as the relative duties and powers of the co-ordinate departments are justly observed. *Gaines v. Thompson*, *supra*. Moreover, it is not fit that these great powers pertaining to sovereignty, which affect the whole people alike, and none less nor more than the rest, should be invoked by individual citizens, or by a class or classes, or body corporate, or an aggregation thereof less than the whole state. State officers should not be subjected to the annoyance of a suit at the instance of every individual, when civil or property rights are not invaded, who might conceive that the laws were being improperly administered, or that public funds were not being applied to legitimate public purposes. State government being divided into three co-ordinate branches,—executive, legislative, and judicial,—it is most essential to the preservation of the autonomy of government that there be no encroachment of one branch upon another. And to this end the just limitations of the constitutional powers accorded to either branch should be nicely defined and jealously guarded. But sometimes one branch of government, in the discharge of its co-ordinate functions, oversteps the limit of its constitutional powers. In such a case one or both of the other branches of government may operate as a check upon its action. The

legislature may pass an act in disregard of the inhibitions of the constitution. The executive may veto the measure, or, failing to do so, the judiciary may refuse to recognize it as controlling. The governor acts upon his own motion, and by right of high constitutional powers and privileges reposed in him. The judiciary acts, not upon its own motion, but only when some suitor duly authorized by law presents, in due form, a cause appropriate for its cognizance. Its machinery may be set in motion by private suitors, in some form or another, in all cases where civil or property rights are being invaded or intrenched upon to their injury or damage, be the suitor ever so humble, or the injury to be encountered ever so small; but in all cases of purely public concern, affecting the welfare of the whole people, or the state at large, the court's action can only be invoked by such executive officers of state as are by law intrusted with the discharge of such duties. The attorney general was such an officer at common law. Under the constitution (article 7, § 17), the prosecuting attorneys are made the law officers of the state, and of the counties within their respective districts. These officers, says Waldo, J., in *State v. Douglas Co. Road Co.*, 10 Or. 201, are possessed "with the powers, in the absence of statutory regulation, of the attorney general at common law." When the office of attorney general was created, it was made the duty of the incumbent to "prosecute or defend for the state all causes in the supreme court in which the state is interested." *Sess. Laws 1891*, p. 188. Whether his duties and powers in any manner supersede those of the prosecuting attorneys, it is not now necessary to inquire; but a vital question here is whether this proceeding has been properly instituted by the law officer of the state, whether he be a prosecuting attorney or the attorney general. The pleading, by virtue of which it is contended the court should take and entertain jurisdiction, may properly be termed a bill in equity by a private individual, to wit, A. O. Taylor, the relator. It is verified by him, and purports to be his bill, and not the information of the district attorney for the Third judicial district, although signed by that officer. We have seen that at common law, if a private individual had an interest in the proceeding apart from the interest of the government, he might, as relator, have his bill incorporated with the information of the attorney general, which was denominated an "information and bill." In practice, if it should afterwards appear that the relator had no interest to be subserved, the bill was dismissed, and the information retained. *Attorney General v. Vivian*, 1 Russ. 236, 237; *State v. Cunningham*, *supra*. But do we find here what may be termed an information or bill by the law officer of the state? As such an officer is the only person competent to institute a proceeding of the nature under con-

sideration, the information should show upon its face, in no uncertain manner, that he is the officer instituting and prosecuting the suit, and the sole person responsible for its inception and maintenance. The most common form of instituting like proceedings, it seems, has been in the name of the attorney general. *Coosaw Min. Co. v. South Carolina*, 144 U. S. 565, 12 Sup. Ct. 689. Less frequently they are brought in the name of the crown or the state upon the relation of the attorney general. *State v. Hibernian Savings & Loan Ass'n*, 8 Or. 396. And, if permissible at all to bring the suit in the name of the state alone, the complaint or information should show upon its face that the appropriate law officer brings the same for or in behalf of the state. The proceeding in either form would fix the responsibility for the maintenance thereof upon that officer, and it is not believed that the mere affixing of his signature in his official capacity to a complaint or bill shown to be the bill of a private relator is sufficient to impress it with the functions and capacity of an information competent to put in motion the machinery of the courts, whereby they will take cognizance of questions pertaining to the high prerogative powers of the state, or affecting the whole people in their sovereign capacity. See *State v. Saline Co.*, *supra*; *Bigelow v. Bridge Co.*, 14 Conn. 578; *State v. Anderson*, 5 Kan. 115; *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.*, 50 Pa. St. 100; *Board v. Keady*, 34 Ill. 296; *People v. Pacheco*, 29 Cal. 213; *Attorney General v. East India Co.*, 11 Sim. 380; *Bobbett v. State*, 10 Kan. 15; *U. S. v. Throckmorton*, 98 U. S. 70.

Having reached these conclusions, the decree of the court below will be reversed, and the complaint dismissed. This leaves the constitutional question still undisposed of, and the fact that we would probably not declare the acts to be unconstitutional cannot affect or change our duty in the premises. Courts will not assume to pass upon a question of that character, unless properly before them; and the case at bar, as presented, not being within our jurisdiction to hear and determine, it is clearly not within our province to assume now to decide that question, although of grave public importance. "As a general rule, a court will not pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to a determination of the cause." Lord, J., in *Elliott v. Oliver*, 22 Or. 47, 29 Pac. 1. We said when this case was here before that "this rule arises out of the due respect which one co-ordinate branch of the state government entertains towards another." The legislature, in adopting laws for the government of the people, does so under its construction of the constitution, and the just presumption always prevails that the business of the legislature is transacted with due regard to the

fundamental law by which its acts are limited and governed. It must be a clear case, therefore, and one in which the constitutional question is the very *lis mota*, before courts will assume the responsibility of declaring an act of the legislative assembly void upon constitutional grounds, and reverse the judgment of a co-ordinate branch of the state government. The case before us affords a striking illustration of the soundness of this doctrine. The law complained of was passed at two succeeding sessions of the legislative assembly, and received the approval of two executives of the state. By the last act an expenditure of \$25,000 under the former, in the purchase of a site for the branch asylum, is approved, as well as all other acts of the board in pursuance of its provisions. At the time of the passage and approval of the latter act, this case was pending in the courts, which fact was strongly calculated to attract the attention of both the legislative and executive branches of the state government to the direct point at issue, and it is but just to assume that the question of its constitutionality was duly and carefully considered. Hence the peculiar gravity of our assuming at this time to pass upon the constitutional question so ably and elaborately presented at the hearing. Being inhibited by the rule under discussion, we cannot go into the question.

These conclusions are concurred in by the full bench, but the majority of the court are of the opinion that such conclusions are susceptible of support on other grounds, and in this connection we will proceed to state them. The power of a court of equity, in a proceeding by the attorney general or district attorney to enjoin the issuance of warrants in payment for the Eastern Oregon Asylum,—as is heretofore intimated might be done if it be conceded that the act locating it is in violation of the constitution,—it is believed, is involved in grave and serious doubt, and, further, the facts in the case do not seem to bring it within any recognized equity jurisdiction. It is not claimed, nor can it be, that the objects and purposes of the acts in question are unconstitutional, or that the defendants threaten to apply the public funds to an unconstitutional use, or to waste or dissipate them. The claim is that the legislature has directed that the branch asylum shall be located at a place other than the seat of government, in violation, as plaintiff claims, of the duty imposed upon it by the constitution; and this, it is asserted, is sufficient ground upon which a court of equity should assume jurisdiction. This is not enough. The construction and location of public buildings of the character in question is purely a public governmental question, belonging to the legislative and governmental departments, and affects no private or property right. Nor do the facts of this case justify the conclusion, as a matter of law, that it would be of any pecuniary in-



jury to the state. If the legislative and executive departments have misconstrued the constitution in this regard, their responsibility is to the people. A court of equity cannot for that reason alone assume the right to sit in judgment on their acts. There is no authority to be found in the constitution or statutes of this state for the exercise of such an extraordinary power, nor is it believed it can be found in the analogies of the common law. In this state the distinction between common law and equity, as a matter of substance, prevails, although both jurisdictions are invested in the same court. *Ming Yue v. Coos Bay R. & E. R. & Nav. Co.*, 24 Or. 392, 33 Pac. 641. And, it being well settled that a court of chancery is conversant only with the maintenance of property rights, it has no jurisdiction to interfere with the duties of the other departments of government, except when necessary to the protection of such rights, and cannot even then interfere with the discretion invested in either of such departments. "The office and jurisdiction of a court of equity," says Mr. Justice Gray in *Re Sawyer*, 124 U. S. 210, 8 Sup. Ct. 482, "unless enlarged by express statute, are limited to the protection of rights of property." And in *Sheridan v. Colvin*, 78 Ill. 247, it is said: "It is elementary law that the subject-matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property, and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of government, except under special circumstances, and when necessary for the protection of rights of property." See, also, *Green v. Mills*, 16 C. C. A. 516, 69 Fed. 852, and authorities cited by Mr. Justice Gray in *Re Sawyer*, *supra*. The several departments of government are each independent of the other. To the judicial department is intrusted the determination of rights and the enforcement of remedies, and, as an incident to the protection of property, a court of equity has the undoubted right to refuse to recognize as valid a clearly unconstitutional act of the legislature, because the constitution is the paramount law of the land, which every suitor can invoke when an infringement of his rights is threatened under some law in violation thereof. But the mere fact that an act of the legislature is alleged to be unconstitutional gives it no jurisdiction to determine that question. Its duty is to determine actual controversies, when properly brought before it, and not to give opinions upon mooted questions or abstract propositions. Before it can assume to determine

the constitutionality of a legislative act, the case before it must come within some recognized ground of equity jurisdiction, and present some actual or threatened infringement of the rights of property on account of such unconstitutional legislation. When the question, as here, is publici juris alone, affects no property rights, and no threatened waste of the public funds is shown, it may be well doubted whether the court has any more power to interfere with the duties of the other departments, on the ground that their acts may be unconstitutional, than it has with their discretionary powers or duties. The independence of the different departments in this respect is so complete that, however ill advised the action of the legislature or executive may be, and no matter how gross an error may be committed, a court of equity is nevertheless powerless to interfere, when rights of property are not involved, unless express authority is conferred upon it to do so. The decision of a large class of public questions must, in the very nature of the case, be left to the legislative and executive departments, and when the decision is made it must be accepted as correct. Among these is the construction and location of public buildings, and the presumption is just as conclusive that in the discharge of this duty they observe the provisions of the constitution as it is that the courts properly interpret that instrument when called upon to do so in discharge of the duty intrusted to them. It is true that by this rule, practically, public or private interests may sometimes suffer in either instance, although theoretically there are no such cases; but, however gross the wrong in fact committed by the other departments, a court of equity is powerless to remedy it, unless property rights are involved, or appeal to the judiciary is given by law. No greater evil could exist, under our form of government, than the usurpation by the judiciary of powers not intrusted to it. It should therefore refuse, under all circumstances, to assume jurisdiction in any case which affects the powers, duties, or prerogatives of the other departments of government, unless its right to do so is so clear as to admit of no reasonable doubt. In the opinion of the majority of the court, this record does not present such a case. No great public wrong is threatened, nor will public justice or individual rights suffer by the execution of the law in question. And, more, it must be admitted that the construction sought to be placed upon the constitution by the plaintiff is at least open to serious question. It has, for almost a quarter of a century, received a practical exposition to the contrary by the legislative and executive departments, each of which is as much bound to obey the constitution as the courts; and to this exposition the courts would be bound to yield, in a proceeding properly within their jurisdiction, unless satisfied that it is

repugnant to the plain provisions of the constitution. Indeed, the very act locating the branch asylum at Union, the execution of which is now sought to be enjoined, was passed by the legislature with only three dissenting votes, while this suit was pending, and its constitutional right to enact such a law thereby challenged. Moreover, it was approved by the present executive, whose eminent legal attainments and familiarity with the question (it having been argued before him in *Sherman v. Bellows*, 24 Or, 553, 34 Pac. 549) justly entitle his opinion in the matter to great respect. The court is bound, therefore, to assume that in the opinion of the legislature and executive there is no constitutional inhibition against the passage of such a law, and while none of these facts would excuse the court from assuming jurisdiction, if its right to do so was clear, nor would the exposition given the constitution by the other departments be absolutely controlling upon it, when called upon, in the discharge of its duty, to construe that instrument, yet they afford a very persuasive argument why the court should not struggle to find some grounds, doubtful at best, upon which it can rest its jurisdiction. Before it could assume the power to question the legality of the action of the other departments of government in such a case its right to do so ought to be beyond all possible question, and it ought to be able to place its jurisdiction upon some well-settled ground for equitable interference, which it is believed cannot be done in this case. Let an order be entered dismissing the complaint and dissolving the injunction.

**STATE ex rel. GERMAN SAVINGS & LOAN SOC. v. SEARS, Sheriff.<sup>1</sup>**

(Supreme Court of Oregon. Jan. 27, 1896.)

**MORTGAGE FORECLOSURE—REDEMPTION—CONSTITUTIONAL LAW.**

1. Act Feb. 23, 1895 (Laws 1895, p. 59), which amends Hill's Ann. Code, § 303, by increasing the time for redemption from forced sales of real estate from four months to one year from confirmation of the sale, applies to subsequent decretal sales for mortgages made prior to its passage.

2. Act Feb. 23, 1895, which amends Hill's Ann. Code, § 303, by extending the time of redemption from forced sales of real estate, does not, in that it increases the time for redemption from decretal sales on mortgages executed prior to its passage, impair the obligation of contracts, within the prohibition of the federal constitution.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Application, on relation of the German Savings & Loan Society, against George C. Sears, sheriff, for writ of mandamus to compel defendant to deed certain land to relator as purchaser at foreclosure sale under a mortgage. From a judgment for defendant, the plaintiff appeals. Affirmed.

Milton W. Smith, for appellant. Raleigh Stott, for respondent.

BEAN, C. J. This is a mandamus proceeding to compel the sheriff of Multnomah county to execute and deliver to the relator a deed for certain real property purchased by it at foreclosure sale. The facts are that on June 2, 1891, one Charles Rivears, being indebted to the relator in the sum of \$6,000, executed and delivered to it a mortgage on the real property in question to secure such indebtedness. Thereafter, Rivears having made default, the mortgage was regularly foreclosed, and the premises ordered sold to satisfy such indebtedness. The sale having been duly advertised, on April 20, 1895, the property was sold to the relator by the sheriff of Multnomah county, in the manner provided by law, and such sale was regularly confirmed on the 13th of June, 1895. No redemption having been made within the time provided by the law as it existed at the time the mortgage was made, the relator demanded a deed from the sheriff, which being refused, he commenced this proceeding to compel the execution thereof. A demurrer to the alternative writ was sustained, and plaintiff appeals.

At the time the mortgage was executed, the statute<sup>1</sup> provided that a judgment debtor, or his successor in interest, might, at any time within four months after the confirmation of an execution sale, redeem the premises by paying the amount of the purchase money, with interest at the rate of 10 per cent. per annum from the date of the sale, together with the amount of any taxes the purchaser may have paid thereon. But, prior to the sale, the law was amended by extending the time for redemption to one year after the confirmation. Laws of 1895, p. 59. And the question now here is whether this latter act was intended to apply to decretal sales on mortgages executed prior to its becoming operative, and, if so, whether it violates article 1, § 10, of the constitution of the United States, which ordains that "no state \* \* \* shall pass any law \* \* \* impairing the obligation of contracts." That it was intended by the legislature to apply to and regulate redemptions from all execution sales made after its passage is too clear for argument. It is the only statute on the subject, and makes no reservations or exceptions in favor of proceedings for the enforcement of prior contracts. We come, then, to the real question in the case, and that is whether, in its application to foreclosure sales on mortgages executed prior to its passage, it impairs the obligation of the mortgage contract. And, at the outset, it must be admitted that, if it impairs any of the contract rights secured by such mortgages in the slightest degree, it is unconstitutional. *Green v. Biddle*, 8 Wheat. 92. But the con-

<sup>1</sup> 1 Hill's Ann. Code, § 303.

<sup>1</sup> Rehearing pending.

tion for the defendant is, that the statute acts on the remedy only, and in no way enlarges, abridges, or changes the terms or conditions of the contract, or retards or postpones its enforcement, and is not, therefore, within the constitutional inhibition. A contract is an agreement between two or more persons to do or not to do a certain thing, and any law passed subsequent to the making thereof which alters or abridges its terms or prevents its enforcement or releases either of the parties from the performance of their undertaking necessarily impairs the obligations of the contract; but the form of the remedy or mode provided by law for its enforcement is no part of the contract, and may be changed at the will of the sovereign, without impairing its obligations, provided a remedy substantially as efficient be substituted. And, although the new remedy may be less convenient, or may in a sense affect the value of the contract or diminish the value of the performance, it does not for that reason impair its obligations, so long as the duty of full performance still exists. It is one of the contingencies which the parties necessarily have in view in making contracts that the mode of enforcing their performance in the courts may be changed or modified by subsequent legislation, as the public good may demand.

What constitutes the obligation of a contract, within the meaning of the constitution, has been a fruitful subject for judicial discussion and controversy; and, notwithstanding all that has been said upon the question, "no attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair such rights. Every case must be determined upon its own circumstances." *Von Hoffman v. City of Quincy*, 4 Wall. 535. It has been frequently said in the opinions of the supreme court of the United States, whose decisions, so far as applicable, are, of course, controlling on the question here presented, that the laws subsisting in a state at the time a contract is made, including those which affect its validity, construction, discharge, or enforcement, enter into and form a part of the contract, as if they were expressly referred to or incorporated in its terms. *Von Hoffman v. City of Quincy*, 4 Wall. 550; *Walker v. Whitehead*, 16 Wall. 314; *Edwards v. Kearzey*, 96 U. S. 595; *Selbert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190; *Louisiana v. New Orleans*, 102 U. S. 206. But the expression of the judges in these, as in all, cases, must be understood in the light of the question to be decided; for, as said by Chief Justice Marshall in *Ogden v. Saunders*, 12 Wheat. 233, "the positive authority of a decision is coextensive only with the facts on which it is made." As so understood and interpreted, the meaning of the rule seems to be that the laws existing at the time a con-

tract is made, which enter into and form a part of it, are only those which, "in their direct or necessary legal operation, control or affect the obligations of such contract." *Insurance Co. v. Cushman*, 108 U. S. 65, 2 Sup. Ct. 236. It is admitted by all to be entirely competent for the state to change or modify the form of the remedy as it may see fit as to past as well as future contracts, without violating the provisions of the constitution, so long as a substantial remedy remains and no right secured by the contract is impaired. "For, undoubtedly," says Mr. Chief Justice Taney in *Bronson v. Kinzie*, 1 How. 311, "a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts, as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But, if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution." And in *Tennessee v. Sneed*, 96 U. S. 74, it is said: "The rule seems to be that, in modes of proceeding and of forms to enforce the contract, the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy or so embarrass it with conditions and restrictions as seriously to impair the value of the right." In conformity to this doctrine, it was held in *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91, that an act of the Virginia legislature requiring the holder of certain coupons to first pay his taxes in cash, and file his coupon in the court of appeals, and afterwards, in some circuitous way, receive back his money, was an act affecting the remedy only, and did not impair the obligation of a contract, although the funding act under which the coupons were issued required the state to receive

them for all taxes and demands due her, and authorized the writ of mandamus to compel the tax collector to so receive them. So, also, in *Morley v. Railway Co.*, 146 U. S. 162, 13 Sup. Ct. 54, a law of the state of New York reducing the rate of interest on a judgment based on a contract for the payment of money which, when matured, began under the then-existing law to draw interest at a specified rate per cent., was held to be valid under the federal constitution. Again, in *Terry v. Anderson*, 95 U. S. 628, it was held that a law shortening the period prescribed by the statute of limitations in force when the right of action accrued was valid, a reasonable time having been given in which to commence the action before the bar took effect, and that such law did not impair the obligation of the contract. In *Curtis v. Whitney*, 13 Wall. 68, it was held that a statute requiring the holder of a tax-sale certificate, made before its passage, to give the occupant of the land described therein three months' notice of the time the deed would be applied for, together with a copy of the certificate and the name of the holder, did not impair the obligation of the contract evidenced by the certificate, and was therefore valid. Mr. Justice Miller, in delivering the opinion of the court, said: "That a statute is not void because it is retrospective has been repeatedly held by this court, and the feature of the act of 1867 which makes it applicable to certificates already issued for tax sales does not of itself conflict with the constitution of the United States. Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts that they may be affected in many ways by state and national legislation. For such legislation, demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the federal constitution, so long as the obligation of performance remains in full force." In *Sturges v. Crowninshield*, 4 Wheat. 122, the law of the state of New York relieving a debtor from imprisonment from debt was held not to impair the obligation of past contracts, because it was only a modification of the remedy given by the legislature for the enforcement of the contract, and not a part of its obligation. In that case Mr. Chief Justice Marshall said: "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force.

Imprisonment is no part of the contract, and, simply to release the prisoner, does not impair its obligation." In *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236, a statute reducing the rate of interest from 10 to 8 per cent. on the amount bid, to be paid by the mortgagor on redemption from a purchaser at a decretal sale, was held valid and applicable to all sales thereafter made, although the mortgage was given before the passage of the act. The opinion of Mr. Justice Harlan in this case is so clear a statement of the law, and his argument seems to bear so directly upon the question before us, that we may be pardoned for quoting from it at some considerable length. He says: "The contention of the company's counsel is that that act cannot be applied without impairing the obligation of its contract. What was that contract? In what did its obligation consist? By the contract between the mortgagor and mortgagee, the former became bound to pay, within a certain time, the mortgage debt, with the stipulated interest of nine per cent. up to final decree, if one was obtained, and with six per cent. thereafter as prescribed by statute when the mortgage was given. Rev. St. Ill. 1874, p. 614. Certainly, the obligation of that contract was not impaired by the act of 1879, for it did not diminish the duty of the mortgagor to pay what he agreed to pay, or shorten the period of payment, or interfere with or take away any remedy which the mortgagee had, by existing law, for the enforcement of its contract. The statute in force when the mortgage was executed, prescribing the rate of interest which the amount paid or bid by the purchaser should bear, as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and mortgagee. The mortgagor might, perhaps, have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage. But, as to the mortgagee, the obligation of the contract was fully met when it received what the mortgage and statute in force when the mortgage was executed entitled it to demand. The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The company ceased to be a mortgagee when its debt was merged in the decree, or, at least, when the sale occurred. Thenceforward its interest in the property was as purchaser, not as mortgagee. And to require it, as purchaser, to conform to the terms for the redemption of the property as prescribed by the statute at the time of purchase, does not, in any legal sense, impair the obligation of its contract as mortgagee. It assumed the position of a purchaser, subject, necessarily, to the law then in force defining the rights of pur-

chasers. But it is insisted that the value of the mortgage contract was impaired by a subsequent law reducing the interest to be paid to a purchaser at decretal sale; this, upon the assumption that the probability of the debt being satisfied by the decretal sale of the property was lessened by reducing the interest which any purchaser could realize on his bid in the event of redemption. In other words, the reduction by a subsequent statute of the interest to be paid to the purchaser would, it is argued, necessarily tend to lessen the number of bidders seeking investments, and thereby injuriously affect the value of the mortgage security. \* \* \* The reduction of the rate of interest by the act of 1879 was by way of relief to the mortgagor and his judgment creditors, and in no sense an injury to the mortgagee. When that act was passed, there was no person to answer the description or to claim the rights of a purchaser; consequently, no existing rights were thereby impaired. That the reduction of interest to be paid to the purchaser would lessen the probable number of bidders at the decretal sale, and thereby diminish the chances of the property bringing the mortgage debt, are plainly contingencies that might never have arisen. They could not occur unless there was a decretal sale, nor unless the mortgagee became the purchaser, and are too remote to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract."

These cases sufficiently illustrate the character of changes or modifications which may be made in the laws existing at the time a contract is entered into without impairing its obligations, and they further show that the statement often made that such laws enter into and form a part of the obligations of a contract is not to be accepted in its broad and literal sense. Within the doctrine of these cases, it seems to us the act of 1895, extending the time in which a mortgagor may redeem from the purchaser at a foreclosure sale, does not impair the obligations of a mortgage contract, as such contract is interpreted and understood in this state. By its terms, the mortgagor becomes bound to pay, within a certain time, the mortgage debt, with interest, and, in case he fails to do so, to suffer the mortgaged premises to be sold in the usual course of proceeding provided by law, to satisfy such indebtedness; and this is the extent of the obligation of his contract. By such a contract, the mortgagee acquires no title or interest in the mortgaged premises, but simply a lien thereon to secure his indebtedness. The legal title and right to the possession remain in the mortgagor. By the common law, a mortgage conveyed the legal title to the mortgagee, and, upon condition broken, his estate became indefeasible; but this doctrine has been "cut up by the roots" by the statutes of this state and judicial decisions thereon; and here a

conveyance of land intended as security for the payment of a debt, whatever its form, is regarded as a mere lien, and must be foreclosed, and the property adjudged to be sold to satisfy the debt by suit, although the conveyance itself may provide a different method for its foreclosure. *Thompson v. Marshall*, 21 Or. 171, 27 Pac. 957; *Marshall v. Williams*, 21 Or. 268, 28 Pac. 137; *Sellwood v. Gray*, 11 Or. 534; *Anderson v. Baxter*, 4 Or. 105; *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420.

The relator obtained no title or interest in the mortgaged premises by its contract, but only a lien thereon, and a right to subject the property to sale to satisfy its claim, and this right has in no way been altered, abridged, or postponed by the act of 1895. How can it be claimed, then, that this act impairs any of the obligations of the contract? It is true "the law which binds the parties to perform their agreement" forms part of the obligations of the contract, but the act of 1895 does not postpone or lessen the duty of performance by the mortgagor. It does not diminish his duty to pay his debt at the time and in the manner agreed upon, or take away or interfere with any of the mortgagee's remedies to enforce its lien by subjecting the mortgaged premises to sale. The statute existing at the time the mortgage was given, prescribing the time in which the mortgagor shall redeem from the purchaser at a foreclosure sale, if one should be made, had no relation whatever to the contract between the mortgagor and mortgagee. The purchaser's right depends upon the law in force at the time of the sale, and why shall he be permitted to appeal to the contract between the debtor and creditor? He is not a party or privy to such contract in any sense; and it does not alter the case that the purchaser and mortgagee are one and the same person. The relator ceased to be a mortgagee when the sale occurred. Thenceforward its interest in the property was as purchaser, and not as mortgagee; and to require it, as such purchaser, to conform to the law in force when the purchase was made, does not in any way impair the obligations of the mortgage contract.

The argument that the value of the mortgage contract was impaired by the subsequent law extending the time for redemption, because it tended to lessen the number of bidders, and therefore the amount of the bids, is based upon an assumption which, in the language of Mr. Justice Harlan in the *Cushman Case*, "is too remote to justify the conclusion as matter of law that such legislation affected the value of the mortgage contract." By the laws of this state, the purchaser at an execution sale is entitled to the possession of the premises and the rents and profits thereof from the date of sale, until redemption (1 Hill's Ann. Laws Or. § 307), and, in case redemption is had, to the return of his money, with 10 per cent. in-

terest thereon, and all taxes paid by him; so that it cannot be said that an extension of eight months in which to redeem from a mortgage sale will, under such circumstances, so materially affect the value of the mortgage contract as to impair its obligations. And, besides, we have seen, every statute which affects the value of a contract or enhances the cost or difficulty of performance, is not prohibited by the federal constitution, so long as the obligation of performance remains in force. The question in this, as in all similar cases, is largely one of reasonableness, and of that the legislature is primarily the judge, and the courts cannot overrule its decision, unless a substantial contract right is necessarily impaired. The act of 1895 was intended for the relief of the mortgagor, and, in the opinion of the legislature, was demanded by the public good; and, however it may retroact on mortgages previously made, it does not impair the obligations of such contracts.

But it is insisted that the law in force at the time the mortgage was executed gave to the mortgagee a vested right to a title to the mortgaged premises in case the mortgage should be foreclosed, and it should become the purchaser at such sale, unless redemption should be made within four months thereafter, and that the effect of the act of 1895 was to take from it this vested right, and give to the mortgagee an eight-months estate in the premises not reserved by the mortgage, and thus impair the obligation of the mortgage contract. In support of this position, counsel cites decisions from the supreme court of the United States, and also some from the state courts. *Bronson v. Kinzie*, 1 How. 311; *Howard v. Bugbee*, 24 How. 461; *Phinney v. Phinney*, 81 Me. 450, 17 Atl. 405; *Baldwin v. Flagg*, 43 N. J. Law, 495; *Robards v. Brown*, 40 Ark. 423; *Allen v. Allen*, 95 Cal. 184, 30 Pac. 213. These decisions, in our opinion, are clearly distinguishable from the case now before the court. In each of them the mortgage conveyed the legal title, and either provided the remedy for its own enforcement, or, under the law existing at the time it was executed, the mortgagee was entitled in case of default to go into a court of chancery, and obtain an order for the sale of the mortgaged property, free and discharged from the equitable interest of the mortgagor; and it was held that the subsequent redemption statutes impaired the obligation of the contracts, because they either annulled the express terms of the mortgages, or conferred upon the mortgagors a new estate, which was not reserved by the original contract, and which was directly and materially in conflict with the estate vested in the mortgagee by his contract. In this state, however, as we have seen, a mortgagee acquires no title to the mortgaged premises by his contract, nor has he a vested right to one. If he should happen to be the highest bidder at a sale of the

mortgaged premises, the title thus acquired would be as purchaser, and not as mortgagee. He has by his mortgage but a mere lien upon the property, with only a vested right to substantially as efficient a remedy for its enforcement as the one existing at the time his contract was made. When the state provides this, his vested rights are protected, and the obligations of his contract are not impaired. The mortgagor retains the legal title until foreclosed and barred in the manner provided by law, and a statute merely extending the time for redemption confers upon him no new or additional estate. It affects only the mode of proceeding for the enforcement of the mortgage lien, and the statute in question does not embarrass it so as to seriously impair the value of the mortgage contract.

The precise question in this case has never been decided by the supreme court of the United States, nor by any of the state courts, so far as we are advised. In the state of Kansas an act of the legislature, which not only extended the time 18 months for redemption, but also took from the purchaser, and gave to the mortgagor, possession of the premises, rent free, during the time, came before the court for consideration in *Greenwood v. Butler*, 34 Pac. 967, and it was held that it did not apply to sales on foreclosure decrees entered prior to its becoming operative. Subsequently, *Watkins v. Glenn*, 40 Pac. 316, and *Beverly v. Barnitz*, Id. 325, called for a decision as to its constitutionality under decrees entered after it became operative, but on mortgages executed prior thereto; and in an able opinion by Chief Justice Horton, in which one of the other judges concurred, it was held to be unconstitutional, as impairing the obligation of the mortgage contract. On a petition for rehearing, however, Chief Justice Horton having in the meantime retired from the bench, the case was again examined; and in an exhaustive and well-considered opinion by his successor, Chief Justice Martin, the law was upheld by a majority of the court. All the authorities bearing upon the question in its various aspects seem to have been collated and reviewed in the various opinions in these cases, and therefore need not be further referred to here. On the whole, while we are conscious of the fact that the question is one on which lawyers and judges will necessarily differ, and that our conclusion is not by any means free from doubt, we feel constrained, after a careful examination of the question, to concur with Mr. Chief Justice Martin in saying that "if a state legislature may totally abolish imprisonment of the debtor as a means of enforcing payment; if it may shorten the statutes of limitation; if it may reasonably extend and enlarge exemptions of property from sale for the payment of debts; if, where coupons are by law made receivable in payment of taxes, it may require such payment in the first in-

stance in cash, to be afterwards refunded, and the coupons taken up; if it may reduce the rate of interest on redemption from decretal sales; if it may lessen the interest on former judgments; if it may require the holder of a tax-sale certificate to give three months' notice of the time when a tax deed will be applied for; if it may require transcripts of judgments against a particular city to be filed in a certain office, as a prerequisite to payment, and divest the courts of the power to grant remedies in force when the judgments were rendered; if it may reduce the terms of court, in number and duration; if it may amend the laws as to attachments, garnishments, and receivers so as to take away causes therefor which were before sufficient; if, in short, 'it may regulate at pleasure the modes of proceeding' in the courts, and all this as to existing obligations, —it is difficult to frame a process of reasoning which would forbid it from" extending the time for redemption from sales under mortgage foreclosure decrees in this state, although the mortgages may have been executed prior to the passage of the law.

Having in view the rule that a court should never declare an act of the legislature unconstitutional unless its repugnancy to that instrument is clear and beyond reasonable doubt, we conclude that the act of 1895 is valid and constitutional as to all sales made under mortgage foreclosure decrees rendered after the law became operative, although the mortgages may have been executed prior to that time; and the decree of the court below is therefore affirmed.

#### WILLS et al. v. LANCE.

(Supreme Court of Oregon. Jan. 27, 1896.)

**FIRE—NEGLIGENCE—CUSTOM—EVIDENCE—EXPERT TESTIMONY—INSTRUCTIONS.**

1. In an action for causing the destruction by fire of wood on plaintiff's premises, a question to defendant, on his cross-examination, as to whether it was customary to "back-fire," in order to save one's property, was improper, where there was no direct evidence of defendant's having kindled the fire, and defendant, without referring to any custom, merely testified in chief that after he discovered the fire he raked away the briars near his fence to keep the fence from burning.

2. Where witnesses who were present at a fire testified that the wind was from a certain direction, and an officer from the weather bureau, which was several miles distant, testified that the automatic register, which was located in an elevated position, free from obstruction, showed the wind to have blown from another direction, it was not error for the court to state to the jury "that when a man comes before you, and says that the direction of the wind at a certain time was from such a quarter, so many miles away, and was blowing at the rate of so many miles per hour, irrespective of hills or forests, you will take into consideration your own experience, and the experience of other witnesses who have testified, whether that instrument is to be believed, under such circumstances and at such a distance, or whether your own experience and the testimony of the witnesses are

worth anything. Consult your own experience, as well as the report made by the officer."

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Wills Bros. against O. H. Lance to recover damages for causing the destruction of plaintiffs' property by fire. Defendant had judgment, and plaintiffs appeal. Affirmed.

F. L. Keenan, for appellants. J. C. Caples and G. W. Allen, for respondent.

MOORE, J. This is an action to recover damages resulting from the alleged willful and negligent conduct of the defendant. The facts are that on September 5, 1892, the plaintiffs were the owners of a quantity of cord wood cut from and remaining on a tract of land that was bounded on the east by the defendant's land and that of one Mrs. Chase, the latter tract joining the defendant's premises on the north; that on said date a fire swept across Mrs. Chase's land to the plaintiffs', and burned a portion and threatened the destruction of all their wood, necessitating the employment of men and teams in removing it from the region of the fire. The plaintiffs allege, in substance, that the defendant willfully and negligently kindled the fire on his premises and Mrs. Chase's land, from which it spread to their tract, and destroyed 408½ cords of wood, of the value of \$816.25; that by reason of the defendant's negligence, they were compelled to and did pay out \$198.30 in the employment of men and teams to remove and protect their said cord wood,—and pray judgment for \$1,014.55. The answer having put in issue the allegations of the complaint, a trial was had, resulting in a judgment in favor of the defendant, from which the plaintiffs appeal, assigning as errors the rejection of testimony, and the giving of certain instructions to the jury.

The defendant, having been called as a witness in his own behalf, testified, in substance, that, between 12 and 1 o'clock in the afternoon of the day in question, he discovered a fire that had been burning in the timber approaching his premises near the northeast corner, the same being the southeast corner of Mrs. Chase's land; that the wind was then blowing quite a gale from the northeast, and the fire was driven thereby upon Mrs. Chase's land, near the southeast corner; that he raked away the briars and twigs at his north line to keep the fence from burning. Upon cross-examination an objection was interposed to the following question: "Is it not customary, if one wants to save his property, to back-fire?" And, the objection being sustained, the plaintiff saved an exception. It is contended that the question was competent, as tending to prove the defendant's negligence and want of due care, and that the refusal to permit the witness to answer it was a restriction of the right of cross-examination. No direct evidence that the defendant kindled the fire was

introduced at the trial, and his testimony showed that he raked away the briars and twigs from the fence only to protect it from destruction. How, then, could the question become material, except upon the assumption that the defendant owed a duty to the plaintiffs of protecting their property? If he neglected to back-fire along the line of his fence, in consequence of which it was destroyed, the loss would fall upon him, and not upon the plaintiffs. Had he testified that he kindled a fire to protect his property, there might have been just reason for allowing him to prove the existence of such an urgent necessity as would have warranted and excused his act, but the right to kindle the fire under such circumstances would not be founded in any custom, but upon necessity. If the defendant, apprehending the destruction of his property, had back-fired, and through his carelessness the fire so kindled by him had escaped and destroyed the plaintiffs' property, proof that the fire was set in conformity with a custom or usage long established would not excuse his negligence. 16 Am. & Eng. Enc. Law, 462. Evidence of a custom or usage is admissible to explain, but not to contradict, the terms of a contract silent as to details, or ambiguous as to incidents and conditions. *Holmes v. Whitaker*, 23 Or. 319, 31 Pac. 705; *Governor v. Withers*, 50 Am. Dec. 95. The plaintiffs' action being founded in tort precludes the defendant from proving the existence of any custom or usage to excuse his alleged negligence, and, this being so, by what right could the plaintiffs insist upon proving a custom for the purpose of establishing the defendant's liability? As we view the question, assuming that the question could have been proven in this manner, and by one witness, the object sought by asking it was to show that, when one's fence is endangered by fire, it is customary to avert the threatened injury by back-firing; and, as the danger to the defendant's property was imminent, an inference might be invoked that he kindled the fire which wrought the plaintiffs' injury. If proof of such a custom were permissible, the burden of establishing it was cast upon the plaintiffs; and the defendant, in his direct examination, not having admitted that he kindled the fire, or testified concerning any custom, what right of cross-examination was restricted by the court's refusal to permit the witness to answer the question? It is true, the right of cross-examination is a valuable one, tending to explain the testimony given in chief, and to establish truth; but it should be confined to matters stated in the direct examination or properly connected therewith. *Hill's Ann. Laws Or.* § 837. The question not being germane to the issue, nor proper cross-examination, the court committed no error in refusing to permit the witness to answer it.

2. At the trial the plaintiffs sought to show that the defendant kindled the fire complained of, while the defendant undertook to prove that it had been raging in the timber for

some time, and on the day in question was driven by force of the wind across Mrs. Chase's land, to the plaintiffs' tract, destroying their wood and causing the injury. The plaintiffs' premises being situate west of Mrs. Chase's, the direction and force of the wind became important factors in determining the origin of the plaintiffs' loss. The testimony of the defendant and seven witnesses called in his behalf tended to show the facts he undertook to prove, and that the wind was blowing from the northeast. W. S. Blandford, being called as a witness, testified, in substance, that he was an officer in charge of the United States weather bureau at Portland, and had in his possession the records of that office, giving the direction and velocity of the wind for September, 1892, and, referring thereto, said that on Monday, the 5th of said month, the wind was blowing from the north until 3 o'clock in the morning, at which hour it changed to the east, and continued easterly until 8 o'clock in the forenoon, when it changed, veering to the southeast and south until 2 o'clock in the afternoon, and from the hour last named the wind was blowing from the south until midnight. Referring to the velocity of the wind on that day, the witness said that from midnight until 9 o'clock in the morning it was blowing from 2 to 6 miles per hour; that, from the hour last named until 8 o'clock in the evening, it was blowing from 9 to 14 miles per hour, except, between 12 o'clock noon and 1 o'clock in the afternoon, it was blowing from the south 14 miles, and, between 3 and 4 o'clock in the afternoon, 7 miles, per hour. The witness also said that the record was made by an instrument attached to a wind vane then located on the roof of the Kamm Building, at First and Pine streets, by means of which the direction of the wind was printed on a sheet of paper fastened to a revolving cylinder, known as an "automatic register," that was kept in motion by clockwork. The following question was then asked the witness by plaintiffs' counsel: "The fact is, that machine could be relied on against the world, or a regiment of ordinary people?" to which he answered: "We would rely upon this, sir, against the city." The court then asked the following questions: "Suppose there was a deep canyon running east and west, and a fire should be built in it, and there was a strong current of air in the direction of the smoke and flame to the east, and your observation would say there was a north wind; would the experience and observation of those who actually saw it be of any consequence, in comparison with your instrument?" A. Our instrument would record the actual direction of the wind, accurately. Q. Where? All over this state? A. No, sir; we would say, if it blew six miles an hour in this valley [Willamette], it would be the constant direction down the valley and up. Q. I am speaking of the direction, not the velocity. A. Yes; if it was very light wind, the wind



would be liable to change; I should say, if it was less than six miles an hour." Whereupon the court, after charging the jury upon the issues of the case, gave the following instruction: "There is one matter further that I will mention to you, and that is, part of the testimony offered here is the record of the weather bureau. That record is not made by the hand of man. It is made automatically. It gives the direction and the velocity of the wind, sought to be ascertained, by means of machinery, and, connected with that machinery, these matters—the velocity and the direction of the wind—are recorded. But that instrument, you will observe, according to the testimony of the witness, was situated in an elevated position, clear from obstruction; and when a man comes before you, and says that the direction of the wind at a certain time was from such a quarter, so many miles away, and was blowing at the rate of so many miles per hour, irrespective of hills or mountains or forests, you will take into consideration your own experience, and the experience of other witnesses who have testified here, whether that instrument is to be believed, under such circumstances and at such a distance, or whether your own experience and the testimony of the witnesses are worth anything. Consult your own experience, as well as the report made by the officer." An exception to this instruction having been saved, it is contended that the language there used was an adverse comment upon expert evidence; that the court usurped the functions of the jury; that undue prominence was given to a part of the testimony to the exclusion of other evidence; and that the record of the weather bureau was not within the experience of the jurors.

If it be assumed, as the plaintiffs contend, that the court charged the jury to disregard the testimony of the officer of the weather bureau, the instruction was erroneous, or, if it required the jury to determine from their experience the accuracy of the automatic register used to ascertain the direction and velocity of the wind, it was equally erroneous; for it must be presumed that such instrument, and the record made by it, were matters not within the general knowledge of mankind, and hence the jury was incompetent to pass upon the question. The bill of exceptions does not show the distance from the weather bureau office to the scene of the fire, nor how many hills, mountains, or forests intervened, or that the fire was confined to a canyon; but, in the absence thereof, it must be presumed that evidence was introduced showing, or tending to show, the relative positions of the fire and the office of the weather bureau, together with the geography of the intervening space. The court did not attempt to question the veracity of the record made by the automatic register, so far as it applied to the location in which the record was made. There was no conflict of evidence in relation to the velocity of the wind

between the hours of 12 and 1 o'clock on September 5, 1892; the defendant saying it blew quite a gale, while the record showed that it was blowing at the rate of 14 miles per hour. There is a conflict, however, as to the direction of the wind at that hour; the defendant and his witnesses saying that at the fire it was blowing from the northeast, while the record shows that at the city of Portland, several miles distant, it was blowing from the south. The testimony of the witnesses who saw the fire, and observed the direction of the wind, may have been true, and the contradictory showing of the record made at a different place does not necessarily prove it to be untrue. The question as to the direction of the wind was for the jury to determine from all the evidence submitted. The jury must be presumed to have been composed of intelligent persons, and, as such, must have known that obstacles such as hills, mountains, and canyons would necessarily divert the course of the wind. They may have observed that a great fire would, in a slight degree, tend to affect its current; and while they, without the aid of a vane, may not have been able to indicate the exact point of the compass from which the wind blew, they could ascertain its general direction. It does not necessarily follow, because the wind was blowing at a certain place from a given direction, that it was blowing at all places from the same quarter. Stations of the weather bureau have been established, and are maintained, by the government, at important points, to observe climatic conditions, and gather and compile useful information, which has become a great aid to agriculture, commerce, and navigation; but the record thus made is not regarded as verity, except at the station where taken, and becomes useful to great areas of territory only when compared with observations taken at other stations. By means of the telegraph these comparisons are readily made, from which storm centers are located, and their general direction, and the force that impels them, noted; enabling the officers of the weather bureau to predict with quite a degree of certainty the "probabilities" of the weather, thereby rendering great benefit to mankind, in the saving of lives and property. The court did not attempt to question this record, when applied to the location in which it was made, but submitted it to the jury to say whether, from their experience, it should outweigh the testimony of numerous witnesses who saw the fire and observed the direction of the wind. The experience to which the court referred did not allude to the operation of the automatic register, or to the record made by it, but to the experience of the jurors as to wind currents, and particularly when affected by obstacles. This being so, the question is presented whether jurors could be governed by their experience, in determining the weight of evidence. Had the fire been in the city of Portland, instead

of several miles away, no one will pretend to say that the record of the weather bureau was conclusive evidence of the direction of the wind, when contradicted by the testimony of witnesses. The witnesses may have been laboring under a mistake, or falsely testified concerning the direction of the wind, yet, if the jury believed their statements to be true, such testimony would outweigh the report of the automatic register. The jury are the judges of the effect or value of evidence, except when it is declared by law to be conclusive, and they are not bound to find in conformity with the declaration of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds. *Hill's Ann. Laws Or. § 845.* If a juror could not consult his experience, he could never reach a conclusion in cases in which the evidence was conflicting. His experience is, or should be, the lamp of reason by which his judgment is controlled, and he may consult and be governed by it in all cases in which the evidence is conflicting, and not declared to be conclusive; and the court may properly instruct the jury that on examining the evidence they may bring to its consideration, in determining the weight to be given to it, such general practical knowledge as they may have upon the subject. *Douglass v. Trask, 77 Me. 35.* We cannot think the instruction complained of violated any rule of law, and hence the judgment is affirmed.

#### MORRELL v. MILLER et al.

(Supreme Court of Oregon. Jan. 13, 1896.)

FRAUDULENT CONVEYANCES—RIGHTS OF CREDITOR  
—LIABILITY OF GRANTEE—NOTICE  
—SUBROGATION.

1. M., being civilly as well as criminally liable for shooting plaintiff, deeded to L., his attorney, at a time when it was apprehended plaintiff would die from the effects of the shooting, his real estate, worth \$5,000, and gave him a bill of sale of his personality, worth \$585, which together constituted all his property; they executing a secret declaration of trust, whereby, in consideration of the conveyances, L. agreed to defend M. in all suits or actions which might be brought against him, and to dispose of the remainder of the property as he and M. should agree. Thereafter it was agreed that the fees of L. should be \$1,000. C. and A. were then engaged to assist in the defense of the criminal matters, each to receive \$1,000 therefor. C. desiring security on the land, and being unwilling to take a mortgage from M., and L. being unwilling to give security himself thereon, because of the trust agreement, M. gave a second deed to L. to cut out the trust as to the land; it being understood that L. should give a mortgage to C., which he did, and that A. should be paid out of the land, there being no understanding that M. should have any interest in the land. Thereafter L. conveyed the land to A., who had notice of all the circumstances, subject to the mortgage to C., for a recited consideration of \$2,000. *Held*, that while the second deed to L. would be considered an absolute conveyance, as between him and M., and not void as to creditors, it was attended with such suspicious circumstances

that it would be permitted to stand, as against creditors, only as security for the attorneys' fees, the amounts of which, as fixed by contract, though somewhat large, should not be disturbed, it not appearing that they were purposely made large to cover up the property against creditors.

2. Where one attorney employs another attorney for his client, and tells him that his client will pay each of them a fee of \$1,000, and then conveys to the second attorney, subject to a mortgage of \$1,000 given to secure the fee of a third attorney, for a recited consideration of \$2,000, land worth \$5,000, which the client had conveyed to the first attorney with an understanding that the second attorney should be paid out of it, the second attorney will be chargeable with notice of the nature of the first attorney's title, and take it subject to the rights of the client's creditors, that the conveyance to the first attorney be treated only as security for the fees of the attorneys.

3. Defendant, to whom plaintiff's debtor conveyed his personal property in secret trust for himself, is liable for the value thereof, to plaintiff, so far as he puts it beyond plaintiff's reach after he instituted his suit to set aside the conveyance as in fraud of creditors.

4. A debtor made conveyances of land and personalty, which, as against plaintiff, his creditor, were fraudulent as to the personalty, and, as to the land, amounted only to a mortgage. *Held*, that the grantee having used the personalty in paying off a prior lien on the land, after plaintiff commenced action to set aside the conveyance of personalty, plaintiff would be subrogated to such lien.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Suit by Otto Morrell against Joseph Miller and others. From the decree, defendants Lord and Mays appeal. Plaintiff also takes a cross appeal. Modified.

W. W. Cotton and A. F. Sears, for appellants. E. B. Watson, for respondent.

WOLVERTON, J. This is a suit to set aside certain conveyances and mortgages, as being in fraud of creditors. The facts out of which it arose are briefly as follows: On November 9, 1892, Joseph Miller shot and seriously wounded the plaintiff, Otto Morrell, for which offense Miller was arrested the same day, and on the 15th of December the grand jury of Multnomah county returned three indictments against him for offenses growing out of said shooting. Afterwards, about April 21, 1893, Miller was convicted on all three of the indictments, and sentenced to serve a term in the penitentiary. On December 10, 1892, the plaintiff began a civil action in the circuit court of Multnomah county against Miller to recover damages on account of said shooting, and on May 3, 1893, obtained judgment for \$10,000 and costs, taxed at \$36.50. On November 18, 1892, Miller conveyed to the defendant Charles F. Lord, by deed of general warranty, in consideration of "one dollar and other valuable consideration," two 10-acres tracts of land situate in Multnomah county, and certain easements appurtenant thereto, and, by bill of sale, conveyed to Lord certain personal property, consisting in the main of a certificate of deposit for \$300, and a promissory note of \$282.60. The deed and bill of sale cover all the property that Miller had. On Novem-

ber 25th the following declaration of trust was executed by Lord and Miller, showing the purposes of the deed and bill of sale, to wit: "This is to certify that for and in consideration of a certain warranty deed and bill of sale placed upon record in the recorder's office of Multnomah county upon the 23rd day of November, A. D. 1892, wherein Joseph Miller is grantor, and Chas. F. Lord is grantee, and of a certificate of deposit for \$300, and of a certain promissory note for \$282.60, sold, delivered, and indorsed by said Miller to said Lord for one dollar, and other valuable consideration, the said Lord agrees to defend the said Miller in all or any suits or actions which may be brought against said Miller, and to make disposition of such remainder of said property as said Lord and Miller shall agree." On December 9th, Miller, for the purpose of securing to the firm of McGinn, Sears & Simon their fee of \$1,000, then agreed upon for defending him in said criminal matters, executed and delivered to the defendant H. E. McGinn a mortgage upon the land described in the deed to Lord; but, this security not being satisfactory to the firm, Miller afterwards, upon the same day, executed to Charles F. Lord another deed of general warranty, covering the same premises, which recites a consideration of \$2,000, and thereupon Lord executed and delivered to N. D. Simon his note for \$1,000, and mortgage upon said premises to secure the same. Both the mortgage to McGinn and the one to Simon were made to secure the same liability. During the course of these negotiations the defendant Mays was employed as counsel to assist in Miller's defense. On December 16th, Lord, by deed of general warranty, excepting only the mortgage to Simon, conveyed the premises to Mays, the deed reciting a consideration of \$2,000. And on April 26, 1893, Mays and wife mortgaged the property for \$1,800 to the defendant W. H. Fowler. This suit was instituted May 20, 1893, and plaintiff seeks thereby to have all these conveyances and mortgages set aside. Fowler, although made a party to the suit, was not served, and did not appear in person or otherwise. The decree being in part adverse to the defendants Lord and Mays, they come to this court by separate appeals; but Lord filed no brief, and did not appear either in person or by attorney at the argument of the cause. The plaintiff took a cross appeal as to Lord and Mays only.

The first question made here, and upon which the main controversy hinges, is upon the finding of the court below "that both said deeds of conveyance from Miller to Lord, and Lord's deed of conveyance to Mays, were intended by all the parties to convey the legal title to said property in trust for said Miller, and that said legal title was taken under said conveyance, and held in trust for said Miller, and the same is now held in trust for said Miller by said Mays." It is claimed

this finding is not supported by the evidence. Let us examine first the testimony touching the execution of the Miller deeds. The declaration of trust, which is signed by both Lord and Miller, clearly establishes the nature of the first deed to Lord. The effect of the bill of sale and that deed, when construed in connection with the declaration, was to impress the property therein described, in the hands of Lord, with a trust for certain purposes—First, to pay said Lord for his services "in all or any suits or actions which may be brought against said Miller"; and, second, "to make disposition of such remainder of said property as said Lord and Miller shall agree." At the date of this transaction there had been no understanding or agreement with Miller as to the amount of Lord's fees for the services agreed to be performed. Now as to the subsequent deed. Lord testifies that: "Afterwards he [Miller] made the statement to me that he was willing to pay me as much as he would pay Mr. McGinn,—as much as he had talked of paying Mr. McGinn. I then asked him what that was,—not knowing definitely at the time,—and he told me a thousand dollars. Then I asked him, in case we engaged Mr. Mays as an attorney to assist in the trial of the cases, said I presumed he would expect to receive the same amount as he had agreed to pay myself, which he assented to. And I think on that day—that I should judge to be the 23d or 24th of November, in that neighborhood—he authorized me to employ Mr. Mays, and I did so; informing Mr. Mays that Mr. Miller had agreed, as with me, to pay the sum of one thousand dollars,—one thousand dollars to Mr. Mays, and one thousand to myself, one thousand to each,—and we were to look after him in all the cases, either civil or criminal, and also after his own matters. \* \* \* After these arrangements were made, and I had this understanding with Mr. Miller, and had employed Mr. Mays, some time along the 1st of December, possibly the first week, Mr. Miller told me he desired to engage further counsel, and that he had talked with Mr. McGinn, and he thought McGinn would probably act as one of his counsel in his cases, as well as myself and Mr. Mays. Some time, I think about the 8th, possibly, of December, 1892, Mr. Miller told me he had engaged Mr. McGinn at the same figure,—that is, he had agreed to give him the same amount that he was to pay Mr. Mays and myself,—and he desired me to make out a mortgage to Mr. McGinn to secure his fee. I told him then that I did not desire to give a mortgage upon the property, in the condition in which I held it, because I simply held the property as a mortgagee, and not in fee. He said he would see Mr. Simon about that, but Mr. Simon wanted a mortgage, and I should have to give him one. I think the next day, any way the 9th of December, I came to the courthouse, and

Mr. Miller said Mr. Simon had been there, and was waiting for me upstairs, if I recall. I talked with Mr. Miller, and he stated that he wanted me to give the mortgage to McGinn that day, and Mr. Simon was waiting upstairs, and would see me about it. I came upstairs and Mr. Simon—by the way, before coming upstairs I spoke to him again about making the deed, that I did not care to give it, in the present shape in which the property was. He says, 'Well, I will sign a deed, and you can then give a mortgage.' I came upstairs, and the deed was drawn up. \* \* \* The second deed was an absolute deed to the property. I came upstairs, and I think Mr. Simon and I met in the law library, and the deed was drawn up there. Mr. Simon went below, and came back, and returned with the deed properly signed and witnessed. \* \* \* The mortgage was then drawn up in the law library, I think, and I signed the mortgage and executed it, and also the promissory note for one thousand dollars, after the deed had been made by Mr. Miller to myself, absolutely deeding the property to me. \* \* \* In the afternoon, when I went down to the jail, Miller informed me that Simon was waiting for me above, to draw up the absolute deed to the property. I then explained to him that the agreement which had been entered into between us only related to the first deed, and would be inoperative so far as the second deed was concerned, and that he would either destroy the instrument, or hand it back to me. I don't recollect whether he said he had destroyed it, or that he would hand it to me the next morning, but it was understood between us that he should either return it or destroy it; and I presumed, until I had been otherwise informed, that it had been destroyed. \* \* \* There was no understanding or agreement between Mr. Miller and myself subsequently, or at the time of making the second deed, that he should have any interest whatever in the real property, the personal matter remaining as it was in the beginning. \* \* \* He deeded the property to me absolutely, for the purpose of securing my fees, and of paying other counsel who had been retained by him in the case. Ques. For the purpose of securing your fees, or paying your fees? Ans. Well, of paying my fees. \* \* \* The amount was understood thoroughly by Mr. Miller that you [Mays] was to receive for your services in the cases which came up the sum of \$1,000, and that sum and fee should be paid out of the property." On cross-examination the following testimony was elicited: "Ques. Now, the only reason you give for changing this deed which enables you to hold the title in trust for Miller, of the 23d of November, 1892, to what you say was an absolute deed on the 9th of December, 1892, was the requirement on the part of McGinn, Sears & Simon that they

should have a mortgage on the property to secure their fee of a thousand dollars? That was the only reason for it? Ans. That is the only reason there was for it; yes, sir. Ques. And so you informed Miller of that fact, that you wanted an absolute deed because McGinn, Sears & Simon wanted a mortgage, and he thereupon gave you this absolute deed? Ans. Yes, sir. Ques. And that is all there was of it? Ans. And that is all there was of it."

In this connection, Simon's testimony shows that the McGinn mortgage was given in the morning. This not being satisfactory, because the legal title was in Miller, it was arranged that Miller should execute to Lord a second deed, and then that Lord should execute a mortgage to Simon, and this was accordingly done the same day; Lord executing the note for \$1,000, which the mortgage was given to secure,—Simon writing out the second deed himself. Lord admits that he realized \$585.80 out of the personal property which he had acquired under the bill of sale. From this testimony we are to deduce the object and purpose of the second deed, it being substantially all that was offered bearing upon the subject, except as the testimony adduced touching the value of the land may affect it. The court below found, from the testimony of a multitude of witnesses called upon that question, that its value at the time these deeds and mortgages were executed was \$5,000, and this finding we are not inclined to disturb. Miller was not called as a witness. A corollary is that, whatever might have been the effect of the first deed to Lord, the second was intended by the parties to be, and was in fact, an absolute deed, and was given for the purpose of cutting out any trust in favor of Miller. It was evidently intended that the legal title should pass by the second deed, if it still rested with Miller at the time of its execution, as its purpose was to so invest Lord with such title as that he could execute a valid mortgage upon the premises to Simon. Lord says Miller deeded the property absolutely, for the purpose of securing his fees and paying other counsel who had been retained, but afterwards declared the purpose was not to secure, but to pay, his fees. Subsequently, but in the same connection, he says it was thoroughly understood that Mays' fee should be paid out of the property. Upon cross-examination he testifies that the only reason he had for taking another deed was to enable him to mortgage the property to secure McGinn, Sears & Simon, he believing that the former deed was in effect but a mortgage, and that he was therefore without authority to execute the desired mortgage. And yet he says, "There was no understanding between myself and Miller subsequently, or at the time of making the second deed, that he [Miller] should have any interest whatever in the real property, the personal matter remaining as it was in the beginning." This testimony is somewhat in-

definite and unsatisfactory, and does not disclose a transaction wherein all the terms and conditions were distinctly understood and defined. Especially is this true as it concerns the consideration to support the deed. But it may be now asserted, as a rule of law, that where a deed is perfectly executed, and is intended to operate at once, no trust will result merely from the want of consideration, unless the attendant circumstances show that it was not intended the grantee should take beneficially. 10 Am. & Eng. Enc. Law, 56; *Philbrook v. Delano*, 29 Me. 410. If the consideration is inadequate, the rule would undoubtedly apply with equal force. The "attendant circumstances" in the case at bar, other than those related, may be briefly stated: Miller was under arrest for a grave offense, then thought to be more serious than it afterwards proved to be, he being apprehensive that Morrell would die of the wound received at his hands. He had incurred a civil liability to Morrell because of the assault made upon him, and had previously transferred all of his property, of the aggregate value of \$5,585.60, to Lord, for the purpose of securing his fees for services as an attorney, with a declaration of trust that the balance should be disposed of as he and Lord should agree. At the time of the execution of these deeds, Morrell was a creditor of Miller, under *Philbrick v. O'Connor*, 15 Or. 15, 13 Pac. 612. This being so, the plaintiff claims that the latter deed was fraudulent as to him, as well as the first. There are some attendant indicia of fraud, such as the transfer of all of Miller's property of such considerable value to Lord, the declaration of a secret trust in connection therewith, and the inadequacy of consideration for the second deed. But, upon the other hand, Miller was deeply interested. He was in the toils of the law, charged with a grave offense, and his object was to extricate himself therefrom. The purpose of making such use of his property as to secure able counsel to conduct his defense, and to attend to other apprehended litigation, was perfectly legitimate. His right to be heard by counsel is a constitutional right, and he should be permitted, unless hindered by legal process, the free and untrammelled use of his property to obtain legal assistance; otherwise constitutional privileges would be invaded. Upon the whole, we believe the second deed was intended, and so operated, as an absolute conveyance of the title to said premises, and we are unable to say from the evidence that it is fraudulent and void as to creditors. But the transaction is attended with such suspicious circumstances that we ought not to permit the conveyance to stand, except as security for such liability as Miller legitimately incurred to meet the expenses of impending litigation, under the doctrine laid down by Chancellor Kent in *Boyd v. Dunlap*, 1 Johns. Ch. 478: "When a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence

of fraud to induce the court to avoid it absolutely, but there are suspicious circumstances as to the adequacy of consideration and fairness of the transaction, the court will not set aside the conveyance altogether, but permit it to stand for the sum already paid." This doctrine has been followed in *Crawford v. Beard*, 12 Or. 447, 8 Pac. 537, and *Philbrick v. O'Connor*, supra, and applied by Deady, J., in *U. S. v. Griswold*, 7 Sawy. 308, 8 Fed. 496; yet the application of this doctrine here must depend upon whether Mays afterwards purchased the premises in good faith, for a valuable consideration, and without notice of the infirmities of title, as, if he did so purchase, he cannot be deprived of the benefits secured by his deed from Lord. Without going into the evidence upon this subject, it is sufficient to say that because of the fact that Lord arranged with Miller for the amount, manner of payment, and security of Mays' fee, and considering the nature of Lord's and Mays' employment, we have concluded that Mays is chargeable with constructive notice, at least, of the nature of the title which Lord possessed, and therefore took subject to whatever claim plaintiff may have had upon the premises.

As to the fees which Lord and Mays were to receive for their services in the defense of Miller in the criminal and civil actions in which he became involved, while they were large, and ordinarily would, perhaps, be deemed excessive, yet we cannot say that they were extortionate and unconscionable. There is no doubt that the evidence of Lord and Mays, against which there is no contradiction, establishes an express contract with Miller whereby he agreed to pay each of them \$1,000 for their services. At the time this agreement was entered into, it was thought that Miller would ultimately be charged with murder in the first degree, but, as it turned out, his victim survived; and three indictments were returned against him,—one for an assault with intent to kill, and two for assault with a dangerous weapon. A trial was had upon two of these indictments. In one there was a mistrial, and a second trial was had. As to the third, Miller pleaded guilty. Mays and Lord appeared, and assisted in the defense, at each of those trials. Prior thereto they, in connection with the firm of McGinn, Sears & Simon, instituted a habeas corpus proceeding for the purpose of having the defendant admitted to bail, in which they were successful, and subsequently defended Miller at the trial of the civil action instituted against him to recover \$20,000 damages, in which the judgment for \$10,000 was secured which forms the basis of this suit. There being no evidence that these fees were purposely fixed at the amounts specified for the purpose of covering up Miller's property to render it inaccessible to his creditors, we cannot say that, because of the largeness thereof, the contract supporting them is void, and ought to be disregarded.

This suit comprehends two funds, and the fairness of the transaction by which Lord acquired them; one consisting of real property, the status of which we have determined, and the other of personal property, out of which Lord realized \$585.60. The greater portion of this latter fund he had in his hands at the date of the commencement of this suit, so that he could not deal with it as to change its legal status to the detriment of plaintiff's rights during the pendency thereof. There is no doubt, under Lord's own showing, that he acquired and held this personal property in secret trust for Miller. The declaration of trust establishes that fact. This fund should not be blended or confused with the real property, as it is separate and distinct therefrom. Lord had expended some of it at the request of Miller, which may be regarded as legitimate, prior to the commencement of this suit. The exact amount we are unable to definitely determine, but it is within bounds to conclude that he had in his hands at that time at least \$500, for which amount plaintiff should have a decree against him, as well as for his costs in the court below.

At the time of the institution of this suit the state had a judgment against Miller for costs in the criminal proceedings for \$519, which, it is admitted by all concerned, was a first lien upon the real property. In part satisfaction of this lien, Lord paid in June, 1893, through Mays, \$247, out of the fund arising from the personal property. An execution having been issued at the instance of the state, Mays, for the purpose of protecting his own lien, paid the balance of this judgment, amounting to \$272. As to these respective amounts, plaintiff and Mays ought to be subrogated to the rights of the state. Aside from this, Mays paid \$22.45 taxes upon the premises, which ought to be repaid. With the Fowler mortgage we have nothing to do, as he was not served, and made no appearance. Not having a day in court, his rights cannot be determined in this suit. In view of these considerations, the decree will be that the sale and assignment of personal property by Miller to Lord be set aside, and that plaintiff have a personal judgment against Lord for \$500 and his costs in the court below; that the real property be sold, and the proceeds arising therefrom be applied—First, to the payment of \$247 to plaintiff; second, to the payment of \$272 to Mays, and the further sum of \$22.45 taxes; third, to the payment of Simon's mortgage; fourth, to the payment of \$1,000 to Mays; fifth, to the payment of \$253 to plaintiff, and his said costs below; sixth, to the payment of \$1,000 to Lord; and the balance, if any remain, to the satisfaction of plaintiff's judgment. Lord to have credit upon plaintiff's decree against him until satisfied for such sums as plaintiff may receive from the proceeds of the real property. Appellant Mays will have a decree here for his costs and disbursements upon the appeal.

## TWOHY v. BOARD OF COM'RS OF GRANITE COUNTY et al.

(Supreme Court of Montana. Jan. 27, 1896.)

APPEAL FROM ALLOWANCE BY COUNTY COMMISSIONERS—WAIVER OF IRREGULARITY IN NOTICE.

1. Comp. Laws 1887, div. 5, § 764, requires, on appeal by a taxpayer from an allowance of a claim against the county by the board of commissioners, that a written notice be served on the county clerk by the sheriff within 30 days after the allowance, after which the clerk is required to transmit the proceedings to the district court. *Held*, that the clerk, by transmitting the proceedings, waives any informality, irregularity, or insufficiency of the service of notice.

2. Service of notice of the appeal on the person in whose favor the allowance was made is not necessary to give the district court jurisdiction of the appeal, though the court, after acquiring jurisdiction, should notify such person of the pendency of the case.

3. Such appeal may be taken from separate items of the allowance without taking an appeal from the whole allowance.

Appeal from district court, Granite county; F. H. Woody, Judge.

Appeal by W. S. Twohy from an allowance by the board of county commissioners of Granite county in favor of John W. Morse. From a judgment of the district court dismissing the appeal, Twohy appeals. Reversed.

Smith & Word, for appellant. H. J. Haskell and W. B. Rodgers, for respondents.

PEMBERTON, C. J. On the 4th day of December, 1894, the respondent John W. Morse presented an account for the rent of house and lot against the county of Granite to the board of commissioners of the county for allowance. The account was for three items of \$900 each, the last item being for \$900 for rent of such house and lot from July 10, to October 10, 1894. All these items for rent were claimed to be due and payable quarterly, as per lease executed by said Morse to the county for said house and lot at a rental price of \$3,600 per year. On the 6th day of December, 1894, the whole of said account, amounting to \$2,700, was allowed and ordered paid by the board of commissioners. Within 30 days after the allowance of said account, the appellant, a taxpayer of said county, appealed from the decision of the board allowing the last \$900 item thereof. The bill of exceptions in the record recites: "And the above named W. S. Twohy, appellant, being dissatisfied with the order of a said board of commissioners allowing said bill, served and filed upon the clerk of said board of commissioners and said respondent his notice of appeal from said order of allowance, which said notice, served and left with the clerk of the said board of commissioners, was in fact a copy of the original notice, and was served by the sheriff of Granite county within 30 days after the allowance of said bill." The original notice of appeal was filed with the clerk of the district court of said county, by the sheriff, with his return there-

on. The county clerk thereafter filed the account so allowed and ordered paid by the board with the clerk of the district court, together with the copy of the notice of appeal served on him by the sheriff, with the following return of the proceedings in the case before the board: "The above is a true copy of a bill, or bills, that was filed in this office on the 4th day of December, 1894, and allowed and ordered paid by the board of county commissioners of Granite county, Montana, on the 6th day of December, 1894." A copy of the notice of appeal was also served upon the respondent Morse by the sheriff. After the papers had been transmitted to the district court, the respondents moved the court to dismiss the appeal for the following reasons: "(1) That there is no proof of a written notice of appeal from the decision of said commissioners having been served upon the clerk of said board within 30 days after the making of such decision and allowance, or at any time, or at all. (2) That there is no proof of such notice having been served at any time upon the claimant, John W. Morse. (3) That no written notice of appeal from the decision and allowance of said commissioners was served upon the clerk of said board of commissioners within 30 days after the making of the decision and allowance pretended to be appealed from, or at any other time, or at all. (4) That no such notice was served at any time upon the claimant, John W. Morse. (5) That said pretended appeal was taken from a part only of the decision and allowance of said county commissioners upon the claim of said Morse, and not from the whole thereof, as required by law." The court sustained the motion, dismissed the appeal and entered judgment for respondents for costs. From this judgment this appeal is prosecuted.

The first ground of the motion to dismiss the appeal is that there is no proof of a written notice of appeal having been served upon the clerk of the board, as required by law. Section 764, div. 5, Comp. St. 1887, requires, in such cases, written notice of the appeal to be served on the county clerk within 30 days after making the decision or allowance by the board. The bill of exceptions in this case recites that a copy of such notice was served upon the clerk by the sheriff within 30 days after the allowance of the account by the board. The county clerk thereafter transmitted the proceedings in the case before the board, with the copy of the notice of appeal, to the district court, as required by section 765, div. 5, Comp. St. 1887. We think the county clerk thereby waived any informality, irregularity, or insufficiency of the service of the notice there may have been. *Wade, Notice*, § 1220, and authorities cited.

The second ground of the motion for dismissing the appeal is that there is no proof of service of such written notice of appeal on respondent John W. Morse, the real party in

interest. He was served with a copy of the notice. Counsel for the respondents contend that Morse, being the real party in interest, was entitled to notice of the appeal, in order to give the district court jurisdiction thereof, and cite *State v. Minar*, 13 Mont. 1, 31 Pac. 723, as authority in support of this contention. In *State v. Minar*, Brown was the real party in interest. This court held that a judgment rendered against him without notice was void, but the court did not hold that it was necessary to give him notice of the appeal in order to give the court jurisdiction thereof. In fact, the opinions in that case are to the effect that it was not essential that Brown should be served with notice in order to confer jurisdiction of the appeal upon the district court. The court held that to try and determine the merits of Brown's claim without giving him notice and opportunity to be heard in court was illegal, and that a judgment rendered against him upon the merits of his claim, under such circumstances, was null and void. We are of the opinion that it was not necessary to serve Morse with notice of the appeal in order to give the court jurisdiction thereof. But, after acquiring jurisdiction of the appeal, it would be the duty of the court to see that Morse had notice of the pendency of the case, and an opportunity to be heard before trying it, or rendering judgment thereon.

Counsel, as a further ground for dismissing the appeal, insist that the appellant could not appeal from part of the allowance or decision of the board. The account allowed is in three distinct items. We think the right to appeal from part thereof is conferred by the statute. A taxpayer who wishes to appeal may not wish to question the legality and justice of part of an allowance by the board, but may have the best of reasons for challenging the legality and justice of other items thereof. In such case there could be no good reason for requiring a taxpayer to appeal from the whole of the allowance or not at all. Such a holding might, in many cases, prevent appeals by taxpayers from the most unjust and excessive allowances by the board.

We think the recital, in the bill of exceptions, that the county clerk was served with a copy of the notice of appeal by the sheriff within 30 days after the allowance of the account appealed from, and his transmission thereafter of the papers and proceedings before the board to the district court, gave that court jurisdiction of the appeal. We think the clerk of the board sufficiently certified a return of the proceedings of the board in relation to the allowance of the account in controversy. We think the court erred in dismissing the appeal for want of jurisdiction. The judgment appealed from is therefore reversed, and the cause remanded for trial.

DE WITT, J., concurs. HUNT, J., absent.

**THOMPSON v. MONTANA CENT. RY. CO.**  
(Supreme Court of Montana. Jan. 20, 1896.)

**APPEAL — REVIEW — EVIDENCE — MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE.**

In an action for death of plaintiff's decedent,—the foreman of the switching crew in defendant's yards,—it appeared that, the switching engine having gotten out of order, decedent procured a common road engine, the use of which was more hazardous than the use of a switch engine. The danger of using a road engine, though, could have been greatly obviated by placing a flat car in front, and decedent had authority to do so without orders from any one. Decedent, in attempting to uncouple the car from the engine, in order to make a flying switch, fell from the pilot of the engine, on which he was standing, and was run over by the cars following the engine. There was evidence that it was not necessary to make flying switches at the point where the switch was being made, due to the grade of the track, and that such switches had been positively prohibited at that point. *Held*, that a finding that decedent was guilty of contributory negligence would not be disturbed.

Appeal from district court, Lewis and Clarke county; William H. Hunt, Judge.

Action by Bertha Thompson, administratrix, against the Montana Central Railway Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff here, as administratrix and personal representative of John J. Thompson, deceased, brought this action, for the benefit of his heirs at law, to recover damages by reason of the death of the deceased, alleged to have been caused by the negligence of the defendant. The verdict of the jury was for the defendant. Plaintiff appeals. There was scarcely any substantial conflict in the testimony in this case. There is ample evidence that the facts were about as follows: Thompson, the deceased, was foreman of a switching crew at the Helena yard of the defendant railway company. The duties of the switching crew were to move and arrange the cars in and about the yard. For this purpose they used what is called a "yard engine," or "switch engine," which was handled by an engineer and fireman. A switch engine has the pilot removed, and in place thereof a footboard, upon which switchmen stand and ride in the course of their duties. The tank, instead of being square, is cut to a slant behind. On the day of the accident the switch engine became disabled about 10 o'clock in the morning. It was taken to the stable, and a road engine procured. The road engine had no footboards, and had the tank of ordinary construction, and a regular pilot in front. The crew worked with this engine until the latter part of the afternoon. It was then their duty to move some cars onto what they called the "Northern Pacific Transfer." That is to say, they were to take the cars to a switch, by means of which switch the cars could be set onto a track which led to the Northern Pacific Railroad tracks. This transfer track between the tracks of the two companies

had a considerable down grade from the Montana Central to the Northern Pacific. It was also a down grade on the Montana Central track as it approached the switch leading to the transfer. The switching crew attached some cars to the engine in front. This road engine was equipped with a pushbar or drawbar, which is attached to the upper end of the pilot, and, when not in use, lies upon the pilot, reaching to about the toe of the same. This pushbar was coupled to the drawhead of the box car. Thereupon the engine started backward, pulling the box cars after it. They proceeded toward the Northern Pacific transfer track. The intention, it appears, was to make a flying switch, and drop the box cars on the transfer track. A flying switch is made by uncoupling the engine from the cars before reaching the switch. The engine then increases speed until it passes the switch, and before the following cars reach the switch the same is thrown by a switchman, and the cars drop into a track other than that upon which the engine is left. Some of the witnesses saw the engine and cars proceeding towards the switch in the manner described, and at the rate of six or seven miles an hour. The deadwood of a freight car is a piece of heavy timbering projecting from the body of the car, about the level of the floor of the same, in order to prevent cars from striking each other if the drawheads break, or if, by any other accident, the cars come into close contact. The deceased was standing between the engine and the box car. He had his right foot upon the deadwood of the car, and his left foot upon the pushbar of the engine. The deadwood being higher than the place where the pushbar was fastened to the engine, his left foot was lower than his right. He was holding with one hand to a hand rail about 14 inches above the deadwood, and trying to pull the pin with his other hand. He was observed in this position, and, just after passing out of sight of the witnesses, the car was uncoupled from the engine; the engine drew away; the plaintiff fell to the track, and was run over by the cars and killed. There was testimony that the position of the plaintiff was a very unusual one. There was also testimony that the deceased could have taken, and had the right to take, a flat car, and put it in front of the engine, and use that for switching purposes; that this would have obviated much of the danger of the road engine without footboards. It was also in evidence that it was not necessary to make a flying switch in order to drop the cars on the transfer track; that by stopping the engine and cars, and uncoupling at a standstill, and then drawing the engine away, the grade was sufficient to drop the cars onto the transfer by simply releasing the brakes. Thompson was foreman of the switching crew, and himself had the right to order the engineer to stop in order to make an uncoupling at a stand. He did not do so,



but chose to make the uncoupling while moving at the rate of six or seven miles an hour. The rules of the company were introduced, showing that the men were prohibited from making flying switches. It also sufficiently appeared that deceased had knowledge of this rule, but there was also evidence that this rule was frequently disregarded. There was, however, other testimony that there was a special order, given by the proper authorities to the deceased, not to make flying switches at this particular point, or to uncouple while moving at this point. The reason for this order was that so great a momentum was acquired that it was sometimes difficult to stop the cars before they reached the Northern Pacific yards, and caused damage by collisions, and, furthermore, that in the course of the cars towards the Northern Pacific yards they were obliged to cross a traveled street of the city of Helena. On these facts, and instructions of the court, the jury found for the defendant.

Walsh & Newman, for appellant. H. G. McIntire, for respondent.

DE WITT, J. (after stating the facts). We are of opinion that the statement of this case about decides it. It is conceded that the use of a road engine for switching purposes was more hazardous than the use of a yard engine specially equipped for that purpose. But deceased knew all about that. He was thoroughly experienced in the business. He, with his crew, obtained the road engine, and went to work with it, without the precaution of putting a flat car in front, which he might have done, and which was within the scope of his own authority to do without orders from any one, and which was a precaution against the danger of using a road engine. The question of the deceased's contributory negligence was fairly presented to the jury. It is contended by respondent that the contributory negligence of the deceased was so clearly established that the court should have taken the whole subject from the jury, and directed a nonsuit. We need not pass upon that question, as the verdict was for the defendant; but, the question of contributory negligence having been submitted to the jury, we are very clearly of the opinion that there was ample evidence to sustain the decision of this question of fact by the jury. It could not possibly be held in this case that the deceased was clearly free from contributory negligence. *Prosser v. Railway Co.*, (this term) 43 Pac. 81. We do not attach great weight, in this case, to the evidence of a general rule of the company forbidding the making of a flying switch, for the reason that in this case there was a special order to the deceased not to make a fly at this particular point, and not to uncouple while in motion at this point. Very sufficient reasons were given for this order, as may be seen by referring to the statement of facts

above. Under all the facts of this case, it seems that the position of the deceased in making the uncoupling was an unusual and unnecessarily hazardous one. He could have stopped the locomotive and cars at the switch, as he was ordered to do, and have dropped the cars, by gravity, onto the transfer track. There can be no doubt in this case that evidence of contributory negligence was ample to go to the jury, and the jury having passed upon that proposition, with a sufficiency of evidence before them, their conclusions will not be disturbed in this court.

The appellant's counsel, in their brief, make some claim as to error in some of the instructions; but they do not pretend to point out in their brief wherein the error lies, and we have not been able to discover any. It is our opinion that the case was fairly presented to the jury upon the facts elicited by the testimony. The judgment and order denying a new trial are affirmed.

PEMBERTON, C. J., concurs. HUNT, J., having tried this case as district judge, does not participate in this decision.

#### CREEK v. McMANUS et al.

(Supreme Court of Montana. Jan. 20, 1896.)

INJUNCTION—DISSOLUTION—DAMAGES—ATTORNEY FEES—EVIDENCE—QUESTION FOR JURY.

1. In a suit for damages on an injunction bond, plaintiff sought to recover, as one item of damages, fees paid to an attorney who resisted the injunction, and also tried the cause on its merits. *Held* that, since the attorney was employed generally, fees could not be recovered as damages.

2. Evidence that damages claimed did not result from the injunction is admissible.

3. Whether work done on an irrigation ditch was rendered valueless by a temporary injunction, restraining its further construction, is for the jury.

Appeal from district court, Gallatin county; F. K. Armstrong, Judge.

Suit by Rachel E. Creek against John McManus and others to recover damages on an injunction bond. From a judgment in favor of plaintiff, and from an order denying a motion for new trial, defendants appeal. Reversed.

Luce & Luce, for appellants.

PEMBERTON, C. J. This is a suit for damages, on an injunction bond. The complaint alleges, substantially, that in July, 1890, defendant McManus commenced an injunction suit against the plaintiff, in the district court of Gallatin county, to restrain the commission of waste on the premises of said McManus, and to perpetually enjoin the plaintiffs from constructing an irrigation ditch thereon; that a temporary restraining order was issued in said suit against this plaintiff; that the defendants Cline and Davis were the sureties on the undertaking which McManus gave

to secure said injunction; that thereafter said injunction was, by order of the court, dissolved; that plaintiff was damaged and put to \$100 costs in employing an attorney to procure the dissolution of the injunction, and suffered and sustained damages to growing crops on her land caused by the wrongful issuance and service of the injunction, as well as other costs and expenses, and labor, incurred in dissolving the injunction, and performed upon said irrigating ditch. All of the allegations of the complaint are denied. The case was tried to a jury, who returned a general verdict for the plaintiff in the sum of \$225. From the judgment entered thereon, and the order denying a motion for a new trial, the defendants appeal.

This is the second appeal in this case. See *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675. On the former appeal the only question presented by the record was the right of Creek to recover attorney's fees paid to secure the dissolution of the injunction. From the record on that appeal, it appeared that that was the only question involved. We then held that "such damages may be recovered in an action upon the undertaking given in the injunction suit." The case, as presented by the record on that appeal, we held, was distinguished from other decisions of this court cited in the opinion. But the record now discloses a very different state of facts. On the trial of the case below, from which this appeal is taken, very many other things seem to have been litigated. In fact, the case was tried upon its merits. On the first trial the plaintiff testified, as the record on the former appeal showed: "I employed Judge Liddell to dissolve the temporary injunction, and to resist the perpetual injunction, and that was the only purpose for which I employed him in that case." The record on this appeal shows that she testified: "I employed an attorney in that case. I employed Moses J. Liddell. I paid him for his services in that case \$100." This evidence, it will be seen, brings the case squarely within the cases from which we distinguished it in *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675. On the former appeal the testimony of the plaintiff separated the services of the attorney from his services in attending to the case generally on its merits, and confined the payment of the fee to his services in dissolving the injunction. On this appeal her testimony does not separate the services, or confine the payment of the fee to his service in procuring the dissolution of the injunction. The case therefore falls within the rule stated in the cases cited in *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675. From the decision of this court, we think it may be asserted to be the rule in this jurisdiction that, to authorize a recovery in a case of this character, it devolves upon the party seeking relief to

show the employment of an attorney to secure the dissolution of the injunction; that through his efforts the injunction had been dissolved; and the payment of a fee for such special services, as contradistinguished from his services in the general management of the case on its merits, or other branches thereof. Counsel for the defendants contend that the evidence does not bring this case within this rule, and complain that the instruction of the court in relation to the attorney's fee is in direct violation thereof. The objectionable instruction is as follows: "The court instructs you that in this case it was not necessary for the plaintiff to have filed or made a motion to dissolve the injunction in order to recover the attorney's fee claimed in this case. If she employed an attorney in the trial of the case, and such attorney did attend to the trial of the case, then I instruct you that plaintiff is entitled to recover the attorney's fee paid in defending the case of *McManus v. Creek*, and your verdict must be for the amount so paid for plaintiff." We think this instruction is erroneous. It entirely ignores the necessity of separate employment of the attorney and payment of a fee in and about securing the dissolution of the injunction.

Counsel for the defendants complain of the action of the court in excluding testimony offered to prove that plaintiff's damage did not result from the issuance and service of the injunction, but from the condition of the ditch itself being such that it would not carry water onto plaintiff's land. There are many of these specifications of error. They are all of the same character and effect. We think the evidence was admissible. If any other causes than the injunction produced the damage, it was competent to show it.

Counsel for the defendants complain that the court erred in holding the defendants liable in damages for the value of certain work done by plaintiff on the ditch, in the construction thereof. If this work was rendered valueless by the interruption of the injunction, then the court was right. But if the work was of permanent value to the ditch, in its construction, the court was wrong. This was a question of fact, and should have been submitted to the jury by proper instructions.

Counsel for the defendants complain that the court did not properly declare the law as to the measure of plaintiff's damages to her crops. In *Carron v. Wood*, 10 Mont. 500, 26 Pac. 388, the measure of damages in such cases is discussed. As the case is to go back for new trial, without treating the instructions given in this case, we refer to the rule in the case just cited. For the reasons given above, the judgment and order appealed from are reversed, and the cause remanded for new trial.

DE WITT and HUNT, JJ., concur.

**FIRST NAT. BANK OF WHITE SULPHUR SPRINGS v. COLLINS et al.**

(Supreme Court of Montana. Jan. 20, 1896.)

**EXECUTORS AND ADMINISTRATORS—PERSONAL LIABILITY ON CONTRACT FOR BENEFIT OF ESTATE.**

An administrator is personally liable on a note, signed by him as such, the proceeds of which were placed with the payee, a bank, and paid out on checks drawn by him to pay, generally, bills and debts of the estate.

Appeal from district court, Meagher county; Frank Henry, Judge.

Action by the First National Bank of White Sulphur Springs against T. E. Collins and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

This action was brought by the plaintiff against the defendants upon two promissory notes made payable to plaintiff, and one promissory note payable to James T. Wood, and indorsed to plaintiff. All the notes were signed by the defendants as administrators of the estate of Jonas Higgins, deceased. The defendants, by answer, admitted the making of the notes as alleged. As a defense they set forth that they did not receive the amount of said notes personally. They further set up that they executed and delivered the notes as administrators, in their capacity as such, and the plaintiff contracted with defendants as administrators, and not as individuals, or personally, and that the amount of the notes was paid to the estate of Higgins, deceased,—that is to say, that it was put to the account of the Higgins estate in the plaintiff bank,—and that the money was then paid out by plaintiff, upon checks drawn by the defendants as administrators, to pay bills and debts of the estate. Upon this answer being filed, plaintiff moved for judgment upon the pleadings. This motion was granted, and judgment entered accordingly, from which judgment this appeal is now taken by the defendants.

Waterman & Callaway and H. G. McIntire, for appellants. Smith & Gormley, for respondent.

DE WITT, J. (after stating the facts). The defendants, in their answer, make their allegations with some vigor of language, but when we arrive simply at the facts set up, the pleading of defendants seems to be that they, as administrators of the Higgins estate, borrowed this money and used it for the estate. We cite the following remarks from some of the leading text writers upon the law of administration, negotiable instruments, and commercial paper: "It is a well-recognized principle that for liabilities contracted by the personal representative, although for the benefit and in the interest and behalf of the estate, it is not liable to creditors. Disbursements, reasonable in amount, and for services necessary in the proper discharge of the duties imposed upon them, will constitute a charge in favor of

executors and administrators against the estate, although their allowance should leave no surplus to pay creditors of the deceased; but, in the absence of statutory authority, the probate court, as already stated, has no jurisdiction to adjudicate between the personal representative and the creditor. It follows that the estate is not liable to an attorney for his services at the instance of an executor or administrator, but that the latter is himself liable in a suit by the attorney. So for corn fed to the stock of the estate; for the terms of a contract by the administrator in renting the land of the estate. The same holds good in respect of negotiable paper made, indorsed, or accepted by him, although he add to his signature his official character; and, a fortiori, where he gives a bond. So where the executor employs a salesman to take charge of the stock in trade belonging to the estate, or a sawyer to saw lumber. So where money is borrowed by pledging property of the estate, unless pledged for the purposes of administration. For the same reason, the estate is not bound by the administrator's agreement to credit a note payable to his decedent with the value of work done upon the lands of the estate." 2 Woerner, Adm'n, § 356. "The executor or administrator of a decedent has no power to bind the latter's estate by any note or bill which he may make in his representative capacity. So, also, is it impossible for the executor or administrator to bind the estate by the acceptance of a bill drawn in settlement of a claim against the estate. In all such cases, the executor or administrator is personally liable, even though the signature is stated in the most explicit manner to have been made in his representative character." Tied, Com. Paper, § 146. "An administrator or executor cannot bind the decedent's estate by any negotiable instrument. He can only bind himself. If he make, accept, or indorse a negotiable instrument he will bind himself personally, even if he adds to his own name the designation of his office as personal representative. Thus, if he signs himself, 'A. B., Executor (or administrator) of C. D.,' or 'A. B., as Executor of C. D.,' the representative terms will be rejected as surplusage. And an accommodation indorser, or acceptor, who pays the amount of the instrument, has no claim against the decedent's estate. But if the bill or note of the personal representative be taken for a debt of the decedent, the estate is discharged from liability, and the representative alone is bound." 1 Daniel, Neg. Inst. § 262. "Where a note or bill is given by an executor or administrator, as such, he will, in general, be individually liable for its payment. So, upon an indorsement by him as executor; or upon his written promise to pay such debt, he having assets of the estate in his hands at the time of giving the promise. This is true, also, where he has given his note in renewal of one

made by his testator. In like manner, an administrator will be individually liable on a note given by him for personal property purchased for the benefit of the estate. But a note given by an administrator, and expressed to be 'for value received by A. (the intestate) and his heirs,' has been held to be void for want of consideration. The mere addition of 'administrator' to an acceptor's signature does not qualify his liability or render the acceptance of a bill conditional. But, in general, an executor, like an agent, must expressly limit his promise to payment out of the estate represented in order to avoid individual liability on it. And merely adding the word 'administrator' will not amount to such a restriction, as we have seen; especially where the estate administered is not particularly designated." 1 Rand. Com. Paper, § 439. See, also, numerous cases cited in these text-books, which we will not review.

It is not pretended that these notes were given for the expenses of administration. This court said, in *Dodson v. Nevitt*, 5 Mont. 518, 6 Pac. 358: "Claims against the estate are those in existence at the date of the death of the deceased. Other claims against an estate are those incurred by the administrator or executor in settling the estate, and are properly denominated 'expenses of administration.'" The rule seems to be as laid down by the above-quoted writers. It is said, in *Dunne v. Deery*, 40 Iowa, 251, a case relied upon by the appellants, as follows: "The rule is very well settled that an administrator or executor cannot bind the assets of the deceased by his promissory note. If he executes a note, and adds to his signature, 'as executor for' the deceased, he will nevertheless be personally liable. *King v. Thom*, 1 Term R. 489; *Aspinall v. Wake*, 10 Bing. 55; *Davis v. French*, 20 Me. 21; *Walker v. Patterson*, 36 Me. 273. But, while the administrator will be personally and alone bound upon the note, yet, if that for which it was given was legally a claim against the estate, the giving and accepting the note will not, without more, discharge the estate." Counsel, in argument, cite this Iowa case as showing that the case at bar is an exception to the general rule, but it does not appear in the case before us that that for which the note was given was already legally a claim against the estate. We take the following from another case relied upon by the appellants,—*McLaughlin v. Winner* (Wis.) 23 N. W. 402: "It is a general rule that, upon all contracts made by an executor or administrator, in the discharge of his duties as such, he is liable personally; and his liability does not depend upon the fact that he has assets in his hands sufficient to discharge the debts so incurred; and the judgment, if any be recovered, is to be satisfied out of his estate, and not out of the estate of the deceased. There are, undoubtedly, exceptions to the general

rule, but they depend upon equitable considerations, which clearly show that the estate in the hands of the executor or administrator ought to be charged with the payment of the claim, rather than the property of the executor or administrator,"—citing many cases. The case at bar, in our opinion, is not an exception to the rule that the administrators are personally liable. It does not appear that the notes given by them were simply an acknowledgment of a former debt existing against the estate and created by the deceased. It does not appear that the money received by the estate upon the notes given was used for purposes of administration or funeral expenses, if such facts would be important if they existed. It does not appear that the money so obtained was upon any order or permission of a court having power to make such order or give such permission. It does not appear that the money was used in the actual preservation of the estate, as discussed in *Dunne v. Deery*, supra. We are therefore of opinion that this judgment must be affirmed, and it is so ordered. Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

#### TRACY v. HARMON.

(Supreme Court of Montana. Jan. 27, 1896.)  
APPEAL—OBJECTIONS NOT RAISED BELOW—EJECTMENT—COMPLAINT—DESCRIPTION OF LAND.

1. On appeal by plaintiff in ejectment, defendant for the first time may, in order to sustain the judgment, raise the question that the description in the complaint is fatally defective.

2. A complaint in ejectment which fails to describe the land with sufficient certainty to enable the officer to locate the land from the description itself is fatally defective.

Appeal from district court, Gallatin county; F. K. Armstrong, Judge.

Ejectment by William H. Tracy against W. F. Harmon. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Sutten & Thresher, for appellant. Hartman & Hartman, for respondent.

PEMBERTON, C. J. This is an action in ejectment, brought by plaintiff to recover possession of certain town lots or parcels of land, situated in the city of Bozeman, Gallatin county. The complaint is substantially such as is ordinarily used in such actions. The answer denies specifically the allegations of the complaint, and also sets up an affirmative defense, which is denied by the replication. It will not be necessary to treat the questions involved in the affirmative defense. The case was tried to a jury, who made and returned special findings of fact, and a general verdict in favor of the defendant. Judgment was rendered in accordance therewith. From the judgment and an order refusing a new trial the plaintiff appeals.

The first question that confronts us is the description of the land in controversy. Counsel for the respondent contend that the description is so uncertain, indefinite, and vague as to be absolutely void, and that, by reason thereof, if the jury had returned a verdict for the plaintiff, the court could not have rendered judgment thereon for the plaintiff, but would have been compelled to have sustained a motion in arrest of the judgment. Hence, counsel contend that this court must affirm the judgment appealed from in this case, regardless of any error that may have been committed by the trial court. These questions were not raised in the lower court, and are presented here for the first time. These questions go to the sufficiency of the complaint to sustain a judgment, and this court held, in *Foster v. Wilson*, 5 Mont. 53, 2 Pac. 310, that they could be raised here for the first time. The description of the land in controversy is as follows: "Commencing at a point 200 feet south of the north line of what is known as the block eight in Springbrook addition to the city of Bozeman, as shown by the recorded plat of said addition now on file in the office of the recorder of deeds of Gallatin county, Montana, and on the west line of the S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 12, Twp. two S., range 5 east; thence running west to the west line of the said block, about 35 feet; thence south, along the east line of said block, 50 feet; thence west about 38 feet, and to a point on the west line of the S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of Sec. 12, Twp. 2 S., R. 5 E.; thence north to point of commencement." The west line of the S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 12, township 2 S., range 5 E., mentioned in the above description, runs through block 8, about 35 feet west of the east boundary line of said block. The initial point in the description is located 200 feet south of the north line of said block, on said congressional subdivision line. The calls, commencing at this designated point, run thence west to the west line of said block about 35 feet; whereas, as is shown by the plat of said block, it is all of 200 feet from the initial point to the west line of said block. The description reads, "Thence south, along the east line of said block, 50 feet." "Thence" means "from that place,"—that is, from the first stop on the west line of block 8. The east line of said block is 250 feet from the west line, as shown by the official plat. How, then, could a line be run thence,—that is, from a point on the west line of block 8,—50 feet along the east line thereof? It is an impossibility. Here is an open jump of 250 feet from a point on the west line to a second starting point on the east line of said block, going about 35 feet east and beyond the initial point. The description runs thence 50 feet south, along the east line of said block; thence west about 38 feet to said congressional subdivision line; thence to the point of commencement. By tracing the calls in the description, it will be readily seen that no land whatever is bounded by or included therein. It is con-

ceded that the description is bad, and that it does not include or bound the land claimed by the plaintiff. But counsel for the appellant contend that it is sufficient to enable an officer with a writ to identify the land claimed. In order to be sufficient to support a judgment for the recovery of the land, the description should be so certain and definite as to enable an officer to identify the land from the description itself, without resort to other sources of information. Unless the description is such, the complaint will be so fatally defective as not to support a judgment; nor can such defect be cured by amendment after judgment. *Haggin v. Lorenz*, 15 Mont. 309, 39 Pac. 285. The description, in the complaint, of the land claimed by plaintiff, we think, is so indefinite, uncertain, and vague as to be wholly void, thereby rendering the complaint insufficient to support a judgment for the recovery of said land. The description does not include, embrace, or bound any land whatever. For the reasons given, without treating other questions presented on this appeal, the judgment and order of the district court are affirmed. Affirmed.

DE WITT, J., concurs. HUNT, J., absent.

#### RODINI v. LYTLE et al.

(Supreme Court of Montana. Jan. 27, 1896.)  
OFFICIAL BOND—JUDGMENT AGAINST PRINCIPAL—  
EFFECT ON SURETY.

A judgment against a constable is not even *prima facie* evidence against the sureties on his bond, conditioned for faithful performance of the duties of his office.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by Andrew Rodini against Elias Lytle and others. Judgment for defendants. Plaintiff appeals. Affirmed.

The plaintiff recovered a judgment against the defendant Lytle for damages by reason of an unlawful seizure by Lytle, as constable, of personal property belonging to plaintiff. The seizure by the constable was made in an action in which persons other than this plaintiff were defendants. The judgment was affirmed in 13 Mont. 123, 32 Pac. 491. Upon the remittitur filed in the district court, the plaintiff, Rodini, commenced the action now before us against Lytle, the constable, and the sureties on his official bond, J. D. Thomas and H. G. Valiton. The plaintiff set up the facts above mentioned, and pleaded in full the official bond of the constable. The bond was to the effect that if said Lytle shall faithfully perform all the duties of his said office as constable, according to law, and the requirements of any law that may hereafter be enacted, the obligation shall be null; otherwise, to remain in full force and effect. The sureties filed demurrers to the complaint. The demurrers were upon several grounds,—among them, that the complaint did not set up facts

sufficient to constitute a cause of action. The complaint set forth the rendering of the former judgment in favor of this plaintiff and against the defendant Lytle. That judgment having been so rendered, plaintiff claimed that, upon pleading that fact, as he did, and the giving of the official bond by the sureties, the said judgment theretofore given against said Lytle created a liability against the sureties. The sureties were not joined in the original suit, and were not in any way made parties thereto. The point raised by the defendants' demurrers was that they, not being parties to the original suit, were not bound by the judgment therein, nor liable, by reason of their bond, to pay said judgment. The demurrers were sustained. Plaintiff electing to stand upon his complaint, judgment was rendered against him, from which he now appeals.

Chas. O'Donnell, for appellant. John T. Baldwin, for respondents.

DE WITT, J. (after stating the facts). The question raised upon this appeal is, what is the effect, upon the sureties on the official bond, of a judgment rendered against their principal? There is a direct conflict in the authorities upon this question. 2 Black, Judgm. § 588; Mechem, Pub. Off. § 290; Brandt, Sur. § 637; and cases collected and reviewed in these text-books. It is held by many courts that, when a bond is given to the effect that the principal will do a certain act,—as, for instance, pay a certain sum of money, or satisfy a judgment,—then the sureties are bound that he shall do such act; and the judgment against the principal is conclusive against the sureties. But that is not this case, and that question need not here be treated. The bond here was not for the performance of a specific act, but it was for general good and faithful conduct. It is as to judgments against principals who have given bonds of this nature—that is, official bonds of sheriffs and constables—that the difference of opinion among the authorities exists, and which difference we shall now note. One line of authorities holds that the judgment against the principal is conclusive against the sureties. The courts holding this view are very few, although among them is one wholly respectable tribunal. The second view held is that the judgment against the principal is *prima facie* evidence against the sureties. The third rule laid down by the authorities is that the judgment against the principal is no evidence at all against the sureties, and that, to hold the sureties for the misfeasance of the principal, the facts of the misfeasance must be proved in an action in which the sureties are defendants. These two latter rules are sustained by probably a nearly equal number of respectable courts.

The question being a new one with us, and the authorities being divided, we shall proceed to decide the matter upon what appears to us to be the most reasonable principle. The case of *Pico v. Webster*, 14 Cal. 203, is a

leading case. We find it cited by all text writers, and in many of the opinions. Its reasoning appeals to us so strongly that we quote from it somewhat at length: "This suit was brought on the official bond of the defendant, Webster, who was sheriff of San Joaquin county, against Webster and his sureties. The suit was brought to recover damages for the levy by Webster on property of plaintiff, which levy was made under color of process. Suit was brought against Webster for the trespass involved in this levy and seizure, and judgment recovered against him before the institution of this suit. The record of this recovery was offered as evidence by the plaintiff on the trial. The defendants offered to prove, on their part, that Webster was not guilty of the trespass complained of, and that the property seized was not the property of the plaintiff here. But the court refused to admit the testimony, upon the ground that the judgment against the sheriff was conclusive of all the facts passed upon and decided by the record. To this ruling the defendants excepted, and now present it for review here on appeal. There is no little conflict in the cases on this subject. There can be no doubt that, when a surety undertakes, for the principal, that the principal shall do a specific act, to be ascertained in a given way,—as, that he will pay a judgment,—the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such cases stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact. *Train v. Gold*, 5 Pick. 380; *Lincoln v. Blanchard*, 17 Vt. 464. See, also, *Riddle v. Baker*, 13 Cal. 295. It is upon this ground that the liability of a bail is fixed absolutely by the judgment against the principal. But this rule rests upon the terms of the contract. In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties. They do not agree to be absolutely bound by any judgment obtained against him for official misconduct, nor to pay every such judgment. They are only held for a breach of their own obligations. It is a general principle that no party can be so held without an opportunity to be heard in defense. This right is not divested by the fact that another party has defended on the cause of action and been unsuccessful. As the sureties did not stipulate that they would abide by the judgment against the principal, or permit him to conduct the defense and be themselves responsible for the result of it, the fact that the principal has unsuccessfully defended has no effect on their rights. They have a right to contest with the plaintiff the question of their liability, for to hold that they are concluded from this contesta-

tion by the suit against the sheriff is to hold that they undertook, for him, that they would be responsible for any judgment against him which might be rendered by accident, negligence, or error, instead of merely stipulating that they would be responsible for his official conduct. The authorities which sustain this view are numerous. In *McKellar v. Bowell*, 4 Hawks, 84, a decree against the administrator of a guardian was held not to be evidence against the sureties of the guardian, to charge them with the amount which was recovered against the estate for unfaithful administration of the trust. *Munford v. Overseers*, 2 Rand. (Va.) 313, went a little further, holding that a judgment against the sheriff was no estoppel against him in an action on the bond against him and his sureties. It seems to be held there that no recovery could be had against the principal, because he was not liable jointly with the sureties, and that the record of the judgment would be only prima facie evidence against the sureties. *Beall v. Beck*, 3 Har. & McH. 242, is to the same effect. *Douglas v. Howland*, 24 Wend. 35, is a leading case. The authorities are reviewed by Mr. Justice Cowan with his usual learning. That case was covenant, brought by the plaintiff against the surety on an obligation, by the principal, to account and pay over such sum as shall be found to be owing by him, and the surety covenanted that the party thus agreeing 'shall perform the agreement.' A decree in chancery against the principal was offered. The decree was on a bill filed to compel an account. Held, that it was no evidence against the surety, unless he had notice of the suit, and an opportunity to defend in the name of the principal. Many authorities are cited by the learned judge, who concludes that the surety's obligation was to pay over a balance due, not that he should abide by a judgment at law, or a decree in chancery, for not accounting." The doctrine of this case is reaffirmed in *Irwin v. Backus*, 25 Cal. 214, in which case, however, it was also held, as in 14 Cal. 203, that administrators' bonds are exceptions to the rule announced. See, further, in the opinion in *Pico v. Webster*, for a review of the cases. The rule was also originally held in Pennsylvania in *Carmack v. Com.*, 5 Bin. 184. A departure from the rule was made in that state in *Masser v. Strickland*, 17 Serg. & R. 354. This departure, however, was in the face of an able protest on the part of Chief Justice Gibeon, as noted in *Pico v. Webster*, 14 Cal., at page 206. See dissenting opinion of Gibeon, C. J., 17 Serg. & R. 358. See, also, generally, *Littleton v. Richardson*, 34 N. H. 179. In this state, a principal and sureties may be sued together. *Wibaux v. Live-Stock Co.*, 9 Mont. 154, 22 Pac. 492; *Hoskins v. White*, 13 Mont. 72, 22 Pac. 163; *Woodman v. Calkins*, 13 Mont. 365, 34 Pac. 187; *Nelson v. Donovan* (Mont.) 40 Pac. 72.

There is no reason, in the case at bar, why the principal and sureties were not originally sued in one action. It therefore seems to us that it is not within the spirit of the practice in this state to allow one to sue the principal first, and then make that judgment either conclusive or prima facie evidence against the sureties, who were not made parties to that action. It seems that to allow such practice would be an invasion of the principle that every man is entitled to his day in court. Another principle is that, when a defendant is sought to be charged with a liability, there is not a presumption of his liability to commence with. If we hold that a judgment against the principal is conclusive or prima facie evidence against the sureties, the sureties are obliged to start into the action with a presumption of liability against them. The ordinary rule of law is that the plaintiff must prove his case by evidence; but, if a judgment against the principal is evidence against the sureties, the affirmative of the case is thrown upon the defendants. They must take the burden of proof. Instead of the plaintiff proving his case, the defendants are placed in a position of being obliged to prove their nonliability. In analogy to a criminal case, the defendants would be obliged to prove their own innocence. Defendants, in such a position, would be required to prove that their principal, the constable, had not been guilty of misconduct in his office. They would be obliged to prove that he had faithfully performed the duties of his office. It appears to us, however, that the proof should come from the other side; that the plaintiff should be required to prove, against the sureties, that the constable had not faithfully performed the duties of his office. This seems to us to be within the ordinary rules of practice and pleading. If the other rule is to be adopted, then the sureties would be obliged to go back, perhaps several years in time (three years, as it appears, in this case), and find the witnesses who were able to testify as to whether the constable had committed a trespass upon the goods of plaintiff. By that time the witnesses may be scattered or dead. The principal himself may be dead. The sureties would be obliged to collect a mass of evidence, the knowledge of which would be peculiarly within the possession of the plaintiff, and perhaps only by accident within the reach of the defending sureties. We cannot countenance such practice. We believe by far the best of the three rules above noticed is that which denies to the judgment against the principal any effect as against the sureties. We think the sureties should not be compelled to face a judgment, with all its presumptions, and one which was rendered in an action to which the sureties were not parties, and of which they had no notice whatever, and to defend which they had no opportunity. This action being upon the judgment, as plaintiff's counsel has

insisted in his brief and argument, we are of opinion that the district court was correct in holding that that judgment could not bind these sureties. The court was therefore correct in sustaining the demurrers to the complaint. The judgment is affirmed.

PEMBERTON, C. J., *concura*.

HUNT, J., *absent*.

STATE *ex rel.* MOROTZ *v.* RICKARDS *et al.*  
(Supreme Court of Montana. Jan. 20, 1896.)

STATE LEGISLATURES—APPROPRIATIONS—APPLICATION OF FUNDS—MANDAMUS TO STATE BOARD OF EXAMINERS.

In mandamus it appeared that the relator filed certain claims with the state board of examiners under Laws 1893 (act approved March 8th), providing for the payment of bounties for the destruction of stock-destroying animals; that said board audited and allowed relator's claims, but refused to indorse or transmit them to the auditor; that appropriations were made by the legislature for the payment of bounties, but that, prior to the approval of the act, appropriations for the fiscal years 1893 and 1894 had already been made in excess of the total revenue of the state; that at the close of 1893 and 1894, whatever parts of the funds which had not been used for the purposes for which they had been appropriated were covered back into the treasury, and had been reappropriated before relator began his proceeding. *Held*, that there was no fund on which the board could direct the auditor to draw warrants in payment of relator's claims.

Application by G. Morotz for a writ of mandamus to compel John E. Rickards, Louis Rotwitt, and Henri J. Haskell, comprising the state board of examiners, to indorse and transmit certain claims to the state auditor. Dismissed.

Cullen & Toole, for relator. H. J. Haskell, for respondents.

PEMBERTON, C. J. This is an application for a writ of mandamus, instituted in this court. In his application the relator alleges that the claims mentioned therein are due and owing to him under the provisions of an act of the legislature entitled "An act appropriating moneys for the payment of bounties for the killing of certain stock-destroying animals," approved March 8, 1893; that he has complied with the provisions of said act; that he duly presented his claims to the respondents, one on the 1st day of March, 1893, and the other on the 4th day of March, 1894; that the respondents numbered and filed said claims on said days; that said respondents, as said board of examiners, audited and allowed his claims, but that, as said board, they refused to indorse their approval of the same, or to transmit the same to the state auditor, to enable or authorize the auditor to draw his warrant for the amount of said claims, as it is alleged it was the duty of said board of examiners to do. It is alleged that at all times

there were ample funds appropriated and available, and still available, for the payment of such claims. The issuance of the writ is resisted by the board of examiners on the ground that prior to the passage of the act of March 8, 1893, referred to and relied on in relator's application, the legislative assembly, by several appropriation bills, had appropriated for the fiscal years 1893 and 1894 sums largely in excess of the revenue and the total tax provided by law for said fiscal years. It is further contended by respondents that, as relator presented his claims to the board on the 1st day of March, 1893, and the 4th day of March, 1894, and did not commence this proceeding until the 19th day of April, 1895, and as, in the meantime, whatever funds that could be held in any event to have been appropriated and available for the payment of relator's claims under the act of March 8, 1893, had, under the law, been covered back into the treasury, and consumed by appropriation bills of the legislative assembly enacted thereafter, leaving no funds in the treasury appropriated or available upon which the board could lawfully direct the auditor to draw his warrant,—under such a condition of affairs, there was no available fund upon which the board could direct the auditor to draw his warrant, and no such fund as the auditor could lawfully draw his warrant upon to pay said claims.

Upon such issues of fact being presented, we appointed Oliver T. Crane, Esq., a member of the bar, referee, to take the testimony, and report the same, together with his findings of fact and conclusions of law, to the court. His findings of fact and conclusions of law are as follows:

Findings of fact: "First. That the moneys appropriated by the third legislative assembly of the state of Montana, by an act entitled 'An act appropriating money for the payment of bounties on certain stock-destroying animals,' approved March 8, 1893, for the fiscal year ending December 1st, A. D. 1893, and the fiscal year ending December 1st, A. D. 1894, respectively, were not available for the payment of bounties, aforesaid, for said years, or either of them. Second. That the said third legislative assembly of the state of Montana, prior to the passing of the act entitled 'An act appropriating money for the payment of bounties on certain stock-destroying animals,' approved March 8, 1893, and during said session, by several appropriation bills appropriated for the fiscal year ending December 1, 1893, not less than the sum of \$734,859.08, which said sum was in excess of the revenue collected, and exceeded the total tax then provided for by law, and applicable to such appropriations or expenditures for said fiscal year. Third. That the receipts of the state's revenue from all sources, and from the total tax then provided for by law, and applicable to said appropriation or expenditures last



aforesaid, for the fiscal year 1893, did not exceed the sum of \$691,264.53. Fourth. That the said third legislative assembly of the state of Montana, prior to the passing of the act entitled 'An act apportioning money for the payment of bounties on certain stock-destroying animals,' approved March 8, 1893, and during said session, by several appropriation bills appropriated for the fiscal year ending December 1, 1894, not less than the sum of \$471,085.00, which said sum was in excess of the revenue collected, and exceeded the total tax then provided for by law, and applicable to such appropriations or expenditures for said fiscal year. Fifth. That the receipts of the state's revenue from all sources, and from the total tax then provided for by law and applicable to said appropriations or expenditures aforesaid for the fiscal year 1894, did not exceed the sum of \$425,153.08. Sixth. That the said act, entitled 'An act appropriating money for the payment of bounties on certain stock-destroying animals,' approved March 8, 1893, which appropriated 'the sum of \$20,000 for the fiscal year ending December 1, A. D. 1893, and for the fiscal year ending December 1st, A. D. 1894, respectively,' exceeded the total tax then provided for by law, for each of said fiscal years, and applicable to such appropriations or expenditures; and that the said legislative assembly, at said session, made no provision for levying a sufficient tax to pay such appropriations or expenditures, within such fiscal years. Seventh. That there was covered back into the treasury of the state, at the end of the fiscal year 1893, the sum of \$66,482.50. Eighth. That there was covered back into the treasury of the state, at the end of the fiscal year 1894, the sum of \$78,670.67. Ninth. That the said moneys so covered back into the treasury of the state, at the end of the fiscal years 1893 and 1894, respectively, were unused portions of appropriations, resulting from the necessary economical action of the state officer in restricting the expenditures of money by the state under the several appropriation bills passed by the third legislative assembly prior to the passage of the act entitled 'An act appropriating money for the payment of bounties on certain stock-destroying animals,' approved March 8, 1893, to amounts less than the whole amount appropriated by said bills, and to an amount not to exceed the total revenue of the state, then provided for by laws, and applicable to such appropriations or expenditures in each of said fiscal years."

Conclusions of law: "First. That the act entitled 'An act appropriating money for the payment of bounties on certain stock-destroying animals,' approved March 8, 1893, and all thereof, appropriating 'the sum of \$20,000 for the fiscal year ending December 1st, A. D. 1893, and for the fiscal year ending December 1st, A. D. 1894, respectively,

was, at the time of its passage and approval, within the prohibitory provision of section 12 of article 12 of the constitution of the state of Montana, and that such appropriation was absolutely null and void, and has never been in force and effect. Second. That, in the absence of any legal appropriation of moneys to pay bounties on certain stock-destroying animals for the fiscal years ending December 1, 1893, and December 1, 1894, the relator has not now, and never has had, any legally enforceable claim against the state of Montana; and his application for the writ of mandamus should be denied. Third. That the sums of money, or any part thereof, covered back into the treasury of the state at the end of the fiscal years 1893 and 1894, respectively, were not legally available for the payment of bounties under the act entitled 'An act appropriating money for the payment of bounties on certain stock-destroying animals,' approved March 8, 1893, in said years, or either of them."

It is not contended that the findings of fact are not sustained by the evidence. The findings are therefore approved and adopted.

It is evident, from the findings, that at the date of the commencement of these proceedings there was no part of the appropriations of funds for the fiscal years 1893 and 1894 remaining unappropriated by the legislative assembly, or available for the payment of relator's claims. Whatever parts of the funds appropriated for those fiscal years which had been covered back into the treasury at the end thereof, because unused, had been absorbed and consumed by the legislative assembly of 1895 in appropriations for other purposes. So that when this suit was commenced there was no fund upon which the board could direct the auditor to draw his warrant, or upon which he could lawfully draw his warrant, if so directed. For this reason the writ is dismissed.

DE WITT and HUNT, JJ., concur.

#### MURRAY et al. v. POLGLASE et al.

(Supreme Court of Montana. Jan. 27, 1896.)

MINING CLAIMS—RIGHT TO PROCEED FOR PATENT  
—EVIDENCE—CANCELLATION OF RECEIPT—  
DECISIONS OF LAND DEPARTMENT.

1. In an action to determine the right to proceed in the United States land office for patent on certain mineral land, plaintiff having offered in evidence the receiver's receipt for entry thereon, which, by Code Civ. Proc. § 542, is declared prima facie evidence of title to the land, defendant may give in evidence decisions of the land department, made on a protest against issuance of patent to plaintiff, canceling the receipt for fraud in obtaining it.

2. Such a decision cannot be excluded on the ground that the reasons therefor therein contained are not admissible, and that a part of it cannot be admitted alone.

3. A decision of the register and receiver of the land office who make the first examination

of a protest against issuance of a patent, on the ground that a receipt for entry thereon was obtained by fraud, cannot be objected to, in an action to determine right to proceed for a patent, on the ground that it is not a decision canceling the receipt, but simply recommends the cancellation; they having concluded that the entry should be canceled, and having, pursuant to their duty and jurisdiction, and the practice of the land office, certified that fact to the commissioner of the general land office.

4. Nor can the decision of the commissioner of the general land office, that "said entry is hereby held for cancellation," be objected to, as not canceling the entry.

5. Nor is such decision of the commissioner affected by the addition of the words, "subject to the right of further appeal."

6. A letter of the secretary of the interior to the commissioner of the general land office saying, "Your judgment from which an appeal has been taken \* \* \* is affirmed," is a judgment of cancellation, being relative to a protest against issuance of a patent, on the ground of fraud in obtaining receipts for entry on land, in which matter the commissioner had rendered a decision of cancellation of the entry.

7. A copy of a paper certified by one as "acting commissioner of the general land office," with the seal of the office attached, does not show a vacancy in the office of commissioner, and is admissible, under Rev. St. U. S. § 891, providing "copies of any \* \* \* papers in the general land office, authenticated by the seal and certificate of the commissioner thereof, or when his office is vacant, by the principal clerk, shall be evidence."

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Action by James A. Murray and others against Jane Polglase and others. Judgment for plaintiffs. Defendants appeal. Reversed.

The defendants made application in the United States land office for patent upon the Ramsdell quartz lode mining claim. The plaintiffs, Murray et al., filed their adverse claim in the land office, and then commenced this action. It is what is ordinarily known as an adverse claim suit. It appears by the complaint that the defendants' mining claim is in conflict, as to part of its area, with the claim upon which the plaintiffs rely, viz. the Maud S. This action is the ordinary one to determine whether defendants are entitled to proceed in the United States land office for patent upon the ground in conflict between their two claims. There are also, in the complaint, allegations in the nature of those in an action of ejectment. The defendants denied all of the alleged rights of the plaintiffs, and, further, set up that, if plaintiffs ever made any location of the ground as the Maud S. claim, they had forfeited all right thereto by failing to represent the ground in the years 1887 and 1888. Plaintiffs, in replication, admitted that they did not place \$100 worth of labor or improvements upon the Maud S. claim in the years 1887 and 1888; but allege that on December 29, 1887, they made entry in the United States land office for the said claim, and that they then obtained the receiver's receipt for the same. Upon the trial the plaintiffs introduced in evidence the location notice of the Maud S. claim, and testimony tending to show its location, and the con-

veyances from the locators to the plaintiffs, and the receiver's receipt which they pleaded in their replication. Thereupon they rested. Thus, at the close of the plaintiffs' case, it appeared, by the admissions of the pleadings, that they had failed to represent their claim in the years 1887 and 1888, and, by the evidence, that they had the receiver's receipt dated December 29, 1887. The defendants opened their case by offering the decision of the register and receiver of the United States land office, canceling and setting aside the receiver's receipt which had been introduced in evidence, and, in the same connection, the decision of the commissioner of the general land office affirming the decision of the register and receiver, and also the decision of the secretary of the interior affirming the decision of the commissioner of the land office. These documents were all excluded by the court. After so excluding these papers, the court practically refused to admit any other testimony by the defendants, and instructed the jury to find a verdict for the plaintiffs, for the reason that there was no evidence admitted in the case on behalf of the defendants. The defendants appeal from the judgment.

Forbis & Forbis, F. T. McBride, and L. J. Hamilton, for appellants. Geo. Haldorn and O. M. Hall, for respondents.

DE WITT, J. (after stating the facts). The receiver's receipt offered by the plaintiffs was evidence that the title to the mining premises was in them. Section 542, Code Civ. Proc. (Comp. St. 1897). If the court was correct in excluding all of the testimony offered to attack the receiver's receipt, then the plaintiffs had made a case of title in themselves, and the court was correct in instructing the jury to find for the plaintiffs. The inquiry, therefore, now is, did the court err in excluding the decisions of the local land office, the commissioner, and the secretary, described in the statement of the case above? The decisions of the land office and the commissioner and the secretary were made upon a protest being instituted against the issuance of a patent to these plaintiffs. The protests were made upon the ground of fraud in obtaining the receipt. The decisions of the interior department of the United States treated the questions of fact raised in the protest on trial before it, and, so treating the facts, arrived at a conclusion. When these decisions were excluded by the district court it was upon the ground, as the judge said, that he could not admit them for the reason that there were matters in them which should not go to the jury at that time. Counsel for the defendants thereupon stated, in effect, that they did not care whether the reasons for the decisions, as contained therein, went to the jury or not; but they wished the fact of the decisions to be introduced in evidence, and offered that the court might ad-

mit the decisions without giving to the jury the reasons therefor which were set out in the opinions rendering the decisions. Thus the court refused to do. The judge remarked that he could not admit the decisions as a whole, and he could not see how he could admit a part without admitting the whole, and therefore would not admit them at all. The court certainly erred in this ruling, if the only reason which could be given therefor was that advanced by the court. We are not prepared to say that the opinions and reasons for the decisions of the land department, as given by the officers rendering the decisions, were not competent to be introduced along with the decisions. But the material point to be proved was the cancellation of the receiver's receipt, and, if that were proved by introducing the decisions of the land office to that effect, it would dispose of the receiver's receipt effectually; and the reasons of the land department for the decisions could not destroy the life of the receipt any more completely than the bare decision itself. Therefore this is not important. But we are far from being able to understand the ruling of the district court in excluding the decisions themselves. Counsel offered to give to the jury the decisions alone. If the court thought that the opinions and reasoning of the decisions were inadmissible, it could very easily and readily have taken the decisions, with the opinions, and examined them, and have placed the decisions before the jury, without giving to the jury the facts and reasons upon which the decisions were based; or the court could have admitted the whole text, and instructed the jury that the material matter for them to consider was simply the decision of the land department, and that they had nothing to do with the reasons therefor. Nothing could have been simpler than such a procedure, and nothing is clearer to our minds than the duty of the court in this respect. Therefore the reasons, as given by the court, for excluding these land department decisions were wholly untenable.

The court's reasons for excluding the land office documents appearing to be bad, we will next examine the other objections made by respondents when the decisions were offered on the trial, and which objections are now insisted upon in their brief and argument before this court. The appellants sought to prove these decisions of the register and receiver, the commissioner, and the secretary by certified copies from the records of the general land office of the United States. See sections 891 and 2469, Rev. St. U. S. One contention of the respondents is that the certified copy of the decision of the register and receiver is a copy of a copy. This contention is trivial. Let respondents consult the transcript on this appeal at page 35. Another objection made to the introduction of the decision of the register and receiver is that it is not a decision canceling the receipt, but that

it simply recommends the cancellation. This objection does not occur to us to be of much greater importance than the last one mentioned. The procedure and form followed by the register and receiver was that of the land office. The register and receiver made the first examination of the protest against the issuance of the Maud S. patent, and their conclusion was that the entry should be canceled, and, in pursuance to their duty and jurisdiction, and the practice of the land office, they certified that fact to the commissioner of the general land office. We next find the case before the commissioner. After reviewing the case, the commissioner makes the following decision: "Said entry is therefore held for cancellation, subject to the right of further appeal." Respondents again object that this is not a decision, because it states that it is "subject to the right of further appeal." Those words, however, are wholly unimportant. If the law gave the right of appeal to the defeated party, he would have that right in any event. The words simply stated a right that the parties had, and did not affect in any way the decision of the tribunal which made it. Respondents criticize the language, "held for cancellation," and state that the entry was not canceled, but only "held for cancellation." We are of opinion that this was simply the method of the land office, and the form of expression customarily used by that tribunal in indicating its decision. Following this comes the decision of the secretary of the interior. That decision is in the form of a letter to the commissioner, in which the secretary says: "Your judgment, from which an appeal has been taken, contains a satisfactory statement of the facts; and as no errors of law appear, said judgment is affirmed." We are of opinion that this decision was a judgment of cancellation. *Perrott v. Connick*, 13 Land Dec. Dep. Int. 598.

Another objection to the certified copies is that they are certified by "Edward A. Bowers, acting commissioner of the general land office," with the seal of the general land office attached. Section 891, Rev. St. U. S., as to certified copies, provides as follows: "Copies of any records, books or papers in the general land office, authenticated by the seal and certified by the commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record." Counsel argue that this certificate was not given by the commissioner, or by the principal clerk by reason of a vacancy in the office of the commissioner. But it appears to us that there was no vacancy in the office of the commissioner. A commissioner was there, and acting. When he made the certificate the

seal was annexed. We think this was sufficient. See Notes on Rev. St. U. S., by Gould & Tucker, p. 277, and cases cited.

We are therefore of opinion that the certified copies of the register and receiver, the commissioner of the general land office, and the secretary of the interior should have been admitted in evidence. It was error to exclude them, either for the reasons expressed by the court or those argued by counsel. These documents were material to defendants' case. Plaintiffs had proved a receiver's receipt for the land in controversy. If this were unattacked, it concluded the defendants. To avoid this result it was material to defendants to show that this receiver's receipt did not exist, and that it, with its force and power, had been destroyed by the cancellation of the same by the officers of the land department having jurisdiction over that subject. For these reasons the judgment of the district court will be reversed and a new trial ordered. There were some other matters argued on this appeal which counsel suggested might properly be before us for decision, even if we reached the result above announced. But we are not quite satisfied that those matters are in condition to be finally disposed of at this time. Reversed.

PEMBERTON, C. J., concurs.

#### HECHT v. STANTON.

(Supreme Court of Wyoming. Feb. 1, 1896.)  
ASSUMPSIT — RECOVERY ON QUANTUM MERUIT IN  
CASE OF SPECIFIC CONTRACT.

That the work was performed under a special contract, will not defeat a recovery on a quantum meruit count.

Petition for rehearing. Denied.  
For original opinion, see 42 Pac. 749.

CONAWAY, J. All the points upon which a rehearing is asked were fully considered on the original hearing, and on reconsideration, now, we are satisfied the decision was correct. One point of the petition for rehearing deserves special mention. It is that the court erred "in holding that, upon taking the estimate made before the work was done as a basis, the jury have made a small deduction from what the defendant in error would be entitled to." Counsel, in the computation upon this point, has fallen into the error of omitting the very material matter of interest. We repeat that there is no conflicting evidence as to whether plaintiff in error accepted the ditch. There is evidence from which the jury might well find that plaintiff in error accepted the ditch, and waived the condition of the contract that it should be inspected and approved by the engineer, Owen. We are not informed by the record whether the jury rejected the contract or not. There is ample evidence to sustain the verdict, whether they did reject it, or did not. Defendant

in error is not paid, by the verdict and judgment, for the full amount of the excavation which he did, at the contract price of 10 cents per cubic yard; and this is the price he claims in his petition as on a quantum meruit, although he testifies that some of the work was worth 25 cents per cubic yard. As we understand the argument on behalf of plaintiff in error, the position is taken that defendant in error must recover upon his quantum meruit, or not at all, although the evidence may show that he is entitled to recover under the contract set up by plaintiff in error in his defense. We cannot agree to this proposition. Neither do the authorities cited sustain it. The contract might change the amount of the recovery, but could not preclude an inquiry as to whether anything was due to defendant in error or not. The verdict is sustained by the evidence, and the judgment upon the verdict is affirmed.

GROESBECK, C. J., and HAYFORD, J., concur. POTTER, J., having been of counsel in the trial court, did not sit; and the other justices called in Judge HAYFORD, of the Second judicial district, in his stead.

#### GILLAND v. UNION PAC. RY. CO. (Supreme Court of Wyoming. Feb. 1, 1896.) LEASED PRAIRIE LANDS—FIRES—PARTIES PLAINTIFF—DEFECT OF—OBJECTION, WHEN TAKEN—INSTRUCTIONS.

1. Verbal permission granted one by a tenant of wild prairie land to pasture his cattle on part of the land, and the fencing in by him of such part, do not make him a cotenant so as to require him to be joined as plaintiff with the tenant in an action against a railroad for damages to pasturage by fire set out by its negligence, where he was not, when the damage was done, in actual possession of the land.

2. A motion to amend an answer by alleging defect of parties, disclosed by plaintiff's evidence on trial, comes too late after verdict.

3. Where the objection of defect of parties plaintiff in an action for damage to pasturage, shown by plaintiff's evidence, has not been taken by amended answer, an instruction that plaintiff cannot recover for pasturage owned by plaintiff jointly with another is properly refused.

Error to district court, Laramie county; R. H. Scott, Judge.

Action by George H. Gilland against the Union Pacific Railway Company for damages to pasturage by fire set by defendant's negligence. From a judgment reducing the damages awarded by the verdict, plaintiff brings error. Reversed.

Action for injuries to land by fire, causing destruction of grass. Verdict for plaintiff. The trial court ordered a reduction of a certain amount from the verdict, and entered judgment for the remainder. Such reduction held to be error. Judgment vacated, and cause remanded, with directions to enter judgment for the amount of the verdict.

Walter R. Stoll, for plaintiff in error. Lacey & Van Devanter, for defendant in error.

POTTER, J. George H. Gilland brought this action against the Union Pacific Railway Company to recover damages for negligently permitting fires upon its right of way to spread into and upon certain lands alleged to be in the possession of the plaintiff, which fires consumed and destroyed plaintiff's grass growing on said lands. Said injury is alleged to have occurred about the 20th day of October, 1891. The damages were placed in the petition at the sum of \$500. The answer of the defendant admitted that it was a corporation, and denied generally every other allegation of the petition. A jury was impaneled to try the case. During the progress of the trial, plaintiff, being examined as a witness in his own behalf, and having testified that the lands upon which the grass was burned were in his possession at the time of the injury, was questioned upon cross-examination respecting the interest of another party in the lands and grass; and the entire controversy now arises upon the testimony of the plaintiff regarding that matter. He admitted, in answer to several questions of defendant's counsel, that another, whose name was not disclosed, but who was referred to as a German in Nebraska, was jointly and equally interested with him in a portion of the pastures burned over. Upon being recalled in his own behalf, and requested to explain the matter further, he testified as follows: "I leased that tract of land there, and have the lease there for the tract itself. I entered into an agreement with this German to let him keep his cattle in that pasture." Q. "That was the sum and substance of that?" A. "Yes, sir." On cross-examination: "In that way he became a joint owner?" A. "He was interested in the pasture. I leased the pasture, and it was in my name. I entered into an agreement to let him keep his cattle there." Q. "He was to build a fence?" A. "That was in the agreement." Redirect: "He was to pasture his cattle there; and it was part of the consideration he was to build the fence?" A. "Yes, sir." How much of a fence was thus built, or when, is not explained. It is sufficiently disclosed by the evidence that the lands in question were wild, uncultivated prairie lands, and devoted to grazing, the grass being the natural growth of the soil.

On the one hand it is insisted that the testimony of plaintiff indubitably proves that a third party was jointly interested with the plaintiff, and jointly in possession of the grass upon a portion of the lands, viz. all the pasture in section 19, and that he should have been joined as a party plaintiff, and, not being so joined, the plaintiff cannot recover for the injury and destruction of the grass upon that section of land; while on the other hand it is urged that the true relation between the parties was not that of joint interest or cotenancy, but that the ownership and possession of the land and grass thereon was in the plaintiff, and the other party had a mere

privilege, by permission of the plaintiff, to depasture his cattle thereon, and that this gave him no ownership in the grass. It is not otherwise claimed, but is apparently conceded, and we think it must be, that the plaintiff also had the right to use and occupy the lands, enjoy the benefits of the grass, and depasture his own stock thereon. The other party had not been given any exclusive right, interest, or privilege in the lands or grass. No testimony was elicited, or attempted to be, respecting the time of making the agreement between the plaintiff and the other party, excepting that it was after the plaintiff had leased the tract in his own name; nor as to the period of time during which whatever rights the other party had were to commence or terminate. It does otherwise appear that the pasture had not been used during the summer, but was being held by plaintiff for the purpose of winter pasturage. The somewhat meager facts, as distinguished from mere conclusions or generality of statement, disclosed by the record, is embarrassing, and tends to surround a determination of the questions involved with much difficulty. Upon the conclusion of the evidence, the defendant requested the court to instruct the jury as follows: "The plaintiff cannot recover in this case for grass owned by him jointly with another person, and you will leave out of the account all such grass as was owned by the plaintiff and any other person or persons jointly." This instruction was refused, and defendant excepted. The court, however, did give, at the request of plaintiff, the following instruction: "If you should find that the defendant is guilty of negligence as charged, then the jury should find for the plaintiff the amount of damages, if any, which are found to have resulted from the fire." To this, also, the defendant excepted. The court submitted to the jury the following special question: "In case you find for the plaintiff, you will please state the number of acres burned off in section 19, and also the value of the grass destroyed in said section 19." A general verdict was returned for the plaintiff, and the damages assessed at \$315.50. In response to the question submitted by the court, the jury answered that there were 372 acres burned off in section 19, and that the value of the grass destroyed in that section was \$186. Thereupon the jury were discharged. Three days later the defendant filed a motion to file an additional defense, to conform to the proof and in furtherance of justice, such motion being supported by an affidavit showing that the matters then desired to be set up as a defense were unknown to defendant until within about 10 hours of the time when the case was called for trial, but that the information at that time obtained was confined to the fact that some German had a joint interest with plaintiff in some of the lands, and that not until the testimony of plaintiff was heard did they learn in

what lands there was such an interest. The additional defense thus sought to be interposed, after the trial and verdict, alleged that, as to the 372 acres in section 19, said land and the grass growing thereon were at the time of the fire in the joint possession of the plaintiff and a certain German, whose name was unknown; that the grass was owned jointly by the plaintiff and said German, and that there is a defect of parties herein in that said German is not made a party. On the same day the defendant also filed a motion for new trial. Both motions were taken under advisement, and subsequently the motion to file additional defense was sustained, and the motion for new trial was overruled. The plaintiff excepted to the former ruling, and the defendant to the latter. Thereupon the court ordered that the sum of \$186, the value of the grass burned off in section 19, be deducted from the amount of damages assessed by the verdict, and rendered judgment non obstante veredicto for the sum of \$129.50, the balance after the making of such reduction. To this the plaintiff excepted, and in this proceeding such order making the reduction and entering judgment for a less amount than was returned by the jury is assigned as error. Defendant files in this court a cross petition in error, alleging error in the overruling of the motion for new trial, thereby complaining of the refusal to give the instruction requested by the defendant, and of the giving of the instruction already quoted.

Whatever may be the correct view to be taken of the other matters which are involved, it is quite clear that the instruction requested to be given by the defendant was an erroneous statement of the law as applicable to the case then on trial, and in its refusal the court did not err. A defect of parties plaintiff, if it appear on the face of the petition, may be taken advantage of by demurrer; if it does not so appear, the objection may be made by answer; and if no objection be taken either by demurrer or answer, the defendant is deemed to have waived the same. Rev. St. 1887, §§ 2449-2451; *Hoop v. Plummer*, 14 Ohio St. 448. At the time of the trial and verdict the defect of parties plaintiff, if any, had been waived by a failure to take advantage thereof by answer. At the common law, such defect was reached by a plea in abatement, and it was the inflexible rule that advantage thereof must be taken promptly. It was regarded, and is still so regarded under the codes, as a dilatory defense. Prior to the trial defendant's counsel had information respecting the interest of another party. The fact that such knowledge was not complete, and the particulars thereof not known, may have been a sufficient excuse for not presenting the objection before trial, although we do not, by any means, regard that as altogether certain; but when the testimony of the plaintiff disclosed the facts upon which the defendant was willing to rely and maintain

its proposition, the objection should have been made at that time, and application then made to amend its answer upon trial, setting forth the facts constituting the alleged defect of parties. Without such an answer, the instruction requested was erroneous, for the reason that, even if the evidence established a joint interest in another, the defect of parties being waived, the plaintiff could nevertheless recover to the full extent of his own interest, or, as it is frequently stated, his damages could be apportioned upon the trial. This principle is well settled, and may be said to be fundamental. Had the instruction permitted the plaintiff to recover to the extent of his interest, and denied his right to recover the amount of the interest of another who was a joint owner with him, it would have been a correct statement of the law, and it would have been improper to have refused it, if the evidence justified such an instruction, defect of parties having been waived.

The instruction which was given, and excepted to by the defendant, authorizing the jury to find for the plaintiff the full amount of damages resulting from the fire, if they should find the defendant to have been negligent, presents in this court the question upon which the parties take issue. Such instruction was proper, from a consideration of all the testimony, if, as a matter of law, the plaintiff had such a possession and ownership of the land and grass in himself as should entitle him to recover the entire damage. It is incorrect if another party had such a joint ownership or interest in the property destroyed as to make him a cotenant with the plaintiff in the land or grass in question. We are, then, to consider and determine whether or not there was a cotenancy between the parties. Counsel for plaintiff in error contends that the explanation made by the plaintiff, viz. that he entered into an agreement with this other party to let him keep his cattle in that pasture, shows clearly a mere privilege of pasturing cattle; and opposing counsel insist that such testimony has effect only to explain the manner in which he became a joint owner of the pasture. There are three other things to be kept in view: First, that plaintiff testifies that he was in possession of the pasture, and held the lease therefor in his own name; second, that he testifies another was jointly and equally interested with him in the pasture; and, third, that the sum and substance of such interest was that it was agreed he could keep or pasture his cattle there, but he did not own the pasture. Permanent injury to the soil does not seem to be alleged or claimed; the only injury complained of is the burning of the grass. Possession in such case is sufficient to authorize a recovery. This may be the possession of the owner in fee, or of a mere tenant. We are not unaware of the rule that the possession of one cotenant will be treated as the possession of all unless such possession is otherwise explained. To entitle the other party to any right of action he must have had

either actual or constructive possession. The possession which is constructive merely would be of no avail, if another is rightfully in actual occupancy. The testimony is that plaintiff was in possession. There is nothing to show that the German alluded to was either personally in possession at the time of the fire, or had any of his cattle there. On the contrary, the inference is strong that his cattle were not in the pasture at the time, as it is in evidence that the field had not been depastured during the summer, but was being kept for winter. His possession, therefore, if he had any, must have been constructive. To be constructive he must have had such a title, right, or ownership as to carry the absolute right to possession. He was not the owner in fee; at least, that is not claimed for him, and we cannot assume that he was. The lease of the land was taken and held by plaintiff. It follows, therefore, that such other party was not in constructive possession unless he was a cotenant with plaintiff, so that the latter's possession would be held to be the joint possession of both. The rule just discussed is nicely expressed in the case of *Cutting v. Cox*, 19 Vt. 518. That was a case of trespass, growing out of the cutting of grass upon a certain tract of land which was claimed by the parties, the dispute arising out of a difference of opinion respecting the boundary between adjoining claims. The plaintiff's undisputed tract or claim was in the possession of a tenant, and it was urged on behalf of the defense that the latter must have been joined. The court say: "If this were the ordinary case of carrying on a farm at the halves, it has not been considered that the owner of the land is so far divested of his possession that he may not maintain trespass, in his own name, for any injury to the inheritance, as digging stone, or cutting timber. As to the growing crops, in which the parties have a joint interest, the parties are treated as tenants in common,—or, more properly, joint tenants, perhaps,—and they should be joined in the action. If they do not join, the nonjoinder can only be pleaded in abatement. If not so pleaded, it will only affect the question of damages. \* \* \* This might be the present case if the land in dispute formed a portion of the premises in the occupancy of Goochy [the tenant] at the time of the alleged trespass. But that does not seem to be the fact. Goochy disclaimed all possession in his own right, and said he would have nothing to do with this land. It is conceded that the land belonged to the plaintiff. It seems clear, if Goochy was not in possession, and would not consent to take possession, in his own right, that no action could be maintained in his name. If not, then the plaintiff must be permitted to sue in his own name, or he cannot sue at all." We doubt the correctness of the statement in the above quotation that the relation between the tenant and landlord as to crops was that of joint tenants rather than tenants in common.

Now, we must consider all the testimony of the plaintiff together, that we may correctly interpret the relations existing between him and the third party, and determine the actual interest of such party in the grass in controversy. Without again adverting to the particulars of that testimony, at this time, we arrive at the conclusion that the right to pasture his cattle in the field jointly with Gilland did not confer upon the former any interest in the land. No assignment of the lease is shown, but is rather negatived. No lease of the land appears to have been made from Gilland to him, and the circumstances do not, in our opinion, amount to a lease of the land. Was there, nevertheless, a tenancy in common or cotenancy in the grass? The question presented is an exceedingly interesting one, and has some elements of novelty about it. We shall not attempt a résumé of all the decisions touching it, but a reference to a few will, we hope, assist in explaining the reasons which control our judgment. The grass was the wild, uncultivated, natural growth of the soil. It was, therefore, a part of the realty. *Evans v. Roberts*, 5 Barn. & C. 830, citing *Orosby v. Wadsworth*, 6 East, 602; 1 Schouler, Pers. Prop. p. 127; 1 Warv. Vend. pp. 177, 178; *In re Chamberlain* (N. Y. App.) 35 N. E. 602; *Powers v. Clarkson*, 17 Kan. 218; *Brantl. Pers. Prop.* § 34. It is within the power of the owner or the one entitled to the land to contract for the separation of the grass from the land, the same to be cut for hay; and, as respects such a contract, the grass might be said to then partake of the nature of personalty. But in this case it was not to be severed. The cases are numerous where there has been held to exist a tenancy in common in the crops grown upon land, although one of such cotenants has no interest in the land. Such cases more frequently arise under contracts for farming land on shares. And it is said that every form of agreement by which land is let to one who is to cultivate the same, and give the owner as compensation therefor a share of the produce, creates a tenancy in common in the crops; and it is declared: "The true test seems to lie in the question, whether there be any provision, in whatever form, for dividing the specific product of the premises. If there be, a tenancy in common arises, at least in such products as are to be divided." *Bernal v. Hovious*, 17 Cal. 542; *Freem. Coten.* § 100; *Putnam v. Wise*, 1 Hill, 247; *Brown v. Lincoln*, 47 N. H. 468; *Lewis v. Lyman*, 22 Pick. 487. Such division may be of the specific crops themselves after they have been harvested, or of the proceeds after they have been marketed. A citation of authorities on this question is hardly required, but the cases are very numerous where courts have been called on to determine whether, under contracts for the cultivation of land on shares, a tenancy in com-

mon of the crops has been created. There was no such agreement in this case, and an examination of these cases alluded to will be useful only as the principle underlying such a cotenancy in crops may be found therein stated.

It is clear that in the case at bar there was no provision for any division of the specific crop of grass. It was not to be severed from the soil at all. The other party could not at any time have cut and taken away the grass, or any portion thereof. It is highly probable, indeed, that the greatest value of the grass depended upon its remaining attached to the soil, to be used only for the purposes of pasturage. We cannot distort the evidence before us into any agreement, executory or executed, for a sale of the grass or any portion to the party in Nebraska. If the grass was not to be severed from the soil at any time, except as it might be eaten by the cattle or other live stock placed in the field, we are unable to ascribe to it the character of personalty, or to treat it as property in any sense as distinguished from the land or soil, upon which it had grown spontaneously and without the assistance of the labor of man. The party in question bestowed no labor upon it. True, he built a fence inclosing it, or a part of it, thereby affording protection to its natural growth, and which would also assist in retaining the cattle within certain limits, and prevent their straying. Whether plaintiff was an agistor of the cattle or not, and was required to look after them, does not appear. He may have been. That would have been entirely consistent with the testimony, although to hold him as such would require proof of additional facts. Under the evidence, there would seem to have been a mere privilege conferred to pasture cattle in a certain field; when, or during what period of time, is not stated. By reference to certain fundamental principles we have observed that the evidence does not show any title or ownership of this other party in the grass. If there was none, then it is self-evident there could be no cotenancy therein, and no constructive possession.

An interesting recent case before the supreme court of Ohio was that of *Morgan v. Hudnell*, 40 N. E. 716. The suit in that case was for the unlawful killing of a horse by a horse belonging to the other party. Plaintiff had his horse in pasture in a certain field owned by another person. The point involved differed materially from the question here, but incidentally it appeared that plaintiff and other parties who paid the owner a certain price per month kept horses in the same field on pasture; that the owner did not keep his own nor any other animals there; that he did not reserve the right to use the field for his own stock or for the stock of others. And in such case the court says: "The circumstances are consistent with

the idea that Houser [the owner] had, for the time these contracts remained in force, given up the possession to those who had thus hired the pasture. In this view, they were then the owners of the growing herbage." And it was also stated, although the matter was not involved, that if the claim were for damage to the herbage, it would probably be held in that state that all the persons so hiring the pasture should join in the action. In such case the herbage seems to have been considered as real estate. It was held, however, that the owner of the horse injured could bring the suit alone, as none of the other parties had an interest in his horse. It will have been noticed that in the case just considered the owner, who occupied the position *Gilland* does in this case, reserved no possession to himself in the land or pasture or grass. The others had the exclusive possession. Their right accrued because they had, as tenants, the possession, and the right to the possession, of the realty. One of the earliest cases upon this subject is *Wilson v. Mackreth*, 3 Burrows, 1824. The plaintiff brought an action of trespass for entering his close and digging and carrying away his turf and peat. The right to the soil was in the lord of the manor, but the plaintiff had the exclusive right to dig the turf and take the profit thereof. The owners of the soil and other tenants of the manor had common of pasture on the lands—or "waste," as it is called in the report of the case—and feed on the mosses, as well as on the rest of the waste. The defendant dug and carried away peats. The question was whether the action was maintainable. It was held it was; and the decision was placed upon the ground that the right of the plaintiff to take the turf was an exclusive one, and the defendant had disturbed him in it. In that case the plaintiff's right was not merely in common with the owner of the soil to feed his cattle upon the land, but to dig and carry away, to sever from the soil, the turf; and that right was exclusive even of such owner of the soil. The real question was whether trespass *quare clausum fregit* would lie. See *Clay v. Draper*, 4 Mass. 266. In the case of *Ornbaum v. His Creditors*, 61 Cal. 455, there was an application to set aside a homestead in certain lands in insolvency proceedings. Only a portion of the lands were inclosed, within which Ornbaum resided with his family. The portion not inclosed he used at all times for grazing. His neighbors also grazed their live stock therein, in common with him, but recognized the land as his. It was contended that Ornbaum did not have possession of the grazing lands, and did not occupy them, but that, if he did, it was as tenant in common with the others. The court held that there was no tenancy in common, and sustained the trial court in setting apart the homestead as to all the lands. The case of *Powers v. Clarkson*, 17 Kan. 218, is quite in point, and approaches this case more



closely than any others which have come under our observation. Clarkson brought suit against Powers for injuries claimed to have been done by the cattle of Powers on certain lands claimed by Clarkson. The land consisted of 800 acres, of which 320 acres belonged to his wife. The land was wild, unoccupied, uncultivated prairie and timber land. Clarkson had testified that when he purchased the land he rode over it, and said to his vendor he would take it. Upon a former trial it had been decided, Judge Brewer delivering the opinion, that he could not recover for injuries to his wife's land. 11 Kan. 101. Upon a new trial he testified that he had the right to the use of the land of Mrs. Clarkson, for taking charge of it, protecting the timber from fire, and paying taxes on it; that he was to protect timber from being cut out and burned, and also to pay what accruing expenses there were, for the use of the land. The question under consideration was whether Clarkson had such an interest in his wife's land, or in the grass growing thereon, that he could recover damages in his own name for injuries done to the land or to the grass growing thereon. The court say: "We suppose it will be admitted that wild grasses growing upon wild, uncultivated land are in all cases a part of the realty. And, if so, it would seem that they could not be transferred from the owner to some other person, except by an instrument in writing. And a person having no interest in a thing cannot recover for its destruction. If Clarkson had had the actual possession of the land, probably he could have recovered for the destruction of the grass; for a person in possession of land is in possession of everything growing thereon. And if he had brought an action in the nature of trespass *quare clausum fregit*, which is purely an action for injuries to the possession, he could have recovered for the entire injuries to his possession, which in this case would have included the value of the grass. But Clarkson had no possession of said land. He did not have the actual possession, as was found by the jury; and he did not have the constructive possession, for the constructive possession of unoccupied land always follows the title. Therefore Clarkson had no interest in the grass of any kind or character whatever. Mrs. Clarkson owned the land, and therefore owned the grass, and constructively she had the possession of the land and of the grass, and therefore she alone can sue for any injury thereto or destruction thereof." As to the agreement allowing her husband to use the land, the court say, further: "It could at most operate only as a license to him to convert the grass to his own use, and to protect him from any action brought by her to recover from him for the grass, or for trespassing upon her land. But, in law, until he should convert the grass to his own use, it would belong to his wife." The analogy between that case and the one before

us cannot escape notice. Clarkson had agreed to look after the land, protect it from injury, pay the taxes upon it, and all accruing expenses, for the use of it, and, indeed, for the use of all of it. But he was not in actual possession, the grass was a part of the realty, and he had not obtained any real ownership upon which could be based a constructive possession. The gentleman who, in the record here, is called a German in Nebraska, had agreed to, and did, build some fencing, in consideration that he should have a joint use with Gilland of the land in question for the purpose of pasturing his cattle. His use, indeed, was limited. He is not shown to have been in actual possession. He had no greater interest in these lands than Clarkson had of his wife's land in the Kansas case. *Bowles v. State* (Miss.) 14 South. 261, was a case of criminal trespass. There seemed to be no question but that one Thompson owned the land. It was pasture upon which no one resided, and was fenced with wire and other material furnished by the owner, but was built by others who were said to be tenants of Thompson for the purpose of pasturage. The land was fenced for the purpose of pasturing the stock of the owner and of his tenants. The court say: "It is altogether clear that William Thompson was the owner and in possession of the pasture, and that Kit Thompson and the other tenants of William Thompson have only the privilege of depasturing their stock therein. The appellant's offense consisted in his having entered the pasture by the express direction and authority of William Thompson, and in having driven therefrom a cow and calf belonging to the owner of the pasture, over the protest, and despite the objection, of Kit Thompson. This offense is purely imaginary. Kit Thompson's possession, as well as the possession of all other tenants using such pasture, is the possession of the owner, William Thompson." It is evident from the language used in the opinion that there was some kind of agreement between Thompson and the others similar to the one spoken of in the testimony we are considering. That agreement is held to amount to no more than giving to the others a mere privilege of depasturing their stock in the pasture. The owner retained the same right, and it was held that he had the possession. That case, indeed, goes further than we are required to, or do, go in this case. The reasons upon which we arrive at our conclusion upon this branch of the case, then, are that the other party referred to was not in actual possession of the land or grass; that he had no constructive possession, because the mere agreement to let him pasture cattle on the land jointly with Gilland did not grant to him any title in the land; and he was not, therefore, a cotenant with plaintiff in the land; that the grass was a part of the realty, was not to be severed from the soil, or specifically divided between the parties, and

as a result there could not be a cotenancy in the grass as personality, or as property separate and distinguished from the realty. We have not discovered any case which conflicts with our conclusions. The following, each more or less pertinent, we think fully sustain them: *McKeeby v. Webster* (Pa. Sup.) 82 Atl. 1006; *Inman v. Morse*, 42 Ill. 151; *Railway Co. v. Cusenberry*, 86 Tex. 525, 26 S. W. 43; *Railway Co. v. Wheat*, 68 Tex. 133, 3 S. W. 455; *Sparks v. Leavy*, 1 Rob. (N. Y.) 530; *Brown v. Wellington*, 106 Mass. 318; *Russell v. Scott*, 9 Cow. 279; *Parsons v. Smith*, 5 Allen, 578; *Giles v. Simonds*, 15 Gray, 441; *Adams v. McKesson*, 53 Pa. St. 81; *Van Hoozier v. Railroad Co.*, 70 Mo. 145; *Gates v. Comstock* (Mich.) 65 N. W. 544.

It follows that the court did not err in giving the instruction complained of, but did err in ordering a reduction from the amount of damages assessed and returned by the jury. The application to amend the answer alleging a defect of parties plaintiff came too late, and should have been denied, as well upon that ground as for the reason that the evidence did not sustain the allegations of the amendment. The judgment as entered must be vacated, and the district court for the county of Laramie ordered to enter judgment in favor of the plaintiff in error for the amount of damages assessed by the jury as returned in the verdict.

GROESBECK, C. J., and CONAWAY, J., concur.

**ROCK SPRINGS NAT. BANK v. LUMAN.**  
(Supreme Court of Wyoming. Feb. 1, 1896.)

**PROCEEDS OF MORTGAGED CHATTEL.—DEPOSIT IN BANK.—APPLICATION TO DEPOSITOR'S DEBT.—NOTICE.—EVIDENCE.—HARMLESS ERROR.—MORTGAGOR'S POWER OF SALE.—RECORDING MORTGAGE.—NOTICE.—TRANSFER OF PROCEEDS.—LIABILITY.**

1. In an action by a chattel mortgagee against a bank for the proceeds of mortgaged property, deposited by the mortgagor (the bank's cashier) to his account, and applied by the bank to its own debt due from the cashier, the admission of declarations of the mortgagor, while acting as such cashier, that the application was without his consent, and that he made the deposit in good faith for the mortgagee, on the issue as to whether the bank had notice, if error, is harmless, where the same facts have been testified to on trial by the cashier and another witness without objection. Conaway, J., dissenting.

2. A reversal in a cause tried to the court cannot be had on the ground that it was tried on an erroneous theory, where the only evidence showing that the court adopted that theory is outside the record.

3. Under the statutory provisions authorizing chattel mortgages to give the mortgagor power to sell, and apply the proceeds to the debt, and making the recording of the mortgage notice of its existence, the recording of the mortgage is notice of the power to sell and apply the proceeds to the debt, so that one taking such proceeds, with knowledge that they are derived from the sale of the mortgaged property, will be liable to the mortgagee therefor. Conaway, J., dissenting.

On rehearing. Denied.

For former opinion, see 38 Pac. 673; 42 Pac. 874.

POTTER, J. Upon the original hearing of this case the judgment of the district court was reversed. 38 Pac. 678. A rehearing was granted, upon which the former order of reversal was vacated, and the judgment was affirmed in part. 42 Pac. 874. The plaintiff in error now moves for a second rehearing.

It is urged that the district court tried the case upon an entirely different theory from that upon which we affirm the judgment. This claim was made and insisted upon at the previous hearings. We hold that, whether or not, as a matter of fact, the trial court imputed to the bank the knowledge of its cashier, who, in his dealings with the bank, was engaged in transacting his own business, that fact is not disclosed by the record; and that there is sufficient evidence to show knowledge on the part of the bank, independently of that. There are no special findings of fact or conclusions of law in the record. The case was not tried to a jury, and therefore there are no instructions to guide us to a correct knowledge of any particular theory which may have determined the case in the mind of the trial court, if that is at all material. Upon the evidence, and the case as presented thereby, it appears that the court found, generally, for the defendant in error, and rendered judgment in his favor. We are of the opinion that the evidence supports the judgment in so far as it has been affirmed; and it is not ground, in such case, for reversal, that it is asserted, however truthfully, outside of the record, that the trial court, trying the case without the intervention of a jury, was largely influenced, or entirely so, by some matters which are not material, or do not in themselves determine the relative rights and liabilities of the parties.

It is contended that the admission of the statements of the cashier, made at the bank, after he had resumed his duties there, indicates that the trial court tried and decided the case upon the theory that the knowledge of such cashier concerning the mortgage to Luman, and that the moneys in controversy were the proceeds of the mortgaged sheep, was binding upon the bank, and constituted like knowledge on its part. In the first place, it may be said that, even had the court entertained such a view at the time of the admission of the testimony, it can hardly be assumed by the appellate court, under the disclosures of the record already pointed out, that such a theory or opinion prevailed until, and influenced, entirely or largely, the finding and judgment. But, beyond that, we are unable to attach to those statements of the cashier the importance, merit, or effect with which counsel regards them. Such statements did not reach the point of notice to the bank of the facts, or any of them, which was required to render it liable. Nothing in the declarations, so received, established or indicated any

notice to or knowledge of the bank; neither could any notice to or knowledge of the cashier regarding those essential facts be predicated upon anything brought out by the said statements. Knowledge of the cashier was self-evident, and required no proof, beyond the facts that he owned the sheep, sold them, received the purchase price, and was the mortgagor of the sheep in the mortgage held by Luman. The declarations, the admission of which was complained of, went only to show that the money was sent to the bank, the disposition which was afterwards made of it, and that such application was without the consent of such cashier, who had deposited the proceeds with the bank. The fact of the receipt of the money, and its disposition, as stated, was testified to by another bank officer, and the cashier also testified concerning his consent with respect to the after transactions of the bank. The admission of the statements was, therefore, not prejudicial. They did not tend to establish any kind of notice; and such admission was harmless error, if error at all. Had such declarations gone to the extent of proving notice on the part of the cashier, a very different question would have been presented.

We cannot regard the case of *Smith v. Bank (Iowa)* 61 N. W. 373, as controlling of the points involved in the case at bar. It is quite evident that an entirely different statute and mortgage were under consideration in that case. We do not hold, however, that, even under our statutory provisions and the mortgage in question, the lien of the mortgage attached to the proceeds. If we did, there would not arise any question of notice, in the case. What we do hold is that the provisions of our statute which authorize the insertion in a chattel mortgage of permission to the mortgagor to retain possession and sell portions of the mortgaged property, and apply the proceeds to the debt secured by the mortgage, and the existence of such a permission in the mortgage itself, impart constructive notice, the mortgage being properly filed, of the fact, not only that the property therein described is covered by the mortgage, but of the provision for the sale by the mortgagor, and the application of the proceeds, as well, and that such proceeds, in the hands of the mortgagor, are held in trust, and any one who obtains them with notice or knowledge that they are the proceeds of certain property, which property was in fact covered by the mortgage, is liable to respond to the mortgagee therefor. Having constructive notice of the fact of the mortgage and its provisions, and actual notice or knowledge of the source from which the money was derived, the liability follows. Rehearing must be denied.

GROESBECK, C. J., concurs.

CONAWAY, J. (dissenting). It seems necessary to a proper presentation of some of the points in which I cannot concur with the majority of the court, that I now say a few

words. In considering the petition for a second rehearing the court says: "We do not hold, however, that, even under our statutory provisions, and the mortgage in question, the lien of the mortgage attached to the proceeds. If we did, there would not arise any question of notice in the case." I have always regarded, and still regard, as elementary law, that a chattel mortgage does not affect, either as a lien or otherwise, third parties without notice. I am not particular whether we say that the fund in the hands of the mortgagor arising from the sale of part of the mortgaged property was charged with a lien, or charged with a trust. In either case, it would be by virtue of the mortgage, and would not affect third parties without notice to them of the lien or trust. The record was notice of the mortgage and its contents. It was not notice that any of the mortgaged property was afterwards sold, or that the fund in controversy was the proceeds of such sale, or charged in any manner with a lien or trust. It further seems clear to me, from the evidence, that plaintiff in error had no notice of the claim of defendant in error to the fund, whether arising from a lien, or from a trust, or otherwise, until the demand was made for the money after the consummation of all the transactions out of which this suit has arisen. The only attempt to bring such notice home to the bank, outside of the knowledge of Pfeiffer, the mortgagor, of his own personal business transactions, is through the knowledge of Goble, vice president, and acting cashier in Pfeiffer's absence, of Pfeiffer's business, and of his financial condition. And he testifies positively that he had no knowledge, at the time of the receipt of the draft by the bank, of the source from which the money represented by the draft was derived. After Luman's demand for the money, he stated that he had no direct knowledge of the source from which it was derived.

In regard to the admission of evidence of Pfeiffer's declarations, as against the bank, in addition to what is stated in the opinion of the court, it is to be remarked: Witnesses were permitted to testify that he said that he knew the money was Luman's; that he sent it in good faith, intending that Luman should have it; and that the bank had taken it, and used it, and he had no way of getting it. All this would be excluded on objection, unless it were regarded as admissions of the bank. So regarded, it must be, in my opinion, very prejudicial. And if the language of Pfeiffer in regard to his business transactions was regarded as admissions of the bank, then his acts must have been regarded as the acts of the bank, and his knowledge as the knowledge of the bank. And, in my opinion, the record is not consistent with the trial of the case on any other theory. I believe the other points of difference of opinion with the court are sufficiently clear in the former opinion. I am of the opinion that a new trial should be awarded.

DENMAN v. BRODERICK, Auditor. (S. F. 237.)

(Supreme Court of California. Jan. 22, 1896.)

CONSTITUTIONAL LAW—SPECIAL LEGISLATION.

After the legislature, in pursuance of Const. art. 11, § 6, providing that it shall classify municipal corporations in proportion to population, had made a classification, the first class of which comprised those containing 100,000 inhabitants or over, Act March 28, 1895, providing for the appointment of a board of election commissioners in municipalities having a population of over 150,000 inhabitants, was passed. *Held*, that the act was unconstitutional, as special legislation.

In bank.

Petition by James Denman against William Broderick, auditor of the city and county of San Francisco, for writ of mandamus. Denied.

Delmas & Shortridge, Philip G. Galpin, Frank J. Sullivan, and David I. Mahoney, for petitioner. Garret W. McEnerney, for respondent.

McFARLAND, J. The petitioner claims to be a member of the board of election commissioners of the city and county of San Francisco, under a certain act of the legislature approved March 28, 1895. St. 1895, p. 341. He presented his demand for a month's salary as such commissioner to the respondent, auditor of said city and county, and requested him to draw his warrant for the amount of such salary upon the treasurer of said city and county. The respondent refused to draw such warrant, on the ground that said act is unconstitutional, whereupon the petitioner presented his petition to this court for a writ of mandamus to compel said respondent to draw such warrant.

The act in question is entitled "An act to add a new article, to be designated as article 4, to chapter 1 of title 2 of part 3 of the Political Code, and also to add six new sections, relative to county, city, and city and county boards of election commissioners." The part of the act necessary to be considered is a new section designated as section 1075, and is as follows: "Sec. 1075. The board of supervisors of each county is ex officio the board of election commissioners in and for the county, and the common council, or other governing body of a city, is ex officio the board of election commissioners in and for such city: provided, that in cities and cities and counties of this state having one hundred and fifty thousand or more inhabitants the board of election commissioners shall consist of four persons, citizens and electors of such city, or city and county, each of whom must be a freeholder, and have been an actual resident of said city and county at least five years preceding his appointment, who shall be appointed by the mayor: provided, that the respective executive committees of the state committees of either of the political parties who may be entitled under the provisions of

this act to have members of their party appointed as members of said board of election commissioners shall have the right, within ten days after such appointment, to file with the mayor a written protest against the appointment of a member of said board of election commissioners, as having been appointed as one of affiliation with said party, on the grounds that said appointee is not a person of well-known affiliation and standing with said party from which he has been appointed; and the mayor thereupon shall make another appointment in the place of the party against whom the protest has been filed. The members of said commission shall be ineligible to any other office of public employment, elective or appointive, during the term for which they have been appointed and for one year thereafter. Two of the persons so appointed shall be selected from the body of citizens and electors of such city, or city and county, of known affiliation with and belonging to the political party or organization which at the last presidential election held in such city, or city and county, polled within said city, or city and county, the highest number of votes cast for the candidates of the political party for presidential electors at such election; and the two remaining members of said board shall be selected from the body of electors of such city, or city and county, of known affiliation with and belonging to the political party which, at the last presidential election held at such city, or city and county, polled within such city, or city and county, the next highest number of votes cast for the candidates for presidential electors of a political party. The members of said commission shall, every two years, choose one of their number as chairman; in the event of their failure to select a chairman in five ballots, the oldest of said members in point of years shall be chairman. The persons first appointed as such board of election commissioners shall be appointed on the first Monday of July, eighteen hundred and ninety-five, and shall each hold their office for the term of four years from and after the date of their appointment, except that of those first appointed, two (one belonging to each political party or organization, as aforesaid), to be designated by the mayor, shall retire at the end of two years, when their successors shall be appointed by the mayor. Whenever any vacancy shall occur in the said board, such vacancy shall be filled by appointment as herein prescribed, and the person so appointed to fill such vacancy shall be selected in the same manner and from the same political party or organization with which his predecessor in office affiliated and belonged at the time of his appointment thereto, and shall hold office for the balance of the unexpired term for which he was appointed. The salary of each member of the board of election commissioners in and for said city, or city and county, having one hundred thousand or more inhabitants, shall

be seven hundred and fifty dollars per annum, payable in equal monthly installments out of the treasury of such city, or city and county, in the same manner as the salaries of other officers of such city, or city and county, are paid."

The constitutionality of this section is attacked upon several grounds, and it is apparent that at many points it at least closely approaches the line which limits legislative power. Under our views of the case, however, there are many standpoints from which respondent assails the law which it is not necessary for us to explore. While it may be true, as counsel for petitioner says, that the law was intended for an excellent and worthy purpose, it was evidently drafted in ignorance of the constitution of the state, or with reckless disregard of its provisions. It is matter of history that when the present constitution was adopted there was a great appreciation of the supposed evils which had arisen out of special and local legislation, and there was a strong purpose to prevent such evils in the future. Perhaps some other inconveniences and evils which arise from too great limitation of the legislative power in this respect were not fully anticipated or considered. At all events, the constitution is exceedingly prohibitory of the power to pass local and special laws; and this feature of the constitution should be kept in view by legislators, for a law passed in plain contravention of it—whether good or bad—cannot be upheld by the judiciary. Section 25 of article 4 of the constitution expressly provides that "the legislature shall not pass local or special laws in any of the following enumerated cases, that is to say"; and then follow 32 enumerated cases, which include nearly all subjects of legislation that can be suggested. In addition, there is a thirty-third clause, which reads: "In all other cases where a general law can be made applicable." Among these enumerated cases are the following: "Ninth. Regulating county and township business, or the election of county and township officers. \* \* \* Eleventh. Providing for conducting elections, or designating the places of voting, except on the organization of new counties. \* \* \* Twenty-eighth. Creating offices, or prescribing the powers and duties of officers in counties, cities and counties, townships, election or school districts." As the statute here under review deals with subjects enumerated in said section 25, it follows that it is unconstitutional if it be local or special. But, as it relates only to a part of the territory and people of the state, it is clearly local and special (*Earle v. Board*, 55 Cal. 489), unless there are some other provisions of the constitution and some principle of law applicable thereto which take it out of that category.

There are two provisions of the constitution which somewhat relieve the pressure against local and special legislation. One is

section 5, art. 11, not particularly applicable here, which provides that the legislature, for the purpose of regulating the compensation of county officers, may "classify the counties by population"; and section 6 of the same article, which provides that "corporations for municipal purposes shall not be created by special laws, but the legislature, by general laws, shall provide for the incorporation, and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed." Now, this court has held that, when there has been a classification, authorized by the constitution, of counties or municipal corporations, a law which applies to all of any one class is not invalid upon the ground that it is local or special. The construction of the constitution on this subject has been quite liberal; it being held that, if the classification be in other respects such as the constitution warrants, the fact that only one or two counties or municipalities are put in a class will not invalidate it. *Cody v. Murphey*, 89 Cal. 522, 26 Pac. 1081. But there must be a classification, it must be by a general law (which, of course, may be amended), and the classification must include all the counties or municipalities. Before 1883 the legislature neglected the duty imposed on it by the constitution to make such classification; and its attempts before that time to legislate specially for certain municipalities were held invalid. *Desmond v. Dunn*, 55 Cal. 242; *Earle v. Board*, *Id.* 489. In *Desmond v. Dunn*, the court held that "sections 6 and 7 of article 11 of the constitution evidently contemplated the enactment of general laws providing for all corporations for municipal purposes, and not for some only; and such laws must be as general as the subject to which they relate." In 1883 the legislature made a classification of municipal corporations as follows: "All municipal corporations within the state are hereby classified as follows: those having a population of more than one hundred thousand shall constitute the first class; those having a population of more than thirty thousand, and not exceeding one hundred thousand, shall constitute the second class,"—and so on to the sixth class; and this classification has never been repealed or amended. St. 1883, p. 24. Since then this court, by *Temple, C.*, said: "On the 3d day of March, 1883, the legislature did, by a general law, as the constitution requires, classify all the cities of the state. The class mentioned by the law in question is not one of those classes. It is a class created by the act itself. I am of the opinion that this cannot be done. Section 5 of article 11 was evidently intended to limit, and not to enlarge, the power of the legislature; and I think that it was intended that the classification there authorized was to be by a general law, in the same sense and in the same way in which it was necessary to provide for the incorporation and organization of cit-

ies and towns. Legislation in regard to such corporations would thereafter be made by reference to the classes thus made. \* \* \* I think a law in conformity with this special permission in the constitution must be a law classifying all cities in the state, or a law amendatory of such a law. It must leave all the municipal corporations classified." *Darcy v. City of San Jose*, 104 Cal. 642, 38 Pac. 500. We see no distinction in principle between that case and the case at bar. In that case, for the purpose, no doubt, of affecting the city of San Jose alone, an act was passed by which a certain provision was made applicable only to "all cities containing a population of not less than ten thousand nor more than twenty-five thousand"; but there was no such classification under the general law. San Jose was in the third class, which is constituted of cities with a population of more than 15,000 and not exceeding 30,000; and therefore the act in question in that case did not affect all the cities of the third class, and was invalid. With respect to the case at bar, there is no classification of cities, or cities and counties, "having one hundred and fifty thousand or more inhabitants." Cities, or cities and counties, having that number of inhabitants are in the first class, which includes "all municipal corporations \* \* \* having a population of more than one hundred thousand" (St. 1883, p. 24); and the act here in question, therefore, does not affect all the corporations of the first class. Moreover, there is an attempt by the act itself to create a class for a special purpose, without reference to the existing classification by general law, which was held to be unauthorized in *Darcy v. City of San Jose*. It is, therefore, local and special, and for that reason unconstitutional and void.

We see no force in the point that the respondent has no interest in the question here involved. The act under which petitioner claims being unconstitutional and void, there is no law authorizing respondent to draw the warrant; and to do the act demanded of him would be to violate his official duty and oath, and subject himself to liabilities and penalties. Neither is there any room here for the play of the principle that separable parts of a statute may be valid while other parts may be unconstitutional. All of the parts of said section 1075, under which alone petitioner claims his salary, are alike involved in the vice of unconstitutionality. Neither is there any distinction, with respect to the point here involved, between cities and consolidated cities and counties. They are both "municipal corporations," and with respect to the constitutional provisions herein discussed they are in the same category. *Desmond v. Dunn*, supra. The views above expressed relieve us from the necessity of determining the many other important and serious objections made by respondent to the validity of the statute here in

question. We hold that it is unconstitutional and void for the reasons heretofore given. The prayer of the petition is denied, and the proceeding dismissed.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; HENSHAW, J.; TEMPLE, J.

**MAHONEY et al. v. SAN FRANCISCO & S. M. RY. CO. (No. 15,944.)**

(Supreme Court of California. Jan. 16, 1896.)

Action by Mary Mahoney and others against the San Francisco & San Mateo Railway Company to recover for the death of the husband and father of plaintiffs. From a decision of department 2 (42 Pac. 968) reversing a judgment in favor of plaintiffs, plaintiffs apply for a rehearing in bank. Modified, and rehearing refused.

PER CURIAM. A hearing in bank is denied, but that portion of the opinion commencing with the sentence, "I think the court also erred in discharging the juror Cooper from the panel," down to and including the phrase, "if a new panel had been taken they could still insist upon their exception," is eliminated therefrom.

GAROUTTE, J. (dissenting). I think a rehearing should be granted, and the judgment affirmed.

**RUNK v. SAN DIEGO FLUME CO. et al. (L. A. 4.)**

(Supreme Court of California. Jan. 29, 1896.)

**MALICIOUS PROSECUTION — COMPLAINT — SUFFICIENCY.**

A complaint against a flume company alleging incorporation of defendant; that defendant maliciously had plaintiff arrested and imprisoned, necessitating bail, and tried, on a charge of interfering with its flume meters without authority; that he was tried and duly acquitted; that by these acts he was injured in reputation, and suffered great anxiety, to his damage in a certain sum,—sufficiently states a cause of action for malicious prosecution.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by J. B. Runk against the San Diego Flume Company and others for malicious prosecution. From a judgment for defendants, plaintiff appeals. Reversed.

Altken & Smith, for appellant. McDonald & McDonald and Works & Works, for respondents.

VAN OLIEF, C. Action to recover damages for an alleged malicious prosecution. A demurrer to the complaint on the grounds that it does not state a cause of action, that in specified particulars it is uncertain, and that two causes of action are improperly joined

therein, was sustained by the trial court; and thereupon, plaintiff declining to amend his complaint, judgment passed for defendants. Plaintiff appeals from the judgment, and contends that the court erred in sustaining the demurrer. The following is a copy of the complaint: "(1) That on the 19th day of July, A. D. 1894, the said defendants, contriving and maliciously intending to injure the said plaintiff in his good name and reputation, and to cause him to be imprisoned, falsely and maliciously, and without any reasonable or probable cause therefor, procured and caused plaintiff to be charged before H. J. Ensign, a justice of the peace of San Diego township, county of San Diego, state of California, with the crime of: 'Without authority from the San Diego Flume Company (a corporation), of said county, or any agent thereof, did raise, disturb, and open an appurtenance attached to a flume belonging to said San Diego Flume Company, then and there used for the purpose of holding and conveying water for agricultural and domestic uses, and which said appurtenance was so attached to said flume or conduit for the purpose of measuring and controlling water held and conveyed in and by said flume or conduit, and used for said purposes,'—and thereupon caused said justice to make out a warrant, in due form of law under his hand, for the apprehension of plaintiff, and falsely and maliciously, and without probable cause therefor, caused plaintiff to be arrested on said charge, and to be imprisoned for two hours, and compelled to give bail in the sum of one hundred dollars (\$100) for his release. (2) That on the 31st day of July, 1894, at the trial of said cause, the plaintiff was acquitted of said crime, and said prosecution is wholly ended and determined. (3) That by means of which said acts the plaintiff has been greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace, and has suffered great anxiety and pain of body and mind, to his damage in the sum of five thousand dollars, and has been forced to lay out and expend the sum of one hundred dollars in procuring his discharge from said imprisonment, and in defending himself. (4) That the defendant San Diego Flume Company is a corporation duly organized under and by virtue of the laws of the state of California, and has its principal place of business at San Diego, California. Wherefore plaintiff demands judgment against said defendants for the sum of five thousand one hundred dollars (\$5,100), and all costs of suit." The cause was submitted to this court by written stipulation, "upon the briefs of the respective parties now [then] on file." But there is no brief on file on the part of respondents; and, without aid from counsel for respondents, I have been unable to perceive that the complaint is open to attack upon any ground specified in the demurrer. It seems to state a single cause of action, conformably to the precedents, and with sufficient certainty. 2 Chit. Pl. p. 555; Work, Prac. & Pl.

211, 212; 1 Boone, Code Pl. § 167; 2 Boone, Code Pl. p. 272; Bates, Pl. 550; 2 Greenl. Ev. § 449; Townsh. Stand. & L. § 420 et seq.; Druex v. Domec, 18 Cal. 83; Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106; Krause v. Spiegel, 94 Cal. 370, 29 Pac. 707. See, also, Pen. Code, § 624, under which the alleged prosecution of plaintiff in the justice's court was probably intended. I think the judgment should be reversed, and the cause remanded, with direction that the court below overrule the demurrer.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed, and the court below is instructed to overrule the demurrer.

**BARRETT v. SUPERIOR COURT OF  
PLACER COUNTY. (S. F. 216.)<sup>1</sup>**  
(Supreme Court of California. Jan. 29, 1896.)  
ADMINISTRATOR—HEARING ON SUFFICIENCY OF  
BOND—APPEARANCE—SERVICE OF ORDER  
—WAIVER.

1. An administratrix cited to appear, under the provisions of Code Civ. Proc. §§ 1394, 1395, for a hearing as to the sufficiency of her bond, and who appears in person and by attorney on the first day of such hearing, cannot object to the jurisdiction of the court to enforce an order entered at a date to which the hearing was adjourned, and which order was excepted to by her attorney, on the ground that such order was not served on her; no service being required by the statute, and she being constructively present in court.

2. An administratrix who tenders a new bond required by an order of the court, though not within the time fixed, thereby waives service of the order, if it were necessary.

In bank.

Petition of Maggie G. Barrett against the superior court of Placer county (J. E. Prewett, judge) for a writ of review. Denied.

Geo. B. Merrill, for petitioner. John M. Fuiweiler, for respondent.

HARRISON, J. The petitioner was appointed the administratrix of the estate of Joseph Byrne, deceased, January 23, 1895; and having filed an undertaking as such administratrix, in accordance with the order of the court therefor, in the sum of \$7,000, with two sureties, who were approved by said court, letters of administration were issued to her. June 13, 1895, the judge of said court, of his own motion, ordered a citation to be issued to the sureties on said undertaking, requiring them to appear before him at the court room in said county on the 24th day of June, to be examined touching their property and its value, and that a citation be issued also to the administratrix, requiring her presence at said hearing. In obedience to said citation said sureties and the administratrix appeared at said time and place, and the sureties were then examined by the

Judge, and the further hearing continued for one week. July 1st an order was made and entered by said court to the effect that said sureties were insufficient, and requiring the administratrix to file additional security within five days. This order was not served upon the administratrix, nor was any notice thereof given her, nor was any order made that she be notified thereof. July 9, 1895, an order was made by the court suspending the powers of the administratrix, and also another order appointing a special administrator of said estate. The present application is for a writ of review, and to annul the last-named orders, upon the ground that they were without the jurisdiction of the court. The ground upon which it is claimed by the petitioner that the order was without the jurisdiction of the court is that no notice of the order requiring her to give the additional security was ever served upon her, and that before she could be in default for not complying therewith she was entitled to notice thereof, and that without such service of notice the court had no power to make an order visiting her with any penalty.

The proceedings were taken under the provisions of section 1394, Code Civ. Proc., and the petitioner was present in person and by her attorney at the hearing under the citation. At the close of the examination on that day an order was made by the court, and entered in its minutes, "that the further hearing of the matter be regularly continued and deferred for one week, to wit, July 1, 1895, at 1:30 p. m." July 1st the court made an order finding that the sureties were insufficient, and "that said administratrix, within the five days next ensuing, cause to be executed and presented to this court, or the judge hereof, for approval, additional security, as follows" (specifying the amount); and it was also stated in this order, "that said administratrix is represented in court at the time of the rendition and entry of this order by her attorney, and that she was regularly cited to be present at this hearing." The minutes of this day were subsequently amended by the court to show "that said administratrix was represented in said court at said time by her attorney, W. B. Lardner, and that said Lardner then and there, on her behalf excepted to the said order requiring further security, and granting her five days within which to give the same." July 9th an additional bond was presented on behalf of the administratrix, with a request by her counsel that the same be approved by the court. This request was denied, and the court then made an order "that the right of the administratrix to the administration of this estate cease," and on the same day made another order "that her powers as such administratrix be and the same are hereby suspended, and her letters as such revoked, until a further hearing upon the question of her permanent removal, now pending, be heard on September 12, 1895."

The administratrix was present in person, and was also represented by her attorney, at the hearing on June 24th; and, if the court, at the close of the hearing on that day, had determined that the sureties were insufficient, and made the order requiring her to give additional security within five days, it would have been a personal direction to her to that effect, and her failure to comply with such order would have caused her right to the administration to cease. Section 1395 does not require any order to be served upon the administratrix, but declares that the mere failure to give the security within the time fixed by the judge's order shall of itself without any further action on the part of the court, cause the right of the administrator to the administration to cease. The continuance of the hearing from June 24th to July 1st had the legal effect to continue until that day the appearance in person and by attorney, which the administratrix made on the 24th of June, and to give to the order that was made on the 1st of July the same effect as if it had been made at the close of the hearing on the 24th of June. Having taken an exception to the order when it was made, it would not be competent for the administratrix afterwards to make the objection that the order had not been served upon her. Her subsequent request to the court to approve "the additional bond heretofore required by the court" must also be regarded as a waiver of the service of the order, even if a service thereof was required.

Upon the failure of the administratrix to file the additional security required by the order of June 24th, and the consequent cessation of her right to the administration of the estate, the court was required by section 1395 to appoint as administrator "the person next entitled to the administration on the estate, who will execute a sufficient bond," and was authorized to make an order suspending the powers of the petitioner until such further appointment could be made, and in the meantime to appoint a special administrator of the estate. Code Civ. Proc. § 1411. The alternative writ heretofore issued is discharged.

We concur: BEATTY, O. J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

PEOPLE v. VAN EMAN. (Cr. 69.)  
(Supreme Court of California. Jan. 28, 1896.)  
EMBEZZLEMENT — INDICTMENT — ALLEGATION OF OWNERSHIP — EVIDENCE — OTHER CRIMES — ADMISSIONS — CROSS-EXAMINATION — REBUTTAL — INSTRUCTIONS AS TO DEFENDANT'S CREDIBILITY.

1. In an indictment for embezzlement of money collected by defendant as an agent from a debtor of his principal, after his discharge, the debtor may properly be alleged as owner.

2. In such a case a demand by the debtor for the return of the money is not necessary.

3. In a prosecution against an agent for em-



bezzlement of money collected by him from a debtor of his principal, after his discharge, the indictment alleging ownership in the debtor, evidence of embezzlement from the principal about the same time is admissible.

4. In embezzlement against an agent, receipts given by him to debtors of his principal over his own name are admissible in evidence against him.

5. That defendant's counsel on cross-examination presented a paper to the witness, and requested him to identify certain entries therein, but did not offer the paper or the items in evidence, does not entitle the prosecution on re-examination to introduce the paper in evidence.

6. In a prosecution for embezzlement, it is error to allow the prosecution to cross-examine defendant as to bets made by him at a race track, defendant not having testified in regard thereto on his examination in chief.

7. It is error to allow witnesses to reiterate their testimony under the guise of rebuttal.

8. Under Const. art. 6, § 19, prohibiting judges from instructing in criminal cases as to the matters of fact, an instruction to the jury on defendant's testimony that in "weighing his testimony you are to consider what he has at stake. You are to consider the temptations brought to bear upon a man in his situation to tell a falsehood for the purpose of inducing you to acquit him or to disagree," is ground for reversal.

Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

W. W. Van Eman was convicted of embezzlement, and appeals. Reversed.

Bruner & Bruner, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was charged with embezzling \$100, the property of one J. Poppa, and was convicted. He appeals from the judgment, and from an order denying his motion for a new trial. Although the case must be reversed for reasons hereinafter given, a few of the points made by appellant which are not tenable must be noticed because they may arise upon another trial.

1. It is contended that the money alleged to have been embezzled was not the property of Poppa, but was the property of the Savage Commercial Company. The appellant had for several years been the agent of said company, with authority to sell goods and collect bills. He had sold goods frequently to Poppa, and had collected the amounts due said company for said goods. On December 13, 1893, he collected from Poppa the \$100 alleged to have been embezzled. Now, witnesses for the prosecution testified that appellant had been discharged from the employ of said company several days prior to said December 13th. If this is true, then there was no fatal variance between the indictment and the proof; and, in that event, the fact that Poppa was not notified of appellant's discharge, and therefore could compel the company to credit him with the money, makes no difference. If, however, appellant had not been discharged on the 13th, then the money was the property of said company, and appellant could not be convicted under

the indictment. We do not think that a demand by Poppa on appellant for the money was, under the circumstances, necessary. We do not think that the court erred in allowing evidence tending to show other embezzlements by appellant of moneys of said company about the time of the alleged embezzlement charged in this indictment. Neither do we think that the court erred in admitting receipts given by appellant over his own signature to certain customers of said company. We do not mean to say that such a receipt would, itself, be sufficient to show an embezzlement; but it would be an act of a defendant admissible as evidence on that issue. The question presented in *Ford v. Smith*, 5 Cal. 314, was a very different one. There it was attempted to introduce the receipt of a third party to prove that the defendant in that case had paid money.

2. On the cross-examination of the people's witness, Ade, counsel for appellant presented a paper to the witness and asked him to identify two items in it, but did not offer the paper or the items in evidence. On re-examination the prosecution offered the paper in evidence in explanation of the two items, and it was admitted over appellant's objection; but as the appellant had not offered the items in evidence, it was clearly erroneous to allow the introduction of the paper by the prosecution at that time. The court also erred in allowing appellant to be cross-examined about some bets which he made on said December 13th, at the race track. It was not proper cross-examination, for it was not a matter about which he testified in chief, nor was it relevant; and its effect was to prejudice appellant in the minds of the jurors. We think that the court improperly allowed witnesses for the prosecution to reiterate their testimony under the guise of rebuttal. There are also minor points made on alleged errors in rulings on the admissibility of evidence, which are hardly of importance enough to demand special notice.

3. But, whether or not the errors above noticed are sufficiently grave to cause a reversal, the judgment and order appealed from must be reversed on account of the instructions given by the court to the jury on the subject of the credibility of the appellant as a witness. If the question were entirely an open one, we would feel constrained to hold, upon principle, that any instruction at all as to the credibility of any witness, or the weight to be given to his testimony, is violative of section 19 of article 6 of the constitution, which provides that "judges shall not charge jurors with respect to matters of fact," and section 1847 of the Code of Civil Procedure, which, referring to a witness, provides that "the jury are the exclusive judges of his credibility." But in *People v. Cronin*, 34 Cal. 191, which was decided nearly a generation ago, an instruction was approved which stated in general terms that, when a defendant had appeared him-

self as a witness, the jury should consider the situation under which he gave his testimony, the consequences to him from the result of the trial, and the inducements and temptations "which would ordinarily influence a person in his situation." During succeeding years a similar instruction was several times approved, and as district attorneys and trial courts persisted in asking for and giving it on all occasions, it was evident that the rule could not be changed without causing reversals in nearly every case on its way here by appeal. Moreover, the instruction in the Cronin Case was very general in its language, and could hardly be construed as an intimation from the judge that he doubted the truth of the defendant's testimony in a particular case, and as therefore it could probably do no harm, it was no doubt better to allow the rule to stand than to disturb the course of justice in many cases by overruling it. But trial courts, moved, no doubt, in many instances by prosecuting officers, began to gradually expand the Cronin instruction, and to substitute for it their own language; and the danger of that course has been many times pointed out by this court. It will be profitable, perhaps, to notice here a few of the opinions and decisions upon the subject, with the hope that officers intrusted with the administration of the criminal law who have not read those opinions and decisions may happen to notice the present opinion.

In *People v. Murray*, 86 Cal. 31, 24 Pac. 802, the court, speaking of the Cronin instruction, said: "That instruction has been affirmed in subsequent cases, and it is now too late to question its correctness; but if courts and prosecuting attorneys think it their duty to have an instruction on that subject in every case, they should be careful to go no further in that direction than courts have already gone. An instruction giving the general rule can do no harm, and is not of much consequence, for every intelligent juror knows, without any instruction on the subject, that a defendant, whether innocent or guilty, is deeply interested in being acquitted. But when such an instruction is reiterated, and put into exceedingly strong language, so as to give it peculiar emphasis, it is too apt to lead the jury to believe that the court thinks the defendant in the particular case on trial to be unworthy of belief. The credibility of the witness in such a case should be left as much as possible to the jury." In *People v. Faulke*, 96 Cal. 20, 30 Pac. 837, the court, after alluding to the Cronin instruction, and saying "that it is too late now to question its correctness," and that "it is an instruction that can rarely be necessary," and alluding to the danger of changing it, say: "If district attorneys, as well as courts, would be careful while framing instructions not to tread upon that dangerous borderland which lies between matter of fact and matter of law, the result

of the trial would rarely be changed, and the occasion for an appeal would be avoided. After a proposition of law involved in an instruction has been often approved upon appeal, the trial court will obviate further appeal thereon if it will limit its instruction upon that proposition to the terms in which it has been approved, rather than attempt a variation upon such terms." In *People v. O'Brien*, 96 Cal. 182, 31 Pac. 45, the court, speaking of a like instruction, say: "As a slight change in the phraseology of the instruction, however, is liable to be construed as going beyond the limits of what has been approved, it would be a safer course, and one which would work no injustice to the people, if it were entirely omitted from the instructions asked and given on behalf of the prosecution." In *People v. Curry*, 103 Cal. 549, 37 Pac. 508, the court, speaking of a similar instruction about a defendant's testimony as a witness, say: "We have often suggested that the better practice would be to refrain from instructing jurors to the effect as evidenced by the foregoing instruction, but the suggestion appears to fall upon stony places, and brings forth no results. We shall limit the rule strictly as it has been heretofore declared, and new trials will be the result if those limits are overstepped to any extent." In *People v. Lang*, 104 Cal. 363, 37 Pac. 1031, the court quoted with approval the language used in the opinion in *People v. Murray*, supra. In *People v. Anderson*, 105 Cal. 35, 38 Pac. 513, the court, speaking of a similar instruction, said: "While the instruction is not so wide a departure from instructions which have been allowed to pass by this court as not furnishing sufficient ground for reversal, we deem it proper to again call attention to the criticism of similar instructions in the recent cases of *People v. Murray*, 86 Cal. 31, 24 Pac. 802, *People v. Curry*, 103 Cal. 549, 37 Pac. 508, and *People v. Lang*, 104 Cal. 363, 37 Pac. 1031." In *People v. Hertz*, 105 Cal. 663, 39 Pac. 32, the trial court had undertaken to carry the doctrine so far as to include the relatives of the defendant; and the court, in its opinion reversing the case, said: "An instruction to the jury bearing upon the credibility of a defendant's testimony is not looked upon with favor by this court. We have repeatedly frowned upon the doctrine, and said that it would be limited within the strictest lines." And in the recent case of *People v. Shattuck*, 42 Pac. 315, in which the judgment was reversed for an instruction touching the testimony of a relative of the defendant, and in which the case of *People v. Hertz*, supra, was approved, the court said: "The court has frequently hinted that a similar instruction in regard to the defendant is erroneous, because it violates the constitutional provision that the judges shall not charge juries with respect to matters of fact."

As to the general proposition that a judge

is precluded from instructing about the credibility of a witness, or any matter of fact, see *People v. McNamara*, 94 Cal. 509, 29 Pac. 953; *People v. Casens*, 90 Cal. 383, 27 Pac. 300; *People v. Travers*, 88 Cal. 233, 26 Pac. 88; *People v. Fong Ohing*, 78 Cal. 189, 20 Pac. 396; *People v. Dick*, 84 Cal. 663; *McMinn v. Whelan*, 27 Cal. 829; *People v. Stanton*, 106 Cal. 142, 89 Pac. 525; *People v. Choyanski*, 95 Cal. 648, 80 Pac. 791. Instructions about the credibility of a defendant as a witness are, no doubt, sometimes given through habit, or to round out a charge; but, considering the many expressions of opinion and decisions above referred to, it is difficult to logically attribute the giving of any instruction whatever on the subject to anything else than a purpose to expressly disparage a witness before a jury,—the very thing that a court has no authority to do. However, if the language used be kept well within the general terms of the instruction in the *Cronin* Case, this court, for the reason that has been so frequently given, will not, on account of such language, reverse the judgment; but when the language used is such as to strongly suggest to the jury that in the case then before them the defendant testified falsely, or to intimate that such is the opinion of the court, then the judgment cannot stand. And in the case at bar we think that the language used, as was said in *People v. Murray*, supra, tended to "lead the jury to believe that the court thinks the defendant in the particular case on trial to be unworthy of belief." There was considerable said in the charge about the defendant's testimony. The jury was called upon to consider "what he said," and "what he didn't say"; and they were finally told: "In weighing his testimony you are to consider what he has at stake. You are to consider the temptations that may be brought to bear upon a man in his situation to tell a falsehood for the purpose of inducing you to acquit him, or to disagree." This was going far beyond the general platitudes of the instruction in the *Cronin* Case. It is difficult to see how it was intended for anything else than an argument against the truthfulness of appellant's testimony. Why were the jurors warned against the temptation that appellant was under to cause them, by his false testimony, to disagree? Why was anything said about disagreement before the case had been submitted to the jury? The suggestion at that time of a disagreement was a suggestion that at least some of the jurors would, or ought to, be in favor of a conviction. Indeed, it is almost impossible to conceive how the jury could have failed to understand that the opinion of the court was adverse to the credibility of the appellant. And where the language used by a court in commenting on the testimony of a defendant is materially different from that used in the *Cronin* Case, and we cannot see that the difference has not been prejudicial, the

judgment must be reversed. An instruction on the subject that is kept within proper limits is of no real benefit to the prosecution, and therefore unnecessary; if pushed beyond those limits, it is erroneously prejudicial to the defendant. Justice would therefore be more surely accomplished if no instruction at all were given, and the credibility of the defendant were left entirely to the jury. The correctness and justice of such a course has been frequently pointed out by this court; and if it were followed, there would be no difficulty on the subject.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; HENSHAW, J.

#### PURSER & EAGLE LAKE LAND & IRRIGATION CO. et al. (Sac. 83.)

(Supreme Court of California. Jan. 28, 1896.)

EVIDENCE AS TO ACTION OF DIRECTORS OF CORPORATION—MORTGAGES—WHEAT CONSTITUTES.

1. An instrument, in form a certified copy of a resolution by the board of directors of a corporation, duly attested by the signatures of the president and secretary, under the corporate seal, ratifying the execution of a mortgage, and sent to the mortgagee, is presumably the act of the corporation, and admissible in evidence to prove the ratification, without proof of the loss of the corporate record of such resolution.

2. An instrument reciting that defendant, to secure a certain indebtedness to plaintiff, conveys to him certain land, and that the agreement is on the express condition that, if defendant conveys to plaintiff certain other land, the instrument shall be void, and that, when defendant shall have conveyed to plaintiff the land, he shall pay defendant a certain sum, and, after defendant has made certain improvements on the land, plaintiff shall pay him a further sum, is a mortgage, entitling plaintiff to foreclose on default in payment or conveyance of the other land, without demand for such conveyance, or tender of the price to be paid thereon.

Department 1. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by Edward T. Purser against the Eagle Lake Land & Irrigation Company, a corporation, and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Goodwin & Goodwin, J. E. Pardee, and Spencer & Raker, for appellants. Shinn & Shinn and F. A. Kelley, for respondent.

VAN FLEET, J. Action to foreclose a mortgage given by defendant, Eagle Lake Land & Irrigation Company, to secure a promissory note of the corporation. Judgment was for plaintiff, and defendants appeal therefrom, and from an order denying them a new trial.

1. It is claimed that the finding that the corporation executed the mortgage in suit is not sustained by the evidence. This is based upon the contention that no authority was shown in the officers of the corporation to ex-

ecute that instrument, and that there was no sufficient evidence of ratification of their act. The original instrument was shown to have been lost, and a certified copy of the record thereof in the county recorder's office was introduced in evidence. From this copy it appeared that the instrument had been signed and acknowledged in due form by the president and secretary of the corporation, but it did not appear that the seal of the corporation had been affixed thereto. No proof was offered to show that the seal was attached to the original instrument, nor was there evidence tending to show any antecedent authority by the corporation for the execution of the mortgage; but plaintiff produced, and was permitted, against the objection of defendants, to put in evidence an instrument purporting to be a ratification of the execution of the mortgage. This instrument was, in form, a certified copy of a resolution by the board of directors of the corporation, duly attested by the signatures of the president and secretary, under the corporate seal. It recites that the resolution was unanimously adopted, at a special meeting of the board called for the purpose, refers to and identifies the note and mortgage in suit and certain other notes, and resolves that the execution of said instruments was "for the best interests of said corporation, and each, every, and all of said acts are hereby ratified and confirmed, and are hereby declared to be the acts of this corporation, with the full and unqualified approval of the directors of this corporation." The objection was, not that this paper, if established, did not show a ratification, but that its contents could only be competently proven by the production of the record thereof in the books of the corporation, or after a showing that no such record had been kept. We think the resolution was properly admitted. It was shown that it had been furnished to plaintiff by the secretary of the corporation, and it was authenticated by the corporate seal. It was, therefore, presumptively the act of the corporation, and admissible in evidence as such; and, in the absence of any countervailing proof, its recitals were binding upon the corporation. *Hawley v. Paving Co.*, 106 Cal. 337, 39 Pac. 609; *Ditch Co. v. Zellerbach*, 37 Cal. 597; *Underhill v. Improvement Co.*, 93 Cal. 300, 28 Pac. 1049.

2. It is further contended that, assuming the execution of the mortgage or instrument in suit to have been competently proven, it is not, in fact, a mortgage, but an executory contract for the sale and purchase of land; and that, as such, the plaintiff did not make a case entitling him to recover thereunder, for the reason that he failed to show that he had tendered the balance of the purchase price of the land and made demand for a conveyance, and that the defendant corporation was, consequently, not put in default. The instrument recites that the party of the first part, the corporation, "is justly indebted to

the party of the second part in the sum of \$6,800, United States gold coin, secured to be paid by a certain promissory note," and then follows a copy of the note; that "for the better securing of the payment of the said sum of money so secured to be paid by the said promissory note, with interest," etc., the corporation grants, bargains, sells, and conveys to the party of the second part (the plaintiff here) certain lands, describing them. It is then provided "that these presents are upon this express condition: that if the said party of the first part shall, on or before March 1, 1893, convey or cause to be conveyed to the said party of the second part, by good and sufficient deed, free from all incumbrances," certain described lands (other than the mortgaged lands), containing 680 acres, together with a deed to sufficient water from the irrigation system of the corporation, at certain stipulated annual rates, to perpetually irrigate said land, "then, in that case, these presents and the estate hereby granted shall determine and be void." It is further provided "that, when said corporation shall have conveyed said 680 acres of land to said party of the second part, as aforesaid," the latter shall pay to the corporation the further sum of one dollar per acre for the 680 acres; that the corporation "shall grub, clear, burn, and remove the brush from said 680 acres of land, and break and plow said land" in a manner to make it suitable for seeding and cultivation; and that, upon the completion of such work, the plaintiff shall pay the corporation the additional sum of four dollars per acre for the 680 acres, on demand, in a manner therein provided. It is then finally provided that, in case the corporation makes default in the conveyance of the land as provided, then plaintiff is empowered to foreclose, and to sell the mortgaged premises, and out of the proceeds pay the principal and interest of said note, with costs, charges, and attorneys' fees, etc.

Regarded in its entirety, we think this paper was clearly a mortgage. It was designed to serve a double purpose, perhaps, but its primary purpose was to secure the indebtedness due the plaintiff. It gave the corporation the option of liquidating that indebtedness by the conveyance of certain lands and water rights, it is true; but it is not clear that it conferred upon plaintiff any corresponding right to enforce such conveyance in the event the corporation failed to exercise its right to make it. Assuming, however, that it did, it clearly gave plaintiff his election between such remedy and that of foreclosure,—upon the default of the corporation to either make such conveyance or pay the indebtedness. Nothing remained for plaintiff to perform to put the corporation in default. It is said he should have tendered the balance of the purchase price, and demanded deeds of the land and water, before suing. But we fail to discover wherein, under the peculiar provisions of the contract, there was

any balance of purchase price due. All of plaintiff's money was up which he was required to put up until a conveyance of the land and the water right, when, and when only, he was required to pay an additional dollar per acre, and upon certain other conditions an additional four dollars per acre. These conditions were wholly independent, and plaintiff was not required to pay or tender such further payments until after the making of the conveyances. The giving of the deeds and the payments of the additional acreage were in no sense contemporaneous or dependent covenants. The corporation was in default when it failed to either convey the land and water or pay the indebtedness within the stipulated time, and plaintiff was then entitled to foreclose. The recitals in the instrument of ratification in no way added to or detracted from the terms of the mortgage, or in any way limited the construction to be put upon them. We think the evidence fully supports the findings, and the judgment and order must be affirmed. It is so ordered.

We concur: GAROUTTE, J.; HARRISON, J.

**CALIFORNIA SAVINGS & LOAN SOC. v. HARRIS. (Sac. No. 65.)<sup>1</sup>**

(Supreme Court of California. Jan. 28, 1896.)

**CORPORATIONS — REQUIRING FILING OF ARTICLES OF INCORPORATION AND COPIES—RIGHT TO SUE—PLEA IN ABATEMENT.**

1. Civ. Code, § 296, requires every corporation to file its articles of incorporation in the county of its principal place of business, and a certified copy in the office of the secretary of state. Section 299 provides that it shall file "a copy of the copy of its articles of incorporation filed in the office of the secretary of state, duly certified by such secretary of state," in the office of the clerk of any county in which it holds any property, and, further, that it shall not maintain or defend any action in relation to such property "until such articles of incorporation, and such certified copy of its articles of incorporation, and such certified copy of the copy of its articles of incorporation, shall be filed at the places directed by the general law and this section." *Held*, that a certified copy of the copy on file with the secretary of state was the only one required by section 299 to be filed in counties because property was there situated.

2. The failure of a corporation to file a copy of its articles of incorporation in a county where it has property, and in which it brings an action, as required by Civ. Code, § 299, does not affect its cause of action, and can only be taken advantage of by plea in abatement.

3. The provision in Civ. Code, § 299, that a corporation "shall not maintain" any action until it complies with the terms of such section, does not prevent it from commencing an action, but suspends its right to maintain it if proper objection is made; and where it complies with the statute after the commencement of an action, but before the filing of a plea in abatement, the latter should be overruled.

Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Action by the California Savings & Loan

Society against Harris. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Larew and W. C. Wallace, Jr., for appellant. J. F. Cowdery and Francis A. Fell, for respondent.

HARRISON, J. Plaintiff is a corporation, whose principal place of business is the city and county of San Francisco, and commenced the present action for the foreclosure of a mortgage that had been assigned to it. The mortgage was executed October 18, 1888, upon lands which at its date were situated in that portion of the county of Fresno which was afterwards included in the county of Madera. The complaint was filed in the county of Madera September 6, 1893, and on April 25, 1894, the defendant Harris filed an amended answer, in which he set up as a separate defense "that said plaintiff did not file in the office of the county clerk of the county of Madera its articles of incorporation, a certified copy of its articles of incorporation, and a certified copy of the copy of its articles of incorporation, as required by section 299 of the Civil Code, prior to the 6th day of January, 1894." The cause was tried by the court, and judgment rendered in favor of the plaintiff. Upon the matter set forth in the foregoing defense, the court made findings in the same terms as it was pleaded. The defendant has appealed upon the judgment roll, and urges in support of his appeal that, inasmuch as the plaintiff had not filed a certified copy of its articles of incorporation in the office of the county clerk of Madera county prior to the commencement of the action, it was not entitled to judgment.

Section 299, Civ. Code, requires every corporation to file in the office of the county clerk of any county in the state in which it holds any property, except the county where the original articles of incorporation are filed, "a copy of the copy of its articles of incorporation filed in the office of the secretary of state, duly certified by such secretary of state," and declares, as the penalty for failure to comply with this requirement, that "any corporation failing to comply with the provisions of this section shall not maintain or defend any action or proceeding in relation to such property, its rents, issues or profits, until such articles of incorporation, and such certified copy of its articles of incorporation, and such certified copy of the copy of its articles of incorporation, shall be filed at the places directed by the general law and this section." The last clause of this sentence shows that the previous clause is to be construed distributively, and that the documents therein named are to be filed at the places required therefor, respectively. As section 296, Id., requires the original articles of incorporation to be filed with the county clerk of the county in which the principal business of the company is to be transacted, and a certified

<sup>1</sup> Rehearing denied.

copy of these articles with the secretary of state, and, as the principal place of business of the plaintiff herein is in the city and county of San Francisco, it is evident that the only document referred to in this portion of section 299, which is required to be filed with the county clerk of the county of Madera, is the copy of the copy of its articles of incorporation certified by the secretary of state.

The failure to file this certified copy does not impose upon the corporation a loss or forfeiture of its property, or impair or deprive it of any cause of action or defense it may have in reference to such property. A previous filing of the certified copy is not a fact essential to the cause of action, or an element constituting the plaintiff's right of action; and the omission of such an averment in the complaint is not a ground of demurrer (*Mining Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222), or for the reversal of a judgment (*Labory v. Orphan Asylum*, 97 Cal. 270, 32 Pac. 231), and consequently is not a jurisdictional element in the suit. Nor does such failure afford to the other party any defense to the cause of action upon which a suit has been commenced, but is merely a special defense, in the nature of a plea in abatement (*Bank v. Tibbits*, 80 Cal. 68, 22 Pac. 66), by which the right of the plaintiff to maintain the action is suspended "until" the statute is complied with, and is subject to the same rules of pleading as are other pleas in abatement. Being matter merely in abatement, it is a defense which may be waived by the defendant, and which is waived by him unless it is affirmatively pleaded.

Pleas in abatement, or dilatory pleas, have never been favored, and are to be strictly construed. *Tooms v. Randall*, 3 Cal. 438; *Larco v. Clements*, 86 Cal. 132. "The party pleading them relies on technical law to defeat the plaintiff's action, and is held to a technical exactness in his pleading." *Thompson v. Lyon*, 14 Cal. 89. Matter in abatement of the plaintiff's action must exist at the time of filing the plea. A plea of nonjoinder of a party plaintiff is unavailing, unless at the time it is made such party can be joined as a plaintiff. 1 *Saund.* 291a. A plea of a pending suit is ineffective unless the former suit is pending at the time the plea is filed. *Pew v. Yoare*, 12 Mich. 16. In *Moore v. Hopkins*, 83 Cal. 270, 23 Pac. 318, it was held that the effect of such a plea was obviated by the dismissal of the former suit at any time after the plea had been filed, and before the trial. A statutory defense which does not affect the cause of action, and which is limited by its terms "until" the removal of the grounds upon which it is authorized, is to be construed with the same strictness. The act of April 1, 1876 (St. 1875-76, p. 729), provided that a banking corporation should not maintain or prosecute any ac-

tion until it had filed and published the statement therein required. In *Bank v. Henderson*, 101 Cal. 807, 35 Pac. 899, it was held that this provision did not deprive the plaintiff of its right of action, and that, as the defense was available only "until" the statute had been complied with, a repeal of the statute pending the action took away the defense, and that a judgment which had been rendered in disregard of such defense would not be reversed where the statute was repealed pending the appeal from such judgment. The defense which is authorized by section 299 does not confer any right upon the defendant, and is authorized for the purpose of enforcing a compliance by the plaintiff with a statutory requirement. It is limited by its terms "until" such compliance has been had, and, when its object has been effected, its terms prescribing a penalty should be strictly construed, and in favor of the corporation. At the commencement of this action the plaintiff had not filed the certified copy with the county clerk of Madera county, but it did file it with that officer several months before the defendant filed his amended answer, setting up this defense, so that at the time this defense was pleaded by the defendant the plaintiff had complied with the statute. The defense pleaded by the defendant was therefore unavailing to him to prevent the plaintiff from thereafter maintaining the action. Section 299 does not declare that the plaintiff shall not commence an action in any county unless it has filed a certified copy in the office of the county clerk, but merely declares that it shall not maintain an action until it has filed it. To maintain an action is not the same as to commence an action, but implies that the action has already been commenced. "The verb 'maintain,' in pleading, has a distinct, technical signification. It signifies to support what has already been brought into existence." *Moon v. Durden*, 2 Exch. 30. The expression in the opinion in *Byers v. Bourret*, 64 Cal. 73, to the effect that the provision of section 2468, Civ. Code, must be complied with before the commencement of the action, was not involved in the case then before the court. That section provides that an action cannot be maintained by the partnership until the publication of the certificate therein referred to has been made for four weeks, and it appeared at the trial of that case that the publication of the certificate had been commenced only one week prior thereto. If the completion of the publication had been essential to the commencement of the action, there would have been no occasion for any discussion respecting its publication subsequent to the commencement. The judgment is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

ROOT v. FAY.

(Supreme Court of Arizona. Jan. 23, 1896.  
COMMISSION OF REAL-ESTATE AGENT—PLEADING—  
DIRECTING VERDICT.

1. A contract to pay a commission on a sale of property may be made through an agent, and proof of one so made will sustain an allegation that it was made by the principal.

2. Where the testimony for a plaintiff is insufficient to sustain a verdict for him, if one should be returned, the court should direct a verdict for defendant.

Appeal from district court, Mohave county; before Justice John J. Hawkins.

Action by Harley Fay against R. T. Root. Judgment for plaintiff, and defendant appeals. Reversed.

Herndon & Norris, for appellant. Reddy & Campbell and Stewart & Doe, for appellee.

BAKER, C. J. This is an action to recover \$5,000 as commission for the sale of mining property. The plaintiff had judgment, and defendant appeals. The plaintiff made his contract with one J. H. Mathews, and his theory is that Mathews was the agent of the defendant in and about the purchase of the property. The record is greatly incumbered with objections and exceptions on the part of the defendant to the rulings of the court in the admission of testimony. They are all based upon the idea that the plaintiff could only show a contract direct with the defendant, but it is elementary that whatever a person may legally do himself he may legally do by the hand of another. Neither is it an objection that the pleadings do not disclose the agency, for it is the theory of the law that the act of the agent is the act of the principal. The principal may, therefore, be declared against direct.

The whole of the evidence is substantially as follows: The plaintiff made a contract with one J. H. Mathews to the effect that if he (plaintiff) induced the owners of certain mines situate in the White Hills, Mohave county, Ariz., to sell the same on a basis of \$200,000, the plaintiff was to have \$10,000 commission; or, if he had anything out of which to secure a trade for the property, he was to have \$5,000. The plaintiff went to San Francisco and obtained an option upon the property for 12 days from the owners, and placed the owners and said Mathews in communication with each other. There was frequent telegraphic communication between plaintiff and Mathews about the property. After making this contract Mathews went to Denver, where the defendant, Root, lived. Root came into the territory and examined the property. One of the owners (Schaefer) received a telegram at San Francisco, Cal., from Kingman, Ariz., signed J. H. Mathews, requesting him to go to Los Angeles, Cal., and meet Mathews. Upon arriving in Los Angeles, he was met by one C. W. Barry, who said, "We are Mathews," and introduced him to Root. Root had accompanied Barry

to California, but denied all knowledge of the telegram. The sale of the mines to the defendant was consummated at that time. Root, when asked to pay plaintiff, admitted that plaintiff had spent money in the matter, but denied that he was responsible for the commissions.

Giving to this testimony full scope, and every fair inference, it is clearly insufficient to establish that Mathews was the agent of Root. There is no question but that an agency may be implied from the acts and conduct of the parties (Whart. Ag. §§ 44, 121); but it is not at all clear to us upon what act or series of acts, or conduct, such an inference can reasonably be drawn in this case. The isolated fact that the defendant went to Los Angeles, Cal., in company with one Barry, and met one of the owners (Schaefer), who had received a telegram signed by Mathews to also go to Los Angeles, is not a convincing circumstance, and that is the strongest circumstance in the whole case.

At the close of plaintiff's case the defendant moved the court to direct the jury to return a verdict in his favor. The motion was denied. We think it should have been granted. The practice of directing a verdict in a proper case has the advantage of saving expense to the litigants and insuring certainty in the application of the law to the facts. Applying the test, and perhaps the best test, for the exercise of this power, would the verdict be permitted to stand if one was returned for the plaintiff? We think the jury should have been instructed to find for the defendant. The judgment is therefore reversed, and a new trial ordered.

ROUSE and BETHUNE, JJ., concur.

SALCIDO v. GENUNG.

(Supreme Court of Arizona. Jan. 23, 1896.)

EJECTMENT—WHEN MAINTAINABLE—CONVEYANCE OF INTEREST.

One who has disposed of his estate in land cannot maintain ejectment against a third person for its possession.

Appeal from district court, Maricopa county; before Justice A. C. Baker.

Action in ejectment by Charles B. Genung against Ferman Salcido. Judgment for plaintiff, and defendant appeals. Reversed.

Millay & Bennett, for appellant. Moss, Fitch & Campbell, for appellee.

BETHUNE, J. This is an action of ejectment for the possession of the N. E.  $\frac{1}{4}$  of section 16, township 1 N., range 2 E., G. & S. R. B. & M., Maricopa county, by appellee, Charles B. Genung, who was the plaintiff in the court below, and who alleges in his complaint that, ever since the 1st day of October, 1884, and long prior thereto, he and his grantors and predecessors in interest have

been entitled to the possession, and, until the ouster herein complained of, were in the actual, peaceable, and quiet possession, and that appellee is now entitled to the possession of said land. The record shows: That the land in question is a part of the lands reserved by section 1948, Rev. St. U. S., for the purpose of being applied to schools in this territory, and in the state to be erected out of it. That Genung went upon the land in 1885, having "bought the piece from the man who had it," cleared off about 80 acres, fenced it, and subdivided it, and planted it in grain, and built a house upon it, costing in the neighborhood of \$2,000, and lived there with his family. Had all but 20 acres of the land fenced and under cultivation. In the fall of 1889 or 1890 the house burned, and appellee lived on the place in tents until April following, when he put Salcido (appellant here) upon the land, and moved to People's Valley, in Yavapai county, with his family, and has resided there ever since. Quoting the language of appellee, as it appears further on in the transcript: "I put Salcido on the ranch with the understanding that I wanted to sell the ranch. Our agreement was that he was to stay on the ranch until I sold it, and he was to have all he could make off the ranch. I had a big crop of alfalfa there, and 18 or 20 horses; and I reserved the privilege of keeping the horses there, and a few head of steers, until I sold it, and I gave him the use of the place for taking care of it; and I made this further agreement with him, that if he bought water and raised a crop, and if I sold the place while he had a crop growing upon it, if he had to get off, I agreed to pay him a reasonable remuneration for the expense that he had been put to. He went on the ranch in pursuance of these agreements." "I cannot remember when was the first time I ever heard of his making any adverse claim to it, or claiming it for himself; but I sold the place and gave Mr. Goldman an order for it, and he went and presented the order, and Salcido ignored it. That was a little more than a year ago. I think it was some time in 1894, and this is the first time that I had notice of any assertion of title in Salcido." And, further on, on cross-examination: "I have had no cattle or stock on that place since the fall of the year I left there. I have not had anything off the place since then. I have not done anything on the place since then." Jensen, a witness for appellee, testified that he had a power of attorney from appellee to sell the place, and had two conversations with appellant in reference to selling the place,—one conversation about four years before the trial, in which Salcido said Jensen could dispose of the place at any time, that he (Salcido) had no lien upon it, that Mr. Genung was a friend of his, and that a ranch would not stand between him and a friend at any time; and the other con-

versation, about two years before the trial, in which Salcido said, "If the buyer [seller?] was willing to give possession, he was." This is all the material evidence on the part of appellee, and is not contradicted by appellant in any material point, except that he did not go upon the land as a tenant of Genung, or under the agreement as testified to by Genung, but went there as an employé, at \$1.50 per day for every day that he should be on the place; that Genung had never paid him anything for taking care of the place, and that for the last three years he (Salcido) had kept the place for himself; that before that time he had asked Genung for pay, but since then had not done so, but claimed the place for himself. It was admitted that the improvements on the place were assessed for the years 1890 and 1891 to Genung, and sold in the years 1891 and 1892, for taxes, to the territory, and were not redeemed, and a deed made thereof to the territory.

Without considering at length the questions involved in the fact that the land in controversy is school land, or any other kind of public land, to which propositions appellant has directed the strength of his argument, we do not perceive how Genung could have any standing as a party to this action, after he had given his testimony at the trial. He swore that he had sold the land in question to Mr. Goldman a little more than a year before the trial, and several months before beginning this action, and the record nowhere discloses the fact of a retransfer of the property to him, or that any right to its possession was in him at any time after his transfer to Goldman. "The privity of estate upon which the plaintiff relies for a recovery is destroyed by showing that he has conveyed his estate, or that it has been extinguished in any other mode." *Holden v. Andrews*, 38 Cal. 119. We think this fact is decisive of the case, and that judgment should have been rendered for defendant upon the evidence adduced at the trial by the appellee or plaintiff. The judgment of the lower court is reversed, and the case remanded, with direction to the lower court to enter judgment for the defendant, with his costs.

ROUSE, J., concurs.

HAWKINS, J. I concur in the reversal.

#### MITCHELL v. TACOMA RAILWAY & MOTOR CO.

(Supreme Court of Washington. Jan. 30, 1896.)

STREET RAILROAD—INJURY TO CHILD AT CROSSING—CONTRIBUTORY NEGLIGENCE—OPINION OF PHYSICIAN AS TO FUTURE EFFECT OF INJURY—EVIDENCE OF SURROUNDINGS—EXCESSIVE RECOVERY.

1. In an action to recover for an injury sustained by plaintiff, a child of tender years, by being run over by a street car, it was not error to



refuse to charge that, if she attempted to cross the street and track without looking for approaching cars, she was guilty of contributory negligence, and could not recover.

2. The opinion of a physician, based on the present condition of a plaintiff in an action for personal injuries, a child, as shown by her own testimony, is competent to show the probable results of the injury in the future.

3. Evidence is admissible to show the noise made by the cable of a street railway at the time a plaintiff started to cross, and was struck by a car, and injured.

4. A judgment for \$30,000 for personal injuries to a girl eight years of age is excessive, and will be reduced to \$12,000, that being the amount fixed by a former jury.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Edna L. Mitchell, by her guardian ad litem, Emily H. Mitchell, against the Tacoma Railway & Motor Company. Judgment for plaintiff, and defendant appeals. Modified.

Crowley, Sullivan & Grosscup, for appellant. Ben Sheeks, for respondent.

HOYT, C. J. This action was brought to recover for personal injuries to the plaintiff, caused by being struck by one of the cars of the defendant. The trial resulted in a verdict for the plaintiff for \$30,000, upon which, after a motion for a new trial had been made and denied, judgment was duly entered.

Several errors are assigned as reasons for the reversal of this judgment. We will consider them in the order in which they are set out in the brief of appellant. The first one relates to the sufficiency of the evidence to sustain the verdict. It is claimed that there was such an absence of testimony to sustain the allegations of the complaint that the court committed error in refusing the request of the defendant for a directed verdict in its favor. The testimony is too voluminous to be set out in this opinion, and it would serve no good purpose for us to say more than that there was, in our opinion, evidence introduced from which the jury was authorized to find the necessary facts to sustain a verdict. The preponderance of testimony may have been to the contrary; but that fact, if fact it was, would furnish no reason for reversing the judgment. If there was any substantial conflict in the evidence, it was the right of the jury to weigh it, and its decision thereon will not be disturbed for the reason that, in the opinion of this court, such decision was against the weight of evidence.

As a further reason why there should have been a directed verdict for the defendant, it is claimed that the uncontradicted testimony showed that the plaintiff was guilty of contributory negligence; but, in our opinion, such circumstances were disclosed by the proofs as made it a question of fact for the jury, and not one of law for the court, to determine as to whether or not the plaintiff was guilty of contributory negligence.

The third assignment of error is founded

upon the second instruction given by the court to the jury. Such instruction was in the following language: "The same degree of care and caution is not required of a child of tender years as of an adult, and greater caution is required toward a child than toward one of mature years, as the age and capacity of the child may appear to require at the time. It is the duty of those operating street cars to exercise diligence and caution, especially at street crossings, where people are known to be frequently passing." It is possible that this instruction might have misled the jury, if no other had been given in relation to the same subject; for, while it probably does not misstate the law, it might have had a tendency, if given without qualification, to have unduly emphasized the duty of the defendant to the plaintiff as a child of tender years. But, at the request of the defendant, instruction No. 11 was given, as follows: "You are instructed that the defendant company was only required to use ordinary care and caution to prevent injury to the plaintiff, and the corresponding duty rested upon the plaintiff to exercise ordinary care and caution to prevent injury to herself; the jury, in this connection, taking into consideration her knowledge of the operation of the cars, and her familiarity therewith, and the extent of her capacity and discretion,"—the effect of which must have been to have prevented the jury from giving any undue weight to said instruction No. 2.

The fourth assignment is founded upon the refusal of the court to comply with the request of the defendant, and give the following instruction to the jury: "You are also instructed you cannot find any negligence against this defendant for any act occurring after the girl was first struck. After she was struck by the car, the undisputed evidence shows that the car was stopped as soon as it could be done by the gripman." Upon the theory of the defendant that the evidence showed that the gripman was paying attention to his business, so that the brake was applied at the earliest possible moment after the danger to the plaintiff could have been known to him, there would be force in the contention that it was entitled to this instruction; but the theory of the plaintiff was that the gripman was not attending fully to his duty and that for that reason the brake was not applied as soon as it should have been, and the evidence was such that it was for the jury to determine what was proven; and, that being so, and it being within the province of the jury to find that the brake was not applied as soon as it should have been, defendant was not entitled to the instruction. This assignment of error is further founded upon the refusal of the court to give requested instructions numbered 8, 9, and 12. What we have said as to the instruction above set out will apply to instructions numbered 8 and 9, and it is not necessary to further discuss the effect of the refusal to give

them. Instruction No. 12 was as follows: "You are instructed that the undisputed testimony discloses that Edna Mitchell knew that the cars of the defendant company frequently passed along Thirteenth street across Tacoma avenue. If she attempted to cross the street over the track of the defendant without looking to see whether there was a car approaching, she was guilty of contributory negligence, and cannot recover. And this is likewise true whether she was actually attempting to cross the street, or was moving back and forth thereon, across or about the tracks of the defendant." To reverse the judgment for refusal to give this instruction would require us to hold, not only that it was the duty of an adult to look in each direction for a car when about to cross the track of a street railway, but to apply the same rule to a child of tender years. We are not willing to do this. To hold that a child of the age of plaintiff would be guilty of contributory negligence if it failed to look for a car before crossing a street railway, would be to practically refuse any relief for an accident to such a child caused by a passing car, however great the negligence of those operating it. The refusal to give this instruction did not constitute reversible error. Especially is this so in view of instruction No. 4, which was given at the request of defendant, and was as follows: "If you should find that Edna Mitchell saw the car approaching, and got upon the track of the defendant believing she had sufficient time to cross the same before the car would reach her, the act was simply an error of judgment on her part, and she was guilty of contributory negligence, and cannot recover."

The fifth allegation of error is founded upon the ruling of the court in permitting the witness Hodge to testify as to the distance in which a car could be stopped upon a level. It is claimed that it was error to allow this witness to testify as to that subject and other subjects relating to the conditions under which, and time within which, a car could be stopped, for the reason that he was not shown to have sufficient knowledge to authorize him to testify upon these subjects. But, in our opinion, he was so qualified that his evidence was competent, and its weight, after the degree of his knowledge had been tested by cross-examination, was for the jury. It is also claimed that the court erred in allowing Dr. Libby to testify as to the supposed condition of the plaintiff as indicated by her testimony at the trial. This was the question which the witness was allowed to answer: "Assuming that testimony [referring to the testimony of plaintiff] to be true, doctor, what, in your opinion, would be the future results, or what does that tend to show?" The objection to this testimony was founded upon the claim that it was allowing a mere possibility to be made an ele-

ment of damage. But every expert opinion as to the future, founded upon present conditions, is, and must necessarily be, uncertain; but the fact that it is so uncertain does not prevent the opinion of an expert being given as to the probable results. The witness Johns was allowed to testify as to the amount of noise made by the cable, and it is claimed that this was error. But we think it was competent for the jury to be put in possession of all the circumstances surrounding the scene of the accident at the time it occurred. The alleged errors in the admission of the testimony of the witnesses Metcalf and Clyde Mitchell are not so clearly pointed out in the brief of appellant as to warrant us in reversing the judgment, even if the evidence had been erroneously admitted, and was material. But we are of the opinion that it was not so material as to warrant a reversal, even if the error founded thereon had been clearly set out.

The only other reason stated by the appellant for a reversal of the judgment is that it was excessive. Upon this question we have carefully examined the testimony contained in the record, and are of the opinion that the claim of appellant is fully sustained; for, while it is true that the evidence shows that the accident was a very severe one, and that the results to the plaintiff were very serious, yet her condition at the time of the trial was not such as to warrant the jury in coming to the conclusion that it would require the large sum of \$30,000 to compensate her for the injuries she had received. There are, in the books, very few cases where judgment for damages to that amount for personal injuries have been allowed to stand. In a great majority of the cases where injuries as severe as those of the plaintiff were sustained, the verdicts which have been allowed to ripen into final judgments have been for sums of not more than one-fourth of the amount of the verdict in this case. In our opinion, the verdict awarded by the jury upon the former trial of the cause was for an amount which would have fully compensated the plaintiff for the injury received. If the question was a new one, we should be of the opinion that even that verdict was for an extreme amount; but, in view of the fact that two juries have found that it would require at least that amount to compensate the plaintiff, we think it our duty to hold that it was within the province of the jury, upon the proofs, to have found a verdict for \$12,000. If the plaintiff elects, within 30 days, to remit \$18,000 from the amount of the judgment, it will be allowed to stand for the remaining amount of \$12,000, and in that amount will be affirmed. If not, it will be reversed, and a new trial awarded.

SCOTT, ANDERS, and GORDON, JJ., concur.

**ELLENSBURG WATER-SUPPLY CO. v.  
CITY OF ELLENSBURG.**

(Supreme Court of Washington. Jan. 23, 1896.)

**CONTRACT OF CITY—CONSTRUCTION.**

Where a city, in consideration of the erection of waterworks, agrees to rent for a certain term a certain number of hydrants, which are to be furnished and placed at the expense of the city, it is not liable for rental of the hydrants on failure to furnish them and direct where they shall be placed, in the absence of any showing that it was called upon to do so by the other party.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by the Ellensburg Water-Supply Company against the city of Ellensburg. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Alfred E. Buell, Ralph Kauffman, and Edward Pruyn, for appellant. John B. Davidson and Graves & Wolf, for respondent.

GORDON, J. The respondent is a municipal corporation organized and existing under and by virtue of the laws of this state. On the 18th of November, 1889, the council of respondent city passed, and on December 21st, 1889, its mayor approved, an ordinance, section 1 of which reads as follows:

"Section 1. The privilege of erecting and maintaining waterworks within the city of Ellensburg is hereby granted to C. A. Sander, his heirs and assigns, for the purpose of supplying the city of Ellensburg and the inhabitants thereof with fresh water for domestic purposes, and for fire and sewerage purposes."

Sections 5 and 6 of said ordinance are as follows:

"Sec. 5. It shall be the duty of the said C. A. Sander, his heirs and assigns, and they shall be required, to place and attach fire hydrants to their mains whenever they may be directed so to do by the said city of Ellensburg, and the same shall be done at the expense of the said city. The same shall be for the use of the city for fire and sewerage purposes, but they shall be kept in repair by the said C. A. Sander, his heirs and assigns, and he shall have the control of such hydrants, for all purposes, except fire and sewerage.

"Sec. 6. It is hereby further ordained that in consideration of the said C. A. Sander, his heirs and assigns, erecting and causing to be erected and maintaining waterworks as aforesaid to supply the said city and the inhabitants thereof with water, the said city of Ellensburg hereby agrees to rent, after the termination of two years as hereinbefore stated, and does hereby rent, from the said C. A. Sander, his heirs and assigns, for the term of twenty-five years, as aforesaid, twenty-five hydrants, and as many more as may be placed in, under the orders of the

city council of the city of Ellensburg, placed along the mains of said waterworks, when constructed as herein specified in such places as may be designated by the city council of the city of Ellensburg, and agree to pay therefor the annual rental of seventy-five (\$75) each. Such rental for the said twenty-five hydrants, to be computed from the expiration of the two years as aforesaid, and the rental for all the hydrants, except the said twenty-five, shall be computed from the time such hydrants are ready for use as a preventative against fire, and shall be at the same rental as the twenty-five aforesaid, for said period of time, but the hydrants, other than the said twenty-five, shall be placed in and taken out, subject to the orders of the city council of the city of Ellensburg, Washington."

The present action was brought to recover the sum of \$1,969.12 for water furnished from January 1, 1893, to the date of the commencement of said action. In its complaint, plaintiff alleges that on January 1, 1893, the said C. A. Sander assigned his interest in said waterworks, and all of his rights and privileges under said ordinance, to the plaintiff. The complaint also alleges that the "said C. A. Sander and his assigns, under the terms of said ordinance, have erected and maintained a system of waterworks for said city of Ellensburg, and have furnished, by means of said waterworks, the said city of Ellensburg, and the inhabitants thereof, with fresh water for domestic purposes, and for fire and sewerage purposes; and the said C. A. Sander and his assigns have at all times done and performed all acts and things which they were required to do by the terms of said ordinance, and have fully complied with all the conditions of said ordinance on their part." Respondent answered, admitting the passage and approval of the ordinance, but denying all other material allegations of the complaint. Said answer also contains certain affirmative defenses, not necessary to be considered herein. A jury was expressly waived, and, appellant having rested its case, upon trial to the court a nonsuit was granted upon respondent's motion; and from such order of nonsuit, and judgment dismissing said action, the case is brought to this court upon appeal. The liability of respondent is predicated upon the provisions of section 6 of said ordinance, whereby the said city "agrees to rent \* \* \* for the term of twenty-five years twenty-five hydrants," etc. Upon the trial in the lower court the evidence disclosed that none of the hydrants had been furnished, and that none had been placed along appellant's mains. Hence we think that there was a failure of proof, and that the nonsuit was properly granted. But appellant contends that it was the duty of the city to furnish Sander with said hydrants, and direct at what points along said mains the same should be placed by him, and that, inasmuch

as they were not furnished by respondent, appellant is entitled to recover precisely the same (and in the same form of action) as if said hydrants had been furnished and placed in the system, and water furnished through them for fire and sewerage purposes. With this contention we cannot agree. It does not appear from the pleading or the proof that the appellant or its assignor at any time offered to put said hydrants in place, or called upon the city to furnish the same, or to designate a place where they should be put in. Assuming, without deciding, that it was the duty of the respondent, under the language of said ordinance, to furnish said hydrants, and that it failed so to do, we think it would nevertheless be the duty of appellant or its assignor to have called upon said city authorities to furnish the same and to direct the places wherein they should be placed; but the mere neglect of the city to furnish them, or to direct where they should be placed, in the absence of any showing that they were called upon to do so, would not entitle the appellant to recover under its complaint in this action. The case of *City Council of Montgomery v. Montgomery Waterworks Co.*, 77 Ala. 248, is not in point, and does not sustain appellant's contention. The variance was fatal. In thus disposing of the case, we are not to be understood as deciding that, as to said 25 hydrants, it was the duty of the city to furnish or pay for the same. As to whether, under the ordinance in question, the duty of furnishing said hydrants was upon the city or upon the appellant, we do not, at this time, express any opinion; it being sufficient, for the purpose of sustaining the judgment of the lower court in the premises, to say that in either case appellant was not entitled to maintain the action. The judgment appealed from is affirmed.

HOYT, C. J., and SCOTT, DUNBAR, and ANDERS, JJ., concur.

**BOLSTER et al. v. STOCKS et al.**<sup>1</sup>  
(Supreme Court of Washington. Jan. 13, 1896.)

**MECHANIC'S LIEN—NOTICE—SUFFICIENCY.**

1. A notice of mechanic's lien, which recites the contract as being to furnish "the hardware and other like material" for a building, will be construed to mean all the hardware for the building, and is sufficiently definite. *Manufacturing Co. v. Wolff*, 31 Pac. 753, 5 Wash. 264, distinguished.

2. A statement, in a notice of mechanic's lien, that claimant furnished under contract "certain goods, wares, and merchandise, being iron \* \* \* and other building material," is too indefinite. *Manufacturing Co. v. Wolff*, 31 Pac. 753, 5 Wash. 264, followed.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Actions by James F. Bolster and others against C. H. Stocks & Co., as contractors,

and J. C. Lighthouse and others, as owners, to foreclose several mechanics' liens. The actions were consolidated. Decrees for plaintiffs, and defendants appeal.

S. A. Callvert, Jerry Netterer, and Black & Leaming, for appellants. Hudson & Holt, Kerr & McCord, Bruce, Brown & Cleveland, J. J. Weisenburger, John R. Crites, Dorr, Hadley & Hadley, Chas. E. Shepard, Albert S. Cole, and J. W. Romaine, for respondents.

**DUNBAR, J.** This case involves the legality of several liens which were consolidated in the court below. Since the appeal was perfected a good many of these cases have been settled by stipulation, and we will proceed to pass upon those remaining unsettled.

The first case is that of *Tacoma Foundry & Machine Company v. C. H. Stocks, J. C. Lighthouse, et al.*, which was No. 645 in the superior court. Two objections are raised by the appellant in this case: (1) That the testimony does not disclose when the contracts were complied with or when the material was furnished; (2) that there was an absence of proof of the date of filing and recording the notice of lien. From a review of the testimony we are satisfied that the referee was warranted in the finding of fact made as to the time when the respondent ceased to furnish the material, and that therefore the court was justified in sustaining the report of the referee. We think the testimony of witness Warner sufficiently establishes that fact. The second contention seems to us to be equally without foundation. Even if the proof of the record had not been sufficient, which we think it was, no objection was made that would call the attention of the court to the particular objection urged here. The objection urged there was: "Objected to as incompetent. It is not a notice of lien. The notice is not, in substance, as required by statute. That it fails to set forth the contracts or contract entered into between Stocks & Co. and J. E. Blackwell." The technical question as to the indorsement of the officer was not called to the attention of the court, and, if it had been, this being an equitable action, the court in its discretion could very properly have given the respondent an opportunity to make the proof required. The judgment in this case will be affirmed.

In the next case,—that of *Whittier, Fuller, et al. v. C. H. Stocks, J. C. Lighthouse, et al.*—it is contended by the appellants that the respondent was seeking to recover for part performance of a contract alleged to have been entered into with Stocks & Co., the contractors of appellant Lighthouse. We do not think that the evidence, fairly construed, bears out appellants' contention, but that the action was brought for but one order, viz. for the glass of the building, and that the second order was not intended to be used in the erection or construction of the building, but was simply intended to be used

<sup>1</sup> For opinion on rehearing, see 43 Pac. 1099.

for the bank fixtures. We think the whole testimony shows that it was a separate, distinct, and independent order, and under a separate contract. It is needless to review all the testimony in the case, but it plainly appears to us, from all the circumstances, including the fact that at the time Mr. Seymour, agent of the plaintiffs, went over the building with the contractors, and checked up the amount of material that had been furnished, for the purpose of making a settlement with the contractors, no mention was made of the glass for the fixtures as belonging in that contract, although it was mentioned that such glass was at the depot, and the further fact that in all the correspondence between Stocks & Co. and the respondents it seems to have been conceded that the second order was an independent order, that the negotiations were evidently based upon that idea. The second proposition, viz. that the court was not justified in finding that the notice of lien was filed in the office of the auditor, is equally as untenable as it was in the other case; for the appellants expressly admitted upon the trial that the notice of lien which was there offered had been filed at the time shown by the indorsement of the auditor, and we are satisfied that it is plainly shown that it was filed for record within the time required by law. As to the time of the record of the lien, that is a matter over which the respondents have no control. They have done what the law requires of them when they file the lien for record. It appears in this case that the attorney's fee was taxed twice, and also that a statutory fee was allowed in addition to the attorney's fee. This court has decided heretofore that a statutory attorney's fee could not be allowed in addition to the fee provided for in a contract. Neither do we think it can be allowed in addition to the fee allowed for the foreclosure. This case will be affirmed on condition that, within 20 days after the filing of this opinion, the respondents remit or consent to the reduction of the judgment to the extent of the statutory fee, and the fee, which was doubly taxed, of \$165; otherwise, it will be reversed.

The next case is that of *Nolton et al. v. C. H. Stocks & Co. and Lighthouse et al.*, and it is claimed by the appellants that the lien in this case falls squarely within that of *Manufacturing Co. v. Wolff*, 5 Wash. 264, 31 Pac. 753, and 32 Pac. 462. In that case, the lien of which this court held to be bad, the statement was that the claimant should "furnish certain windows, doors, mouldings, glass, and lumber for the inside finish of said building." We do not desire to extend the close construction placed on the lien law in the case just cited, and we think that this lien can be distinguished from that one. There, as will be seen from the quotation, there was nothing to indicate that all the windows, doors, moldings, glass, and lumber were to be furnished under the contract, but

the implication, from the use of the word "certain," was rather to the contrary, for "certain windows, doors," etc., by its specific terms, directly negatives the idea that all the windows, etc., were to be furnished. But not so with the case at bar, where the language of the lien is as follows: "That said C. H. Stocks & Co. are the contractors, who, as such contractors and agents of said J. C. Lighthouse, the owner, entered into a contract with said Nolson & Adams Hardware Company, under and by which said Nolson & Adams Hardware Company were to furnish the hardware and other like material for the construction of said 'Lighthouse Block' building, and to be paid therefor upon the furnishing of said material." It seems to us that the language used there could very reasonably be construed to mean all the hardware to be used in the building. Ordinarily, if a contractor was to make the announcement that he was to furnish the material for a building, it would be understood that he was to furnish all the material, and the expression, "other like material," seems to be more superfluous than anything else, although it was probably used to strengthen the idea, which was evidently intended to be expressed, that they were to furnish all of that kind of material. We think a liberal construction of this lien will permit it to stand. Nor do we think that the complaint was so ambiguous that it was difficult to understand, or that it is irreconcilable. There is nothing in the complaint that could mislead the defendants. Under its allegations they could readily determine just what issues they were expected to make and stand upon. We do not think there is anything in the further objection, urged by the appellants, that the lien does not give the name of the wife as one of the reputed owners of the property sought to be charged. It is alleged in the complaint that, at the time of filing the said notice, J. C. Lighthouse and Margaret V. Lighthouse were husband and wife, and were the owners or reputed owners of the land. The case does not fall within the principles announced in *Manufacturing Co. v. Miller*, 3 Wash. St. 480, 28 Pac. 1035, or *Sagmeister v. Foss*, 4 Wash. 320, 30 Pac. 80, 744. The judgment in this case will be affirmed.

In the case of *Underwood & Minturn v. C. H. Stocks & Co., Lighthouse, et al.* (No. 1,203), the language of the fifth clause in the lien notice is that at the request of Stocks & Co. they furnished certain goods, wares, and merchandise, being iron, iron work, galvanized iron, nails, paints, glass, and other building material, which were reasonably worth and of the value of \$1,646.56. This statement, it seems to us, brings this case squarely within the rule announced by this court in the case of *Manufacturing Co. v. Wolff*, 5 Wash. 264, 31 Pac. 753 and 32 Pac. 462, nor do we think that the partially itemized statement in the seventh count in the lien notice makes

the notice any more definite. The itemized statement is as follows:

To C. H. Stocks & Co. direct:	
Material in bank room.....	\$ 448 00
Cornice, iron, nails, galvanized iron	252 41
To Gallup & Weber:	
Galvanized iron work and other material .....	609 45
To A. C. Clausen:	
Paints, oils, and other material....	250 55
To C. H. Stocks & Co. direct:	
Plumbing and other material.....	86 14
Total .....	\$1,646 56

It will be noticed that each one of these items is as indefinite as to quantity as the general notice is, and there is nothing in the first item, viz. "material in bank room," to indicate even the kind of material. We are also satisfied, from an inspection of the record, that the objection urged by the respondents that there were no proper exceptions to the findings of fact and conclusions of law in this case is untenable. The judgment in this case will therefore be reversed, with instructions to the lower court to deny the respondent's petition to adjudge the material furnished a lien upon the building and land of the appellants.

If we have not misunderstood the stipulations in these cases, this comprises all the liens that were before the court for review. The judgment in the first three will be affirmed, as indicated; and the last one, viz. Underwood & Minturn et al. v. J. C. Lighthouse et al., will be reversed.

We concur: HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ.

**BOLSTER et al. v. STOCKS et al.,<sup>1</sup>**  
(Supreme Court of Washington. Jan. 28, 1896.)  
**MECHANIC'S LIEN—NOTICE—INCLUDING ITEMS NOT FURNISHED—OMITTING WIFE'S NAME AS PART OWNER.**

1. A notice of claim for a mechanic's lien which states that under the contract the claimant was "to furnish the lumber, sash, doors, etc.," for a certain building, is sufficiently specific.

2. Including items for materials not actually furnished, in a statement for a lien, by mistake,—the materials being such as a lien could have been claimed for,—will not vitiate the lien for materials actually furnished.

3. The fact that a wife, who has a community interest with her husband in real estate, is not named as owner in a notice of claim for lien thereon, will not defeat the lien, where it does not appear that the claimant knew of her interest, and she is made a party to the action to foreclose.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Actions by James F. Bolster and others against C. H. Stocks & Co. and others. The actions were consolidated. From a decree for plaintiffs, Lighthouse and others appeal. Affirmed.

S. A. Callvert, Jerry Neterer, and Black & Leaming, for appellants. Hudson & Holt,

Kerr & McCord, Bruce, Brown & Cleveland, J. J. Weisenburger, John R. Crites, Dorr, Hadley & Hadley, Chas. E. Shepard, Albert S. Cole, and J. W. Romaine, for respondents.

**DUNBAR, J.** This is the case of the Fairhaven Land Company, Plaintiff and Respondent, v. C. H. Stocks & Co. et al., Defendants (Lighthouse et al., Appellants),—No. 652 in the lower court,—which was one of the consolidated cases under the title of James F. Bolster et al. v. C. H. Stocks & Co. et al., in which cases an opinion was filed in this court on January 13, 1896. 43 Pac. 532. It has been called to the attention of the court that this case was not disposed of in said opinion. The case was considered and decided by the court at the time a decision was arrived at in the other cases, but, through the inadvertence of the writer of that opinion,—who is the writer of this,—the opinion omitted this case.

It is contended by the appellants that the complaint did not state a cause of action, and that the lien notice was not sufficient. The language of the lien notice complained of is "that C. H. Stocks & Co. are the contractors, who, on or about July 1, 1890, as such contractors, made and entered into a contract and agreement by which said Fairhaven Land Company was to furnish the lumber, sash, doors, etc., used in the construction of said Lighthouse Block, at the agreed and contract price of \$2,449.85." We think what we said in the case of Nolton et al. v. C. H. Stocks & Co., and Lighthouse et al., applies directly to this case; and, for the reasons assigned in that case, we hold the lien under consideration here to be good. And we think, also, that the complaint plainly and concisely complies with the provisions of the statute in relation to the foreclosure of liens, and that the pleader has brought himself within its terms. It is no objection to the complaint that it fails to allege that the materials were such as are lienable articles, or of a kind or character to be used in the construction of the building in controversy. If it did so allege, it would only be an allegation of a conclusion of law. When it states the facts, and alleges the kind of materials furnished, the law will determine whether or not the materials so furnished were lienable articles. The term "lumber" is certainly specific enough to furnish the owner with definite information as to the subject-matter of the lien sought to be foreclosed, and we held in the companion cases to this one that the term "other material" had reference to material of the same kind. The lien notice here, which is made a part of the complaint, alleges that this lumber was furnished to be used in the building, and that it was so used.

So far as the amendments to the complaint are concerned, it does not appear from the record that any objection was made thereto, and, even if there had been, it was a matter that was so largely within the discretion of the court that we should not feel like disturb-

<sup>1</sup> For opinion on rehearing, see 43 Pac. 1099.

ing it, unless an injury had been done to the appellants; and there is nothing here to indicate that the appellants were in any way misled, or that their rights were in any way jeopardized, by these amendments.

We think that the testimony fully sustained the findings of the referee, and while it appears that no sash or doors were furnished for use in this building, or at least that there is no evidence that they were furnished, it does appear that lumber was furnished to the amount of the lien claimed; that the items of sash and doors in the lien were a mistake, which was abandoned upon the trial. And such fact will not be allowed to destroy the lienor's claim for the amount of material that was actually furnished, when it does not appear that there was any attempt to deceive, and when it does plainly appear that the amount of the claim was not increased by the statement, and that the items were lienable articles. This court held in *Whittier v. Mill Co.*, 6 Wash. 190, 33 Pac. 393, that the lien is not vitiated where a mere mistake or inadvertency caused items otherwise lienable to be included in the lien. It is evident from the testimony in this case that the claim would have been the same, and the result the same, with the statement in regard to the sash and doors omitted.

It is contended by the appellants that there is no proof as to the character of lumber furnished, or the value of rough or dressed lumber furnished by respondent; that the books of account were not introduced, nor a copy of the account produced, so that there is absolutely no proof under which a judgment for any amount can be predicated. It seems to us that the question of the amount due on the account from Stocks & Co. to plaintiff in this case is settled beyond peradventure by a stipulation which is found on page 300 of the statement of facts. The stipulation is as follows: "It is stipulated and agreed by and between counsel that the several books of entry offered by the plaintiff, the Fairhaven Land Company, in this case, in evidence, contain a correct account of the plaintiff the Fairhaven Land Company's account with C. H. Stocks & Co. for the lumber and material, and that the book shows the amount still due on that account to be \$449.85." It is true that the lien notice does not give the name of the wife as one of the owners or reputed owners of the property sought to be charged, but this does not bring the case within the law announced in *Manufacturing Co. v. Miller* (Wash.) 28 Pac. 1035, nor *Sagmeister v. Foss*, 4 Wash. 320, 30 Pac. 80, 744. All that was held in the first case mentioned was that, in all suits to foreclose liens upon community real estate, the wife was a necessary party defendant; and, in the last, that a claim of lien against a husband and his interest in certain realty, which shows on its face that the claimant has knowledge that the wife has a community interest in the real estate, is defective. This lien claim does not show on its

face that the wife had an interest in the property sought to be charged, but the wife was actually brought in by the pleadings, and made a party to the action. Her rights were adjudicated, and she has no cause of complaint.

There may have been in this case some slight discrepancy between the allegations of the complaint and the proof, on immaterial questions; but it seems evident from the whole case that the material was furnished, and that the lien was filed within the time and in the manner prescribed by law. The amount due is conclusively proven, and the judgment should therefore be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

LOUDEN IRRIGATING CANAL CO. et al.  
v. HANDY DITCH CO. et al.

(Supreme Court of Colorado. Oct. 21, 1895.)

IRRIGATION—DISTRICT COURT—JURISDICTION—RES JUDICATA—CONSTRUCTION OF CONSTITUTION.

1. Sess. Laws 1879, p. 99, § 19, provides that, when any water district shall extend into two or more counties, the district court of the county in which the first regular term after the 1st day of December shall soonest occur shall be the proper court in which proceedings for the adjudication of priorities in appropriating water, and other questions connected therewith, shall be commenced, and that such court shall thereafter retain exclusive jurisdiction until final adjudication is had. Sess. Laws 1881, p. 159, § 34, provides that nothing therein contained shall prevent any person from maintaining an action, theretofore allowed, in any court having jurisdiction to determine any claim or priority of right to water, at any time within four years after the rendering of a final decree under that act, in the water district in which such right may be claimed. *Held*, that the act of 1879 vested exclusive jurisdiction in a particular district court in an irrigation district extending into several counties, and that said jurisdiction was not affected by the act of 1881.

2. After the district court, designated by said act of 1879 has rendered a final judgment in an action fixing the rights and priorities of the parties thereto, such judgment, unless opened in the manner and within the time provided by statute, is res judicata in so far as it determines the rights of the parties thereto, and no party thereto can maintain an independent action in the district court of another county in the same irrigation district to determine his respective rights and priorities.

3. Const. art. 6, § 11, providing that the district court shall have original jurisdiction of all civil causes, both in law and equity, does not give every district court in the state jurisdiction in every cause, without regard to the location of the property or the residence of the parties.

4. The court first obtaining jurisdiction will retain it throughout, as against other courts having concurrent jurisdiction.

Appeal from district court, Larimer county.

Actions by the Handy Ditch Company and another against the Loudon Irrigating Canal Company and others to settle all priorities to the use of water from the Big Thompson river. There was a judgment for plaintiffs, and defendants appeal. Reversed.

Appellees brought separate actions in the district court, which were afterwards consolidated, and this appeal is taken from the decree rendered in the consolidated actions. The complaints are in the nature of bills in equity to adjudicate and settle all priorities to the use of water from the Big Thompson river. It is averred, in substance, that the defendants severally claim appropriations of water from the Big Thompson river prior in point of time to those claimed by the plaintiffs. Plaintiffs allege that said claims are excessive, and are, in fact, junior to the priority of each plaintiff. To these complaints demurrers were interposed upon the following grounds: First, insufficient facts to constitute a cause of action; second, want of jurisdiction of the subject of the action. These demurrers were sustained as to the first ground and overruled as to the second. Thereafter amended complaints were filed. Among the defenses pleaded to the amended complaints are the following: First defense "avers that irrigation district No. 4 did extend, at the time when said district was created by law, and hence hitherto has extended, and now extends, into the county of Boulder, for that a portion of the lands irrigated, from ditches taking water from the tributaries of the Big Thompson, have, from and including the time of the creating of said irrigation district, been situated within the limits of the said county of Boulder; and said irrigation district No. 4 extends into the three counties of Boulder, Larimer, and Weld in said state, and no others. (2) That when said irrigation district No. 4 was created and established, and at all times since, and now, the district court in said irrigation district of the county in which the first regular term after the 1st day of December in each year soonest occurs has been the district court of Boulder county. (3) That heretofore, and on the 21st day of October, 1881, in a certain proceeding in said Boulder county district court, entitled 'In the Matter of a Certain Petition for the Adjudication of the Priorities of Right to the Use of Water for Irrigation in Water District No. 4,' which said suit or proceeding was duly and regularly instituted and then pending in said court, pursuant to an act [here quoting title of act] approved February 23, 1881, Thomas R. Owen, Jr., Esq., was duly and regularly appointed referee of said court in said matter, to whom was referred the statements of claim on file in the said matter, and the matter of taking evidence and reporting the same, making an abstract of the findings of same, and preparing the decree in said adjudication. And said referee in all respects performed his duties, as required by law and the order of court, and took all testimony offered in behalf of any party claiming an appropriation of water for irrigation in said irrigation district, and made report of the same, together with an abstract and find-

ings upon the same, and prepared a decree in said adjudication. That thereafter, and on the 28th day of May, 1883, same being one of the regular juridical days of the May term, A. D. 1883, of said Boulder county district court, said matter came on duly and regularly for final hearing and adjudication upon the report of said referee, as well as upon the exceptions filed in said matter; and after hearing the same the court duly entered in said matter its final adjudication and decree, establishing the priorities of right to the use of water for irrigation in water district No. 4. That all parties interested had due and proper notice of all proceedings had in said matter, as well before said referee as before said court. That the plaintiff, as well as all of the defendants in this suit, were parties to said proceedings in said Boulder county district court, and entered their appearance therein, and made proofs of their priorities. That no appeal was taken from said decree by any party thereto, nor did any party sue out a writ of error to cause said decree to be reviewed by the supreme court; but that said decree is now in full force and effect. That since the date of said decree, hitherto, the waters flowing in the Big Thompson river, as well as in its tributaries, have been apportioned to the several ditches taking water therefrom, by the water commissioner of said water district, pursuant to said decree. And said defendant avers that by virtue of the premises and the statute in that behalf, the said Boulder county district court obtained, and ever since has retained, exclusive jurisdiction, for the purpose of hearing, adjudicating, and settling all questions concerning the priority of appropriations of water between ditch companies and other owners of ditches drawing water for irrigation purposes from said Big Thompson river or its tributaries, within the said water district, and all other questions of law and questions of right growing out of and in any way involved or connected therewith. Wherefore this defendant says that the district court of Larimer county has no jurisdiction of the subject-matter of this action." A demurrer to this defense was sustained by the district court. Other defenses were interposed, but as the opinion of the court is in no way influenced by such defenses, they will not be further referred to.

The following provisions of the state constitution and statutes are necessary to a full understanding of the opinion of the court: "The district court shall have original jurisdiction of all causes both at law and in equity." Const. Colo. art. 6, § 11. "For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within



the same water district, and all other questions of law and questions of right growing out of or in any way involved or connected therewith, jurisdiction is hereby vested exclusively in the district court of the proper county; but when any water district shall extend into two or more counties, the district court of the county in which the first regular term after the first day of December in each year shall soonest occur, according to the law then in force, shall be the proper court in which the proceedings for said purpose as hereinafter provided for, shall be commenced, by the entry of an order appointing a referee in the manner and for the purpose hereinafter in this act provided. Such court shall thereafter retain exclusive jurisdiction of the whole subject until final adjudication thereof is had, notwithstanding any law to the contrary now in force." Sess. Laws 1879, p. 99, § 19. "Nothing in this act or in any decree rendered under the provisions thereof, shall prevent any person, association or corporation from bringing and maintaining any suit or action whatsoever hitherto allowed in any court having jurisdiction, to determine any claim or priority of right to water, by appropriation thereof, for irrigation or other purposes, at any time within four years after the rendering of a final decree under this act in the water district in which such rights may be claimed. Save that no writ of injunction shall issue in any case restraining the use of water for irrigation in any water district wherein such final decree shall have been rendered, which shall effect [affect] the distribution or use of water in any manner adversely to the rights determined and established by and under such decree, but injunctions may issue to restrain the use of any water in such district not affected by such decree, and restrain violations of any right thereby established, and the water commissioner of every district where such decree shall have been rendered, shall continue to distribute water according to the rights of priority determined by such decree, notwithstanding any suits concerning water rights in such district, until in any suit between parties the priorities between them may be otherwise determined, and such water commissioner have official notice by order of the court or judge determining such priorities, which notice shall be in such form and so given as the said judge shall order." Sess. Laws 1881, p. 150, § 34.

E. A. Ballard and H. N. Haynes, for appellants. Willard Teller and A. H. De France, for appellees.

HAYT, C. J. (after stating the facts). After the district court had overruled a plea to its jurisdiction and a plea of res judicata, and before trial, the interposition of this court was sought by an application for the extraordinary remedy by prohibition. This

writ was, however, denied, for the reason that the petitioners had an adequate remedy at law, by appeal or writ of error to the final judgment of the district court, in case such judgment should be against the defendants or either of them. *People v. District Court of Pitkin Co.*, 11 Colo. 574, 17 Pac. 298. The questions of jurisdiction and of res judicata each involve a construction of certain provisions of our irrigation laws and for convenience may be considered together.

The argument of counsel in support of the judgment of the district court may be briefly summarized as follows: The present action is in the nature of a bill of peace, or an action of *quia timet*, and is quite analogous to an action to quiet title to real estate; that the action was permissible in this class of cases prior to the enactment of the irrigation laws of 1879 and 1881; that this suit was commenced within four years next after the statutory decree, and that the statute gives any person the right to bring such a suit at any time within such period; that the district court of Larimer county, in common with all other district courts of the state, was given jurisdiction, by section 11, art. 6, of the state constitution, "of all causes, both in law and in equity"; that the legislature is powerless to take away such jurisdiction, and that it has not attempted so to do; that the ditches involved in this suit are mostly in Larimer county, and nearly all the parties are residents of said county, and the district court of that county offered the most convenient forum for the trial of the present action; that the legislation of this state bears within it evidence of an intention of the law-making body not to limit actions like this to the district court which may have jurisdiction of the statutory proceeding. Reliance is also placed upon section 1786, Gen. St. 1883, p. 580, wherein permission is given the district court or judge to make rules "from time to time during the progress of the case." It is argued that it is evident, from this language, and from the whole tenor of the act, and from the title, that only the statutory proceeding was in the legislative mind. Nothing in the title of the act, it is said, indicated an intention to deprive any court of jurisdiction, and even if such had been the intention of the legislature, such intention should have been clearly expressed in the title, as required by the constitution. The object of the section relating to jurisdiction, it is argued, was to avoid any possible conflict with respect to the proceeding therein provided for, and not to confer, for all time to come, exclusive jurisdiction upon any one court. Again, it is said that the very section relied upon as conferring exclusive jurisdiction refutes the contention, as it provides that the court shall retain jurisdiction "until," etc.; the argument being that the court, in no event, is to retain such jurisdiction after the termination of that proceeding. In opposition to this argument, appellants contend:

That the nineteenth section of the act of 1879, by its terms, vested jurisdiction exclusively in the district court of a particular county, and when any water district shall extend in two or more counties, the district court of the county in which the first regular term after the 1st day of December in each year shall soonest occur shall have such exclusive jurisdiction; the district court of Boulder county being such court, on the admitted facts of this case. The Irrigation act of 1881. It is said, recognized and supplemented the exclusive jurisdiction of one court in the district, as provided by the act of 1879. That this is evidenced from the first section of the act of 1881, providing, as it does, for the filing of a statement of claim by the owner of any ditch "with the clerk of the district court having jurisdiction of priority of rights to the use of water for irrigation in such water district," and by the fourth section of the act, which provides that the owners of a ditch in an irrigation district may present "to the district court of any county having jurisdiction of priorities of right to the use of water for irrigation in such water district, according to the provisions of "the act of 1879." It is urged that this act does not limit the exclusive jurisdiction to the statutory proceeding, but extends to the whole subject-matter of priorities of right to the use of water in such district; that the twenty-second section of the act provides for "application to the court having jurisdiction" by any party not offering evidence originally in the statutory proceeding; that these three sections show, conclusively, a continued legislative purpose to exclude the jurisdiction of more than one court as provided by the act of 1879. As to section 34 of the law of 1881, specially relied upon by appellees, appellants say there are no words therein which, in expressed terms or by implication, repeal section 19 of the act of 1879. The former, in the order here mentioned, it is claimed, provides only that nothing in the act or in the decree rendered under it shall prevent any person "from bringing and maintaining any suit or action whatsoever, hitherto allowed, in any court having jurisdiction to determine any claim or priority, at any time within four years after the rendering of a final decree." It is urged that this language does not confer jurisdiction upon any court, but leaves the jurisdiction as fixed by the pre-existing law, and that it refers to such law so far as this subject is concerned. It is also urged that there are many provisions of the section which clearly show such to have been the legislative intent, if considered in the light of familiar rules of construction. For instance, it is said the continuing force and validity of such decree is for many purposes recognized, and that the legislature could not have intended that any other court of co-ordinate jurisdiction should, under this section, interfere with the distribution of water by the water commissioner under a de-

creed previously rendered in the statutory proceeding; that a contrary construction would permit the several district and county courts to interfere with what had been previously and solemnly determined in the district court of Boulder county, thereby involving the distribution of water in hopeless uncertainty, and the water commissioner, Givens, in inextricable confusion. This intention, it is said, is further manifested by the twenty-eighth section of the act, which provides that, where testimony shall be taken in the statutory proceeding, the same shall be receivable in evidence in any subsequent proceeding; that this language is applicable to the present suit, the legislative understanding being that the action referred to would be pending in the court where the former evidence is on file and readily accessible. Counsel contend that this construction is in accordance with the principle governing courts of concurrent jurisdiction, requiring that the one first obtaining jurisdiction must be allowed to dispose of the controversy without interference from a co-ordinate court, and that the district court of Larimer county was without jurisdiction of the present controversy for any purpose, and for this reason it was not necessary, and would not have been proper, to have applied for a change of venue to the district court of Boulder county, as suggested in the argument of appellees. It is also claimed that the previous decree is *res judicata* of the present controversy; that section 34 of the law of 1881 was not intended to authorize a separate action by a party to the former proceeding to be brought against other parties thereto, but that the intention was simply to afford a concurrent remedy with that already provided.

We have given space to the leading, and, as we think, to all the salient, points in the argument of counsel, for the reason that the questions involved are of great importance, not only to the immediate parties, but also to many persons similarly situated with reference to decrees in other water districts. Questions affecting the economical and orderly distribution of water for the purposes of irrigation in the arid region are not surpassed in importance by any controversies involving the property rights of individuals or communities. This importance is recognized by our state constitution, while the question of priorities, and the economical adjudication of the same, has from the first commanded a large share of legislative and judicial attention. Early in the history of the state, the legislature, finding the ordinary processes of the law and the actions then known to the courts too expensive, and also inadequate to meet the novel conditions incident to the appropriation of water for the purposes of irrigation, enacted what is known as the "Irrigation Statute of 1879," the purposes of which act are concisely stated in its title, viz.: "An act to regulate the use of water for irrigation, and for providing for

settling the priority of right thereto, and for payment of the expenses thereof, and for the payment of all costs and expenses incident to said regulation of use." Laws 1879, p. 94. The main features of this act have withstood the test of experience and criticism, and are still the law of this state. At the next biennial session of the legislature the act was supplemented by such additional provisions as experience had demonstrated to be expedient, if not absolutely necessary to the welfare of our agriculturists, and the quiet, orderly, and economical distribution of water. The latter act is entitled "An act to make further provisions for settling the priority of rights to the use of water for irrigation in the district and supreme courts, and for making a record of such priorities, and for the payment of costs and expenses incident thereto." Laws 1881, p. 142. This act, as its title indicates, supplements and completes the act of 1879. The two together constitute a complete system of procedure, that, in operation, has been found so salutary and free from unnecessary expense as to command the tacit indorsement of all subsequent legislatures. One of the leading, fundamental characteristics of this legislation is a provision for the appointment of a referee in each water district upon application by any party interested; and, in case the judge cannot hear the evidence, it is made the duty of such referee to take testimony and present a decree to the district court determining the priorities to the use of water in the particular district in which he is acting. The referee, before proceeding to take testimony, is required to give notice by publication, and also by posting notices of the time and place appointed for the taking of testimony. The party or parties moving such an adjudication are also required to cause a printed or written copy of the notice, published as aforesaid, to be served on every person, association, or corporation shown, by the statement of claim on file, to be claimants of a right to use water in such water district. The acts provide a complete system of procedure, with a right of appeal by any party whose rights are adversely affected by the decree, making only those parties who "represent one or more ditches, canals, or reservoirs affected in common adversely to the interests of appellants" (Laws 1881, p. 156, § 27); thereby rendering it unnecessary to bring all parties into the appellate court, and requiring only so much of the evidence and proceedings to be certified to as may be necessary to determine the rights of those made parties to the appeal. The acts also provide the manner in which any decree may be opened in the district court at any time within four years after the same shall have been rendered.

If this suit can be maintained, the benefits to be derived from an adjudication of water rights in the manner provided by statute will be of slight avail to protect the rights of water consumers. There can be no misun-

derstanding of the contention of counsel, or of the nature and necessary result of the doctrine announced by the district court; the effect being to declare all statutory adjudications as simply interlocutory, binding upon no one except for the time being, but with liberty to all interested parties to commence a new suit to quiet the title to water rights, although such rights have been adjudicated in the statutory proceeding. Some idea of the expense and labor necessary to take the evidence and formulate a decree in some of our water districts may be gathered from the statement that, in some districts, not only months, but years, have been consumed in doing the necessary work incident thereto; and we unhesitatingly say that a construction which will allow a party to such a proceeding to ignore the result therein reached, and the next day or the next year institute a new action, for the purpose of readjudicating the rights already adjudicated, is so at variance, not only with the general intention and purpose of the acts of 1879 and 1881, but so contrary to the ordinary rules covering decrees of courts, that it ought not to be indulged, if any other reasonable result can be reached. The statutory proceeding is in the nature of an action in rem; and the well understood character and effect of judgments in such actions, as defined by the authorities, throw light upon many of the provisions of Acts 1879 and 1881. *Freem. Judgm. (4th Ed.)* § 120a; *Herm. Estop. & Res. Jud. c. 5*. The doctrine of priority to the use of water for irrigation was not, at the time of the passage of these acts, and is not yet, fully developed. To have given the statutory decree at once the force and effect of a judgment in rem would have been contrary to the best interests of the state, which require an economical use of water in order that the largest acreage may be brought under cultivation. Lands, when first irrigated, require more water than after the soil has become thoroughly saturated by repeated flooding; and the exact amount required to properly irrigate a given tract of land can only be determined by experiment. Hence the necessity for the various provisions of the statute allowing a decree to be opened within certain fixed periods after its rendition. A conclusive adjudication at a time when the practical application of the proceeding was a matter of conjecture might have been disastrous. To guard against results such as these, it is not unreasonable to suppose that the legislature would make some provision. And we think those portions of the statute relied upon by the district court to overthrow the plea of *res judicata*, and to support its jurisdiction, are clearly referable to an intent to provide against the conclusive character of the statutory proceeding for the period of four years, but in no way to interfere with the exclusive jurisdiction of the court first acquiring jurisdiction, or to be construed as giving permission to a party to such an adjudication to ignore the same

and maintain an independent action, as is here attempted. In the opinion of the court the words of the thirty-fourth section, providing that actions may be brought "in any court having jurisdiction," do not repeal the provision of the act of 1879 giving exclusive jurisdiction to a particular district court; but the "court having jurisdiction" is the court "first acquiring jurisdiction," as provided in section 19 of the act of 1879. Therefore, in view of the facts pleaded in the answer and admitted by the demurrer, the district court of Larimer county was without jurisdiction to entertain this action, and the demurrer should have been overruled. We are not called upon to determine, and we do not decide, what the effect would be in a cause commenced in a court other than the one designated by statute, if no proper objection is made in apt time. And we are also of the opinion that the former proceeding, unless opened in the manner and within the time provided by other sections of the act, is res judicata, at least in so far as it fixes the priorities of those who were parties thereto and participated in such proceeding.

But one other matter remains to be considered, viz. the constitutional provision giving the district court "original jurisdiction of all causes both at law and in equity." Const. Colo. art. 6, § 11. This, certainly, cannot be construed as giving every district court in the state jurisdiction in every cause, without regard to the place where the transaction occurred, the location of the property, or the residence of the parties; and, were a contrary construction admissible, it would not avail these plaintiffs, as, under the rule governing courts of concurrent jurisdiction, the one first acquiring jurisdiction will retain it throughout. *Haywood v. Johnson*, 41 Mich. 598, 2 N. W. 926; *Wells, Jur.* (1880) c. 19. "The leading general principle as to concurrent jurisdiction is that whichever court of those having such jurisdiction first acquires possession of a cause will retain it throughout. It has been observed that 'great caution should be exercised lest the powers of these co-ordinate courts should be brought into conflict, as it is apparent the evils of such collision would be of serious magnitude; and the safer, if not the only, course, is that each court shall never suffer itself to indulge in a cause, or in regard to a subject-matter, over which another has exercised its jurisdiction.'" *Wells, Jur.* § 156. The judgment of the district court is reversed, and the cause remanded. Reversed.

**BOULDER & WELD COUNTY DITCH CO.  
et al. v. LOWER BOULDER  
DITCH CO. et al.**

(Supreme Court of Colorado. Nov. 6, 1895.)

DECREE—ESTOPPEL—RES JUDICATA—BAR.

1. One who recognizes a decree by participation in its benefits is estopped from denying its validity.

2. Where one to whom a decree awards the right to appropriate a certain quantity of water in excess of what he is entitled to from a natural stream for irrigation, after decree, continuously asserts that right by user, the decree is, as to the parties to it, res judicata in a subsequent action between them for the same quantity.

3. Gen. St. 1883, § 1797, provides that a decree awarding a right to appropriate water for irrigation shall after remaining undisputed for four years bar all parties from claiming any right adversely to it. *Held*, that where a decree awarding one a right to appropriate a quantity of water in excess of what he was entitled to was asserted by him by constant user, and acquiesced in by the others, for nine years, the decree was a bar to such others' claiming any right thereto by acts of appropriation prior to the decree.

Appeal from district court, Boulder county.

Action by the Boulder & Weld County Ditch Company and others against the Lower Boulder Ditch Company and others to establish their right to the beneficial use of a quantity of water from a natural stream. From a judgment for defendants, plaintiffs appeal. Affirmed.

R. H. Whiteley, and Rogers, Shafroth & Walling, for appellants. S. A. Giffin and Byron L. Carr, for appellees.

CAMPBELL, J. This action was brought to obtain a decree adjudging to the plaintiffs the ownership of a right to the use of a designated quantity of water diverted from the natural stream of Middle Boulder creek, of which, it is alleged, the defendants had wrongfully deprived them. There are two causes of action set out in the amended complaint, the first of which grounds plaintiffs' rights upon a decree of court duly rendered by the district court of Boulder county in certain proceedings under the irrigation statutes of 1879-81. The second cause of action disregards the decree, and bases the right of plaintiffs upon a prior valid appropriation. To this amended complaint, defendants filed an answer, containing three separate and distinct defenses, being substantially the same defenses to each of the causes of action. The first defense is a general denial of the material allegations of the amended complaint; the second, a plea of res adjudicata; and the third, a plea of the statute of limitations in bar of plaintiffs' right to recover. To the second and third defenses, plaintiffs interposed a demurrer, on the ground that neither constituted a defense to the causes of action set out in the complaint. The district court overruled the demurrer, to which ruling the plaintiffs excepted. Thereupon plaintiffs elected to stand by their demurrer, and the court dismissed the complaint. Assuming that there is an appeal from the final judgment,—a question not argued by counsel, and not considered by the court,—the sole question raised by the demurrer of the plaintiffs is as to the sufficiency of the second and third defenses of the answer, designated, respectively, as the "plea of res adjudicata" and the "plea of the statute of limitations."

It should be stated that in their first cause of action the plaintiffs allege that the amount of water which they now claim as against the defendants was awarded to the defendants by the prior decree of the district court; but that, nevertheless, plaintiffs' right thereto is a superior right, and arises from the fact that the defendants had never used the same, and that plaintiffs, as appropriators, are entitled to the use of the amount of water included in defendants' decree, in excess of that actually applied by the defendants to a beneficial use. From this it will be seen that the plaintiffs base their claim to such alleged excess, not upon an abandonment thereof by the defendants subsequent to the date of the decree, but upon the fact that defendants were not entitled to such excess, though covered by their decree, because they had never used the same. This nonuse must refer to a period of time prior to the date of the decree, for in the same paragraph the plaintiffs say that during and since 1883 (the year next ensuing after the decree was rendered) the defendants have continuously, though wrongfully, used such excess. This reference is further manifest from the argument of counsel for appellants when giving their reasons for setting up two causes of action for the same wrong. Their theory was to rely upon the first cause of action, which expressly recognized the validity of the former decree, provided they could get a ruling from the court that the decree might still be reopened for material change; but, if the court should hold that such matters were res adjudicata, then the plaintiffs would repudiate the decree, and insist that it was void, because the court pronouncing it proceeded upon an unconstitutional basis for determining the priority of rights of the different claimants, and that, the decree being void, the whole question of priority of rights to the use of water was still unsettled, and that it was now before the court for original adjudication.

There is no contention that either of these two defenses is defective as to form. Indeed, they contain all the formal requisites of, and all the allegations appropriate to, such defenses. 2 Black, Judgm. §§ 789, 790. The second defense to the first cause of action substantially alleges that in the district court of Boulder county, in proceedings there pending under the irrigating statutes of the state, to which these plaintiffs and these defendants were parties, the same matters and claims now sought to be brought into controversy in the case at bar were fully and duly adjudicated, and decrees in said proceeding were duly rendered, as particularly set forth in the complaint, fully adjudicating all the rights of the parties to this action concerning the matters and things sought to be readjudicated in the case at bar, which former decrees are in full force and effect. In addition to the foregoing matters, the second defense to the second cause of action

contains an allegation to the effect that ever since the said former decree was rendered, and for more than nine years prior to the beginning of the present action, the plaintiffs had claimed the right to use the amount of water given to them by the decree. The third defense to these two causes of action properly pleads the special statute of limitations, which is a part of the general irrigation statutes of the state (Gen. St. 1883, § 1797). It will be observed that each of these defenses is pleaded as a bar to the cause of action to which it refers. In their first cause of action, plaintiffs rely upon the validity of the former decree of the district court of Boulder county, but charge that it gave to the defendants more water than they were entitled to. In their second cause of action, plaintiffs repudiate the former decree, and claim that their rights to the water in dispute were not determined thereby, but exist, without judicial determination, up to this time.

As to the first cause of action, the plea of res adjudicata is unquestionably good. One of the things determined and settled by the decree was the quantity of water to which the parties thereto were entitled. That decree remains in full force and effect, and these plaintiffs are not now entitled to readjudicate the same matters in this action.

The second defense is also good as a bar to the second cause of action. This second cause of action of the plaintiffs alleged that the decree gave to the defendants a quantity of water which the plaintiffs now claim, but, as already stated, that the decree is invalid. We do not find it necessary to consider the constitutionality of the acts under which this former decree was rendered, for this defense to the second cause of action alleges that this question of the quantity of water was determined by the former decree of the district court of Boulder county; and, in addition to such allegation, it is further alleged that, ever since the rendition of the decree, plaintiffs have participated in its benefits, and accepted its fruits, by using the waters therein decreed to them. Therefore, the plaintiffs, having claimed and enjoyed rights under the decree, are estopped from assailing its validity, and are bound by the same. *Water Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565; *Arthur v. Israel*, 15 Colo. 147, 25 Pac. 81.

By the third defense to these two causes of action, it appears that more than nine years have elapsed since the date of the decree which purported to settle precisely the same questions which are sought to be raised in this suit. Meanwhile no petition for reargument or a review of said decree was filed within the two years, nor was any other action for establishing these rights brought within the four years limited by the statute. The decree cannot, at this late date, be reopened, under the allegations of

this complaint. This court, at the present term, in the case of Loudon Irrigating Canal Co. v. Handy Ditch Co., 21 Colo. —, 43 Pac. 535, in an exhaustive opinion by Chief Justice Hayt, has passed upon the questions involved in this case against the contention of appellants. The law has been so clearly and explicitly laid down in that case that further consideration is unnecessary.

We are, however, cited to the case of Ditch Co. v. Armstrong, 21 Colo. —, 40 Pac. 989, as authority for the position assumed here by appellants. Counsel for appellants, however, misconceive the effect of the decision in that case if they deem it as authority in their favor. There the appropriator, who relied upon the provisions of the decree for the full quantity of water awarded him, abandoned a part of the same, and had never made any use thereof for a long period of time after the decree was rendered, which quantity of water thereby abandoned by him was subsequently appropriated by others. As against these subsequent appropriators, it was held that the decree offered no protection to the prior appropriator as to the entire quantity of water awarded, when, after the rendition of the decree, the claimant abandoned his rights to a portion thereof. In the case at bar the question of the waste of water is not properly before us, nor is there, in the pleadings, any claim that the water right has been abandoned by defendants. On the contrary, the plaintiffs allege that the right to the use of the water in dispute never belonged to them. If it never existed, it could not be abandoned. Hence the doctrine of abandonment cannot be invoked. This is a substantial point, and not a matter of mere definition. *Stone v. Mining Co.*, 52 Cal. 315. In *Ditch Co. v. Armstrong* it was expressly held that the object of the defense was not a "setting up of any claims to a priority of rights to water for irrigation in this water district adverse or contrary to the effect of the decree"; and that, "after the expiration of the time limited by the act, the decree cannot be reopened by a party thereto, in the absence of proof of fraud, for the purpose of reducing the quantity of water therein awarded, or for any other material change or correction." The judgment in that case was based upon the fact shown by the evidence that one who, by the decree, was awarded a certain quantity of water, was entitled only to what he thereafter, and within a reasonable time, used for a beneficial purpose, but as to any quantity of water of which, for a long series of years, he had made no use at all, there could be, and was, an abandonment of the same, which was susceptible of appropriation by others. Very different was that case from the case at bar, wherein it expressly appears from the allegations of the complaint that the defendants have continuously used the quantity of water given to them by the de-

creed ever since its rendition, and up to the time of the beginning of the present action; and the only claim which plaintiffs make—aside from their unsuccessful attack upon the validity of the former decree—of a right to any quantity of water is based upon the alleged fact that the decree improperly granted to the defendants more water than they had theretofore used. The amount of water, however, to which the defendants were entitled, was expressly adjudicated, according to the allegations of the plea of *res adjudicata* interposed here, by the district court of Boulder county in proceedings wherein these parties were duly represented. For that reason the plaintiffs are now estopped to allege to the contrary, as well as estopped to repudiate the decree whose benefits they have retained and long enjoyed.

It follows that the ruling of the court below as to the sufficiency of the second and third defenses of the answer was right, and the judgment should be affirmed. Affirmed.

#### PARKS, Auditor, v. COMMISSIONERS OF SOLDIERS' & SAILORS' HOME.

SAME v. PEOPLE ex rel. LEE.

(Supreme Court of Colorado. Jan. 18, 1896.)

APPROPRIATIONS — CONSTITUTIONAL LIMIT — PREFERRED CLAIMS AGAINST STATE — WHO ARE EXECUTIVE OFFICERS — PRIORITIES OF UNPREFERRED CLAIMS AGAINST STATE — PENAL INSTITUTIONS — STATE NORMAL SCHOOL.

1. Acts passed in violation of Const. art. 10, § 16, prohibiting the general assembly from making appropriations or authorizing expenditures in excess of constitutional limits, are void, and create no indebtedness against the state. In re Appropriations by General Assembly, 22 Pac. 464, 13 Colo. 316, followed.

2. In the event of deficiency of revenue to meet the appropriations for the support of the state, or its institutions, the necessary expenses of the executive, legislative, and judicial departments, including interest on any public debt, are entitled to preference. In re Appropriations by General Assembly, 22 Pac. 464, 13 Colo. 316, followed.

3. Where appropriations are made by the general assembly in excess of the revenue, priority of date at which the acts making such appropriations take effect will govern, after preferred appropriations are discharged. *Goodykoontz v. People*, 38 Pac. 473, 20 Colo. 374, followed.

4. In case several appropriations of the same grade are made by separate bills bearing the same date, and there are funds to pay only part, priority will be given as of the time of day at which the several acts take effect.

5. The fact that the auditor, through inadvertence or otherwise, has issued warrants upon a later appropriation, will afford no defense to an action brought by a party having the prior right.

6. The purpose of Const. art. 4, § 1, in declaring that the executive department of the state "shall consist of a governor," etc., was to provide for such executive officers as the members of the constitutional convention deemed absolutely indispensable, leaving it to the legislature to create new offices when they became necessary, and to abolish the same, but without authority to abolish any of those enumerated.

7. Every state officer who holds his position

by election or appointment, and whose duties, defined by statute, are in their nature continuous and relate to the administration of the affairs of the state, and whose salary is paid out of the public funds, is an officer of either the legislative, executive, or judicial department of the state, and may, therefore, properly have his salary included in the general appropriation bill, and take rank accordingly.

8. The power of the legislature over the revenues of the state, within constitutional limitations, is plenary, and its exercise of such power is not subject to revision by the courts.

9. The fact that the inmates of the penitentiary and insane asylum are confined involuntarily does not, in the event of a deficiency of revenue, give such institutions a preference to state funds over other institutions, resort to which is voluntary on the part of the inmates.

10. The act of 1895 making an appropriation for the state normal school, and requiring the state board of equalization to levy a tax of one-sixth of a mill for the year 1896, and annually thereafter for the support of such institution, authorized that board to extend such levy upon the assessment for the year 1895.

11. The office of mining commissioner having been created by Const. art. 16, § 1, the incumbent of such office is a member of one of the three departments of the state government, and as such is entitled to have his salary, and that of his assistants, paid by the state, without reference to the date at which the act making the appropriation took effect.

Error to district court, Arapahoe county.

Actions by the commissioners of the Soldiers' & Sailors' Home, and by the people of the state of Colorado on the relation of Harry A. Lee, against Clifford G. Parks, state auditor, to compel defendant by mandamus to issue warrants for certain appropriations. From judgments awarding peremptory writs to both petitioners, defendant brings error. The judgment in the case of the People *ex rel.* Lee is affirmed, and in that instituted on behalf of the Soldiers' & Sailors' Home reversed.

The revenues of the state for the fiscal year A. D. 1895 not being sufficient to meet all the appropriations made by the legislature for that year, the auditor refused to issue warrants for a part of the appropriation for the Soldiers' & Sailors' Home, and also refused to issue warrants for a part of the salary and expenses of the commissioner of mines and his assistants. Actions were accordingly commenced to compel the auditor by mandamus to issue warrants for the residue of these appropriations. It is averred in the answers of the auditor, and not denied, that the appropriations for the fiscal year 1895 were largely in excess of the revenues available to meet the same. The answers, in addition to setting up the revenues for the year, as estimated, set up a list of claimants for the revenue remaining undisposed of, and asked that such claimants be made parties to the action, in order that a multiplicity of suits may be avoided. The prayer of the petitioner in this behalf having been granted, the various claimants appeared, and without objection submitted their claims to the residue of the revenues in question. As a result of the hearing in the district court, a peremptory writ of mandamus was ordered in favor of the commissioners of the Soldiers' & Sailors' Home,

requiring the auditor to issue warrants upon the treasurer for the balance of the appropriation for that institution for the year 1895. In the case of the commissioner of mines the writ was also allowed. The auditor brings both cases here upon error. The following provisions of our constitution are referred to in the opinion of the court: Article 3, § 1: "The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial—and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others except as in this constitution expressly directed or permitted." Article 4, § 1: "The executive department shall consist of a governor, lieutenant-governor, secretary of state, auditor of state, state treasurer, attorney general, and superintendent of public instruction. \* \* \*" Article 5, § 32: "The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the state, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject." Article 8, § 1: "Educational, reformatory and penal institutions, and those for the benefit of the insane, blind, deaf and mute, and such other institutions as the public good may require, shall be established and supported by the state, in such manner as may be prescribed by law." Article 10, § 2: "The general assembly shall provide by law for an annual tax, sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year." Article 10, § 11: "The rate of taxation on property, for state purposes, shall never exceed six mills on each dollar of valuation." Article 10, § 18: "No appropriation shall be made nor any expenditure authorized by the general assembly whereby the expenditure of the state during any fiscal year shall exceed the total tax then provided for by law and applicable for such appropriation or expenditure unless the general assembly making such appropriation shall provide for levying a sufficient tax not exceeding the rates allowed in section eleven of this article to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war." Article 16, § 1: "There shall be established and maintained the office of commissioner of mines, the duties and salaries of which shall be prescribed by law. When said office shall be established, the governor shall, with the advice and consent of the senate, appoint thereto a person known to be competent, whose term of office shall be four years."

B. L. Carr, Atty. Gen., and F. P. Secor, Asst. Atty. Gen., for plaintiff in error. H.



T. Sale, *amicus curiæ*. Charles Hartzel, for state board of health. Harvy Riddell, for School of Mines. H. B. Babb, for Home for Dependent Children. Kinkaid, Eddy & Hart, for commissioner of mines and the state game and fish warden. J. W. McCreery, for State Normal School and state board of cattle inspectors. J. K. Goudy, for Mute & Blind Institute. Hugh Butler and Giffin & Murfree, for regents of the University of Colorado. Robinson & Love, for Agricultural College. H. H. Eddy, for defendant in error, Lee.

HAYT, C. J. (after stating the facts). These cases, having been consolidated for the purpose of the argument, will be considered together. They are a part of the crop of litigation which springs from the custom of the legislature, at each biennial session, to appropriate money in excess of the revenues of the state, in violation of express constitutional mandates, leaving the various claimants to contest in the courts their rights to the actual revenue. This practice on the part of the lawmaking power has led to expensive and vexatious litigation, to the impairment of the credit of the state, resulting not infrequently in the deprivation of some of our most deserving institutions of funds absolutely necessary for their successful operation. To the credit of the legislature be it said, however, that such unconstitutional appropriations have gradually decreased in amount during the six years that have elapsed since the first opinion of this court was rendered upon the subject, which is entitled *In re Appropriations by General Assembly*, 13 Colo. 316, 22 Pac. 464. The 7th general assembly, which convened shortly prior to the rendition of that opinion, appropriated \$750,000 for the years 1889 and 1890 in excess of the estimated revenues of the state for those years, and for this reason in violation of the constitution, while the appropriations made by the 10th general assembly only exceeded the revenue for the year 1895 by about \$75,000. Justice to the legislative department requires the further statement that the deficiency for the year 1895 arose from a falling off in the revenues of that year, not anticipated at the time of the legislative session. Questions growing out of appropriations beyond the constitutional limit have of late years received the careful attention of the courts. As a result of the cases that have reached this court for determination, certain principles of constitutional law have been promulgated, which aid materially in the determination of the present controversies. As to those principles we shall content ourselves with their brief statement, and for the benefit of those who care to investigate the reasons for the conclusions reached we shall refer to the reports where the cases may be found.

The leading opinion in this state in reference to the subject was written in the case in 13 Colo. and 22 Pac., already referred to.

In that case it was determined, *inter alia*, that the general assembly is inhibited by the constitution from making appropriations or authorizing expenditures in time of peace in excess of the revenue applicable to such appropriations, and that if acts are passed attempting to authorize such expenditures, such acts are void and of no effect. It was further held that no state officer could in any way legally approve or recognize legislation making appropriations beyond the limit fixed by the constitution. And, what is of special importance in this case, it was also held that, in the event of deficiency of revenue to meet the appropriations, the necessary expenses of the executive, legislative, and judicial departments of the state, and interest on any public debt, were entitled to preference. These principles have been followed and approved in a number of cases. *Henderson v. People*, 17 Colo. 587, 31 Pac. 334; *Institute v. Henderson*, 18 Colo. 98, 31 Pac. 714; *Goodykoontz v. People*, 20 Colo. 374, 38 Pac. 473. It has also been determined that, where appropriations are made in excess of the revenue, priority of date of the taking effect of the acts making such appropriations must govern, after preferred appropriations are discharged. Within constitutional limits, the general assembly may appropriate the public funds of the state as it chooses; but when it has once reached the limit, further appropriations are of no force and effect, for the reason that there is no revenue available to meet such appropriations. *Goodykoontz v. People*, *supra*; *People v. State Board of Equalization*, 20 Colo. 220, 37 Pac. 964.

As some of the opinions to which reference has been made were delivered in answer to questions propounded by the executive, it is perhaps well to say, in passing, that it must not be assumed for this reason that full argument was not heard by the court, or that the opinions were pronounced except upon the most careful consideration. The answer to the questions propounded by the governor in *Re Appropriations by General Assembly*, *supra*, as we have already stated, involved the striking off of excessive appropriations to the amount of \$750,000. To this extent the decision set aside, as unconstitutional, solemn acts of a co-ordinate department of the state government. This court has frequently given expression to the reluctance with which, in the discharge of its sworn duty, it approaches the consideration of questions affecting the constitutionality of any act of the legislative department. To examine such questions with the utmost care and circumspection, and to be diligent in upholding all legislation which is not shown to be unconstitutional beyond all reasonable doubt, is required by a rule founded upon the soundest considerations of public policy, and universally recognized and approved. The issues presented by the governor's questions in *Re Appropriations by General Assembly* involved the constitutionality of many acts of the leg-



lislature. This legislation covered a wide field, and affected vast and varied interests, while many of the statutes were of conceded merit. In view of these circumstances, it was not possible for the court to overlook the gravity of the situation. No cause which has been determined by this court in recent years has received more serious consideration than did the examination of those interrogatories propounded by the executive. The conclusions announced in the other cases cited are but little more than the application of the principles promulgated in the case in 13 Colo. and 22 Pac. to new and peculiar facts. These cases are not only *stare decisis*, but the legislature having them in view at the time of making the appropriations now in question furnishes an additional reason against a departure in the present controversy from the principles heretofore announced. Accepting, therefore, these principles, not only as the law of the state, but as the adjudged law of these cases, we shall pass to the new questions presented in this case. These may be summarized as follows: First. What officers belong to the executive department, and as such have preferred claims against the state? Second. The inmates of the penitentiary, insane asylum, and similar institutions being confined involuntarily, does this circumstance give such institutions a preference to funds over other institutions, resort to which is voluntary on the part of the inmates? Third. Did the act of 1895 making an appropriation for the State Normal School, and requiring the state board of equalization to levy a tax of one-sixth of a mill annually for the support of such institution, authorize that board to extend such special mill levy upon the assessment for the year 1895?

We shall address ourselves to the consideration of the foregoing questions in the order in which they are stated. The solution of the first is particularly important in this case, by reason of the constitutional provision to the effect that the general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the legislative, executive, and judicial departments of the state, interest on the public debt, and for public schools; the argument upon this provision advanced by counsel for the Soldiers' & Sailors' Home being that appropriations for certain public officers to be found in the general appropriation act are void, for the reason that such officers and their assistants are not a part of either of the three departments mentioned, and therefore the money so attempted to be appropriated was not in fact appropriated, and should be used to meet other appropriations constitutionally made. As to what officers constitute the executive department of the state is a question somewhat difficult of solution. Article 3 of our constitution, which has its counterpart in the constitution of every state in the Union, divides the powers of the state government into three distinct de-

partments, the legislative, executive, and judicial. It is admitted that, were this provision standing alone, the classification made must be held to include all public officers of the state, without regard to their rank or duties; and as the officers composing the legislative and judicial departments are well understood not to include the warden of the penitentiary, or of the reformatory, the commissioner of mines, or of insurance, and the like, these must of necessity be classed as executive officers, unless some other provision of the constitution changes or modifies the effect of the language of article 3. Upon the theory that the mention of some necessarily implies the exclusion of all others, such modification or change is sought in the following, from section 1, art. 4: "The executive department shall consist of a governor, lieutenant-governor, secretary of state, auditor of state, state treasurer, attorney general, and superintendent of public instruction. \* \* \*" The maxim "*expressio unius est exclusio alterius*" is not, however, of universal application. It has its exceptions, one of which is that, when there is reason for mentioning one thing and not the other, the absence of any mention of the latter will not be considered as an exclusion. Sedg. St. Const. Law, p. 81; Suth. St. Const. § 329. In declaring what officers should constitute the executive department of the state, it was not intended that the legislature should not create new executive officers. Such a presumption would do violence to the intelligence of the framers of that instrument, and of the people who adopted it. It is, we think, the purpose of this section to provide for such officers of the executive department as the members of the constitutional convention deemed absolutely indispensable, leaving it to the legislature to create new offices as the growth of the state and experience might suggest, and to abolish the same, but without authority to abolish any of those enumerated. The constitution of the United States provides that the executive power of the nation shall be vested in the president, but it will certainly not be contended that it was intended by this that the president should be the sole and exclusive executive officer of the nation. A provision of the constitution of the state of Washington is identically the same as section 1 of article 4 of our constitution, which reads: "The executive department shall consist," etc. The provision came before the supreme court of Washington for construction in the case of *State v. Womack*, 4 Wash. 19, 29 Pac. 939. That was a case founded upon a statute making it a criminal offense for any person to bribe or attempt to bribe certain designated officers or "any executive, judicial or ministerial officer." Leach and others were members of the state board of education, and the defendant was charged with attempting to influence by bribery the vote of Leach with reference to certain text-books to be

used in the common schools of that state. Leach not holding an office specifically mentioned in the statute, it was sought to include him within its provisions as an executive officer. The indictment was demurred to for the reason, among others, that Leach was not a member of the executive department of the state. This demurrer was sustained in the lower court, but the supreme court, in reversing the judgment, held that the constitution provided for three departments of the government, the executive, judicial, and legislative, and that when a state officer is appointed or elected he must necessarily belong to one of these departments. The same provision of the constitution upon which reliance is here placed to show that certain officers are not members of the executive department was relied upon in that case, and as to it the court says: "The language of the section is mandatory. It says 'the executive department shall consist,' etc. If the contention of the respondents is correct, that the intention of the section was to limit the executive officers of the state, their further position that the legislature can by subsequent enactment increase those officers is untenable, for the essence of a constitutional provision is its limitation of the power of the legislature, and when the constitutional provision is exclusive in its nature it is supreme, and it is not within the power of the legislature to vacate or alter it. Hence, their main contention would force us to the absurd conclusion that the constitution perpetually limits the executive officers of the state to the officers mentioned in said section. No known rule of construction will justify such a conclusion in this case." We shall not extend this opinion beyond the case presented, and for the purposes of this case it is sufficient to say that every officer of this state who holds his position by election or appointment, and not by contract, and whose duties are defined by statute, and are in their nature continuous, and relate to the administration of the affairs of the state government, and whose salary is paid out of the public funds, is a public officer of either the legislative, executive, or judicial department of the government, and may in the discretion of the legislature properly have his salary included in the general appropriation bill, and have the appropriation therefor take rank accordingly; and as the priority attaches not to the form of the act making the appropriation, but to the office, the priority of a particular appropriation will not be jeopardized if made by a separate act. Moreover, as the officers established by the constitution and those created by authorized legislative authority are usually required to keep offices, records, papers, etc., it is evident that expenses for these and like items may also be provided for as a part of the ordinary expenses of the legislative, executive, and judicial departments of the government. Our conclusions upon this branch

of the argument may be summarized as follows: That as to those offices not expressly enumerated in the constitution the legislature has plenary power to create or abolish the same, subject to well-known constitutional restrictions. It may, subject to such restrictions, increase or diminish the salaries of the incumbents, but while the offices are in existence, and the officers are discharging their duties, appropriations made for their salaries or necessary expenses are entitled to take rank with the ordinary expenses of the state government.

The second question has reference to appropriations for institutions like the state penitentiary, where the inmates are confined against their will. The claim advanced in behalf of such institutions is that their appropriations should take precedence over others, without reference to the date thereof. This argument is based upon what is denominated *ex necessitate rei*; it being urged that the penitentiary, although established by statute, is expressly recognized by the constitution, and that the experience of all civilized governments has demonstrated the necessity for such an institution; that the punishment for many crimes is by confinement therein. Hence it is said to be the duty of the state to see that the inmates are properly fed and otherwise cared for, and that appropriations for this purpose constitute a preferred claim against the state. It is claimed that this position finds some support in two opinions of this court. In *Re Appropriations by General Assembly*, supra, it is said: "By section 16, art. 10, of the constitution, appropriations and expenditures which may be made or authorized by the general assembly are of two general classes. First, ordinary, which include all kinds of appropriations and expenditures necessary and proper for the support of the government and its institutions in time of peace; second, extraordinary, or such as are necessary to suppress insurrection, defend the state, or assist in defending the United States in time of war." And in the case of *Goodykoontz v. People*, supra, it is said: "The Soldiers' & Sailors' Home, established by an act of 1893, is a state institution, and it is entitled to be supported by the state the same as other state institutions, except that those institutions in which the inmates are involuntarily confined may be entitled to the preference in case the public revenues are not sufficient for all." The word "institutions" in the first of these opinions is used in its enlarged sense, and even as so used it was only employed to designate for what purposes the appropriations might lawfully be made by the state, and the opinion does not warrant the conclusion that in case of shortage the appropriations for the state educational, reformatory, or penal institutions are to have preference over other appropriations. The entire reasoning of the opinion is against such a conclusion. So, also, too

much stress has been put upon the language used in the case of *Goodykoontz v. People*. It was apparent by the facts disclosed in that case that the scramble for public funds was becoming so fierce that, unless such institutions could in some way be protected, the revenues of the state might be exhausted in advance of appropriations for the penitentiary, insane asylum, reform school, etc. However disastrous to the best interests of the state such a result might prove, we are now satisfied, upon mature deliberation and reflection, that this is a matter within the discretion of the legislature, and that such discretion is beyond control by the courts. This conclusion necessarily results from the distinctive character and independence of each of the three departments of government; the power of the legislature over the revenues of the state being plenary, except as limited by constitutional provisions. We are therefore of the opinion that all arguments with reference to the necessities of the various state institutions, or as to the duty which the state owes to maintain its educational, penal, reformatory, and other institutions, can have no weight with the judicial department, it being entirely beyond the province of the courts to revise legislative action in reference thereto.

Several of the state institutions have been provided for by special levies. These institutions were as a precautionary measure made parties to this action, and have entered their appearance here; but we do not see that these special levies are in any way involved in the present controversy, except, incidentally, the levy for the State Normal School. The facts as to that levy are as follows: At the last session of the legislature the sum of \$29,500 was appropriated for the maintenance and support of this school for the year 1895, this amount to be paid out of the fund accruing in the state treasury from the assessment and levy for 1894. The second section of the act provides that for the year 1896, and annually thereafter, a special tax of one-sixth of a mill shall be collected for the support and maintenance of the school. If the second section is to be alone considered, there is some doubt as to when the tax is to be levied, but if construed in connection with other portions of the act, the legislative intention that the levy should be made upon the assessment for the year 1895 is plain. That it should be thus made is necessary, in order that the funds may become available for the support of the school for the fiscal year 1896; otherwise there would be no provision for the payment of the expenses for that year, a conclusion we cannot indulge; and we are therefore of the opinion that the tax was properly extended upon the tax rolls for the year 1895, the revenue thus created to be used "for the year 1896."

The general appropriation bill contains an item of \$75,000 for the suppression of the

insurrection at Cripple Creek, and an item of \$100,000 for casual deficiencies of the revenues for the years 1893 and 1894. As bonds have been issued and sold, and the proceeds devoted to the payment of these items, they are in no way involved in the present controversy, and need not be further mentioned. The court fully indorses all that has been so eloquently said by counsel with reference to the duty of the state to make proper appropriations for the Soldiers' & Sailors' Home, and to provide against the inmates thereof being turned out upon the world in their aged, infirm, and helpless condition. At the same time, it must be remembered that it is beyond the power of the courts to validate an unconstitutional appropriation from the public funds for this or any other purpose. In the case of *Goodykoontz v. People*, at the relation of this institution, reported in 20 Colo. 374, 38 Pac. 473, it was held that the appropriation for this home, then under consideration, being of an earlier date than many of the appropriations made at the last preceding legislative session, the residue of the appropriation should be paid. Applying the same rule of priority to the case at bar, the appropriation for the fiscal year 1895 being subsequent in point of time to other appropriations, which more than consumed all the revenues of that year, it is clear that the district court erred in granting a peremptory writ of mandamus against the auditor in favor of this institution. Moreover, the same result necessarily follows, if the language of the act of 1895 be alone considered, as the appropriation is only "to be paid out of any moneys in the treasury not otherwise appropriated." As all the revenues were at the time "otherwise appropriated," there was nothing remaining for the act to operate upon. In the case of *Harry A. Lee*, mining commissioner, it appears that the office was created in pursuance of a constitutional mandate; that when the incumbent was appointed he became, by virtue of the constitution, a member of one of the three departments of the government, and as such was entitled to have his salary, and those of his assistants, etc., paid by the state, as part of the expenses of such departments, without reference to the date at which the act took effect. Among the institutions made parties to this proceeding is the Home for Dependent Children. This institution was established at the last session of the general assembly, as a result of a quickened public conscience upon the subject of the waifs of the state, a comprehensive understanding of the relation of the state to the child, and the demonstrated effect of such institutions in decreasing crime. It is urged, however, that the institution is too young to be entitled to much consideration until the demands of the older institutions are fully met. Such an argument has no foundation

in logic or reason. It is now an established institution of the state, and the appropriation for its support, although meager, is entitled to consideration as of the date of the taking effect of the act. It may be competent for the legislature to provide that, in case of deficiency, the public funds shall be prorated between claimants of the same grade, but certainly, in the absence of such legislation, the courts cannot require this to be done when the priority in time can be ascertained; consequently, in case of several appropriations of the same grade made by separate bills bearing the same date, where there are funds to pay part, but not sufficient for all, priority should be given as of the time of day of the taking effect of the several acts. *People v. Clark*, 1 Cal. 406; *Brainard v. Bushnell*, 11 Conn. 16. And if the auditor, through inadvertence or otherwise, has issued warrants upon a later appropriation, this will afford no defense to an action brought by a party having the prior right. The auditor is not justified to act in these matters from caprice, or to be governed by favoritism, but has a sworn legal duty to perform. Hence, having issued warrants in full for nearly all of the appropriations for the year 1895, he cannot be permitted to refuse to do so for those of prior date, upon the pretext that he was not required to issue any warrant in the absence of cash in the treasury to meet the same. At the time the answers were filed the revenues of the state for the year 1895 were estimated by the auditor, but it is now conceded by counsel that subsequent events have demonstrated that such estimates were much too low; and as the first of these causes must be remanded for further proceedings, it is directed that the parties be allowed to amend their pleadings in that case, as they may be advised. In the case of the mining commissioner, the judgment of the district court is affirmed. In the case instituted on behalf of the Soldiers' & Sailors' Home, the judgment of the lower court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

**CHARLES v. E. F. HALLACK LUMBER & MANUFACTURING CO. et al.**

(Supreme Court of Colorado. Dec. 16, 1895.)

CONTRACT—PERFORMANCE—WAIVER—HARMLESS ERROR—MECHANIC'S LIEN—EVIDENCE.

1. A building contract provided that, on failure of the contractor to properly complete the work, the owner of the building could himself correct defective work, and deduct the cost thereof from the contract price. The contractor having laid defective flooring, the owner corrected the defective work at the cost of 2 per cent. of the contract price. *Held* that, thereafter, the owner could not defeat a recovery of the contract price, less damages for the omission, on the ground of nonperformance.

2. Error in denying a motion to strike out

part of a pleading setting up an estoppel is not ground for reversal, where the court finally decided against the estoppel.

3. In an action to enforce a mechanic's lien for material furnished, a statement between the material man and the contractor as to the value of the material is admissible against the owner of the building to show its value.

Error to district court, Arapahoe county.

Action by the E. F. Hallack Lumber & Manufacturing Company against John Q. Charles and others to enforce a mechanic's lien. From the judgment for plaintiff and for the other defendants, defendant Charles brings error. Affirmed.

The plaintiff in error, John Q. Charles, and the defendants in error Thompson & Tomlinson entered into a written contract, dated April 10, 1889, for the erection and completion of a six-story building on the corner of Fifteenth and Curtis streets, in the city of Denver, for the sum of \$97,525, payable in installments, as the work progressed, less 20 per cent. of the work done and material furnished, which was to be deducted and held back until the building was fully completed, such installments to be paid upon the production of the architect's certificate. The provisions of the contract that are applicable and material to the questions involved in controversy are as follows: "First. The said parties of the first part covenant, promise, and agree to make, erect, build, and finish, for the said party of the second part, in a good, substantial, and workmanlike manner, on lots numbered 1 to 6, inclusive, in block number 106, situated on the corner of Fifteenth and Curtis streets, in said city of Denver, now owned by the said party of the second part, a six-story building, the fronts of said building on Fifteenth and Curtis streets to be of red sandstone or the best quality, taken from Greenlee's quarry, near Manitou, Colorado, and to furnish all the labor and material necessary and required for building, completing, and finishing the same, agreeable to and in strict conformity with the drafts, plans, drawings, explanations, and specifications of the same, prepared by L. Cutshaw, Esq., architect and superintendent of said building, and severally signed by the said parties hereto, and which said plans, drawings, and specifications shall be taken to be, and are hereby made, a part of this contract. That all the work done, and materials furnished in the erection of said building shall be so done and furnished under the supervision of L. Cutshaw, architect and superintendent, as aforesaid, and to his satisfaction, who shall, before the final completion and acceptance of such labor and materials, furnish the said party of the second part with a certificate, in writing, to the purport and effect that such work done and material so furnished are in strict conformity and compliance with said plans, drawings, and specifications, and provisions of this agreement. \* \* \* And when said building shall be fully completed.

and finished, in accordance with said plans and specifications, and the covenants and stipulations of this agreement, then, in like manner, upon the certificate of said architect to that effect, the said party of the second part shall pay or cause to be paid to the said parties of the first part the remainder of the contract price agreed upon, and hereinbefore stated, for the erection and completion of said building, amounting to the further sum of \$33,025; it being the intention of the parties hereto that said payments above mentioned shall, in the aggregate, amount to said sum of \$97,525. \* \* \*

Third. It is further stipulated, understood, and agreed, by and between the parties hereto, that the architect and superintendent above named shall have the right, at his discretion, to reject any work or materials which he may deem not to be in accordance with the plans, drawings, or specifications, or either of them, or the provisions of this contract, or which he may deem unfit or unsuitable for the work required or necessary to be done under this contract. He shall also have power and authority to remove all work or material which he shall deem to be contrary to the terms and conditions hereof, and to have the same replaced by proper work and materials, at the cost and expense of the said parties of the first part, and may deduct the amount thereof from the estimates and payments required to be made thereafter by the said party of the second part. \* \* \*

Fifth. That in case the said parties of the first part shall neglect or refuse to supply the necessary workmen or material to properly carry on the work, with a view to complete on or before the time herein agreed, then, in such a case, the said party of the second part shall have power, and is hereby given the right, after twenty-four hours' notice, in writing, shall have been given the parties of the first part of their intention so to do, to furnish the necessary workmen or materials to properly carry on the work, and the expense of all work or materials so procured shall be deducted from the amount herein agreed to be paid to the parties of the first part by the party of the second part. Sixth. That in order to prevent all disputes or disagreements between the parties hereto, in relation to the execution of the work, the quantity or quality of the materials, it is expressly understood that the parties of the first part shall adhere strictly to the plans, drawings, and specifications, and to obtain from the architect all necessary explanations and instructions of the drawings and specifications; and in case of any disagreement between the parties hereto in relation thereto, the decision of the architect above named shall be final and binding on all parties hereto. \* \* \*

Eighth. It is further covenanted and agreed, by and between the parties hereto, that the said parties of the first part shall complete and finish the storerooms in

said building, situated on Fifteenth and Curtis streets, so that the tenants may occupy the same for business on or before the 1st day of September, A. D. 1889, and that they will fully complete and finish said building, in conformity with said plans, drawings, and specifications, on or before the 1st day of November, A. D. 1889. And it is distinctly declared and understood by the parties hereto that the time mentioned above for the completion of said storerooms, and the final completion of said building, is a very important consideration in this contract, and of the essence thereof; and, in case of a failure to complete said stores at the time above named, the damages arising therefrom shall be liquidated and assessed at the sum of twenty-five dollars per day for each and every day said storerooms remain uncompleted after said 1st day of September, A. D. 1889, as aforesaid; and in case of a failure to complete and finish said building on said 1st day of November, A. D. 1889, the damages arising to said party of the second part shall thereafter be liquidated and assessed at the sum of twenty-five dollars per day that said building shall thereafter remain unfinished, which said sums shall be deducted from the amounts herein agreed to be paid to said parties of the first part, or may be collected by action against said parties." And it is further provided in said contract that Charles might make any alteration he deemed proper, by adding to or deducting from the amount of work or materials, or by changing them from one grade or quality to another; and if the parties to the agreement could not agree as to the amount occasioned by any such change, then the architect should appraise the amount and value, and indorse said appraised sum on the contract, and it should thereby become binding on all the parties. Under this provision Charles elected to, and did, deduct from the amount of work to be done by Thompson & Tomlinson the plastering, and relet the same; also, the putting down of the basement floors, and relet such work to other parties. The installments as provided in the contract were paid, except the last, upon which \$2,500 had been advanced.

This suit was instituted by the E. F. Hallack Lumber & Manufacturing Company against Charles, the owner of the building, Thompson & Tomlinson as the principal contractors, and the other parties as subcontractors. The pleadings are voluminous, but the principal issue, being the amount due the principal contractors, is presented by their cross complaint, and the answer of Charles thereto, and his counterclaim against them; he (Charles) claiming a deduction on account of damages arising from a failure on their part to complete the contract in the time and manner specified. The trial court made full and specific findings of the facts established by the evidence, among them the following: "That the said defendants Thomp-

son & Tomlinson substantially performed the contracts entered into by them with the defendant Charles, except as to the floors which were completed; but in a defective condition of floors, damages in the amount of \$2,000 should be allowed defendant Charles. That the building in its entirety was not completed at time and date originally required and stipulated by the terms of the contract, but that such requirements as to time and date of completion were waived by conduct on the part of the defendant Charles; and demurrage claimed on account of failure to complete in point of time was also waived by conduct on the part of the defendant Charles, and is disallowed." It found that there was due Thompson & Tomlinson, after deducting the amount paid them by Charles, and the amount paid to other parties for plastering and the basement floors, and the \$2,000 for the defective flooring, the sum of \$23,671.64. It further found that there was due to the subcontractors, from Thompson & Tomlinson, in the aggregate, the sum of \$22,961.05; that there was due from Charles to Groth & Co., in addition to the amount due Thompson & Tomlinson, the sum of \$2,450, on account of extra materials, work, and labor, furnished at his request and by his direction; and it adjudged and decreed said sums to be a lien upon the premises in favor of the respective parties. To reverse this decree, Charles brings the case here on error.

John R. Smith, for plaintiff in error. R. Heber Smith, Brown & Smith, Williams & Whitford, and C. H. Burton, for defendants in error.

GODDARD, J. (after stating the facts). It appears from the certificate to the bill of exceptions that it does not contain all of the evidence introduced upon the trial of the cause; the original exhibits, which include the plans and specifications, being omitted. These are made, in express terms, a part of the contract, and are therefore important and essential factors in determining the principal issue in the case. Without them before us, we are unable to determine whether the building was completed in conformity with them or not, or to pass upon the sufficiency of the evidence to sustain the conclusions reached by the trial court, and must accept as conclusive its finding that Thompson & Tomlinson had substantially performed their contract, except in the particular mentioned. It is insisted by plaintiff in error that this finding, in itself, by reason of the exception, fails to bring the case within the most liberal rule of substantial performance, since it shows so material a deviation as to entitle Charles to the sum of \$2,000 as damages on account thereof, and that the exception neutralizes the force of the finding as to the fact of substantial performance, and leaves the question open for this court to examine the contract in the

light of the evidence, and determine whether the condition of the floors was in conformity with its stipulations and the plans and specifications; but for the reason above stated we are precluded from this investigation, and can only look to the pleadings, and ascertain therefrom the theory upon which the case was tried, and determine whether, under all the provisions of the contract therein set forth, such finding can be upheld, and, if so, its sufficiency to support a recovery in this character of action. Upon an examination of the contract, it will be seen that, while performance as to work and materials in conformity with its provisions is made a condition precedent to payment, it also provides that, if the work or material are contrary to its requirements, the architect shall have authority to remove the same, and replace them by proper work and materials, at the contractors' cost. It also appears from the pleadings, although the issue of performance was tendered by the cross complaint of Thompson & Tomlinson and the answer of Charles, that by way of counterclaim he sought to recoup damages on account of defective floors, and alleged, as a ground for such damages, that he was compelled "to wholly relay and cover with new flooring said building, and by reason of said acts mentioned, of said defendants Thompson & Tomlinson, in respect to said flooring, he was damaged thereby in the sum and amount of \$4,000," etc. And he further avers that on or about the 5th day of May, 1890, Thompson & Tomlinson made and presented a statement and account of extra work and labor; and thereupon he made and presented to them a statement and account for labor and materials omitted, and also presented a claim for damages, by reason of bad floors, accruing up to that time; and that, being unable to agree, the respective claims and demands were referred to L. Cutshaw, architect, for his examination and decision, both under the terms of said contract, and by express agreement of the several parties; and it was decided by said Cutshaw, among other things, "that for damages, as aforesaid, by reason of bad floors, there ought to be allowed the defendant the sum of \$1,500," etc. In his prayer he asks, among other things, that an accounting may be had, as between him and Thompson & Tomlinson, as to the sum, if any, due to them; and that upon such accounting he may be allowed and credited with his damages in said sum of \$4,000, etc.; and that he may recoup the same against their claim under the contract; and that he may be permitted and directed to bring such sum as may be found due from him to said Thompson & Tomlinson into court, etc.

It would seem, therefore, that the finding was in accordance with the issues made by the pleadings, and a proper one in view of the theory upon which the case was tried, and that the plaintiff in error is not now in a position to invoke the application of the rigid rule, announced by some courts, to

the effect that, when performance is stipulated for and made a condition precedent to the right of recovery, and the action is solely on the contract, performance in every essential particular must be shown before a recovery can be had, or to insist that, under the issues tendered by the pleadings in this case, no excuse for nonperformance can be shown, nor recovery of the contract price (less damages on account of omission) be had, whether he might, if he had elected so to do, have stood upon his technical rights under the contract, and successfully resisted payment of the balance of the contract price until a strict performance of all the requirements of the contract was had, and the certificate of the architect produced, as provided therein, it is unnecessary to determine, since he has elected to avail himself of his option, under the contract, to replace the defective flooring and repair the omissions of the contractors in respect thereto, and to submit his claim for the amount expended in the completion of their work as a set-off or counterclaim against the amount, if any, found due them under the contract. In support of his position he invokes the rule, adopted in New York and some other states, to the effect that a strict performance is necessary as a condition precedent to recovery on the contract. Among them, the case of *Van Cleaf v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017, is cited as being particularly in point upon the proposition that, when a substantial sum is required to finish the work, a substantial performance has not been had. In that case the contractor was to furnish materials and erect a building for the net price of \$4,023, payable in installments. Among such installments was the sum of \$800, to be paid when the plastering was finished. He abandoned his contract, leaving the building uncompleted, and refused further performance. After such refusal the owner furnished materials and employed a workman to finish the building at an expense of \$1,905.20, which included \$200 for completing the plastering. The suit was brought by a subcontractor to obtain a lien against the building for materials furnished the contractor. After referring with approval to the doctrine announced in former cases upon the subject of substantial performance, and expressly finding that the plastering was not substantially finished, and that the abandonment of the work was willful, and the omission to perform intentional, the court say: "The owner, however, although under no obligation to do so, completed the building herself, according to the contract, which thus continued operative through her action. After the contractor refused to proceed, she performed the contract for him, as it expressly permitted her to do. As her action was according to the contract, it will be presumed, under all the circumstances, and in support of the judgment, that it was under the contract. \* \* \* Instead of plead-

ing a cancellation or rescission in her answer, she asked to have the amount expended by her to complete the building 'allowed as a set-off or counterclaim to any claim of the said defendant Smalle or the plaintiffs herein, or of any of the other defendants herein, in case the court should eventually determine that the said defendant Smalle is entitled to any sum whatsoever under the said contract.' \* \* \* The amount paid by her for this purpose, in legal effect, was paid for the original contractor. The difference between the sum thus expended and the aggregate amount unpaid on the contract with Smalle, upon the completion of the entire work, became due under the contract. To the extent of that sum, being the difference between \$2,023 and \$1,905.20, the lien of the plaintiffs attached, and they are entitled to a foreclosure for that amount." Thus it appears that the damages allowed as a set-off are much larger, in proportion to the contract price and the balance found due, than the amount allowed in this case. This decision, by reason of the analogy between the facts and pleadings of that case and those of the case under consideration, clearly sustains the right to recover the balance due upon the contract, less the amount required to repair omissions and defects, under the issues joined. In the case of *Crouch v. Gutmann*, 134 N. Y. 45, 31 N. E. 271, the court say: "While the condition of the carpenter work, when the Wadsworths left it in July, was such as to indicate defects and omissions, the correction of which would cost \$656.29, it may be observed that such defects, upon such estimate of the cost, to the amount of \$439.29, were remedied through the action of the defendant, taken pursuant to his right reserved by the contract. \* \* \* This work having been done by the defendant, in the exercise, by his election, of such right, he cannot effectually assert forfeiture in respect to the deficiency so supplied; but the Wadsworths were entitled to the benefit of the work thus produced, and were chargeable to the defendant for the amount of the expense incurred by him in doing it." See, also, *Murphy v. Buckman*, 66 N. Y. 207. That there may be a substantial performance, notwithstanding the amount required to remedy defects and omissions may be quite substantial, is shown in several of the New York cases. Among them, see *Woodward v. Fuller*, 80 N. Y. 312; *Murphy v. Buckman*, supra; *Crouch v. Gutmann*, supra; *Phillip v. Gallant*, 62 N. Y. 256. We conclude, therefore, that the amount of damages allowed is not necessarily inconsistent with the fact of substantial performance; and, it appearing, both from the pleadings and proof, that the plaintiff in error has relaid the defective flooring, he is not in a position to resist a recovery under the contract on the ground of nonperformance, or the nonproduction of the architect's certificate.

Counsel for plaintiff in error discuss at some length the error predicated upon a preliminary ruling denying the motion to strike out so much of the second defense of Thompson & Tomlinson as attempted to set up an estoppel, by reason of the failure of the architect to call their attention to the defective flooring, and to object to the poor work as it was being done. If it be conceded that the court erred in its ruling upon this motion, the error was harmless, since the judge who tried the case was not, as counsel assume, controlled by that ruling in his final determination of the case, but allowed damages on account of defective flooring.

The first and second assignments of error are based upon the admission in evidence of a stipulation, signed by the contractors and the subcontractors, wherein the respective amounts due the subcontractors were agreed upon. This stipulation not only fixed the amounts due the respective subcontractors from the principal contractors, but further recited that they were entitled to liens on the building for these respective amounts. To the introduction of this stipulation the plaintiff in error objected, on the ground that it was immaterial, irrelevant, and improper. It was clearly admissible as evidence against Thompson & Tomlinson, to fix the amount due from them to the subcontractors and the amount of the personal judgments to be rendered against them. For this reason, therefore, the general objection to its admission was properly overruled. But, giving to the objection the force claimed, and conceding that it presented the question of the admissibility of the stipulation as evidence for any purpose against Charles, we still think it was properly overruled. The right of the owner to have an adjudication of the amount due from the principal contractors to a subcontractor, before his property can be subjected to a lien therefor, is well settled, and hence the necessity of making the principal contractor a party to an action by the subcontractor against the owner, unless such adjudication has been already had. The purpose to be subserved by these requirements is that the owner, if compelled to satisfy a subcontractor's claim to relieve his property from a lien, may be credited for the sum so paid as against the amount due the principal contractor; and when, either by the contract or a subsequent agreement between the contractor and a subcontractor, the price of material or labor furnished is fixed and liquidated, and the payment of such price by the owner would be binding against the principal contractor, there seems to be no good reason why such contract or agreement should not, at least prima facie, constitute evidence against the owner of the value of such materials or labor. Phillips, in his work on Mechanics' Liens (section 204), states the rule on this subject as follows: "The owner, when the contract is not made immediately by himself or his duly-authorized agent, but by his contractor, may show that

the price agreed to be paid by the contractor was beyond the fair market value at the time; but, if there is no evidence to show that the materials furnished by a subcontractor are worth less than the price agreed on between him and the principal contractor, he is entitled to a lien for this agreed price. The owner, when sued by a subcontractor, would be able to impeach the contract only for fraud or mistake. The contract in either case is admissible in evidence." He cites in support of this proposition: *Cattanach v. Ingersoll*, 1 Phila. 285; *Hilliker v. Francisco*, 65 Mo. 538; *Miller v. Whitelaw*, 28 Mo. App. 639. To the same effect see, also, *Deardorff v. Everhart*, 74 Mo. 37. We think, therefore, that the stipulation was not only admissible as against Charles, but, in connection with all the testimony introduced, was sufficient to sustain the finding of the court as to the value of materials furnished by the company, and that they were used in the building. It furthermore appearing that the claim of the company and the claims of all the subcontractors, in the aggregate, were less than the amount found due the principal contractors, the allowance of this claim could in no way prejudice the plaintiff in error.

Error is further assigned upon the action of the court below in denying damages on account of failure to complete the building in the time specified. If we were at liberty, upon this record, to examine the evidence introduced upon this subject, for the purpose of passing upon its sufficiency, we would be compelled to accept the finding of the court as conclusive, since the testimony as to the causes of the delay is conflicting, and there is much that tends to uphold the court's conclusion that the delay was caused, in part at least, by the conduct of plaintiff in error, and that the requirement of the contract in this particular was waived by him.

It is further insisted that the court erred in its finding that Groth & Co. were entitled to a lien against the premises, and a personal judgment against Charles, for the sum of \$2,450, as principal contractor. The claim for extras was asserted by Groth & Co. and denied by Charles. This controversy also necessarily involved an examination of the plans and specifications; and the conclusion of the court below, therefore, being based upon such examination, in the light of conflicting testimony, its finding is conclusive upon this review.

The thirty-fifth assignment of error is predicated upon the refusal of the court to permit counsel for plaintiff in error to examine a paper shown to the witness Thompson to refresh his memory while testifying. His attention had been called to a conversation had with Charles, and he was asked if he had, at the time, any figures from Charles as to the amount he thought was due. The witness was handed a paper from which to refresh his recollection. He then stated the amount. Counsel for plaintiff in error asked to see the paper, and was refused, the court remarking,



"It is received only as bearing upon the question of interest." On cross-examination of the witness, counsel did not renew his demand for an inspection of the paper. Waiving the question whether the demand was made at the proper time, and conceding that the court erred in its refusal to allow counsel to examine the paper, it was, nevertheless, error without prejudice, since the testimony was received only as bearing upon the question of interest, and the court ultimately made no allowance of interest.

Without noticing in detail the errors assigned upon the admission or rejection of testimony, we think the action of the trial court in these particulars in no way prejudiced the rights of plaintiff in error, and upon a careful examination of the record we find no error that will justify a reversal. The judgment and decree of the district court are accordingly affirmed. Affirmed.

# RATCLIFF v. PEOPLE.

(Supreme Court of Colorado. Jan. 15, 1896.)

CONSTITUTIONAL LAW—UNVERIFIED INFORMATION—HOMICIDE—PREMEDITATION AND DELIBERATION—QUESTION FOR JURY.

1. Sess. Laws 1891, p. 240, § 2, as amended in 1893, providing that an information need not be verified in case a preliminary examination has been had, is not unconstitutional, as in derogation of Bill of Rights, § 7, providing that no warrant shall issue without probable cause, supported by oath or affirmation reduced to writing.

2. It appeared that defendant shot three persons, while in session as a school board; that he had hostile feelings towards such persons, which were aggravated by a rumor that one of them had at a former meeting slandered his daughter; and that he went to the meeting armed with a Winchester rifle. He testified that he shot "these men simply to protect my own life." The dying statement of one of the men killed was that no one was armed but defendant; that there was a heated discussion before the shooting; that defendant claimed they had slandered him; that no attempt was made to assault him; that five shots were fired, the first being accidental; that a few minutes elapsed between the first and second shots; that defendant stood near the door, behind seats; and that nothing was said after the first shot. Held, that the question whether the killing was willful, deliberate, and premeditated was for the jury.

Error to district court, Chaffee county.

Benjamin Ratcliff was convicted of murder in the first degree, and appeals. Affirmed.

Vinton G. Holliday, for plaintiff in error. Byron L. Carr, Atty. Gen., and F. P. Secor, Asst. Atty. Gen., for the People.

GODDARD, J. The plaintiff in error was convicted of the crime of murder of the first degree, and sentenced to suffer the death penalty. He was tried upon three separate informations, which respectively charged him with the deliberate and premeditated killing of George Douglas Wyatt, Samuel Taylor, and L. F. McCurdy. On motion of his counsel these informations were consolidated for trial, upon the ground that the of-

fenses charged were of the same character, and grew out of one and the same transaction. Separate verdicts were rendered. The record before us presents the proceedings in the Wyatt case, which are identical with those in the other cases. From this record it appears that, upon a complaint duly sworn to before a justice of the peace, plaintiff in error was arrested, and brought before said justice for a preliminary examination; that he waived examination, and was bound over to appear at the next ensuing term of the district court. A transcript of the proceedings before the justice of the peace was duly certified to the clerk of the district court, and filed in his office before the first day of the next term. At that term, by leave of the court, an information charging the plaintiff in error with the crime of murder, signed by the district attorney, was filed upon this transcript. The information was not verified. The fact that the information was unverified is the principal ground relied on for reversal. It is insisted that the act of 1893, amending section 2 of the act of 1891,<sup>1</sup> in that it provides for no verification of an information, in case a preliminary examination has been had, is in derogation of section 7 of our bill of rights, which provides that "no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing." The case of Lustig v. People, 18 Colo. 217, 32 Pac. 275, is cited in support of this claim. In that case the court had under consideration the act conferring jurisdiction upon county courts in misdemeanor cases, and the validity of a conviction thereunder upon an unverified information; and it was held that a prosecution and conviction under an information not supported by an oath or affirmation were in violation of said section, and could not be upheld. But it will be observed that the act under consideration in that case provided for the initiation of a prosecution upon the filing of an information in the county court, and the issuance of a warrant of arrest thereupon, without any preliminary affidavit or examination,—a proceeding clearly in violation of the requirements of section 7 of the bill of rights. But the information act of 1891, as amended in 1893, is not amenable to this objection, since it expressly provides that, unless a preliminary examination has been had or waived, the information must be supported by a proper and sufficient affidavit before a warrant of arrest can issue. The objection, therefore, to the information under consideration, is not supported by the reasons that controlled the decision in that case. The information act under which this prosecution was had has been before this court for con-

<sup>1</sup> Sess. Laws 1891, p. 240.

sideration in several cases, and in each the constitutionality and validity of its various provisions has been upheld. See *In re Dolph*, 17 Colo. 35, 28 Pac. 470; *Jordan v. People*, 19 Colo. 417, 36 Pac. 218; *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221; *Brown v. People*, 20 Colo. 161, 36 Pac. 1040. In the first three cases, convictions upon informations based upon preliminary examinations were sustained. It does not appear from the records in those cases whether the informations were verified or not; but in the latter case the objection to the verification of the information relied on for a reversal was, in its force and effect, the same as the objection now urged, the information being verified only by the district attorney, on information and belief. The record failed to disclose whether a preliminary examination was had, and a motion to quash the *capias* issued upon the information, for the reason that the same was not supported by oath or affirmation, was overruled. It was held that, in the absence of evidence to the contrary, it would be presumed that a preliminary examination was had, and in that event the verification was sufficient. In discussing the provisions of the act of 1891 touching the manner in which informations should be verified, we said: "By these provisions, two conditions are provided upon which an information may be filed: First, where there has been a preliminary examination, or the same has been waived; and, second, where the prosecution has its inception in the district court, and the information furnishes the foundation for the issuance of a *capias*. In the latter case it is provided that the information shall be supported by the affidavit of some person who has knowledge of the facts, and verifies them upon his own knowledge. Section 2 contemplates the verification by the district attorney in cases where a preliminary examination has been had. In the latter instance his verification upon information and belief is sufficient, since the arrest of the party charged must have been made upon warrant issued upon the requisite affidavit before the justice or examining officer, which affidavit, warrant, etc., are required to be delivered by the examining magistrate to the clerk of the court having jurisdiction of the offense." *Brown v. People*, supra. Since the decision in that case the legislature, by the act of 1893, has amended section 2 of the act of 1891, and dispensed with the unnecessary and useless formality of a verification by the district attorney on information and belief, and provided that, in case a preliminary examination has not been had or waived, the information shall be verified by the affidavit of some person who has knowledge of the commission of the offense. This amendment, however, in no way affects the application of our views, as therein expressed, to the case at bar, since a preliminary examination was had, and the arrest of plaintiff in error was made upon a warrant issued upon

a sufficient affidavit before the justice of the peace. We deem it unnecessary to notice at length the argument of counsel for plaintiff in error to the effect that the act of 1893 does not repeal section 2 of the act of 1891, but leaves in force the provision requiring the information to be verified by the district attorney upon information and belief. It is sufficient to say that the amendment was passed in strict conformity with the requirements of the constitution, and the section, as amended, stands in lieu of the original section, and so much of that section as is omitted therefrom is necessarily repealed. *End. Interp. St. § 196*, and cases there cited.

Counsel for plaintiff in error urges with much earnestness, especially in his oral argument, that the evidence is insufficient to sustain the verdict, since it fails to show that the killing was done with that deliberation and premeditation essential to constitute murder of the first degree; that it appears from the dying declaration of Wyatt that there was a heated discussion between the parties at the time, and that the cause of the quarrel was of such a nature as to arouse the passions of plaintiff in error to an uncontrollable pitch, and that the state of his mind at the time of the killing was such as to reduce the crime to manslaughter. But, unfortunately for counsel's argument, neither the conduct of plaintiff in error nor his testimony tends to support such a theory. He does not claim that he acted under such an impulse, but seeks to justify the killing upon the ground of self-defense. After stating his prior trouble with Wyatt, Taylor, and McCurdy, as members of the school board, and his inability to obtain schooling or books for his children, and after stating that his visit to the school house on this occasion was in regard to a letter he had received from a Mrs. Crockett, notifying him that McCurdy, at a meeting of the school board in May, 1894, had slandered his daughter, and that he had entered the school house where Mr. Wyatt was alone, and that Taylor and McCurdy afterwards came in, he says: "Then I told them my business,—that I was on the road to Fairplay to bring suit under this letter I had received from Mrs. Crockett, informing me my life was in danger, and that Mr. McCurdy had made this statement, that one of my children was six months pregnant, and he had made it there before the board last summer, and they knew it was an infamous falsehood, and unless they pleaded guilty I should bring suit for libel and damages. Mr. Wyatt was still sitting on the table, and he laid his hands on either side of him, and swore no live man could bring him before the court on a charge like that. I immediately replied: 'Gentlemen, I am a live man; and unless you plead guilty, as I stated before, I will bring charges that will bring you before the court this month, at Fairplay, if I live to get there.' And then, when I made the reply, that I la-

tended to bring this suit before the court unless they pleaded guilty, Taylor waved his left hand in an angry way. Wyatt passed around Taylor, and took his place between Taylor and McCurdy. Taylor waved his left hand, put his right hand in his overalls pocket, in an angry manner, and he said, 'Now, boys!' and they came down at me at a rapid gait, talking and hollering. You couldn't hear what they said. I begged them to stay where they were. I says: 'Gentlemen, stay where you are. I can hear you just as well from here.' I got the gun as quickly as I could. By that time they had got somewhere past the stove. I saw there was no show of letting up, and they couldn't hear anything I said, nor I, for the noise they were making. I threw up my hand, and told them to halt. They didn't halt at all. I fired into the floor, to stop them. They just made a start. Says I, 'Stay where you are, or the next one is yours.' Taylor waved his hand again, for the other two to pass around the benches, as I understood him, and made his spring forward at me, and I fired." After stating in detail the manner in which the three men were shot, he further says: "I was afraid my own life would be taken at the time I done this shooting, and shot these men simply to protect my own life. When I shot Taylor, I thought he was in the act of drawing his hand from his pocket, with a gun, to take my life." This testimony certainly precluded any inference that the killing was done in the heat of passion, or under an uncontrollable impulse, whatever credence it may be entitled to as tending to establish the theory of self-defense. Therefore the material inquiry is whether, from all the testimony introduced upon the trial (the jury manifestly discrediting the defendant's version of the encounter), they were warranted in finding that the killing was deliberate and premeditated, notwithstanding the dying declaration of Wyatt is contradicted by the plaintiff in error, who was the only other eyewitness of the homicide. It appears from letters written by him to the county superintendent of schools that he entertained a feeling of animosity against Wyatt, Taylor, and McCurdy—whether justifiable or not—on account of their action as members of the school board in refusing to furnish his children with such school facilities and the use of school books that he claimed were furnished other children in the district. And it is also shown, from his and other testimony in the case, that this feeling was aggravated by the rumor that McCurdy, at a former school meeting, had made slanderous accusations against one of his daughters, and that, incensed by these real or imaginary wrongs, he went to the meeting of the school board, on the day of the homicide, armed with a loaded Winchester, for the avowed purpose of obtaining a retraction by the members of the board of this slanderous statement. His version of what occurred

after entering the school house is above given. The only other testimony as to what then occurred is the dying declaration of Wyatt, which is as follows: "I, Douglas Wyatt, realizing my condition to be precarious, do depose and say: I was shot by Benj. Ratcliff, as was also Saml. Taylor and L. F. McCurdy. Taylor was shot first, McCurdy next, then myself. No one else armed. No blows struck before shooting. Heated discussion preceded shooting. Ratcliff claimed we (Taylor, McCurdy, and myself) had slandered him,—said he had an intrigue with his own daughter. No attempt made by any of the parties to assault Ratcliff. Five shots fired. First shot accidental, struck the floor in front of Taylor. A few minutes elapsed between 1st and 2nd shot. 2nd shot struck Taylor. Two shots fired at McCurdy. One shot fired at myself. I was shot at far end of room, looking from door. Ratcliff stood near door, behind seats, when he fired shots. No conversation took place after 1st shot was fired." As was said in *Power v. People*, 17 Colo. 178, 28 Pac. 1121: "It is true, also, that the taking of human life by the use of a deadly weapon does not necessarily justify the inference that the killing was either willful, deliberate, or premeditated. But that such inference may be warranted from the use of a deadly weapon, under certain circumstances, cannot be successfully controverted." And in *Hill v. People*, 1 Colo., at page 448, it is said: "The statute has not declared that homicide effected by means of a deadly weapon shall be punished with death, but deliberate or premeditated homicide is so punishable. Therefore the ultimate point which the evidence must extend to and establish is not the use of a deadly weapon, but the deliberation or premeditation with which the fatal act is done, and whether the intention is shown by evidence of antecedent menaces, former grudges, lying in wait, the means employed to effect the homicide, or any other circumstances which may give assurance of it. I think that it is to be submitted to the jury to find the fact under the direction of the law." We think, therefore, it being within the province of the jury to determine the credibility of the witnesses, and the weight to be given to the testimony, that there was evidence before them amply sufficient to justify their finding that the killing was willful, deliberate, and premeditated. And the evidence having been properly submitted to them under full, explicit, and correct instructions as to the law of the case, their verdict of murder of the first degree must be sustained.

No other error of importance being urged, the judgment of the district court must be affirmed; and an order will be entered of record, appointing and designating the calendar week commencing February 2, A. D. 1896, as the week for carrying the judgment of the district court into effect as the statute provides. Affirmed.

**COLORADO FUEL CO. v. MAXWELL  
LAND-GRANT CO.**

(Supreme Court of Colorado. Jan. 15, 1896.)

**QUIETING TITLE — EVIDENCE — MEXICAN LAND  
GRANTS—CONFIRMATION—CONCLUSIVENESS OF  
SURVEYS—REVIEW ON APPEAL—RECORD.**

1. In an action to quiet title, plaintiff claimed under a Mexican land grant, and defendant claimed under subsequent patents issued by the United States on homestead entries. *Held*, that it was not error to admit in evidence the patent from the government to the grantees of such Mexican grant, and the various mesne conveyances through which plaintiff deraigned title.

2. In an action to quiet title, where plaintiff claims under a deed from a corporation, the articles of incorporation of such grantor are admissible in evidence.

3. The official survey made of a Mexican land grant, after the grant has been confirmed by congress, is conclusive as against any collateral attack in the courts; and in an action to quiet title, by one claiming under the grant lands lying within the survey, against one claiming the same under a subsequent homestead entry, evidence by defendant that the survey was incorrect, and that a correct survey would have excluded the lands in dispute, is not admissible. *Russell v. Land-Grant Co.*, 15 Sup. Ct. 827, 158 U. S. 253, followed.

4. Where no exception is taken to a final judgment, or, if taken, the exception is not properly brought into the record by a bill of exceptions, the judgment cannot, on appeal, be reviewed on the facts.

Appeal from district court, Las Animas county.

Action by the Maxwell Land-Grant Company against the Colorado Fuel Company to quiet title. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 7th day of November, 1889, the Maxwell Land-Grant Company instituted this action against the Colorado Fuel Company to quiet title to 800 acres of land situate in township 34, range 64, in Las Animas county, Colo., averring ownership and possession of the land under and by virtue of a patent issued by the United States to Carlos Beaubien and Gaudalope Miranda on the 19th of May, 1879, for a grant of land made to them by the republic of Mexico in 1841, and known as the "Beaubien and Miranda," or "Maxwell," land grant, and various mesne conveyances. The defendant's claim of title is based upon certain patents issued in 1880 upon homestead entries made in 1878. The case was tried to the court, and judgment rendered in favor of plaintiff. To reverse this judgment, defendant brings the case here on appeal.

D. C. Beaman, for appellant. J. M. John and C. E. Gast, for appellee.

GODDARD, J. (after stating the facts). The record fails to disclose that any exception to the judgment was properly preserved. The statement in the order allowing the appeal that an exception was taken to the final judgment is not sufficient. It constitutes no part of the record. *Burnell v. Wachtel*, 4 Colo. App. 556, 36 Pac. 887. Un-

der the uniform decisions of this court and the court of appeals, an exception to the final judgment, properly preserved, and brought into the record by a bill of exceptions, is essential to obtain a review of the judgment upon the facts, or the law as applied to the facts. *Jerome v. Bohm*, 21 Colo. —, 40 Pac. 570, and cases there cited. Upon this record, therefore, we are limited to the consideration of those assignments based upon exceptions, duly preserved, to the rulings of the trial court, upon the admission and rejection of testimony. Among these are objections to the admission in evidence of the patent from the government to Beaubien and Miranda, and various mesne conveyances through which the Maxwell Land-Grant Company deraigns title. Counsel for appellant, in his argument, challenges the sufficiency of this evidence to sustain plaintiff's title, but assigns no reason why it was inadmissible. An examination of these various instruments satisfies us that they were properly admitted. What weight they were entitled to as evidence in support of plaintiff's title is not for us to determine upon this record. The objection to the introduction of the articles of incorporation of the Maxwell Land-Grant & Railway Company, upon the ground stated, was also, we think, properly overruled. The certificate is prima facie evidence of the officer's authority to take the acknowledgment. *Keichline v. Keichline*, 54 Pa. St. 75.

Without noticing in detail the numerous errors assigned upon the admission of testimony on the part of plaintiff, it is sufficient to say that in our opinion they are without merit, and that the court below committed no error in the rulings complained of.

On cross-examination of the witness Archibald, and by witnesses introduced in its behalf, appellant sought to prove that the calls in the original grant to Beaubien and Miranda were different from the calls of the official survey, and proposed to follow this by proof that the boundary as defined in the original grant does not cover the land in dispute. The court below rejected this testimony. This ruling is complained of, and principally relied on as constituting a ground for reversal. The question thus presented has been considered by the supreme court of the United States in several cases, and determined adversely to the claim of appellant. In the *Maxwell Land-Grant Case*, 121 U. S. 325, 7 Sup. Ct. 1015,—a suit brought to set aside this patent,—the court say: "In regard to the questions concerning the surveys, as to their conformity to the original Mexican grant, and the frauds which are asserted to have had some influence in the making of those surveys, so far from their being established by that satisfactory and conclusive evidence which the rule we have here laid down requires, we are of opinion that if it were an open ques-

tion, unaffected by the respect due to the official acts of the government upon such a subject,—depending upon the bare preponderance of evidence,—there is an utter failure to establish either mistake or fraud.” In the case of *Beard v. Federy*, 3 Wall. 478, it was said by the court, in discussing this question, on page 492: “By it [the patent] the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. \* \* \* The term ‘third persons,’ as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property.” The same doctrine was affirmed in *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. 1067; and in the case of *Russell v. Land-Grant Co.*, 158 U. S. 258, 15 Sup. Ct. 827, the identical question here presented was before the court, and Mr. Justice Brewer, who delivered the opinion of the court, said: “The accuracy of the survey is therefore, so far as the government is concerned, no longer open to inquiry. If, in a direct proceeding in equity brought by the United States to set aside the patent on the ground of error in the survey, the matter has become *res judicata*, it would seem that the patentee could not be compelled, in every action at law between itself and its neighbors, to submit the question of the accuracy of the survey, as a matter of fact, to determination by a jury. Nor is the matter open to such inquiry. A survey made by the proper officers of the United States, and confirmed by the land department, is not open to challenge by any collateral attack in the courts.” And, after quoting at some length from the foregoing cases, he continues: “These authorities are decisive upon this question. And, in the nature of things, a survey made by the government must be held conclusive against any collateral attack in controversies between individuals. There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys, and no other tribunal is so competent to deal with the matter as the land department. \* \* \* Take the particular case at bar. If the survey is not conclusive in favor of the plaintiff, it is not conclusive against it. So we might have the land-grant company bringing suit against parties all along its borders, claiming that, the survey being inaccurate, it was entitled to a portion of their lands; and, as in every case the

question of fact would rest upon the testimony therein presented, we should doubtless have a series of contradictory verdicts.” We think, therefore, that the rulings of the court below upon this matter were in conformity to the doctrine announced in the foregoing cases, and the testimony offered was properly excluded. Upon a careful examination of the matters presented by the record for our consideration, we find no error in the rulings of the court below that would justify a reversal, and its judgment must be affirmed. Affirmed.

#### WILSON v. THOMPSON et ux.

(Supreme Court of Idaho. Jan. 28, 1896.)

DEED ABSOLUTE—WHEN A MORTGAGE—PLEADINGS

1. Defendants executed and delivered a deed of certain real property to plaintiff. At the same time, plaintiff executed a contract to defendants, by the terms of which plaintiff agreed to redeed to defendants the said lands, upon the payment to him of the sum of \$800, with interest, within one year, etc.; defendants giving to plaintiff a promissory note for that amount. *Held*, that the deed and contract constituted a mortgage.

2. Complaint in this case examined, and *held* not to contain facts sufficient to constitute a cause of action.

(Syllabus by the Court.)

Appeal from district court, Ada county; J. H. Richards, Judge.

Action by H. G. Wilson against W. L. Thompson and Ellen Hayes Thompson. Judgment for plaintiff. Defendants appeal. Reversed.

Vineyard & Williams, for appellants.  
Hawley & Puckett, for respondent.

HUSTON, J. This is an appeal from a judgment of the district court for the county of Ada. This action is *sui generis*. It is not an action in ejectment, because it alleges neither possession, ownership, nor ouster. It contains none of the essentials of a complaint under the statute for *quia timet*. It alleges a contract between plaintiff and defendants by which plaintiff agreed to sell to defendants, for the sum of \$800, to be paid within one year, with interest at the rate of 1 per cent. per month, certain real estate situated in Ada county, Idaho. This contract is not, as appears, predicated upon any ownership or possession, right, or title in or by the plaintiff. To this complaint a general demurrer was interposed, which was overruled by the district court. This was error. The wisdom of Solomon, accentuated by the legal lore of Coke and Mansfield, could not devise a judgment which this complaint would support. The evidence, as appears by the record, shows this state of facts:

On the 31st day of December, 1891, the defendants were the owners of, and in possession of, a certain tract of land situated in Ada

county, Idaho; and on that day they purchased of the plaintiff certain lands in Kansas, and, to secure him for the purchase price thereof, they executed to plaintiff a deed of said land in Ada county, taking back from plaintiff, at the same time, a contract or agreement, of which the following is a copy:

"This agreement, made and entered into this 31st day of December in the year of our Lord one thousand eight hundred and ninety-one, between Henry G. Wilson, of Boise City, Ada county, and state of Idaho, party of the first part, and Ellen Hayes Thompson, of Boise City, Idaho, party of the second part, witnesseth, that the said party of the first part, in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained, agrees to sell and convey unto the said party of the second part, and the second party agrees to buy, all that certain lot, piece, or parcel of land situated, lying, and being in the county of Ada and state of Idaho, and particularly bounded and described as follows, to wit: The northeast quarter of the northwest quarter of section No. 13, township 3, containing 40 acres, more or less, according to government survey, for the sum of eight hundred dollars (\$800.00), lawful money of the United States; and the said party of the second part, in consideration of the premises, agrees to pay to the said party of the first part the said sum of eight hundred dollars (\$800.00), as follows, to wit: \$800.00. One year after date, I promise to pay Henry G. Wilson, or order, the sum of eight hundred dollars, at Boise City, Idaho, for value received, with interest at the rate of 1 per cent. per month from date until paid. And the party of the second part agrees to pay all state, school, and county taxes or assessments, of whatsoever nature, that are or may become due on the premises above described. In the event of a failure to comply with the terms hereof by the party of the second part, the said party of the first part shall be released from all obligations, in law or equity, to convey said property, and the said party of the second part shall forfeit all rights thereto, and all payments made on said property; and the said party of the first part, on receiving such payment at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or her assigns, a good and sufficient warranty deed to said premises, free from all incumbrances; and it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties. In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year first above written. H. G. Wilson. [Seal.] Signed, sealed, and delivered in presence of O. L. Miller.

"Duly acknowledged on January 2d, 1892,

and recorded February 3d, 1893, in the Records of Ada County."

The character and purpose of the transaction is shown by the evidence of the defendant Ellen Thompson and S. L. Tipton.

Mr. Tipton testifies as follows: "My name is S. L. Tipton. Am an attorney at law by profession. I know W. L. Thompson and Mrs. Thompson, I was their attorney during the months of November and December, 1891. I remember making arrangements with Mr. H. G. Wilson with regard to the transfer to defendants of certain Kansas property. That arrangement was: Mr. Wilson was to deed four lots in El Dorado, Kansas, to Mrs. Thompson. In consideration of that, he was to get a mortgage for \$800 on 40 acres of land which she owned over here on the Mesa; and, as my understanding was at the time, it was to be in the nature of a deed to him, and he was to give back a contract of purchase, in which, if she would pay the debt within a year, he would redeem the property. This must have been in November or December, 1891. I might have had more than one conversation with him. I don't remember whether or not that arrangement was ever carried out." Cross-examination: "I cannot say we had a contract. I don't mean to say a direct contract, but we had a conversation of that kind. I am sure this was in December, 1891. I believe this was in the Odd Fellows Building. They had just completed the new part of the building, and we had the conversation there. It runs in my mind that the rooms were not completed. I am satisfied we had this conversation in regard to his conveying to Mrs. Thompson these four lots in El Dorado, Kansas. I think Mrs. Thompson was there, and I am sure Mr. Wilson was present. There might have been somebody else. This conversation took between one-half hour and an hour. I might have had more than one conversation. I don't think I ever had more than two conversations with him. I am satisfied I had two. I might have had more. I went to that office that day, and asked him what he would take for that property in Kansas, and he told me he would take \$800; and I said, 'Yes, and you will take a good deal less' (using a profane word instead of 'good'). I told him that Mrs. Thompson could not pay the money; that he would have to be secured in some way. I knew she had no means by which she could raise the money, and I thought it was necessary for her to have the Kansas property. I think we had a further conversation at that same time about his wanting to take a mortgage on the home which she lived in to secure that \$800; that is, their house down in City Park addition, or Riverside, in Boise City. I am pretty well satisfied that is the case. I did not draw up any papers nor memorandum. I think Mr. Curtis drew the papers. I am not aware of that. We were both interested in the case for the Thomp-

sons. I never saw the papers that were drawn."

Mrs. Ellen Thompson testifies as follows: "I remember going to Mr. Wilson's office with my attorney, and making arrangements about this transaction. In the first place, Mr. Hartley traded property to me in Kansas. I went to Mr. Wilson, and I says: 'We are bit on that property in Kansas. I would like those four lots back, in order to pass Mr. Hartley his property back the same as I got it.' And I asked Mr. Wilson what he would take for those lots, and he said, 'Two hundred dollars.' I went there with Mr. Tipton, and I asked Mr. Wilson for those four lots back. He said he was willing to do it for \$800, and got me to give him this 40 acres for security for the \$800. I agreed to pay that \$800 in one year from that time. This was reduced to writing, in the shape of a bond for a deed back. He agreed to take the \$800. I was, under the circumstances, obliged to allow him the \$800. I didn't have a dollar. I expected to settle this when Mr. Hartley settled with me. I gave him that security for those lots back in Kansas, and I gave him as such security my 40 acres sagebrush ground. He agreed to, whenever I paid him the \$800, to redeed the property to me. Those papers were executed in an unfinished room in the back part of Odd Fellows Hall. Mr. Wilson's office was there, and these papers were executed in that office. I never executed any other deed to Mr. Wilson on my 40 acres. That is the only thing I gave him. (Papers handed witness.) This is the security that I gave to Mr. Wilson for the \$800. Mr. Wilson at the same time executed a paper to me, it was a contract or a bond for a deed. It was for that ranch back whenever I paid him the \$800. I reside on the 40 acres in controversy. It is the farm that I live on. I have no more land out there. At the time I executed this deed, he gave me back a contract to reconvey the same property on the payment of that \$800." Cross-examination: "My husband was not there all of the time. I talked with Mr. Wilson, asking him for the four lots, after I returned from Kansas without Mr. Thompson, because I deeded them to Mr. Wilson. It was my deed. There was a note given. I had to give a note. Mr. Wilson— I couldn't help myself. I had to. I mean a promissory note. I swear to that. I am just as sure of that as I am of anything else. There was but one deed made that I have any recollection of. I made the deed to the El Dorado property to Wilson at Hartley's office. I did not know Wilson at the time I deeded the El Dorado property. This was a short time before. He asked me \$200 for that property, and then he raised it to \$800. It was not \$200.00 a lot. The first thing I asked Wilson, on my return. I told him how the Kansas property was, and I told him I wanted the four lots back. I got to give them back, and I asked him what he wanted for them.

He says, 'Two hundred dollars.' When I went to get him to deed them back, he asked \$800."

This testimony is undisputed, and, as far as it goes, is conclusive, and, it seems, establishes the character of the deed by defendants to the plaintiff, and that the same was given and intended by the parties as a mortgage. The case, as shown by the evidence, is so clearly within the rule given by this court in *Kelley v. Leachman*, 2 Idaho, 1112, 29 Pac. 849, that it seems to us unnecessary to go into a discussion or citation of authorities.

Exception was taken by defendants to the refusal of the court to give the following instructions: "The jury is instructed that, if a promissory note was executed by the defendants to the plaintiff, then I instruct you that that fact is strong evidence to show that the deed was intended as a mortgage." We think there was no error in refusing this instruction, for want of definiteness. It does not refer to either time when the promissory note was given, nor the amount thereof.

Exception is also taken by defendants to the refusal of the court to give the following instructions: "The jury is instructed that if you find from the evidence that the defendants were in the peaceable possession of the land in controversy in this action on the 31st day of December, 1891, and at that date they executed a deed, absolute on its face, to the plaintiff, as security only, and that at the same time, or as a part of the same transaction, the plaintiff executed the agreement, bearing same date, to reconvey the land to the defendant Ellen Hayes Thompson upon payment by the defendants, or either of them, of the consideration named in the deed, with interest, taxes, etc., by a specified time, the two instruments together constitute a mortgage, and in such case this action will not lie to obtain possession of the land from the defendants." We think this instruction correctly states the law, and should have been given, and its refusal was error. The judgment of the district court is reversed, and cause remanded for further proceedings in accordance with this opinion. Costs to appellants.

MORGAN, C. J., and SULLIVAN, J., concur.

#### HASKINS v. CURRAN et al.

(Supreme Court of Idaho. Dec. 28, 1895.)

PLEADINGS—SUIT BY PARTNER—PARTNERSHIP CONTRACT—EVIDENCE—INSTRUCTIONS.

1. Under the contract sued on herein, a partnership was formed for promoting the sale and the development of the mining claims referred to in the complaint.

2. In the case of an express promise by one partner to repay to the other his share of advances made by the latter on account of partnership business, the amount of such share be-

comes the debt of the promisor, recoverable by an action at law, without dissolution of partnership or an accounting between the partners.

3. *Held*, that the answer sets up a subsequent contract to the one sued on as a defense and counterclaim, and that defendants should have been permitted to introduce all pertinent testimony tending to prove that issue.

4. In the trial of a case to a jury, it is error for the court to instruct the jury that there is no evidence tending to prove the defense or counterclaim of defendants, when there is such evidence.

5. *Held*, that the instructions asked by defendants should have been given.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; Alex Mayhew, Judge.

Action by William S. Haskins against Martin Curran and Susie Hussey to recover a money judgment for certain advances made by him in pursuance of a certain contract. From a judgment in favor of plaintiff, defendants appeal. Judgment reversed.

The respondent, William S. Haskins, brought this action against the appellants, Martin Curran and Susie Hussey, to recover \$3,649.97, with interest thereon, on account of certain advances claimed to have been made by him under the following contract, to wit: "The undersigned, Martin Curran and Susie Hussey, being the owners of a certain mining bond held by them of the Paymaster, Clear Grit, and Lost Wonder lode claims, held in the name of the said Martin Curran, and being without sufficient money to meet and perform their obligations under said bond, it is hereby agreed that the undersigned, W. S. Haskins, shall furnish such money so long as it shall be mutually agreeable to him and the said Martin Curran and Susie Hussey to carry out the terms of said bond; and, in consideration of such advancements, said Martin Curran and Susie Hussey hereby admit him as an equal one-third partner in and under said bond, and in and to all property, rights, titles, and interests therein and thereunder, and obligate themselves to repay him on or before June 8, 1892, two-thirds of all moneys so advanced by him, with interest at the rate of ten per cent. thereon per annum from the date of such advancements, with costs of collecting the same, if any, including reasonable attorney's fees. Witness the signature of said parties, this 9th day of October, 1891. Martin Curran. Susie Hussey. Wm. S. Haskins." The defendants, by their answer, deny the allegations of the complaint, and set forth what they claim to be the facts of the transaction out of which the contract sued on arose; and further, as a counterclaim, they aver that a contract was entered into by the parties to this suit subsequent to the one sued on herein, whereby the defendants sold all of their two-thirds interest in the contract that they held for the foreclosure and working of the mines referred to in the complaint, for which interests the plaintiff agreed to pay them \$2,000, and release them from any and all claims which

plaintiff had against them under the contract sued on; and demanded judgment for the sum of \$2,000, with interest thereon from the 19th day of November, 1891. The case was tried by the court, with a jury, and a verdict and judgment given and entered in favor of plaintiff for the sum of \$2,309, with \$230.90, as attorney's fees. A motion for a new trial was made and overruled. This appeal is from the order denying a new trial and the judgment. Reversed.

C. W. Beale and W. W. Woods, for appellants. W. B. Heyburn and E. H. Heyburn, for respondent.

SULLIVAN, J. Appellants assign 67 errors, and demand a reversal of both the order denying a new trial and the judgment, and a dismissal of the action.

Appellants open the argument in their brief with the proposition that because the bond which appellant Curran had on the mines did not, in terms, require him to work them, the plaintiff cannot recover for money advanced for that purpose; that the contract sued on only required Haskins to advance money to carry out the obligations of Curran and Hussey with the owners of said mines, and indorsed on the deed or envelopes which contained them, and deposited in the bank; that the conditions thereon indorsed only provided for the payment of money to the owners, and contained no mention of work to be performed on the mines. It appears that this contention was first raised in this court, but I have concluded to pass upon it. The facts appear in the record that, at the time the contract sued on was made, the appellants were working said mines, and the first advance of money made by respondent amounted to \$2,750, \$2,400 of which was paid to the owners of the mines, and the balance, to wit, \$350, was paid by Mr. Curran for work done on the mines. Mr. Curran testified that he worked the Paymaster mine with Mr. Haskins until November 8, 1891, when Haskins told him to quit work, that he would not put up any more money. We think the record clearly shows that the contract sued on contemplated that the mine should be worked, and that Haskins should put up money therefor, as long as it was agreeable for him so to do. There is no merit in the contention.

It appears from the record that the appellants defended in the court below on two grounds, to wit. (1) That a mining partnership was formed by the terms of said contract, and that one partner could not maintain an action at law against his copartners in regard to partnership matters until, at least, a settlement and an accounting had been had between the partners, and a balance struck and agreed upon; and (2) that the contract sued on had been canceled, and superseded by a subsequent contract; while the cause was tried in that court by respondent.



ent on the theory (1) that no partnership was created under said contract, and that no partnership existed in said matter; and (2) that the subsequent contract relied upon by appellants was only an option, at best, which had been waived by plaintiff, and was no defense for that reason.

As to the first contention of appellants, to wit, that a partnership was formed by the terms of said contract: It was the evident intention of the parties thereto to form a partnership for promoting the sale of said mines, and to do certain development work thereon, each to stand one-third of the payments and expenses, and each to receive one-third of the profits of the venture. The contract itself recognizes the parties thereto as partners, and contains the following stipulation, to wit: "In consideration of such advancements, said Martin Curran and Susie Hussey hereby admit him [Haskins] as an equal one-third partner in and under said bond, and in and to all property rights, titles, and interests therein," etc. The attorneys for the respondent earnestly contend that said contract contains none of the elements of a partnership, while, in their brief filed herein, they recognize the defendants as partners of the plaintiff, under and by virtue of the terms of said agreement. They say: "The venture seems to have had in it some of the elements of uncertainty incident to mining speculation; and Mr. Haskins, while evidently willing to risk losing one-third of the money which he should put into the speculation, desired to secure himself upon personal security for the two-thirds advanced for his partners. And his partners evidently had sufficient faith in the outcome of the speculation to undertake, in the event of its failure, to repay Mr. Haskins the two-thirds of the money advanced on their account." As to the law on this proposition, Mr. Justice Story, in his work on Partnership, at section 82, says: "There may also be a partnership in some cases touching interests in lands, or in a single tract of land, which will be governed by the ordinary rules applicable to partnerships in trade and commerce. Thus, for example, there may be a partnership in working of mines, for courts of equity constantly treat the working of a mine as a species of trade, and apply the same remedial justice to such cases as they do to ordinary partnerships." And we need not go beyond our own statutes to sustain the proposition that a partnership may be formed for such ventures as the one under consideration. Rev. St. § 3300, declares that "a mining partnership exists when two or more persons who own or acquire a mining claim, for the purpose of working it and extracting the mineral therefrom, actually engage in working it." In the absence of an express contract of partnership, that section of the statute declares that when certain facts, therein enumerated, exist between parties, a mining partnership exists between them. Such parties

or any of them do not necessarily need to own the mine so worked. It is sufficient if they acquire it for the purpose of working it, and actually engage in working the same. The provisions of said section need not be invoked in the case at bar to hold that a mining partnership existed between the parties, for the reason that the parties themselves have made an express contract of partnership for promoting the sale and development of said mines, and have actually engaged in working them.

Appellants contend that, as the parties to said contract were partners, the respondent cannot maintain this action, for the reason that one partner cannot maintain an action at law against his copartners for advances made by him on account of the firm, until, at least, a settlement and an accounting of partnership matters has been had, and a balance struck and agreed upon by the partners, and cite, in support thereof, *Ross v. Cornell*, 45 Cal. 133; *Graham v. Holt*, 40 Am. Dec. 408; *McDonald v. Holmes (Or.)* 29 Pac. 735; *Crossly v. Taylor*, 83 Ind. 337; *T. Para. Partn.* p. 268; *Story, Partn.* p. 558, § 348a. Those authorities recognize the general rule, and some of them also recognize that there are exceptions to the general rule. As a rule, advances to the firm and advances from it do not constitute debts, strictly speaking, but are only items in the accounts between the partners in the winding up of the concern; and in that class of cases a suit for an accounting is as necessary to settle the account as in the case of any other partnership accounts. *Wilson v. Soper*, 56 Am. Dec. 578; 2 *Lindl. Partn.* bottom page 1350, and note 2. But I do not think the case at bar comes within that rule. The stipulation in the agreement sued on is as follows: "It is hereby agreed that the undersigned, W. S. Haskins, shall furnish such money as long as it may be mutually agreeable to him and the said Martin Curran and Susie Hussey to carry out the terms of said bond; and, in consideration of such advancements, said Martin Curran and Susie Hussey hereby admit him as an equal one-third partner in and under said bond, and in and to all property rights, titles, and interests therein and thereunder, and obligate themselves to repay him on or before June 3, 1892, two-thirds of all money so advanced by him, with interest at the rate of ten per cent. thereon per annum from date of such advancements, with costs of collecting the same, if any, including reasonable attorney's fees." This contract is one admitting Haskins to participate equally in a copartnership theretofore existing between Martin Curran and Susie Hussey; and, in consideration of being admitted a one-third partner therein, he agrees to put up his one-third of the money required, and agrees to loan, or, if you please, advance, the two-thirds required to be advanced by his copartners; and, in consideration thereof, his copartners obligate themselves to repay their

share so advanced on or before June 3, 1892, with interest thereon, and also to pay all costs of collecting the same, including a reasonable attorney's fee. Here is an express promise by Curran and Hussey to repay their share of advances made by Haskins on or before June 3, 1892, including interest and costs of collecting the same. Under those circumstances, the money so advanced becomes the debt of the promisors, recoverable by direct action therefor, without dissolution of partnership or adjustment of partnership accounts. 2 Lindl. Partn., bottom page 1350, latter part of note 2; T. Pars. Partn. p. 285 et seq.

If the defendants had given Haskins their promissory note for the sum so advanced, would it be urged that he could not maintain a suit thereon when due? I think not. Appellants make a contract in writing to repay two-thirds of all advances, which they agreed to pay at a certain date; thus clearly showing that it was not the intention that such advances should be considered as items in the partnership accounts to be adjusted with them. In *Sprout v. Crowley*, 30 Wis. 187, the court, after stating the general rule in regard to one partner maintaining a suit at law against his copartner, says: "But, where there is an express agreement by one partner to repay to the other his share of advances made by the latter on account of partnership business, the amount of such share becomes thereby the debt of the partner who has thus agreed to pay the same, which may be recovered in an action brought directly therefor, without any regard to the partnership relation existing between the parties or the state of their firm accounts,"—and cites numerous authorities in support of that proposition. The doctrine there laid down is reaffirmed in *Gauger v. Pautz*, 45 Wis. 449. The rule there laid down is applicable to the case at bar.

As to the contention of appellants that the contract sued on had been canceled by a subsequent contract between the parties, the trial court held that no contract of that kind was pleaded as a defense, and refused to admit any evidence thereof. The answer contains the following averments, to wit: "Whereupon, on or about the 9th day of November, 1891, the said Haskins, being desirous of owning and purchasing from the defendants all of said bond, and thereby handling the said property himself, and of procuring the interest of these defendants therein, purchased of and from these defendants their two-thirds interest in said bond, for which the said Haskins then and there agreed that he would within ten days from the date thereof, to wit, within ten days from the 9th day of November, 1891, pay these defendants the sum of \$2,000 therefor, and also agreed then and there to release under seal, and did then and there release, these defendants from any and all claims, debts, or dues by reason of any moneys advanced or expenses paid or otherwise in and about said bond and

the working of said mines, and fully released these defendants from any obligations or liabilities to the said Haskins therefor, which was a part of the consideration of said transfer," etc. And it is further averred as follows, to wit: "That the said Haskins promised and agreed that upon such assignment being made, and such deeds being placed in escrow, as aforesaid, to pay to these defendants the sum of \$2,000 therefor on December 5, 1891; but the said Haskins failed, neglected, and refused to pay the same," etc. I think those allegations clearly set up a subsequent contract to the one sued on, as a defense in this suit, and that defendants should have been permitted to introduce all pertinent testimony offered by them in support of that defense. The trial court held that the subsequent agreement referred to was only an option, which option was waived by respondent; and, as the money was not deposited as per terms of the escrow agreement placed with the deed, neither party was bound thereby, and all evidence in support of that defense was rejected for that reason. This ruling of the court was prejudicial error. There was an escrow agreement deposited with the deeds, that provided, in case \$5,600 be paid to Martin Curran on or before December 5, 1891, and other payments therein enumerated be made, the deeds were to be delivered to E. D. Boyle, which option was not taken up or was waived; but that option is not the subsequent agreement pleaded as a defense to this suit.

The first eight specifications of error go to the question of the admission of certain testimony offered and admitted by the court in support of the allegations of the complaint. As that testimony tended to prove those allegations, there was no error in admitting it.

The ninth, tenth, eleventh, nineteenth, and twentieth specifications of error go to the ruling of the court in excluding answers to certain cross interrogations propounded to the witness Haskins. We do not think that there was prejudicial error in the rulings complained of.

The court erred in its rulings on the points made by specifications of error numbered 13 to 18, inclusive, and from 21 to 31, inclusive. By way of counterclaim, defendants alleged that plaintiff, Haskins, agreed that, upon an assignment being made of certain matters and certain deeds being placed in escrow by appellants, he would pay to them \$2,000 on the 5th of December, 1891; and the testimony excluded by the rulings complained of in said assignments of error tends to prove a part of appellants' defense. It appears that the offer to introduce the testimony referred to, or a part of it at least, may not have been made at the proper time; but no objection was made on that ground, and only made on the grounds of materiality and relevancy or competency.

As to the thirty-second error specified, the

court did not err in permitting witness W. W. Woods to testify as to what he considered a reasonable attorney's fee under the term of the contract sued on, that being one of the issues in the case.

The thirty-third alleged error is fully disposed of in a former part of this opinion. There was no error in overruling appellants' motion for a nonsuit.

As to the specifications of error numbered 34 to 39, inclusive, and 40, 41, 42, 43, 44, 45, 46, 47, 49, 51, 52, 53, 54, and 55, the testimony sought to be introduced as set out in said assignments of error would tend to prove the defense and counterclaim in this action, and the court erred in rejecting that testimony.

Specification No. 40 goes to the rejection of the instrument claimed by the appellants to contain the contract whereby Haskins agreed to pay the defendants \$2,000 for their entire interest in the partnership, and they to turn the same over to him. Mr. Curran testifies as follows: "Then on the 9th of November, 1891, he, Haskins, came up [to the mine], and I signed this agreement. He brought this agreement to me,—that is, Mr. Haskins did,—and asked me to sign it; and this is the agreement that me and Susie Hussey and Mr. Haskins entered into. I kept my copy. He gave me a copy, and he took this away with him, and I never saw it again until to-day. I have a copy of the same agreement that he left with me." Thereupon defendants offered said instrument in evidence, to the introduction of which plaintiff objected, on the ground that it was incompetent, and for the reason that it was an agreement that had never been in operation. The court sustained the objection, on the ground that there was no mutuality; that it would not bind one party, and would not bind the other. Counsel for defendants then stated that he desired to show what was done at the end of the 10 days mentioned in said instrument, to wit, on November 19th. The court replied: "I don't see any materiality to the agreement at all until you show the agreement was entered into and in force." The witness Curran had already testified as above stated, that that contract was brought to him already prepared by Mr. Haskins, and that he (Curran), Mr. Haskins, and Susie Hussey entered into the same; that Haskins left him a copy, and took the one signed by Curran away with him; and that witness had not seen it again until when presented to him on the witness stand. If the statement of the witness be true, that contract was a valid one between the parties, whether signed by Mr. Haskins or not; and the truthfulness of the testimony of the witness was a question for the jury. The court appears to have gone off on the theory that the written instrument last above referred to was not a valid contract between the parties, for the simple reason that Mr. Haskins had not signed it, entirely regard-

less of the truthfulness of Curran's testimony in regard to the making of said contract. This offered and rejected testimony was followed by offering testimony tending to prove that Curran and Hussey had nothing to do with the sale and development of said mines after the 19th of November, 1891, the date when Curran made deeds of conveyance of the said mines to Haskins and Boyle, and that Haskins had full charge and management of promoting the sale of said mines and the development thereof thereafter; and, further, that on that date the payment of the \$2,000 referred to in said written contract was extended to December 5, 1891. As to the truthfulness of all this testimony, the jury was the judge, and all relevant and proper testimony should have been submitted to the jury that tended to prove the issues made by the pleadings, under proper instructions.

The questions raised by specifications of error numbered 50, 56, 57, 58, 59, and 60 are, in substance, included in preceding assignments of error, and disposed of in former parts of this opinion.

Specifications of error numbered 61, 62, and 63 go to the giving of instructions 1, 2, and 3 asked by plaintiff, and given by the court. Instruction No. 1 is as follows: "The jury are instructed that the plaintiff having proven the contract alleged in the complaint, and the payment of the sums alleged to have been paid out for expenses on the mining claims, as provided in said contract, the burden is on the defendant to show that liability for repayment was avoided by some act that would relieve them in law from the liability under the contract." Instruction No. 2 is as follows: "There is no evidence that the plaintiff ever bought the interest of the defendants in the bond which Curran had on the mining properties, and no evidence that the contract sued on was ever canceled." Instruction No. 3 is as follows: "Under the evidence, the plaintiff is entitled to recover two-thirds of such amount as you may find that the plaintiff advanced under the contract, and, in addition thereto, is entitled to recover such sum as attorney's fees as you may find to be reasonable." By the first instruction, the jury is instructed that the plaintiff had proved the allegations of the complaint, thus taking away from them the very question of fact that they were sworn to determine themselves. By the second instruction, they are instructed that there was no evidence that plaintiff ever bought the interest of the defendants in the bond which Curran had on the mining properties, and no evidence that the contract sued on was ever canceled. This instruction takes from the jury the main points of this defense and counterclaim, and instructs them that there is no evidence on those points. Aside from the testimony of Curran on those points, A. W. Steele and John Keating, witnesses for the defendants, both testified that Hawkins

informed them that he had bought Curran out, or that Curran was out of it, and that he had it, and much of the evidence offered and rejected tended to prove those points. By the third instruction, they are instructed to bring in a verdict for the plaintiff for two-thirds of such sum as they might find plaintiff had advanced under the contract sued on. This instruction is peremptory, and leaves nothing for the jury to do except to ascertain two-thirds of the amount the plaintiff had advanced, and return a verdict for that sum. These instructions are radically wrong, and should not have been given.

The fourth instruction is excepted to, but it correctly states the law applicable to the feature of the case that it covers, and there was no error in giving it.

Instructions numbered 1, 2, and 3, asked by defendants, were refused by the court, and this is assigned as error. Those instructions state the law, and should have been given.

A new trial should have been granted, and it is so ordered. The judgment of the court below is set aside, and the cause remanded, with directions to the court to retry the case in accordance with the views expressed in this opinion. Costs awarded to appellants.

MORGAN, C. J., and HUSTON, J., concur.

#### On Rehearing.

This is a petition for a rehearing. The first contention is that the court erred in holding that the answer sets up a subsequent contract to the one sued on as a defense and counterclaim, and that the defendants should have been permitted to introduce all pertinent testimony tending to prove that issue. It is urged that said subsequent contract was unilateral, it being one in which Haskins made no express contract on his part. As a matter of fact, that contention may be true, but the answer avers that Haskins did agree to said subsequent contract. Said averment is set forth in the opinion in this case, and it is not necessary to set it out in full here.

It is substantially averred that Haskins promised to pay defendants \$2,000 on November 19, 1891, and release them from all liability to him for money theretofore advanced for promoting the sale and development of the mines referred to, for their two-thirds interest in said partnership; and thereupon defendant Curran, on the 19th day of November, 1891, did transfer by deed, on the request of Haskins, said mining claims, and then and there delivered said deed to said Haskins, which deeds were placed in the Coeur d'Alene Bank, with the deeds of the owners of said mining claims, which last-named deeds conveyed said claims to Martin Curran; also an escrow agreement authorizing the delivery of all of said deeds upon the payment to Martin Curran of the sum of \$5,000 on or before December 5, 1891,

and the further sum of \$33,000 on or before June 1, 1892. It is also averred that, of said \$5,600, Haskins was to receive \$3,600, and Curran and Hussey \$2,000, but said escrow agreement, on its face, fails to show that Haskins was to receive any part of said \$5,600 in case it was paid to Curran. Immediately following the averment last above stated is the following: "That said Haskins promised and agreed that upon such assignment being made, and such deeds placed in escrow, as aforesaid, to pay to these defendants the sum of \$2,000 therefor on December 5, 1891; but the said Haskins has failed, neglected, and refused to pay the same, or any part thereof," etc. This allegation clearly avers that the \$2,000 therein referred to was to have been paid as a consideration for the making of such assignment and such deeds placed in escrow as aforesaid, and not upon Haskins or his friend Boyle taking up said option. This averment is taken in connection with the averment that "Haskins, being desirous of owning and purchasing from the defendants all of said bond, and thereby handling the said property himself, and of procuring the interest of these defendants therein, purchased of and from these defendants their two-thirds interest in said bond," etc., for which he agreed to pay them \$2,000; not in case that he concluded to exercise his option under said escrow agreement, but on condition that Curran and Hussey assign to him all of their interest in said original contract with the owners of said mines, and deliver possession to Haskins. It appears from the pleading that by the alleged agreement of November 9, 1891, said \$2,000 was due and payable on November 19, 1891; and the last averment in regard to said \$2,000 would indicate that the time of its payment had been extended to December 5, 1891.

I think said allegations are sufficient to put in issue the making of said subsequent agreement, and any relevant proof thereof offered on trial should be admitted. The allegation, in effect, is that Haskins would pay to defendants \$2,000 for the performance of certain conditions and acts on their part; that they fully performed those conditions and acts as agreed; and that said \$2,000 was due and not paid. I do not think that said averments refer to said escrow agreement. If the proof shows that they do refer to said escrow agreement, and to no other, that would be an end to that matter. The escrow agreement is in regard to the payment of money and the delivery of deeds. The contract averred and set forth as a counterclaim and defense was for a very different purpose. I do not hold that a subsequent contract was entered into (that is a fact for the jury), but do hold that a subsequent contract is pleaded as a defense and counterclaim in this suit. The payment of the \$5,600 mentioned in the escrow agreement was optional; the payment of the \$2-

000 mentioned in appellants' Exhibit No. 9 was not optional, if the averments of the answer are true.

The counsel for petitioner criticises the following statement contained in the opinion in this case, to wit: "The trial court held that the subsequent agreement referred to was only an option, which option was waived by appellant,"—and insist that the statement is incorrect, in that appellants had nothing to do with waiving said option. Through some oversight, the word "appellant" was used in the quotation referred to, instead of "respondent." That error has been corrected. The last word of said quotation, to wit, "appellant," has been changed to "respondent"; so that criticism, which was a just one, will not apply to the opinion as corrected.

We find no reason for changing our views as expressed in the opinion heretofore given in this case. The petition for a rehearing is denied.

MORGAN, C. J., and HUSTON, J., concur.

#### WRIGHT v. KELLY et al.

(Supreme Court of Idaho. Dec. 31, 1895.)

MANDAMUS—APPLICATION—WHERE MADE—COUNTY COMMISSIONERS—CONSTITUTIONAL LAW.

1. Writ of mandamus will not issue where there is a plain, speedy, and adequate remedy at law.

2. The writ must be applied for, in the first instance, from the district court, unless there appears some reason which renders it indispensable that application should be made directly to the supreme court.

3. Where the writ is sought to compel the commissioners of a county to perform an official act, the respondents must be de facto officers of such county at the time such writ is to issue.

4. The constitutionality of an act of the legislature cannot be determined collaterally by the court in an application for a writ of mandate by a private party to enforce a private right.

(Syllabus by the Court.)

This is a petition filed by plaintiff, Robert H. Wright, against the respondents, to compel them, as county commissioners of Logan county, to meet as said commissioners of Logan county, and to either reject or allow his bill against said county for the sum of \$36. The petition alleges: That the respondents qualified as commissioners of Logan county, Idaho, on or about the 1st day of January, 1895. Afterwards, to wit, on the 5th day of March, 1895, by an act of the legislature, Alturas and Logan counties were abolished, and Blaine county created out of and including all of the territory theretofore comprised in the two counties of Alturas and Logan aforesaid. That said Fred W. Gooding and Sidney Kelly, aforesaid, were by the terms of said act made two of the commissioners of Blaine county, and, together with I. T. Osborne, constituted, and now constitute, the board of county commissioners of

Blaine county. By section 7 of said act (Sess. Laws 1895, p. 33), it was provided that "all valid and legal indebtedness of Alturas and Logan counties shall be assumed and paid by the county of Blaine," as then and thereby constituted. It appears, then, that the alleged indebtedness of Logan county to this petitioner became and was the indebtedness of Blaine county, which contained all the territory of Logan and Alturas counties, as aforesaid. That, since the passage of said act of the legislature, said Sidney Kelly and Fred W. Gooding have qualified and acted as two of the county commissioners of Blaine county. That afterwards, to wit, on or about the 18th day of March, 1895, an act, having theretofore been passed, was approved by the governor, creating the county of Lincoln, as is alleged, out of the territory which formerly constituted Logan county. The respondents appear, and demur to this petition, for the reason, as they say, that it does not state facts sufficient to entitle the petitioner to the relief sought. Demurrer sustained, and writ denied.

Hawley & Puckett and Thos. Halley, for petitioner. Johnson & Johnson and S. B. Kingsbury (P. L. Williams, Geo. M. Parsons, Atty. Gen., and V. Bierbower, of counsel), for respondents.

MORGAN, C. J. In this case the writ of mandate is asked for in the first instance from this court. Writs of this character must be applied for in the first instance from the district court, unless reasons are given which render it indispensable that the writ should issue originally from this court (paragraph 5, rule 28, Rules Sup. Ct., 32 Pac. xii.); and the sufficiency or insufficiency of said reasons will be determined by this court in awarding or refusing the writ. The petition gives as a reason for not applying for the writ in the first instance from the judge of the district court, that he is informed and believes such application would be unavailing, and further alleges that said judge has announced that he would consider said acts creating Blaine and Lincoln counties constitutional, until otherwise determined by the supreme court. We think this is no reason for neglecting to present this petition to the district court, in the first instance. It is the duty of each of the judges of the courts of this state to hear and determine all cases presented to them, and of which they have jurisdiction, impartially, and with due and careful consideration of the law, and the evidence applicable thereto; and this court presumes, and it is the duty of litigants to presume, that this duty will be faithfully performed, and no attention should be paid to reports and rumors to the contrary.

Has this petitioner a cause of action as stated in his petition? He shows in his petition that at the time this writ was prayed for, and for some time prior thereto, the said Fred W. Gooding and Sidney Kelly, two of

the alleged commissioners of Logan county, had ceased to act as such; that they both had accepted the office of "commissioner of Blaine county," so called, and qualified and were acting as such. By the allegations of the petition, it appears that such office was utterly incompatible with the office of commissioners of Logan county, and this is true whether the county of Blaine was legally and constitutionally created and organized or not. These defendants were therefore de facto officers of Blaine county, and not in any sense de facto officers of Logan county. They had accepted the acts of the legislature, creating and organizing the counties of Blaine and Lincoln as the law of the land, in accordance with the advice of this court in the case of *Hampton v. Dilley*, 2 Idaho, 1162, 81 Pac. 807, wherein this court says: "It is therefore deemed advisable for every good citizen to obey whatever may be promulgated by the lawmaking power as law, until the same shall have been passed upon by the courts of the country in a legitimate and proper manner." The defendants must be de facto officers of Logan county at the time the writ is to be commanded to issue, otherwise, it would be nugatory and cannot issue. High, Extr. Rem. §§ 37, 49. The petitioner has also a complete and adequate remedy in the presentation of his claim to the commissioners of Blaine county, which is charged with all the indebtedness of Logan county. Where this is the case, the writ will not lie. Id. § 50.

Again, we are asked to declare two acts of the legislature unconstitutional and void, in a petition for a writ of mandate filed by a private citizen against three persons, alleged to be county commissioners of Logan county, to compel them to pass upon a bill for work and labor performed for said Logan county. The only legitimate parties to the suit are the plaintiff and three persons named as defendants, who are not even de facto commissioners of Logan, as we have shown. Neither the commissioners of Blaine or Lincoln counties, so called, nor any other officer of said counties, are made parties to the application, nor could they properly be. Individuals in a private suit of the character of the one at bar cannot question the constitutionality of a solemn act of the legislature. Authorities in support of this principle are abundant, and founded in reason and justice. In *Re Short* (Kan. Sup. 1891) 27 Pac. 1005, the court says, referring to the organization of Garfield county: "Where a public organization of a corporate character has an existence in fact, and is acting under color of law, and its existence is not questioned by the state, its existence cannot be collaterally drawn in question by private parties." Dill. Mun. Corp. § 43. In the above cause two persons were imprisoned, and it was undertaken to show that the law organizing Garfield county was invalid. Here one of the dearest rights of the citizen was involved,—the right of personal liberty; and yet the court says (in re

Short, supra): "We do not think, however, that the question of the validity or invalidity of the organization of Garfield county can be raised in these collateral proceedings [habeas corpus] or in any collateral manner. The question can be raised only by the state by an action in quo warranto;" and a large number of authorities are cited to sustain, and which do abundantly sustain, the court. Cooley, in his *Constitutional Limitations* (pages 309 and 310), says: "These questions are generally questions between the corporations and the state, with which private individuals are supposed to have no concern." "In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the state as such." The reason for this rule is apparent and plain to the most ordinary understanding. If one individual in a suit for the enforcement of a private right may raise the constitutionality of the organization of a county, another may do so, and this may extend to 100 individuals, each thinking he has a new or better reason to present to the court why it should declare the law organizing a county unconstitutional; and thus the constitutionality of the law would continually be before the court in the most trivial suits, and the decision in none of the cases would be authoritative to destroy the de facto existence and organization of the county, because neither the county nor the state would or could be legally a party in any of the suits; and thus the public, consisting of all the citizens of the county or of the state, in no sense a party to the litigation, would have the validity of their corporate existence determined, or attempted to be determined. And the rule, we apprehend, would be no different if the constitution itself prescribed the manner of incorporation. Even in such a case, proof that a corporation was acting as such under legislative sanction would be sufficient evidence of right, except as against the state, and private parties could not enter upon any question of regularity (and in the case at bar the petitioner himself says in his petition that the county of Blaine is fully organized, and is acting under such county organization, with a full corps of officers). Cooley, *Const. Lim.* p. 310.

Mandamus is not only an extraordinary, but in some respects a summary, remedy, and cannot be made an instrument for giving a court jurisdiction of litigation on collateral matters in an irregular way. Spell. Extr. Rel. § 1336. Nor will this writ be granted in order to test collateral questions, nor can the question of the validity of an act of the legislature be raised by an application for mandamus. Id. § 1440. In the case of *State v. Douglas Co.*, 18 Neb. 506, 26 N. W. 815. The court says: "On an application for a mandamus against the county commissioners of Douglas county to com-

pel them to call an election in the city of Omaha for twelve justices of the peace therein, there being six precincts, and alleging that the act reducing the number of justices in such city to three was unconstitutional and void, held, that a court would not in that proceeding determine whether or not the act was in contravention of the constitution,"—and proceed to say: "The presumption is that the legislature has done its duty, and that an act passed by it is not in conflict with the constitution; and it is the duty of all ministerial officers to obey it until the act is declared invalid." Such questions should not be decided without a full hearing of parties interested, and careful consideration of the entire subject in a proper proceeding. Mandamus should not be issued, as a general rule, in cases where the right of the relator depends on holding an act of the legislature unconstitutional. 14 Am. & Eng. Enc. Law, 100; *People v. Supervisors of San Francisco*, 20 Cal. 591. This was an application for mandamus to compel the board of supervisors of the city and county of San Francisco to issue a license to the relator to keep an intelligence office in San Francisco. The court says: "The question whether the first section of the law of 1861, authorizing the board of supervisors of San Francisco to license intelligence offices, is unconstitutional, cannot be raised by the appellant in this proceeding, nor when it becomes necessary to decide on the constitutionality of a law involving the interests of third persons." *Smyth v. Titcomb*, 31 Me. 272. Mandamus is an appropriate remedy to be employed against delinquent tax collectors to enforce the performance of their duties; nor, in such cases, can the respondent, as a ministerial officer, object that the act of the legislature authorizing the tax is unconstitutional, since it is not within the province of such officers to determine the constitutionality of laws; nor will the courts, upon summary proceedings in mandamus, determine as to the constitutionality of statutes fixing the rights of third persons not parties to the suit. *High, Extr. Rem.* 143. In *People v. Stephens*, 2 Abb. Prac. (N. S.) 348, the court says: "I may add, also, to the reasons above stated, that it is rarely, if ever, proper to award mandamus in a case in which it can only be done by declaring an act of the legislature unconstitutional. That should be done in a more solemn mode of adjudication, upon a full trial, all parties being in court." In *Maxwell v. Burton*, 2 Utah, 599, the court says: "The validity of the law which imposes the duty upon the respondent to enter the names of the persons named in the register cannot be brought into question in a proceeding of this kind; that is, by petition for mandamus. We find that there is a law on our statute books in reference to registration, compelling the respondent to do what we are now asked to compel him to undo. We cannot,

for the purpose of this proceeding, inquire into its validity."

From the cases here cited, and a large number cited therein, and which it is not necessary here to quote, it is apparent that mandamus is not the proper proceeding in which to test the constitutionality of an act of the legislature. The validity of the act creating Blaine county cannot be brought in question when neither the county itself, the officers thereof, nor the state, are made parties to the suit; nor could they be legally made parties to this suit, as is shown above. But it is desired on the part of the petitioner in this case to show the invalidity of the acts creating and organizing Blaine county and Lincoln county by the legislature, by means of the journals of the two houses showing the manner in which these acts were passed. It is conceded by both parties that these journals can only be examined by this court in a proper proceeding, for the purpose of ascertaining whether the provisions prescribed by the constitution were complied with in the passage of the acts; and that the motives that actuated the two houses of the legislature in the passage of these acts, and of the governor in approving of them, cannot in any manner, by means of the journals or otherwise, be brought in question; and yet we are asked to consider the two acts as one, simply because they relate to the same subject-matter, and were considered the same legislative day, and then to assume that the motive and intention of the legislature in the passage of the two acts was to violate the provisions of the constitution. It would be highly improper for this court in this manner, or in any manner, to question the motives actuating the legislature in the passage of any particular act or acts. The fact that these two acts passed through some of their stages or all of them, on the same legislative day, has no significance. By an examination of the journal, we will, undoubtedly, find many acts considered by the legislature on the same day, and relating to the same subject-matter. It will scarcely be seriously contended that any two of these acts, relating to the same subject-matter, should be by this court taken to be and considered as one act, for the purpose of assuming that the legislature was actuated by improper motives in the passage of the acts, and that the intention was to avoid some of the provisions of the constitution. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional or statutory provision, which comes within the judicial cognizance. The protection against unwise or oppressive legislation within constitutional bounds is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people, in their sovereign capacity, can correct the evil, but courts cannot assume their rights. The court can-

not run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the powers apporportioned to the other departments of the government being *prima facie* valid must be enforced, unless restrictions upon legislative authority can be pointed out in the constitution, and the case shown to come within them in a proper action; nor can this court hunt for pretexts, nor assume improper motives on the part of the legislature, nor combine different and distinct acts relating to the same subject-matter, in order to afford an excuse to declare such acts unconstitutional. It is only in extreme cases, and in cases where the violation of the constitution is so clear that it does not admit of a reasonable doubt, that the court will assume to declare any act repugnant to the constitution. In short, all reasonable presumptions must be entertained, and all reasonable construction of the statute must be resorted to, in order to sustain the acts of a co-ordinate branch of the state government; remembering at the same time that the legislative power extends to all proper subjects of legislation, and are therefore unlimited, except as they are restricted by the constitution, and that the power of the legislature over municipal corporations is supreme and transcendent. It may erect, change, divide, and even abolish them at pleasure, as it deems the public good to require, unless such action is expressly forbidden by the provisions of the constitution. *Dill. Mun. Corp. § 54; Los Angeles Co. v. Orange Co., 97 Cal. 329, 32 Pac. 316.*

Petitioner refers to the fact that the counties of the state as they existed at the time of the adoption of the constitution were recognized in that instrument as legal subdivisions of the state. This is true, but it does not follow that the legislature cannot change those counties, create new ones, or abolish old ones, if, in so doing, it does not violate any of the provisions of the constitution. In short, the above-quoted clause of the constitution contains no limitation whatever upon the power of the legislature to change the then-existing counties. In the case of *People v. George* (Idaho) 26 Pac. 983, the contest was one of an entirely different character. There the suit was brought by and in the name of the people of the whole county; not by a private party, to enforce a private right, but by the public, to enforce that which was alleged to be a public right, to wit, to compel the auditor of the old county to deliver the books, records, and papers belonging to the people of Logan county to the persons alleged to be the constituted authorities of the new county. The respondent demurred, on the ground that the act creating Lincoln county was unconstitutional.

This suit being instituted by the public to enforce that which was deemed to be a pub-

lic right, the unconstitutionality being alleged, that was the matter in issue, and property so. The constitutionality of the act being presumed, it cannot be questioned in an application for writ of mandate by a private party to enforce a private right, particularly so where there is another and adequate remedy at law. The demurrer is sustained, and the writ denied.

SULLIVAN and HUSTON, JJ., concur.

# BELLEVUE WATER CO. v. STOCKSLAGER, Judge.

(Supreme Court of Idaho. Dec. 31, 1895.)

PROHIBITION—WHEN ISSUED—CONSTITUTIONAL LAW.

1. The writ of prohibition is the counterpart of the writ of mandate, and subject to the same conditions.

2. It will not issue where there is a plain, speedy, and adequate remedy at law.

3. The constitutionality of an act of the legislature will not be passed upon in an application for writ of prohibition, in a case where it is not directly in issue, and is only collateral to the questions in issue as shown by the petition.

(Syllabus by the Court.)

Petition for writ of prohibition to restrain the respondent from holding court in Halley or in Shoshone, as the county seat of Logan county, or as the county seat of any county. Demurrer sustained, and writ denied.

It was agreed, by counsel upon both sides, that these two cases should be considered and determined together. In this case H. E. Miller, as president of the Bellevue Water Company, a resident of Bellevue, prays for a writ of prohibition to restrain Judge Stockslager, the judge of district court for the Fourth district, from holding court at Halley or Shoshone, as the county seat of Logan county, and to prohibit him from holding court at any place as the county seat of Blaine county or Lincoln county, on the ground that no such counties exist, and alleges: The legislature passed two acts, as stated in petition for writ of mandate in *Wright v. Kelly*, 43 Pac. 535. That said acts are unconstitutional. That said respondent is the qualified and acting judge of Fourth judicial district, in which is Logan county. That said petitioner has a suit pending in the said court at Bellevue, and that it is material and necessary that said suit should be tried and determined at Bellevue in Logan county, and if not so tried that petitioner will sustain great and irreparable damage, not being able to obtain a trial and determination of said cause. That petitioner demanded of said judge that he hold a term of court at Halley as the county seat of Alturas county, and that he demanded that a term of court be held at Bellevue as the county seat of Logan county. That this was refused, and that respondent appointed a term of court to be held in Halley as county seat of Blaine



county, and in Shoshone as county seat of Lincoln. That such action would recognize the acts creating those counties as valid. That respondent replied, to said demand, that he held, and should continue to hold, that the city of Bellevue was not the county seat of Logan or of any county, and that he should recognize the acts creating Blaine and Lincoln counties as valid. That the parties whose interests would be directly affected by this proceeding are the city of Bellevue and the pretended counties of Blaine and Lincoln. And he asks that the chairman of each of the boards of county commissioners shall be served with process, and the mayor of the city of Bellevue. Petitioner states, as a reason for the application to this court for said writ of prohibition, that this court is the only tribunal that has power and authority to compel said judge to hold a term of court in Bellevue, as the county seat of Logan county, aforesaid. Demurrer is interposed in this case, also, on the ground that the petitioner does not state facts sufficient to entitle him to said writ.

Hawley & Puckett and Thos. Hailey, for petitioner. Johnson & Johnson and S. B. Kingsbury (P. L. Williams, Geo. M. Parsons, Atty. Gen., and V. Bierbower, of counsel), for respondent.

MORGAN, C. J. (after stating the facts). By the provisions of our statute "the writ of prohibition is made the counterpart of the writ of mandate, \* \* \* and arrests the proceedings of any tribunal, \* \* \* when such proceedings are without or in excess of the jurisdiction of such tribunal." Rev. St. § 4994. "It may be issued by any court except a probate or justice's court, to an inferior tribunal, \* \* \* in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law, \* \* \* upon the affidavit of the person beneficially interested." Id. § 4995. It will be seen that the writ issues only when the tribunal is about to proceed in a matter in excess of its jurisdiction. The statute itself, it would seem, answers every question raised by the petition. The petitioner asks that the respondent be restrained from holding court at Shoshone, or at Hailey, or at any other place, as the county seat of Logan county. The petition itself shows that the respondent is not proposing or threatening to hold court at either of the places named, or at any other place, as the county seat of Logan county. Again, petitioner asks, also, that respondent be prohibited from holding court at the county seat of Blaine county, or the county seat of Lincoln county, on the ground that no such counties exist. It is among the plainest and most elementary principles of law that questions not involved in the determination of a suit should not be, and cannot be, decided therein by any court, from the highest to the lowest. The petitioner, in

his petition, does not show that he has any interest whatever, greater or more than any other citizen or individual, in the question as to whether the acts creating Blaine or Lincoln county are constitutional. Nor does he show that he has any interest whatever in the determination of such question. The petitioner states that the Bellevue Water Company, of which he is president, has a suit pending against the city of Bellevue in the county of Logan, and that it is material and necessary that said suit should be tried in said Logan county, and if such is not done that plaintiff will sustain great and irreparable injury by not being able to obtain a trial of said suit. Section 8 of the act creating Blaine county has the following provision: "All actions, prosecutions, and legal proceedings of all kinds whatsoever now pending in either Alturas or Logan county shall be continued maintained and prosecuted in the new county of Blaine." Blaine is an organized county, with a full corps of officers, and is, in fact, a de facto county,—a de facto municipal corporation,—with a county seat at Hailey, with terms of court fixed and holden at said county seat, in said county. Whether constitutional or not, all the judicial machinery is in full and complete operation. The suit of the petitioner, then, may be tried at Hailey. There appears no reason in the petition why it may not be as well and as speedily tried in Hailey as in Bellevue. The plaintiff has, then, a plain, speedy, and adequate remedy at law. Where such is the case the writ cannot issue. Rev. St. § 4995.

All the authorities quoted in the case of the petition for writ of mandate, on this branch of the case, apply with equal force and pertinency to the application for writ of prohibition. No statement is made in the petition which indicates in the slightest degree that the constitutionality of the acts creating Blaine and Lincoln counties is in any way involved in the suit of petitioner against the city of Bellevue. The constitutionality of these acts not being involved in the said action in any way whatever, it is a matter not even collateral to the pending application. If it were a collateral issue, it could not be determined, in determining this application, as the constitutionality of an act cannot be determined when it is only collateral to a pending suit, and, more especially, when the pending action is an application for writ of prohibition. All the authorities upon this point, quoted in the application for writ of mandate, apply again with equal force and pertinency in the present application. Any opinion rendered in regard to the constitutionality of these acts would be obiter dictum simply, not binding on this court nor any other. The writ of prohibition will not issue where the act to be restrained has already been performed, even where the act has been performed during the pendency of the application for the

writ, for the reason that the writ would be without any effect whatever. *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179; *More v. Superior Court*, 64 Cal. 345, 28 Pac. 117; 19 Am. & Eng. Enc. Law, 273. The terms of court, both in Blaine and Lincoln counties, sought to be restrained, have already been held.

Petitioner further alleges that the said action of the district court will be highly injurious to the residents and taxpayers of Logan county, and will be injurious to the Bellevue Water Company, plaintiff herein, in that it will prevent this plaintiff from having a trial of said cause before a tribunal having a legal existence. It what respect the holding of a term of court in Hailey will be injurious to the residents and taxpayers of Logan county is not shown, and we cannot assume or presume any injury not alleged or shown. If the plaintiff should obtain a judgment against the city of Bellevue in Blaine county, and at Hailey, it would be as valid and binding as if it were obtained at Bellevue, as the petition states facts which show that Blaine county is fully organized as a municipal corporation, and is, as was said above, a de facto county, and the acts of the court while holding its session at Hailey are as valid and binding upon litigants as if held in any other county within its jurisdiction. In short, it does not appear that the constitutionality of the acts creating Blaine county or Lincoln county is involved in any way in petitioner's suit against the city of Bellevue. It does appear that the petitioner has a plain, speedy, and adequate remedy at law. It does not appear that the district court of the Fourth judicial district is proceeding, or is about to proceed, in any way in excess of its jurisdiction. The demurrer must be sustained, and the writ denied, and it is so ordered.

SULLIVAN and HUSTON, JJ., concur.

#### PENNY v. NEZ PERCES COUNTY.

(Supreme Court of Idaho. Dec. 31, 1895.)

##### APPEAL—WAIVER OF REQUIREMENTS—DISMISSAL.

1. When the record fails to show a compliance with the statutes or the rules of this court in the taking of an appeal, the appeal will be dismissed.

2. A failure to comply with the provisions of the statutes or the rules of this court in taking an appeal cannot be cured by stipulation.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by George S. Penny against Nez Perces county. From a judgment for defendant, plaintiff appeals. Appeal dismissed.

Jas. W. Reid, for appellant. Geo. M. Parsons, Atty. Gen., and Clay McNamee, Dist. Atty., for respondent.

HUSTON, J. The transcript in this case comes to us in such questionable shape that it is extremely difficult for us to learn therefrom just what the real status of the case in this court is. Counsel seem to have an idea that the appellate jurisdiction of this court is controlled, or, at least, directed, by stipulations of counsel. The statutes prescribe the means by which the appellate powers of this court can be invoked, and in no other way can such power or jurisdiction be made available. The case, as appears from the record, was heard by the judge of the district court, without a jury, upon an agreed statement of facts. The court finds the facts different from what is set forth in the agreed statement; as, for instance, the agreed statement of facts contains the following: "That after receiving the said warrants from the said several parties, as hereinbefore stated, on or about the middle of June, 1892, and for a long time prior thereto, plaintiff had all and each of said warrants deposited in the safe of J. D. C. Thiessen, in his saloon in the city of Lewiston, county and state aforesaid, and that, on the 16th day of June, 1892 the said safe of the said Thiessen was blown open and robbed of its contents, while the said county warrants were deposited therein, and all and each of the said warrants were taken by the persons who robbed the safe, and were destroyed by said persons." The eighth finding of the court is "that George Penny swears that, after receiving the said warrants as aforesaid," etc., and then follows the same language used in the statement of facts above given. Now, it appears from the record that no witnesses were sworn in the case. It was submitted upon an agreed statement of facts. If George Penny swore as stated in the said finding, it must have been in his complaint, or in the exhibit attached to said complaint; and it is evident counsel agreed that such statement, whether sworn to or not, was true, and it would seem that it should have been so accepted by the trial court. Otherwise, the findings of fact of the court are in accord with the agreed statement of facts. The court finds, as conclusion of law, "that the said board of county commissioners have no authority to issue warrants in lieu of those alleged to have been lost, as in the complaint set forth, unless especially empowered so to do by express provisions of the statute." Then follows, in the record, what is denominated therein a "decree," wherein "it is ordered, adjudged, and decreed that the said complaint be dismissed, that the plaintiff take nothing thereby, and that the defendant be entitled to judgment for its costs in the above entitled action. [Signed] W. G. Piper, District Judge. Dated this 20th day of January, 1894." Immediately following the above there appears what is denominated in the record a "judgment," which, after stating the preliminary facts, closes as follows: "Wherefore, by rea-

son of the law and the premises aforesaid, it is ordered, adjudged, and decreed that the said complaint in this action be dismissed, that the plaintiff take nothing thereby, and that the said defendant do have and recover of and from the said plaintiff its costs and disbursements in this action. [Signed] W. G. Piper, District Judge. Judgment filed 25th day of February, 1894." The notice of appeal is from the judgment only. It is dated January 25, 1895, and served February 25, 1895. There is no evidence in the record that it was ever filed. There is contained in the transcript a stipulation, signed by the attorney for the plaintiff and the district attorney, which would seem to have been made for the purpose of curing the defects in the record. We cannot recognize this kind of stipulation. In the first place, such a stipulation ignores the plain provisions of the statute, and seeks to establish jurisdiction in this court by stipulation of parties. This cannot be done. Again, we cannot recognize stipulations entered into by a district attorney after a case has passed out of the jurisdiction of the district court. Such a course is not only not in accordance with law, but is embarrassing to the officer whose duty it is to attend to those cases in the supreme court, as well as to the court itself. We find ourselves in this condition in this case: The record shows conclusively that no appeal was taken within the time prescribed by the statute, and yet the district attorney has assumed to stipulate, in a case in which, if his stipulation states the truth, he had no legal right to stipulate that the appeal was taken in time, and the record contains a written acceptance of service of the notice of appeal, signed by the district attorney, dated February 25, 1895, a full month after the time had expired for taking an appeal from the judgment, if any judgment was ever entered, which does not appear from the record. It is unpleasant for us to be constantly dismissing appeals because of a non-compliance with the statutory provisions and the rules of the court. But neither leniency nor admonition by the court seems to have any effect. Over our own rules we have control, but we have no authority to set aside or vary the positive enactments of the statute, or permit it to be done by others. In this case the appeal is from the judgment. There is no statement which we can consider. There is no bill of exceptions. The record does not show any motion for a new trial, but contains a stipulation, signed by the attorneys, to the effect "that motion for new trial is considered as made, and the ruling and order of the court therein may at once be made without notice," and this stipulation is entered into March 5, 1894, and notice of appeal was served on February 25, 1895. We cannot indulge this kind of practice. The people of Nez Perces county have interests here which should not be overlooked, and they have the same right to in-

sist upon a compliance with the law that an individual would have. The appeal is dismissed, without costs in this court.

MORGAN, C. J., and SULLIVAN, J., concur.

**FALK-BLOCH MERCANTILE CO. v. BRANSTETTER, Sheriff.**

(Supreme Court of Idaho. Jan. 23, 1896.)

**LEVY OF WRIT OF ATTACHMENT—CHATTEL MORTGAGE—PRIORITY OF LIEN—POSSESSION AND CUSTODY OF PROPERTY.**

Under the levy of a writ of attachment on personal property, if the custody and possession thereof is such as to enable the officer to hold the property and subject it to the order of the court issuing the writ, it is sufficient to create a lien thereon prior to a lien of a chattel mortgage executed and filed subsequent to making the levy of the writ, but prior to taking actual possession of all of the property on which said writ was levied, provided the officer proceeds with reasonable diligence to reduce all of such property to his actual possession, and does so reduce it.

(Syllabus by the Court.)

Appeal from district court, Ada county; J. H. Richards, Judge.

Action by the Falk-Bloch Mercantile Company against H. C. Branstetter, sheriff, for damages for conversion of personal property claimed to be subject to the lien of a chattel mortgage. Judgment for plaintiff, and defendant appeals. Reversed.

Hawley & Puckett, for appellant. Geo. H. Stewart and S. L. Tipton, for respondent.

SULLIVAN, J. This action was brought by the Falk-Bloch Mercantile Company against H. C. Branstetter, as sheriff, to recover the sum of \$850 as damages alleged to have accrued by reason of the levy and seizure, under a certain writ of attachment, in the suit of McConnell v. Lawson and Williams, of certain electric light poles, upon which the respondents, the Falk-Bloch Mercantile Company, claimed to have a lien by reason of a certain chattel mortgage. The defense was that the chattel mortgage was given to defraud creditors of the mortgagors, and that the seizure of said poles, under said writ of attachment, was made prior to the filing of said chattel mortgage. The cause was tried by the court with a jury, and resulted in a verdict and judgment for plaintiff in the sum of \$750. A motion for a new trial was overruled. This appeal is from the judgment and order denying the motion for a new trial.

The following facts appear from the record: Suit was brought by one C. S. McConnell against J. H. Lawson and Ben Williams, in the probate court of Ada county, and a writ of attachment issued. On May 8, 1893, said writ was placed in the hands of Branstetter, as sheriff, for service. It appears: That said Lawson and Williams had several hun-

dred telephone or electric light poles, all of which, except 24, were in Bois  river, between what is known as the "Upper Bois  Wagon Bridge" and the mouth of Moore's creek, a distance of about 20 miles, which poles were being floated down said river to said bridge, and, when they reached the bridge, were being taken out and piled on the bank of the river by Lawson and Williams. That on the evening of the 9th of May, 1893, the said sheriff went to said bridge and served the summons in said suit of McConnell v. Lawson and Williams on said defendants, and levied said writ of attachment on 24 of said poles, which he found piled on the bank of the river near said bridge. Thereupon Lawson and Williams informed the sheriff that, "if that is the way they are going to act, we will have nothing more to do with them [the poles]," and left the place. The sheriff put a man in charge of said 24 poles after making the levy. On the following morning, May 10th, the sheriff sent his deputy, Mr. Duncan, to said bridge, and it appears from his testimony that he went to said bridge and found one O. C. Allen there, and informed him that he had come, as deputy sheriff, to attach the logs in the river, and that he appointed Allen keeper, with instructions to take possession of the logs in the name of the sheriff, as they came down the river, and agreed to pay him \$3 per day for his services. The return on the writ of attachment shows that the writ was served at 10 o'clock a. m., on May 10, 1893. That thereafter the men employed by the sheriff began taking said poles from the river (as in floating down the river they reached a point at or near said bridge), and continued so to do until all of said poles were taken therefrom. It appears from the testimony of Charles McConnell that he went with the deputy sheriff, Duncan, on the morning of May 10, 1893, to the bridge above referred to; that they arrived there between 9 and 10 o'clock a. m. of that day; that, when they arrived, these men were out in the river catching logs; that they signaled them to come in, and, when they came, the deputy sheriff instructed said Allen to employ men to take the logs out of the river, and appointed him (Allen) foreman. It appears that said poles had been put in Bois  river at or near the mouth of Moore's creek for the purpose of floating them down said river to Bois  City, to be disposed of there for electric light purposes. The record shows that, after the service of the summons on Lawson and Williams, on the evening of May 9, 1893, they gave no more attention to the banking of said poles; that they went to Bois  City, and, between 10 and 11 o'clock a. m. of the 10th day of May, 1893, executed the chattel mortgage, above referred to, to the Falk-Bloch Mercantile Company, to secure the payment of \$750; that said mortgage was filed in the office of the county recorder of Ada county at 10 minutes after 11

o'clock on said 10th day of May, and within a half an hour thereafter the sheriff was notified that said mortgage had been executed and filed. The main contention of appellant is that the writ of attachment was levied, and that there was a valid subsisting lien thereunder, on said poles, before the chattel mortgage became a lien thereon; while the respondent contends that the lien under the writ was valid as to the 24 poles found on the bank of the river, but that it was not valid as to the poles which were floating down the river at the time the mortgage was filed in the recorder's office.

The poles were put in the river 20 miles or more above the point where it was intended that they should be and were taken out, and while floating down the river were scattered along the river for that distance. Men with skiffs were guarding the river at the latter point, and catching and banking the poles as they arrived. Twenty-four poles had been taken out and banked at the time of the levy of said writ, and thereafter the employees of the sheriff took entire charge and control of said work, and prosecuted it with reasonable diligence until actual possession was taken of all of said poles. Subdivision 3 of section 4907, Rev. St. (which section provides the manner of levying writs of attachment), is as follows: "Personal property, capable of manual delivery must be attached by taking the same into custody." I think the acts of the sheriff in this case, in making the levy of the writ, taking into consideration the situation and location of said property, and the diligence exercised by him in taking them into actual possession, show a sufficient compliance with the provisions of said section to create a lien upon the personal property referred to prior to that created by said mortgage. The most of said property consisted of loose poles floating down Bois  river, and scattered along the river for a distance of 20 miles above said bridge. The sheriff took actual possession of 24 of said poles that had been taken out of the river and banked, and employed men to catch and bank the remainder as they arrived at said bridge. After the banking of said 24 poles and the service of the summons, the owners quit the work that was necessary to save the poles still in the river, and left the sheriff in complete control thereof. They went to Bois  City and there sought to defeat the attachment by executing the chattel mortgage above referred to. When said mortgage was given, the mortgagee and mortgagors all knew that many of said poles were floating down said river. They made no effort to bank them, and thus save them, nor offered so to do. Apparently, they were perfectly willing that the sheriff should do that at his own expense, and, in case he failed to produce them, on demand, to satisfy the conditions of said mortgage, they would hold him for their value. But, regardless of these facts, I think the custody acquired by the

officer was such as to enable him to hold said property, and subject it to the order of the court that issued the writ, and to create a lien thereon prior to that of said mortgage. See *Hemmenway v. Wheeler*, 25 Am. Dec. 411; *Mills v. Camp*, 36 Am. Dec. 488. In our view of this case, it is not necessary for us to pass upon all of the errors assigned, as the view above expressed indicates that the lien under the attachment was prior to that of the chattel mortgage. The judgment of the court below is reversed, with instructions to that court to enter judgment in favor of the appellant, *Branstetter*, in accordance with the views expressed in this opinion. Costs awarded to appellant.

MORGAN, C. J., and HUSTON, J., concur.

NEW MEXICO ENSOR REMEDY CO. v.  
HOBSON et al.

(Supreme Court of Idaho. Jan. 29, 1896.)

ACTION ON NOTE—FRAUD—BONA FIDE PURCHASER.

Evidence examined, and held to be sufficient to authorize submission to jury, and that the court erred in taking case from jury.

(Syllabus by the Court.)

Appeal from district court, Bannock county; D. W. Standrod, Judge.

Action by the New Mexico Ensor Remedy Company against Newton C. Hobson and another on a note. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

E. P. Blickensderfer, for appellants. Eden & Terrell, for respondent.

HUSTON, J. This is an appeal from a judgment of the district court for Bannock county, and from the order refusing a new trial. The facts, as they appear from the record, are substantially as follows: Some time in the year 1892, certain persons (five in number) organized, under the laws of Idaho, a corporation known as the New Mexico Ensor Remedy Company. The ostensible purpose of this company was to carry the beneficence of what is commonly known as the "jag cure" into the benighted regions of the territory of New Mexico. It appears from the record that the five persons aforesaid had purchased from Dr. Ensor, the alleged discoverer of the wonderful panacea of inebriety, his secret, prescription, dose, or whatever it may be called, and, being imbued with the spirit of altruism, they were solicitous of dispensing the blessing among the less fortunate people of New Mexico. To carry out this laudable purpose, the aforesaid corporation was formed, with a capital of \$30,000. The shares were 30,000, at a par value of \$1 per share. The treasury of the corporation not being plerotic of wealth (that is, ready cash), it was

agreed that each of the five original corporators should take 1,200 shares of the capital stock, to dispose of as he should see fit, to remunerate him for his original "lay out." The "president," and, as it would appear, the moving spirit of the enterprise, was a person ycleped "Dr." Crozier. Crozier, having acted as the physician of the defendants, and having established the confidence which usually follows that relation, to manifest his zeal for, and his interest in, the pecuniary welfare of his said patients, the defendants, proposed to improve their financial condition by allowing them to become purchasers of 200 shares of the capital stock of said corporation. And the more completely to divest this offer of any seeming benefit to himself, and that his only motive was to benefit the defendants, he assured them that the stock he proposed to sell them was preferred stock, and would receive dividends in advance of any other stock. Induced by, and relying upon, the representations of the benevolent "Dr." the defendants were induced to purchase 200 shares of the capital stock of the New Mexico Ensor Remedy Company, and to give in payment therefor their promissory note for the sum of \$200, with interest at the rate of 12 per cent. per annum, and a reasonable attorney's fee.

It is virtually conceded by respondent that "Dr." Crozier perpetrated a fraud upon the defendants, but it is claimed that such fraud does not attach to plaintiff, as the owner and holder of the note and mortgage. The evidence of W. F. Fisher, who appears to have been one of the original corporators, and is now, we infer, a sort of administrator de bonis non of the whilom corporation, is as follows: "This is the note sued on in the complaint, purchased from Dr. Crozier by the company. The company purchased the note from Dr. Crozier in December, 1892, before its maturity." Mr. Fisher testifies as follows: "There was a pool formed by the five original promoters, as individuals, for the purpose of selling some of our individual private stock, and it was agreed between us that the money from such sale should be divided equally among all in the pool." This note and mortgage were palpably "Dr." Crozier's contribution to the pool. At the time of the alleged sale and transfer of the note and mortgage, "Dr." Crozier was the president of the corporation, and the sale is explained by Fisher as follows: "In explanation of what took place at the time of purchase, I will say: Along in December this company wanted money to start business. We had a note of J. S. Chevigney, but could not get cash on it at the bank. This note was for \$250. It was suggested by Crozier that he would as soon have the Chevigney note as Hobson's, and as Hobson's note was secured by a mortgage, we thought it could be cashed at bank; so we traded for it." It appears that, soon after, all of the original promoters, except Fisher

and Mrs. Palmer, who are residents of Bannock county,

"Folded their tents like the Arabs,  
And as silently stole away."

But it is contended by respondent that defendants never proffered a return of the stock for which the note and mortgage were given. It appears by the testimony of several witnesses—two, at least, of whom are stockholders and officers of the corporation—that the stock had no value whatever. And, besides, it appears from the record that defendants had not only offered to return the 200 shares of the stock to the company on delivery or cancellation of their note and mortgage, but had also offered to add thereto 500 shares of said stock which the conscientious "Dr." Crozier had given them to placate them, it would seem, until he was able to "get out." We think, with the evidence set forth in the record before it, it was error for the district court to take the case from the jury. The judgment of the district court is reversed, and the cause remanded, with costs to appellants.

MORGAN, C. J., and SULLIVAN, J., concur.

#### LEVAN v. THIRD DISTRICT COURT et al.

(Supreme Court of Idaho. Jan. 24, 1896.)

#### CONTEMPT PROCEEDINGS—APPEAL—WHEN LIES— WRIT OF REVIEW—PUNISHMENT.

1. When the district court, in contempt proceedings, keeps within its jurisdiction, and there is no abuse of the discretion vested in said court, there is no appeal. Nor will a writ of review lie in such case.

2. When, however, the district court exceeds its jurisdiction, the case may be brought to this court by writ of review. Section 5164, Rev. St. Idaho, prescribes the punishment that may be inflicted by the court upon the person guilty of contempt, and must be held to be a limitation of the power of the court to punish the person so found guilty, and must also be held to be a negation of all other modes of punishment.

(Syllabus by the Court.)

Writ of review by D. B. Levan against the Third district court in and for Boise county (J. H. Richards, Judge) and others. Judgment modified.

The petitioner was cited to appear before the court for contempt in disobeying the order of the court. He pleaded not guilty. An investigation was thereupon had, and evidence taken, with the result that the petitioner was found guilty of contempt of court. It was further found that in committing said contempt the petitioner had stopped or delayed the survey of mining property which had been ordered by the court; that in so doing he had damaged the party making the survey, namely, John Ranson et al., plaintiffs in the suit of John Ran-

son et al. v. D. B. Levan et al., as follows, namely:

Services of surveyor.....	\$ 20 00
" " chainmen .....	12 00
" " flagmen .....	7 00
For meals .....	4 25
Services of two witnesses.....	5 00
Fees of attorneys.....	250 00
Total .....	\$298 25

The said district court thereupon proceeded to assess a fine of \$25 upon the petitioner, D. B. Levan, and entered the following judgment, to wit: "Now, therefore, in consideration of the premises, it is ordered and adjudged by the court that the said defendant, D. B. Levan, be fined in the sum of twenty-five (\$25) dollars penalty, and the costs and disbursements of plaintiffs above mentioned herein, amounting in the aggregate to the sum of two hundred ninety-eight dollars and twenty-five cents (\$298.25); and it is hereby further ordered and adjudged that the said defendant, D. B. Levan, deposit with the clerk of this court, within ten days from the date of this order, the said sum of twenty-five (\$25) dollars fine, and the said sum of two hundred ninety-eight dollars and twenty-five cents (\$298.25) costs and disbursements, with the clerk as aforesaid, and this sum shall be paid over to the attorneys of record of the plaintiffs herein, on their demand; and in case said sums, respectively, shall not be so deposited within ten days as aforesaid, the clerk of this court shall, without further direction, issue a special execution against the property of the said D. B. Levan for the collection of the same, and that, in addition thereto, the plaintiffs herein may make application to the court, or judge thereof, for an order upon said D. B. Levan to show cause why he should not be punished for contempt in failing to make such deposit, which said judgment was signed and recorded as judgment of said court." No findings of fact or conclusion of law were made. The defendant in said contempt proceedings presents the case to this court for review.

J. T. Morrison and W. E. Borah, for plaintiff. Atty. Gen. George M. Parsons, L. Vineyard, and Wm. H. Claggett, for defendants.

MORGAN, C. J. (after stating the facts). The petitioner makes no objections to the action of the court in the assessment of the fine of \$25 and costs of the contempt proceedings, but alleges that that portion of the judgment proposing to assess damages in the sum of \$298.25 is wholly void, and that the court had no jurisdiction to render any such judgment; in other words, that the sole power of the court in contempt proceedings is defined by our statute, and is limited to a fine and imprisonment. The defendants contend that the writ of review will not lie, because there is a remedy by appeal. No writ of error will lie, and no

appeal can be taken from a void judgment. Therefore the controversy reverts to the question as to whether the part of the judgment objected to is in excess of the jurisdiction of the court, and therefore void. Section 5168, Rev. St. Idaho, is as follows: "The judgment and orders of the court or judge made in case of contempt are final and conclusive." The statute, then, indicates very clearly that when the district court, in contempt proceedings, keeps within its jurisdiction, and there is no abuse of the discretion vested in said court, there is no appeal. It is clear, also, that, where the court confines its judgment to matters within its jurisdiction, its judgment cannot be reviewed by this court. Section 5164 of our statute is as follows: "Upon the answer and evidence taken, the court must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed upon him not exceeding five hundred (\$500) dollars, or he may be imprisoned not exceeding five (5) days, or both." This is precisely the same as the statute of California relating to the same subject-matter. With reference to that statute, the supreme court of California, in the case of *Galland v. Galland*, 44 Cal. 478, says: "In this state the power of courts to punish for contempt has been regulated by statute. It is provided that, when one is adjudged guilty of contempt, he may be punished by a fine of not exceeding five hundred (\$500) dollars, and by imprisonment for not exceeding five (5) days, except, etc. Prac. Act, §§ 488, 489. This is a limitation upon the power formerly exercised by courts to punish for contempt."

In the case of *Kirk v. Manufacturing Co.*, 28 Fed. 501, the court says: "The sole power of the federal courts to punish for contempt of their authority, both at law and in equity, is derived from section 725 of the Revised Statutes; and they cannot impose penalties, under the state statute, in the form of pecuniary indemnity to the party injured." The above was a case on appeal from the United States circuit court for Wisconsin. In that state the statute provides that, if any actual loss or injury has been produced to any party by the misconduct alleged, the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him, and to satisfy his costs and expenses, instead of imposing a fine upon said defendant. Rev. St. Wis. § 3490. We have no such statute as the one quoted above, and therefore the district court, in contempt proceedings in this state, has no authority, under the statute, to proceed to assess any damages against the party for the loss or injury that may have been suffered by the party in the cause in which the contempt was committed. In *Maxwell v. Rives*, 11 Nev. 214, the court says, "The statute concerning contempts is a penal statute,

and must be strictly construed in favor of those accused of violating its provisions." The same is also held in *Ex parte Sweeney*, 18 Nev. 74, 1 Pac. 379; also, in *Boyd v. State*, 19 Neb. 134, 28 N. W. 925. In the case *Ex parte Robinson*, 19 Wall. 512, the court says, "The law happily prescribes the assessment which the court can impose for contempt. The seventeenth section of the judiciary act of 1789 [referring to the Revised Statutes of the United States] declares that the courts should have power to punish contempts of their authority, in any case or hearing, by a fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbarring the petitioner, treated as a punishment for the contempt, was therefore unauthorized and void." So with our statute; Rev. St. § 5164 prescribes the punishment that may be inflicted by the court upon the person guilty of contempt, and must be held to be a limitation of the power of the court to punish the party so found guilty, and must also be held to be a negation of all other modes of punishment. It will be seen, therefore, that that part of the judgment assessing the damages to the injured party in the sum of \$298.25 is wholly beyond the jurisdiction of the court, and is therefore void. So much of said judgment, therefore, must be set aside; and held to be of no effect. The proceedings of the district court in the assessment of the fine are approved. Costs awarded to the plaintiff.

SULLIVAN and HUSTON, JJ., concur.

#### BLUMAUER-FRANK DRUG CO. v. BRANSTETTER, Sheriff.

(Supreme Court of Idaho. Dec. 20, 1895.)

PROCESS—WHAT CONSTITUTES—NOTICE OF CHATTEL MORTGAGE FORECLOSURE—DUTIES OF SHERIFF.

1. Affidavit and notice for the foreclosure of a chattel mortgage under sections 3390, 3391 (and other sections therewith connected), Rev. St. Idaho, 1887, are held to be process, and as such will protect the sheriff in the execution thereof, the same as he is protected in the service of an ordinary execution in case of judgment.

2. Upon receipt of said process, the sheriff must proceed to execute the same; and having, by virtue thereof, levied upon goods described in the affidavit and notice, and taken them into his possession, he must proceed to give notice and sell the same under the directions set forth in the statute, notwithstanding an attachment or execution of a judgment creditor may be placed in his hands after the said affidavit and notice were levied upon the goods.

3. The sheriff is not called upon to determine whether the mortgage upon which the affidavit and notice were issued is a valid mortgage or not. If the judgment creditor desires to attack the validity of the mortgage, he can do so as directed by section 3396, Rev. St.

(Syllabus by the Court.)

Appeal from district court, Ada county; J. H. Richards, Judge.

Action by the Blumauer-Frank Drug Company, a corporation, against H. C. Branstetter, sheriff. Judgment for plaintiff, and defendant appeals. Reversed.

J. R. Wester and George H. Stewart, for appellant. Samuel H. Hays and Henry Z. Johnson, for respondent.

MORGAN, C. J. On the 5th day of March, 1893, W. H. Ridenbaugh sold to T. D. Farrer and M. J. Rounseville, of the firm of T. D. Farrer & Co., a stock of drugs and fixtures then being and situated in the store building of the said Ridenbaugh, in Bolsé City, Idaho, for the sum of \$5,000, and delivered same to said firm. In payment for said stock, said Ridenbaugh took the note of said firm for said sum, and, to secure the same, took a chattel mortgage on said stock of drugs and fixtures in said store. Thereafter, on the 7th day of August, 1893, said T. D. Farrer & Co., having in the meantime paid the said W. H. Ridenbaugh the sum of \$2,000, gave to said Ridenbaugh a new note for the sum of \$3,832.28, and, to secure the same, gave to said Ridenbaugh a new mortgage on said stock, described as follows, to wit: "All drugs, medicines, bottles, cases, flasks, patent medicines, chemicals, wines, liquors, cigars, tobaccos, paints, oils, brushes, glass, varnishes, soaps, toilet articles, toilet soaps, perfumes, trusses, suspensories, sponges, syringes, catheters, rubber tubing, combs, cutlery, compasses, spectacles, and all drug sundries; soda fountain, water glasses, fixtures, and apparatus; oil; file of prescriptions, and all medicinal pharmaceutical books, medical and unabridged dictionaries, price lists, and catalogues; fixtures, show cases, prescription cases, counters, shelving, stoves, writing desks, safe, scales, step-ladder, hose, signs, electric light fixtures, tools, sponges, sacks, all ornamental fixtures, chairs, printed matter, paper sacks, motors, graduates, and medicine and merchandise; and, in fact, every thing and article owned and used in and about said store room and place above described." A portion of the drugs and other goods, except fixtures, had been sold before foreclosure proceedings, and the money used to purchase other goods in the ordinary course of trade. On November 15, 1893, the mortgagee, Ridenbaugh, gave the defendant, as sheriff of Ada county, an affidavit and notice of foreclosure of said mortgage, and for the sale of said stock, under section 3390-3392, Rev. St. Idaho. On the 29th of November, 1893, the sheriff served this process levied upon the goods and fixtures, and took them into possession, and thereafter sold them under the mortgage. December 1, 1893, the respondent commenced an action against the said Farrer and Rounseville to recover \$542 for goods sold to them between March 9, 1893, and August 1, 1893, and on said December 1st delivered an at-

tachment in said action to said appellant, the sheriff, and orally requested the sheriff to disregard the mortgage, and take the property by virtue of the attachment. No indemnity bond was offered, and the sheriff had the goods in his possession under the foreclosure proceedings when he received the attachment. The sheriff levied the attachment subject to the chattel mortgage. The respondent recovered judgment against T. D. Farrer & Co., February 21, 1894. On the 5th day of December, 1893, the appellant sold said property at public sale, after due notice, to W. H. Ridenbaugh, the mortgagee, for \$2,500, and delivered the same to him, and thereafter returned said writ of attachment nulla bona. Thereupon the respondent commenced this action against said appellant, March 14, 1894. The action was tried by the court without a jury, and judgment rendered against the appellant, March 30, 1894, for said sum of \$542, from which judgment the defendant appeals to this court.

In the case at bar, both parties concede that process good upon its face protects the sheriff even though founded on a void or irregular judgment. See section 1832, Rev. St. Idaho (which is simply an enactment of a principle of the common law); *Dusy v. Helm*, 59 Cal. 188; *Norcross v. Numan*, 61 Cal. 640; and many other authorities that may be cited. Respondent contends, however, that affidavit and notice under sections 3390 and 3391 are not process, and that "process and orders," as defined by section 1870, is the only kind of process known to our statute, and the only kind that will protect the officer, if fair upon its face. This definition includes, of course, attachments and executions by virtue of which goods may be levied upon and sold to pay debts. Section 1870 is as follows: "Process as used in this article includes all writs, warrants, summons and orders of courts of justice or judicial officers." It will be seen that this section does not pretend to name all writings that may properly be denominated "process." It only says the word "process" includes certain papers. It may, notwithstanding section 1870, include many other papers not therein named. It is not claimed that the method pointed out in sections 3390 and 3391, and others thereto connected, is not a legal and constitutional method of foreclosing chattel mortgages. By virtue of this affidavit and notice, everything can be done, within its specified limits, that can be done under and by virtue of an execution. Section 3391 requires that the affidavit, together with a notice signed by the mortgagee, his agent or attorney, shall be delivered to the sheriff, requiring such officer to take the mortgaged property into his possession and sell the same. Section 3392 gives the officer directions how to proceed to serve the affidavit, and give the proper notice, etc. Section 3393 is as follows: "The officer [sheriff] must take the property into his possession and



give notice of sale in the same manner and for the same length of time as is required in the cases of the sale of like property on execution and the sale must be conducted in the same manner." Section 3394 states that the purchaser at such sale takes all the interest of the mortgagor in the property at the time of the execution of the mortgage, and the officer must execute to him a bill of sale of the property. Section 3395 requires the sheriff to make return on the affidavit of all his proceedings thereunder, and transmit the same to the clerk of the district court. It is apparent that the affidavit and notice are as effectual, in the sale of property mortgaged, and in the collection of the debt, in every respect, as an execution. The levy, taking possession, and sale must be made in the same manner; and the absolute and legal transfer from one person to another, and the collection of the money result. Where these papers are placed in the hands of the sheriff, and they are fair upon their face, he must proceed to execute them in the manner pointed out in the statute. The law requires it, and the sheriff has no alternative. It is, in fact and in law, a writ of execution in this proceeding, and for a neglect or refusal to execute which he would be liable to the creditors, as pointed out in section 1875, Rev. St. Idaho. And the converse is true. It is process, in the execution of which the sheriff is protected. In this case the sheriff had levied upon and taken the property into his possession, by virtue of the affidavit and notice, before the attachment was placed in his hands. Having put his hand to the plow, he cannot hesitate, or turn back, upon the verbal instruction or request of the attaching creditor. In this respect the case at bar differs from the case of *Bank v. Martin*. In the case of *Bank v. Martin*, 2 Idaho, 700, 23 Pac. 920, the stock of drugs was mortgaged in substantially the same manner as in the case at bar, and goods were sold in ordinary course of trade, and money used to purchase new goods, and this was permitted by the provisions of the mortgage, under the provision that the goods should remain in the possession of the mortgagor; and gave him the free and full use and enjoyment of the same. Before any attempt was made to foreclose the above mortgage, by affidavit and notice, or otherwise, Porter & Co. obtained judgment against the mortgagor, levied execution on said goods, and sold them on August 20, 1888. Thereafter, on the 11th day of September, the bank obtained judgment against the mortgagor, and an order of sale of the mortgaged property under the supposed lien. Execution was issued, and the sheriff refused to levy upon and sell said goods under the latter execution, because of prior levy and sale. The bank sued the sheriff for value of goods, and in this suit the court held the mortgage void, on authority of *Robinson v. Elliott*, 22 Wall. 524.

The facts in *McConnell v. Langdon*, 2 Idaho, 892, 28 Pac. 403, were the same. The attachment was levied before foreclosure proceedings were commenced, and in each case the goods were levied upon, and in the first case sold, before foreclosure proceedings were commenced. The respondent claims that the mortgage in the case at bar is almost a copy of the mortgage mentioned in *Bank v. Martin*, supra. Without in any manner intimating what the opinion of this court may be when such mortgage is fully presented for consideration, we answer: Yes; so it seems to this court; and if, as in that case, the respondent had levied his attachment upon these goods before any proceedings had been instituted for the foreclosure of the mortgage, then the cases would seem to be almost precisely alike, and the validity of the mortgage would then have been before the court. And the same is true of the case of *McConnell v. Langdon*, supra; and, if presented under the same state of facts, the decision of this court in this case might have been the same as in those cases.

We must not lose sight of the fact that process fair upon its face must be executed by the sheriff, upon its being placed in his hands. We hold the affidavit and notice to be process. No objection is made by the respondent to the form of the process. Therefore the sheriff must execute it. The sheriff cannot be called upon, when he receives an execution, to sit in judgment upon the validity of the judgment. Neither can he, in this case, be called upon to sit in judgment on the validity of the mortgage. This is for the court, and not for the sheriff.

But the attaching creditor is not without abundant and easy remedy. Section 3396 is: "The right of the mortgagee to foreclose as well as the amount claimed to be due, may be contested in the district court by any person interested in so doing, for which purpose an injunction may issue if necessary." What, if any, remedy, the respondent now has it would, of course, be improper for this court to indicate. This disposes of the questions raised by the attorneys for the respondent.

The case of *Jewett v. Sundback* (S. D.) 58 N. W. 20, is cited as an authority sustaining the respondent's contention. That case is similar in many respects to the case at bar, and, if the same questions had been raised before that court as are raised here, it would have been an authority in point. In that case the sheriff had the goods in his possession under foreclosure proceedings when the execution was delivered to him for service, and he was directed to levy on the goods, as in this case, and he refused. The plaintiff in execution sued the sheriff. The sheriff, for his defense, introduced the mortgage, and the plaintiff, without objection from the defense, proceeded to show that the mortgage was void; and proof was taken, and the case decided upon that proof. The sheriff did not seek to rest his defense upon the ground that

he was proceeding under a writ of foreclosure which was process fair upon its face, and which he must execute, unless commanded to desist by the court, by injunction or otherwise. Therefore the question before this court was not before that court, and was neither considered nor decided therein. We have not the statute of South Dakota, and therefore cannot tell what effect the statute may have had in the decision of that case. The decision of the court below is reversed, and the judgment set aside.

**SULLIVAN and HUSTON, JJ., concur.**

On Rehearing.

(Feb. 1, 1896.)

**MORGAN, C. J.** The principal contention of the respondent, in his brief, was that the affidavit and notice, under the statute, is not process; and therefore the opinion deals principally with this contention. The statement that "no objection is made to the form of the process" was intended to apply to the form, simply, and not to the description of the property therein, which followed the description in the mortgage. The description is sufficient, as between the parties to the mortgage. The respondent in this case did not avail himself of the means pointed out by the statute to contest the validity or sufficiency of the description, either in the mortgage or affidavit; and therefore, having taken no legal means to contest the same, such sufficiency was not before the court. And the court does not hold that such description is sufficient. The respondent repeats his argument as to insufficiency of description, and again quotes *McConnell v. Langdon*, 2 Idaho, 892, 28 Pac. 403. The court explained its position with respect to this, fully, in the original opinion, and does not think it necessary to repeat what was then said. *Howard v. Clark*, 43 Mo. 344, cited by respondent, states that the statute of Missouri provides a mode of settling all questions of priority between attaching creditors, and where the officer neglects these provisions, and decides the questions himself, he does so at his own peril. The case is not in point, as the sheriff in that case levied both attachments upon the same property on the same day, and thereby put himself in the position where he must decide as to priority. That is not this case. The priority in this case was with the mortgagee, as his levy was made first. He was as much a creditor as the attaching creditor, and the sheriff was not obliged to resort to section 4110,—commence suit, advance costs, and employ counsel to determine a matter in which he had no interest. In this case the respondent was the party who wished to secure and enforce his lien upon a portion of the goods in this store, upon which it was claimed the mortgage was not a lien. It was for the respondent to make such claim good, by such legal means as the statute provided. The respondent had the means at his disposal to compel a deci-

sion as to the validity of the mortgage, and also to compel the mortgagee to point out the goods upon which his mortgage was a valid lien. Having neglected to employ the means so provided, he could not, by verbal request or order, compel or require the sheriff to do this for him. *Trowbridge v. Cushman*, 24 Pick. 310; *Bank v. Mitchell*, 58 Cal. 42,—are neither of them in point, as there the question was whether an execution against an individual could take priority over an execution against a firm, or two joint makers of a note, when levied upon the firm or joint property. Not so in this case. We are quite surprised at the statement in the petition for rehearing "that, by an agreement between the mortgagor and mortgagee which the law declares void, a confusion of goods had occurred." We find no agreement in the mortgage or elsewhere, on the part of the mortgagee, that new goods might be purchased with the money received on sales, and such goods mingled with the others. The reasoning, therefore, founded upon such false premises, and the authorities quoted in support thereof, must fall of reaching the case. There can be no question of the right of the plaintiff to attack the validity of the mortgage, under section 3396, Rev. St. Idaho. Rehearing is denied.

**SULLIVAN and HUSTON, JJ., concur.**

**WHEELER v. DONNELL. (L. A. 91.)**

(Supreme Court of California. Feb. 8, 1896.)

On petition for rehearing. Denied.

For prior report, see 43 Pac. 1.

**PER CURIAM.** The petition for a rehearing is denied. We desire to say, however, that the right of appeal of a defendant charged by accusation under section 772 of the Penal Code is not here involved. Therefore, whether or not the legislature, under the latter clause of section 18, art. 4, of the constitution, may confer the right of appeal upon a defendant in such proceeding, and whether or not it has conferred such right, are to be considered as open questions.

**JOHNSON v. THOMAS. (L. A. 63.)**

(Supreme Court of California. Jan. 31, 1896.)

**NEGLECT—FAST DRIVING—VIOLATION OF CITY ORDINANCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

1. Plaintiff was run over at a street crossing by a wagon driven at great speed by defendant's servant. Plaintiff saw the wagon when it was about a block away, but, thinking that it would not be turned towards the side street where he was standing, because of the high speed, paid no further attention. Held, that the question of contributory negligence was properly left to the jury.

2. In an action for injuries due to fast driving, a city ordinance prohibiting fast driving is admissible to show negligence.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Peter Johnson against Albert Thomas for personal injuries due to negligence of defendant's servant. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

H. D. Cassidy, for appellant. Variel & Davis, for respondent.

SEARLS, C. This is an action by Peter Johnson to recover damages for personal injuries received by plaintiff by being knocked down and run over by a horse and wagon driven by a servant of defendant, upon a public street in the city of Los Angeles, California. Plaintiff had a verdict and judgment for \$500, from which judgment, and from an order denying his motion for a new trial, defendant appeals. Appellant makes three points for reversal: (1) That the court below erred in denying defendant's motion for a nonsuit. (2) That the court erred in admitting in evidence, on the part of plaintiff, section 4 of Ordinance 202 of the city of Los Angeles. (3) That the verdict of the jury is not sustained by the evidence.

The evidence on the part of the plaintiff, among other things, tends to show that Macy street, in the city of Los Angeles, runs east and west, is, say, 57 feet wide, and is crossed at right angles by Alameda street, which is 96 feet wide, with a sidewalk on the west side thereof 12 feet wide, and two railroad tracks running longitudinally through it, at or near the center thereof. Macy street, going east thereon, has, at the point in question, a down grade of, say,  $7\frac{1}{4}$  feet in a distance of 175 feet. Plaintiff is a cabinet maker and carpenter, and has a shop on the west side of Alameda street 150 feet south of its intersection with Macy street. On the 15th day of January, 1894, plaintiff started to go from Kerchhoff & Cuzner's mill, on Macy street, to his shop, on Alameda street. He had his apron full of blocks, brackets, etc., which he held with his right hand, and in his left hand he carried some larger articles of like character. His course took him west along the south side of Macy street, to and across Alameda street, thence south, on the west side of the latter street, to his shop. When crossing Alameda street, the horse and heavy spring wagon of defendant, driven rapidly by Albert Jennings, the servant of defendant, came east down Macy street, turned south into Alameda street, and struck plaintiff, who was upon the crossing, and within 8 to 10 feet of the sidewalk, on the west side of Alameda street, knocking him down, and two wheels of the wagon passing over him, whereby he was seriously injured, etc. Plaintiff first saw the horse and wagon of defendant a block away (175 feet) coming down Macy street, when he was near the center of Alameda street, and, as he testified, coming down Macy street "at terrific speed," and supposed from the rapidity with which the horse was being driven he would

continue on straight down Macy street, and did not further observe the team or look for it until at or about the moment he was struck down. To the question asked plaintiff, on cross-examination, "Well, at the time when you saw him coming rapidly, didn't it excite your fear of danger at all?" He answered, "No, sir; it didn't. I supposed by the way he was coming that he was going on right down Macy street." Again, he said, in answer to what reason he had for thinking he would continue down Macy street, "He was going so fast. It is kind of a sharp turn there for a man down Macy; and, as I said, I paid no attention." There was other testimony tending to show that defendant's horse was driven down the grade at "about a four-minute gait," and that there were no obstructions to a clear view. There was also evidence tending to show that defendant's horse was restive and nervous; had been frightened by a passing freight train, and as a consequence was not fully under control of his driver when he came down Macy street, but that he was stopped within "ten or fifteen feet" after the accident. That the horse came down Macy street at a speed so great as to attract the attention and excite the interest, if not fears, of witnesses, is apparent from the testimony. Allen J. Cobb says: "I saw a wagon coming very rapidly down Macy street. I watched it to see which way it was going, as it was coming so fast I thought I might have to dodge." Plaintiff introduced in evidence section 4 of Ordinance No. 202, of the city of Los Angeles, which is as follows: "It shall be unlawful for any person to immoderately ride or drive any horse upon any public street of the city of Los Angeles, or to permit any horse or horses attached to any vehicle to gallop, run or race upon any public street of said city."

Upon the showing made by plaintiff, the motion for a nonsuit was properly denied. Treated as a question of contributory negligence on the part of plaintiff, which proximately led to the result, the evidence falls short of a case in which the court is authorized, as matter of law, to say the plaintiff was inhibited from a recovery. As a general proposition, cases of negligence (to which those of contributory negligence form no exception) present a mixed question of law and fact, in which it devolves upon the court to say, as matter of law, what is or amounts to negligence, and upon the jury to determine, as matter of fact, whether or not, in the particular case, the facts in proof warrant the imputation of negligence. Where, however, the facts are undisputed, and the inference of negligence is irresistible, and not open to doubt, debate, or rational difference of opinion, the question becomes one of law, to be passed upon by the court. *Dufour v. Railroad Co.*, 67 Cal. 319, 7 Pac. 769; *Long v. Railroad Co.*, 96 Cal. 269, 31 Pac. 170; *Jamison v. Railroad Co.*, 53 Cal. 593; *Van Praag v. Gale*, 107 Cal. 438, 40 Pac. 555;

*Davis v. Button*, 78 Cal. 248, 18 Pac. 133, and 20 Pac. 545; *Holmes v. Railroad Co.*, 97 Cal. 161, 31 Pac. 834; *Wardlaw v. Railway Co.* (Cal.) 42 Pac. 1075. As was said in *Van Praag v. Gale*, 107 Cal. 438, 40 Pac. 555, "it by no means follows that the facts are admitted because there is no conflict in the testimony. \* \* \* What the plaintiff did is established without dispute and beyond cavil; but whether from this conduct the deduction is inevitable that he did not exercise the precautions for his own safety which a reasonable man would have done under precisely the same circumstances is not so clear. That this is the ultimate fact to be determined must be conceded." When plaintiff saw the servant of defendant coming down the street, driving like "Jehu, the son of Nimshi," he reasoned that he would continue down Macy street, and not make the short turn at such a rate of speed onto Alameda street. This conclusion was very likely one warranted by observation in like cases, and the inference of negligence on the part of plaintiff in not further watching the team depended upon whether or not he was justified in this reasoning. It was certainly an inference upon which minds might well differ, and hence proper to be submitted to a jury, under proper instructions. There is nothing in the testimony to show that plaintiff could have reasonably escaped injury by any amount of care, after the horse and wagon turned upon Alameda street, and to hold that a foot passenger in crossing a side street must watch and plan to escape injury from vehicles upon a main street without some indication that the latter are about to leave such main street, and that a failure so to do is conclusive evidence of negligence, is to carry the doctrine of contributory negligence to a romantic and unwarranted length. The evidence of negligence on the part of defendant's servant was ample, and the motion for a nonsuit was properly denied.

2. The section of the city ordinance was properly admitted in evidence. "The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. Thus, the violation of a statute or ordinance regulating the speed of vehicles, horses, or trains \* \* \* is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such a regulation, provided he is specially injured thereby." *Shear & R. Neg.* (4th Ed.) § 13, and cases there cited.

3. The evidence was sufficient to uphold the verdict. To discuss it at length can be productive of no good. Many of the incidents testified to by Jennings, the driver of the horse, were sharply contradicted, and in such a case the action of the jury thereon is

conclusive. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

SCHWARZ et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 251.)

(Supreme Court of California. Jan. 23, 1896.)  
CONTEMPT—VIOLATION OF INJUNCTION—EFFECT OF APPEAL—SUPERSEDEAS—CERTIORARI—EXTENT OF REVIEW.

1. An appeal from an injunction ordering the removal of trade signs, and prohibiting the future use of the trade name thereon, stays proceedings as to the mandatory portion of the injunction, so that a failure to remove such signs could not, pending appeal, be punished as contempt.

2. Plaintiffs were ordered by the court to remove certain trade signs from their premises, and prohibited from using the trade name thereon, and, pending an appeal from the order, made no new use of the name, and removed it from their business stationery, but failed to remove the signs, claiming that they were the property of their lessor. *Held*, that the fact that they continued to do business on the premises was not a violation of prohibitory portion of the injunction, which could be punished as contempt pending the appeal.

3. On certiorari to review proceedings for contempt for violation of an injunction, the court is not limited to the record proper and the order of commitment in determining the power to make such order, but may look to evidence not in the record.

In bank. Certiorari by Gustave Schwarz and another to review an order of the superior court of the city and county of San Francisco adjudging petitioners guilty of contempt. Order annulled.

Morrison, Stratton & Foerster, for petitioners. J. J. Scrivner, for respondent.

VAN FLEET, J. This is a proceeding to review by certiorari an order or judgment of department 7 of said superior court (hon. A. A. Sanderson, J.) convicting petitioners of contempt for the alleged violation of an injunction. The facts pertinent to the inquiry are briefly these: The petitioners are the defendants in an action pending in said superior court, brought by Rudolf Hagen and Felix Eisele, wherein it is alleged that the latter are conducting a saloon and restaurant business at No. 8 O'Farrell street, in the city of San Francisco, under the name and designation of "Louvre"; that they are the owners of said designation as a trade name by right of purchase from their predecessors in interest, by whom it was appropriated for the purpose; that the defendants (these petitioners) have established a like business at No. 1 O'Farrell street, in said city, and have without right adopted the words "Louvre" and "Old Louvre" as a trade

ness designation for their saloon and restaurant, and have had said words placed upon the gaslight lamps in front of the entrance, and upon large glass signs over the entrances to their place of business, and elsewhere about the premises, etc.; and it is prayed that they may be forever enjoined and restrained from using the said words in connection with or in any manner in or about their said restaurant and saloon, and that defendants be required to remove said signs and other objects upon which said name appears, etc. Pending the trial of the action, the superior court, on July 19, 1895, made an order in said action whereby petitioners, the defendants therein, were "enjoined and restrained from using said word 'Louvre,' or the words 'Old Louvre,' upon any sign or signs, lamps, transparencies, either engraved or painted or otherwise arranged thereon, in connection with or in any manner in or about defendants' restaurant and saloon at No. 1 O'Farrell street, in the city and county of San Francisco, state of California, or any other words or devices printed, painted, or stamped or written on such signs or street lamps in such manner as to be a colorable imitation of the trade name of plaintiffs; and that defendants be required to remove their said lamps and transparencies upon which is now in any manner placed or appears the word 'Louvre,' or the words 'Old Louvre,' or any colorable imitation thereof; and that the said defendants, and each of them, be further enjoined and prohibited from using the said words, or either of them, in connection with the said business at No. 1 O'Farrell street, in said city and county of San Francisco." From this order, petitioners, on August 1, 1895, duly perfected an appeal to this court. Thereafter, the petitioners, having been cited to show cause why they should not be punished for contempt in failing to comply with said injunction order, appeared, and objected that said court had no jurisdiction to hear or proceed in the matter, by reason of the appeal from said order, the taking and perfecting of which appeal were duly called to the attention of the court; but, notwithstanding said objection and the said appeal, the superior court proceeded with said hearing. Thereupon petitioners introduced affidavits showing that the premises No. 1 O'Farrell street, where petitioners carry on their business, were at the time, and for several years prior thereto had been, held under a lease from the owner of the building by the Pabst Brewing Company, a corporation, which latter, previous to the occupation by petitioners, had at its own cost fitted up and furnished said premises in a complete manner for the purposes of a restaurant and saloon, and had caused said premises to be designated by the name "Old Louvre," by having said designation placed upon the several signs complained of; that two of said signs, one over each of the two

entrances to said premises, are of fancy stained glass of an expensive character and make, and another of said signs is painted upon the wall of the Phelan building, in which said premises are situated; that all of said signs were so placed by said corporation before petitioners occupied said premises, and are the personal property of said corporation; that in March, 1895, petitioners rented said premises, with the furniture and fixtures therein, from said Pabst Brewing Company, as subtenants, for the purpose of conducting a saloon and restaurant business therein, and have since been carrying on such business, and were so engaged when the injunction was served upon them; that, immediately after the service of said injunction, petitioners complied therewith, and have since continued to do so in all respects, excepting only that they have not removed or interfered with the said signs above adverted to, which, as aforesaid, do not belong to them; that upon their wine cards and bills of fare the words "Old Louvre" have been left off, and the word "Louvre" in no manner or connection appears thereon, but instead appears the designation "Schwarz & Beth's Restaurant and Family Resort"; and that neither said name of "Louvre" or that of "Old Louvre" has since existed or been used in connection with their said business upon any signs, street lamps, or transparencies, or otherwise, excepting only upon the said signs, belonging to said brewing company. At the conclusion of said hearing, on August 27, 1895, the court made an order finding that petitioners were continuing to "use the said word 'Louvre' and the said words 'Old Louvre' in connection with their said business," in violation of said injunction, and adjudged them guilty of contempt therefor, and it was ordered and adjudged that they be committed to the county jail "until they, and each of them, shall desist and refrain from carrying on or conducting their said business at said No. 1 O'Farrell street, under the trade name of 'Louvre' or 'Old Louvre,' or from in any manner using said names in connection with their said business, or from carrying on the business of restaurant and saloon at said No. 1 O'Farrell street, under the said name of 'Louvre' or 'Old Louvre,' in said city and county of San Francisco"; and it was adjudged that they be fined in the sum of \$150, and that they pay the same with the costs of the proceedings to plaintiffs, and that plaintiffs have execution therefor.

It is conceded that the injunction, in so far as it requires petitioners to remove the signs bearing the name in controversy, is mandatory in character; and it is further conceded that, as to the mandatory features thereof, it is stayed and suspended in its effect by the appeal taken by petitioners from the order granting the same. The appeal, however, has no such effect upon that part of the injunction which is merely prohibitory, but

that remains in force and unimpaired, notwithstanding the appeal; and the question therefore arises: What was the particular in which the petitioners failed to conform to the requirements of the injunction, and for which they were found guilty of contempt? Was it in failing to observe the prohibitory features of the writ, or in not doing the affirmative thing required thereby,—that is, the removal of said signs? If the latter, then the court had no power to punish petitioners for their failure, since, that part of the writ being in suspension, the court could not proceed to enforce it pending the appeal. Code Civ. Proc. § 949; *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333; *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156, 563. While the recitals of the judgment of contempt are general in terms, that the petitioners "have continued to and do now use" the prohibited name "in connection with their said business," it is quite manifest, we think, from the record, that the failure to remove the obnoxious signs was the fact upon which that finding is based, and that it was this fact which in the mind of the court constituted the failure of petitioners to comply with the injunction, and rendered them guilty of contempt. This is very apparent, not alone from the facts above recited, and which were wholly uncontradicted, but also by reference to the charge in the affidavit upon which the contempt proceedings were predicated. In substance, this affidavit is to the effect that, notwithstanding petitioners have been restrained from using the word "Louvre" or the words "Old Louvre" upon their signs, transparencies, etc., and are required to remove the same, they still continue, in violation of the injunction, to employ said designation. It is not charged specifically that the name is so being used in any other manner than upon said signs, and the affidavit can therefore be construed only as a charge that the name is being so used thereon, and not otherwise. The judgment follows the general language of the affidavit in this respect, and should receive no broader construction than the latter will bear. Contempt being a criminal proceeding, and the party being entitled to know with what he is charged, it will not be presumed that he was held guilty of some act not specifically alleged in the affidavit or fairly covered thereby. The offense being criminal in its nature, both the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused. *Batchelder v. Moore*, 42 Cal. 412; *Maxwell v. Rives*, 11 Nev. 221; *Phillips v. Welch*, 12 Nev. 158 (Opinion of Beatty, J., 187).

The objection that we are not at liberty to go beyond the recitals or findings in the judgment itself, in reviewing the action of the court below, is no well taken. While the writ of review is not a writ of error, and is not a means by which, as upon appeal, the mere manner of conducting the proceedings,

the rulings of the court upon questions of evidence, and other matters within the jurisdiction, involving the merits, however erroneous they may be, can be reviewed, it is, nevertheless, a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, where necessary to determine the jurisdictional fact. *People v. Board of Delegates of San Francisco Fire Department*, 14 Cal. 479; *Lowe v. Alexander*, 15 Cal. 301; *Blair v. Hamilton*, 32 Cal. 49; *Bodine v. Goodwin*, 5 N. Y. 568. In *Blair v. Hamilton*, supra, in reviewing by certiorari the order of the court below, it is said: "In many cases jurisdictional facts may not appear of record, either by failure of the inferior court or officer to follow the requirements of the law and make them of record, or because the law itself does not require it to be done. In such cases this court and all other courts having jurisdiction to review and correct the proceedings of inferior courts would be powerless unless it can compel the inferior tribunal to certify to this court not only what is technically denominated the 'record,' but such facts, or the evidence of them, as may be necessary to determine whatever questions as to the jurisdiction of the inferior tribunal may be involved; and the grossest abuses of power, to the great reproach of the law, might be perpetrated with impunity and without the possibility of a remedy."

But, while it is conceded that the removal of the signs cannot be compelled pending the appeal, it is contended that petitioners, in continuing business with the signs in place, were thereby using the said trade name in connection with their business, in contravention of the prohibitory features of the injunction, and that this constituted a contempt of the order of the court; that such use could have been avoided by either quitting their business or removing it to other premises, and, failing to do this, the petitioners were properly punished. But assuming that this would constitute such use as would, under the facts of this case, render it obnoxious to the injunction in any sense, to hold under such circumstances that petitioners could be punished therefor pending the appeal would simply be enabling that to be accomplished indirectly which could not be done directly, and to deprive petitioners entirely of the benefit of the stay afforded by their appeal. "The stay of proceedings pending an appeal has the legitimate effect of keeping them in the condition in which they were when the stay of proceedings was granted. It operates so as to prevent any future change in the condition of the parties." *Mining Co. v. Fremont*, 7 Cal. 130. To require petitioners to abandon their business or the premises would be working a very material, if not an irreparable, change in the condition of the parties, notwithstanding the

effect of the appeal was to stay all affirmative action in the premises.

It results inevitably from these considerations that the record discloses a case where the court had no power to proceed and punish the petitioners as for a contempt, and its judgment in that respect must be annulled. It is so ordered.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

### CARLSON v. BURT. (L. A. 20.)<sup>1</sup>

(Supreme Court of California. Jan. 27, 1896.)

#### ELECTION CONTEST—RETURN DAY.

The "return day," within Code Civ. Proc. § 1115, providing that, when an elector contests the right of a person declared elected, he must within 40 days after the return day of such election file a statement, is not the day on which the result of the election is declared, but the day on which the canvass begins, under Pol. Code, §§ 1278, 1280, 1281, declaring that the board of supervisors shall meet on the first Monday after the election to canvass the returns; that, if they have not all been received, the canvass must be postponed from day to day, till all the returns have been received, or till six postponements have been had; and that the canvass shall be made by opening the returns and estimating the votes.

Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Proceeding by William H. Carlson against John P. Burt. Judgment for defendant. Plaintiff appeals. Affirmed.

William H. Fuller, for appellant. H. S. Utey and Charles Wellborn, for respondent.

TEMPLE, J. This is a contest for the office of assessor of the county of San Diego. The case was decided against the contestant on demurrer to the complaint. The court held that it had no jurisdiction, because the complaint (or "written statement," as it is termed) was not filed with the county clerk within 40 days after the return day of the election, as required by section 1115, Code Civ. Proc. The complaint shows that the election was held on Tuesday, November 6, 1894; "that the respective boards of election of the several precincts of said county, on or before Monday succeeding the said Tuesday, made their returns to the board of supervisors of said county of San Diego, of the votes cast at the said general election; and that upon said Monday said board of supervisors met, and, finding that all of the returns in the several precincts in which said election was held had been duly and properly received, they thereupon proceeded to canvass said returns." It is also averred that on the 19th day of November, 1894, the board caused to be entered in the record of said board a statement which purported to show the various matters required by section 1282 of the Political Code, and that thereupon the board declared John P. Burt elected county

assessor of San Diego county. The complaint in this case was filed December 29, 1894. This was the fortieth day after the entry was made in the records of the board declaring Burt elected, and the forty-sixth day after the day on which it is averred that the board proceeded to canvass the votes. If the return day is the day upon which the result of the canvass is declared, then this contest was inaugurated in time. On the other hand, if the return day is the day upon which the returns being all in are produced before the board, which then proceeds to canvass them, the statement was filed too late, and the court properly refused to entertain the case.

Section 1115, Code Civ. Proc., provides that, "When an elector contests the right of any person declared elected to such office, he must, within forty days after the return day of such election, file with the county clerk a written statement," etc. The Codes do not in any other place speak of any return day, but several sections in the Political Code direct the precinct officers to transmit to the county clerk certain matters pertaining to the election. The papers to be transmitted must be in packages, and in section 1278, Pol. Code, are spoken of as returns. The board is directed to meet on the first Monday after the election to canvass the returns. If the returns have not all been received, the canvass must be postponed from day to day until all the returns have been received, or until six postponements have been had. The canvass shall be made by opening the returns and estimating the votes. Pol. Code, §§ 1278, 1280, 1281. The clerk of the board is required as soon as the result is declared to enter on the records a statement similar to that which the complaint shows the board caused to be entered on the 19th. Id. § 1282. In other sections the election returns are mentioned, so that there can be no doubt as to the meaning of the phrase "election returns." But what is the return day of an election? The phrase "return day" has been long a familiar phrase in legal practice. Blackstone says (book 3, p. 277) that they are called "days in banc"; that is, days of appearance in the court of common bench. They were stated days in the term on which writs were returnable. These were original writs by which suits were commenced. If the defendant did not then appear and submit to the jurisdiction, process was issued to compel him to do so. In analogy, the last day on which any process can be returned is called "return day"; or, in case of an order to show cause, the "day of the hearing." The statute fixes no precise day in which election returns must be made. They should be sent to the clerk at once. But it would seem that any return is timely which is received before the board commences the canvass. Naturally, then, the return day would be the first Monday after the election, with authority in the board to adjourn return day six times from

<sup>1</sup> Rehearing denied.

day to day, if all returns have not been received.

Appellant argues that this construction may deprive an elector of the right to contest altogether, as the board may not declare the result until 40 days after the canvass begins. Unquestionably, the argument is entitled to great weight; and, if any reasonable construction can be given to the law which would not result in nullifying the law as applied to a possible case, such construction should be given, rather than a construction which would have that effect. But this right to contest is not given to enable a candidate to vindicate his rights, but to any elector. Public policy requires that it should be inaugurated at once. If commenced within 40 days after the commencement of a canvass, it will be before the commencement of the term of the person declared elected. If delayed much longer, it will be after the commencement of the next term of office. To contest the right to an office in this mode is not a natural right, but one given by statute. The phrase "return day" refers to the election returns, and to some day fixed by reference to something done in regard to the returns. If it had been intended that the time should run from the day on which the person was declared elected, it was easy to say so, and the very language required was in the precise sentence in which the limitation was made. How natural it would have been to say that a contest as to the right of a person "declared elected" shall be commenced within 40 days after he has been so declared elected, instead of changing the expression, making it read "from the return day of the election." There is nothing in the expression used which naturally refers to the day on which the person whose right is contested was declared elected.

To the suggestion that the board may take more than 40 days to canvass the votes, it may be said that it may be possible, but it is quite improbable. If it should take much more than 40 days, the vote would not be canvassed until the term for which officers are to be elected will begin. Such a contingency was not anticipated, and can rarely happen, except through a criminal intent. The presumption is that in fixing the election at a certain period before the commencement of the terms of office, and in limiting the period for the commencement of a contest, the legislature has taken all these things into consideration, and has concluded that the period fixed will always prove sufficient, and I believe that in practice it always has.

It must be held, then, that the return day is the day on which the board actually commences the canvass, or, rather, the day on which, under the law, they ought to do so. It follows that the contest was commenced too late, and the judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

In re TREADWELL et al. (No. 15,954.)

(Supreme Court of California. Jan. 30, 1896.)

APPEAL—ACQUIESCENCE IN JUDGMENT—DISMISSAL.

Where a guardian, pending an appeal by him from an order revoking his appointment, tenders his resignation, which is accepted, and his account settled, it is an acquiescence in the order appealed from, and the appeal will be, on motion of appellee, dismissed.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Appeal in the matter of the estate and guardianship of one Treadwell and others. Heard on motion by appellant to recall remittitur on dismissal of appeal. Denied.

Jackson Hatch, E. M. Rosenthal, W. C. Burnett, and L. C. Burnett, for appellant. Myrick & Deering and C. D. Wright, for respondent.

HARRISON, J. When this cause was called for argument, in its order upon the calendar, August 19, 1895, there was no appearance on behalf of the appellant, and the counsel for the respondent then stated to the court that, since the appeal was taken, the oldest of the minors had attained majority; and he also presented a certified copy of an order settling the account of the appellant as guardian of the estate of said minor and discharging him from his trust, and also a certified copy of another order of said court discharging the appellant as guardian of the other minors, made upon his own application, both of said orders having been made subsequent to the taking of the appeal herein, and submitted the matter to the court for such order as should be proper. Thereupon the court made an order that, as it appeared that all matters involved in the appeal were disposed of, the appeal be dismissed. September 20th the remittitur upon this order was filed in the superior court, and on the 18th of October a notice on behalf of the appellant was given to the attorneys for the respondent of a motion to set aside the order dismissing the appeal, and to recall the remittitur, upon the ground that said order had been improvidently granted upon a false suggestion, and under a mistake as to the facts of the case. At the hearing thereon, the appellant based his motion upon the ground that no notice of a motion to dismiss the appeal had been previously served upon him, but made no showing of any false suggestion to the court or of any mistake as to the facts of the case. In support of the order, the respondent, in addition to the above-certified copies, presented a certified copy of a petition made by the appellant to the superior court subsequent to the taking by him of the appeal herein, in which the appellant stated that on the 13th of August, 1894, he resigned his trust as guardian of the minors, and that his resignation was duly and regularly accepted by the court. The order from which the appeal herein was taken



was made July 31, 1894, and was an order revoking and annulling a previous order appointing the appellant guardian of the minors. The resignation by the appellant of his office as such guardian, subsequent to the order revoking his letters, and the acceptance of such resignation by the court, together with the settlement of his account, operated as an acquiescence by him in the previous order of the court annulling his letters, and precluded him from assigning any error in such order, and rendered the order dismissing the appeal proper. The motion is denied.

We concur: MCFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

ROZECRANS MIN. CO. v. MOREY. (Sac. 12.)

(Supreme Court of California. Jan. 23, 1896.)  
CORPORATIONS—DIRECTORS—DE JURE AND DE FACTO.

Under Civ. Code, § 305, providing that directors of a corporation must be stockholders, a person owning no stock in the corporation, elected a director without his knowledge, does not become a director, either de jure or de facto, so as to prevent his purchasing corporate property at a judicial sale, though a share of stock was, subsequently to his election, issued and delivered to him, which he retained; he never having acted as a director or been called upon to do so until 10 years after his election, when he repudiated his office.

Department 1. Appeal from superior court, Eldorado county; N. D. Arnot, Judge.

Action by the Rozecrans Mining Company against H. S. Morey. There was a judgment for defendant, and plaintiff appeals. Affirmed.

A. Everett Ball and Irwin & Irwin (Van R. Paterson, of counsel), for appellant. Williams & Witmer, for respondent.

GAROUTTE, J. This is an action in equity, involving the ownership of certain mining property. Plaintiff became financially embarrassed, and the property was sold under execution sales, and also sold for nonpayment of taxes. Deeds passed to Morey, the defendant, under these execution sales, and also under the delinquent tax sale. Plaintiff appeals from the judgment rendered against it, and also from the order denying its motion for a new trial.

There are many questions discussed by counsel in their respective briefs, but at the threshold of the case a single matter presents itself, which, upon consideration, we think necessarily points the judgment. The regularity of the proceedings leading up to the execution sales and the tax sale are not attacked, but it is insisted that Morey during all these times was a director and trustee of the corporation plaintiff, and, as such director and trustee, all his dealings with the property of plaintiff must be held to have been for

its benefit, and that, by reason of his fiduciary relation, whatever title to plaintiff's property came to him is held as trustee for plaintiff. Of course, this principle of law is elementary, and must prevail here if the facts present those conditions. But we think they fail to do it, as may be readily seen from the following finding of fact made by the trial court. After hearing all the evidence the court found: "That on the 19th day of June, 1883, H. L. Robinson, owning the entire stock of the plaintiff, held a stockholders' meeting for the election of trustees. That said Robinson conducted the election, and cast a ballot for the election of five trustee, as follows: H. L. Robinson, 64,000 shares; A. Everett Ball, E. D. Sawyer, E. W. Scott and C. A. Darby, each 64,000 shares. That none of said parties owned any stock of plaintiff, except Robinson. That, immediately after the election aforesaid, a trustees' meeting was held, and Sawyer, Scott, and Darby resigned. That thereupon E. S. Chester, James Blair, and H. S. Morey were elected to fill the vacancies caused by the resignations of Sawyer, Scott, and Darby. That, at the time of said election, the said Morey was not a stockholder, had no interest in the corporation, had no knowledge of the meeting of the stockholders or trustees, or of his election, and in no manner consented to be elected or to act as trustee of plaintiff. That, on the 3d day of July, 1883, a certificate of one share of the stock of plaintiff was issued to said Morey. That said Morey did not know of the issuance of said share of stock, paid nothing for the same, nor did he authorize it to be issued to him. That at some time subsequent to the 3d day of July, 1883, and prior to the 23d day of February, 1886, said share of stock was delivered to said Morey by H. L. Robinson. That he (Morey) has had possession of said share of stock ever since. That said Morey, at the time of the delivery to him of said share of stock by said Robinson, learned that he had been elected a trustee of plaintiff. That said Morey at no time acted as a trustee of plaintiff; that he was not at any time consulted as trustee by any officer or agent of plaintiff; that he did no act or thing whatever as trustee of plaintiff; and when, for the first time, he was notified, in September, 1893, to attend a meeting of the trustees, he refused to act or to have anything to do with plaintiff or the other trustees at said meeting." Upon an examination of the evidence, we find this finding in all its material parts is fully supported; and such being the fact, the whole superstructure of plaintiff's case must fall, for the foundation upon which it was built has been absolutely undermined and taken away. We think such is the necessary and only construction to be placed upon this finding. It discloses that Morey was neither a director de jure nor de facto. Morey was not a director de jure, for he was not a stockholder of the corporation when elected. Section 305 of the Civil Code declares

that the directors must be selected from the stockholders, and also declares that directors must be holders of stock in an amount fixed by the by-laws of the corporation. Conceding that the by-laws of the corporation plaintiff fixed no amount of stock to qualify a stockholder for election as a director, still, under the provision of the Code quoted, the director must be a stockholder. He must own stock in some amount, or his election is invalid. The fact that Robinson gave Morey one share of stock, weeks, and perhaps months, after the day of election, of which share of stock "Morey has had possession ever since," entirely fails to meet the case, and is wholly lacking in curing the invalidities existing in his election. Neither is Morey a director de facto. The rule of law for the protection of third parties as to the acts of de facto officers may well be doubted when applied between the corporation and its own illegally elected officers. It is said in *State v. Curtis*, 9 Nev. 339: "In order to protect third persons transacting business with such officers under such circumstances as to induce them to believe that they were dealing with legal officers, the law has reached out its strong arm to a dangerous extent, upon the principle that, although not officers de jure, they were officers in fact, whose acts public policy required should be considered valid. Such a principle ought not to be extended to a case where the rights of the public are not affected, nor where all the parties interested have knowledge that the person pretending to be an officer is not an officer de jure; for in such a case the reason of the rule no longer exists, and the law should not be invoked for protection." But, conceding this principle of law is a proper one to be here invoked, still there is nothing in this finding to indicate Morey to be a director de facto. Upon the contrary, the showing prevents the drawing of any such inference. He never did an act as a director. He never accepted the office. He was never consulted as a director by any officer of the corporation. He never held himself out as a director in any way, and, when notified of a meeting of the directors some 10 years after his alleged election, he repudiated his office. It is not necessary to cite authorities as to who are and who are not officers de facto, for we apprehend that no legal precedent may be found which would justify us in holding Morey a de facto director, as testified by the facts of this case. We conclude that defendant Morey was neither a de jure nor a de facto director and trustee of the plaintiff corporation at the times set out in its complaint, and for such reason plaintiff fails to prove a cause of action. We find no error in the record authorizing a reversal of the judgment and a new trial of the case. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

# CALIFORNIA TITLE INSURANCE & TRUST CO. v. PAULY. (L. A. 66.)

(Supreme Court of California. Jan. 25, 1896.)

## MORTGAGES—DESCRIPTION OF PROPERTY—PAROL EVIDENCE—APPURTENANCES.

1. Findings that a street-railroad company, after executing a mortgage, acquired pavilion grounds "for use on or about its said lines of railway"; that they were "adapted to" such use, and were operated and held by the company in connection with its railroad, and for use in and about it,—bring such grounds within the description of the mortgage: "Its real \* \* \* property \* \* \* that it may hereafter acquire for use, or adapted to use, on or about its said lines of railway."

2. A court having made findings bringing pavilion grounds acquired by a street railway, after making a mortgage, within the description thereof: "Its real \* \* \* property \* \* \* that it may hereafter acquire for use, or adapted to use, on or about its said lines of railway,"—the word "appurtenances," in its further finding that "such pavilion grounds, with said accessories, are an important and necessary part of the appurtenances and equipment of said railroad," will be construed as one that the grounds and improvements thereon, as used in connection with the railroad, are needful aids to the business of the road, in that they add to its income.

3. To bring pavilion grounds within the description of a street railway company's mortgage of real property, that it might afterwards acquire "for use on or about its said lines of railway," parol evidence is admissible that the purchase of the grounds was contemplated by the road at the time of the mortgage, that one of the termini of its road was therein, and that the sole object of the purchase thereof was to increase travel on the road.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the California Title Insurance & Trust Company against Charles W. Pauly, assignee of the San Diego Cable-Railway Company, an insolvent debtor. Judgment for plaintiff. Defendant appeals. Affirmed.

James E. Wadham and Frederick W. Stearns, for appellant. Dorn & Dorn and E. W. Britt, for respondent. T. J. Bergin, Works & Works, E. Parker, A. E. Cochran, Luce & McDonald, and Gibson & Titus, for various interveners.

VANOLIEF, C. Action to foreclose a mortgage executed by the San Diego Cable-Railway Company, a corporation, to the plaintiff, in trust, to secure the payment of a series of bonds executed by the mortgagor. Before the commencement of the action, the said railway company had been adjudged an insolvent debtor, pursuant to the insolvent act of 1890, and all its estate, real and personal, had been duly assigned to the defendant, Pauly, who was the duly elected and qualified assignee of the estate of said insolvent debtor. The plaintiff prevailed in the lower court; and the defendant, Pauly, appeals from the judgment of foreclosure, and from an order denying his motion for a new trial. The appellant contends that the court erred in finding that a certain piece of land, known as the "Pavilion

Grounds," was embraced in the description of the mortgaged property, and in ordering a sale of those grounds as a part of the property mortgaged; and this is the principal point in controversy on this appeal. Subsidiary to this, however, a question is raised as to whether the court erred in admitting certain parol evidence, for the purpose of applying the description contained in the mortgage to the pavilion grounds.

The description of the mortgaged property in the mortgage is as follows: "All and singular the franchises and lines of railway, and appurtenances thereof, of the said San Diego Cable-Railway Company, which lines of railway commence at the corner of Sixth street and L street, in said city of San Diego, and thence extend along said Sixth street to O street, on C street to Fourth street, on Fourth street to Newhall avenue, and thence on Newhall avenue and connecting streets eastward to terminus at University Heights, in said city of San Diego,—a distance, including curves and switches, of five miles; and all the concrete subway, cables, cars, dummies, and other rolling stock, equipment, machinery, power houses, fares, rents, income, and other property of the said San Diego Cable-Railway Company, appurtenant to its lines of railway above described; and its real, personal, and mixed property, franchises, rights of way, privileges, interests, and appurtenances, of every kind and nature, that it now owns, or that it may hereafter acquire, for use, or adapted to use, on or about its said lines of railway; also the following described parcel and tract of land, situated in the city of San Diego, county of San Diego, state of California, to wit: Block three hundred and fifty-eight (358) of Horton's addition to said city of San Diego, according to the official map of said addition by Lockling, on file in the office of the recorder of said county; the same being the block of land containing the power house of the said cable-railway company, together with the appurtenances."

1. Appellant contends that "the only ground on which the court holds the pavilion grounds to be included in the mortgage is that said grounds are an appurtenance of the line of railway," and insists that whether or not those grounds are appurtenant to the railway is the only material question involved; and then proceeds to controvert the proposition that they are so, on the ground that land cannot be appurtenant to land, etc. But I think counsel mistaken as to the ground on which the court held the pavilion grounds to be included in the mortgage. The court found, as alleged in the complaint, that the pavilion grounds were acquired by the railway company after the execution of the mortgage, "for use on or about its said lines of railway," and that said grounds are "adapted to" such use, and were "operated and held by said cable-railway company \* \* \* in connection with said railroad, and for use in and about such railroad." These findings

brought the pavilion grounds clearly within the description in the mortgage as a part of "its real \* \* \* property \* \* \* that it may hereafter acquire for use, or adapted to use, on or about its said lines of railway," though not appurtenant to the railway in the technical legal sense of the word; and therefore it is wholly immaterial whether the pavilion grounds were appurtenances or not, in any sense of the word. The only ground upon which it is insisted that the court found the pavilion grounds to be appurtenant to the railway is that, after finding facts which bring those grounds within the mortgage description, and show that they could not be appurtenant to the railway in the legal sense of the word, the court added the following: "And that such pavilion grounds, with said accessories, are an important and necessary part of the appurtenances and equipment of said railroad." But it is quite apparent that the word "appurtenance" was not here used in its technical legal sense. Read in connection with its context, the legal technical meaning of the word cannot be attributed to it without making the finding inconsistent with other material findings to the effect that the pavilion grounds consist of about five acres of land which, by no legal possibility, could be appurtenant to the railway in the technical law sense of the word. Under these circumstances, the finding should be so construed, if possible, without doing violence to the language expressing it, as to make it consistent with all other material findings (Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053; Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742; Kimball v. Lohmas, 31 Cal. 154); and that the word "appurtenance" may properly be used in a sense broader than its technical legal meaning,—as, for example, in the sense of the word "addition,"—has been judicially recognized. In Frey v. Drahos, 6 Neb. 10, Lake, C. J., speaking of the word "appurtenances," said: "It is, however, doubtless true that the word is frequently used in a more enlarged and comprehensive sense [than its technical legal sense], and when it can be gathered, from all the attendant circumstances, that it was so understood and used by the parties, a corresponding effect should be given to it in the interpretation of a contract." See, also, Harris v. Elliott, 10 Pet. 25, 54, and Cent. Dict., where the law meaning is distinguished from other senses in which the word may be used. I think the obvious meaning of the finding in question, read in connection with the other findings above stated, is that the pavilion land, and the improvements thereon, as used in connection with the railway, are important and necessary additions or appendages thereto; which meaning does not imply that they are appurtenances of the railway in the technical sense of the word, nor even that they are indispensable to the use of the railway for the purposes of transportation, but only that they are needful aids to the business, in that they increase the profits or

diminish the losses of the business. If, as claimed by counsel for appellant, the finding, as they construe it, is not justified by the evidence, this is an additional reason for adopting a different construction which is justified by the evidence, provided the language of the finding is susceptible of such different construction. My conclusions on this point are (1) that the judgment is supported by those unchallenged findings which bring the pavillion land within the description in the mortgage, as real estate acquired after the execution of the mortgage, and appurtenant to nothing; and (2) that the above-discussed finding relied upon by appellant is not inconsistent with those. It is not questioned that a mortgage may be given on property to be acquired by the mortgagor after the execution of the mortgage. As a case in point, see *Omaha & St. L. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 108 Mo. 298, 18 S. W. 1101. See, also, *Jones, Mortg.* §§ 152-157. It should also be noted here that it is not claimed by counsel for appellant, either in their brief or statement on motion for a new trial, that the findings of the court are not self-consistent. They have wholly ignored or overlooked those findings which identify the pavillion grounds as the after-acquired real estate described in the mortgage.

2. Counsel for appellant say: "The court erred in admitting parol evidence showing the general course and termini of the cable road, the location of the pavillion grounds, and the amount of travel induced by reason of the pleasure resort maintained thereon." In this connection, it was proved by undisputed parol evidence that the purchase of the pavillion grounds was contemplated by the railway company before, and at the time, the mortgage was executed; that one of the termini of the road was within those grounds; that the sole object of the purchase was to increase travel upon the road; that the grounds were used in connection with the road for that purpose only; that they were adapted to such use, and did increase the traffic on the road about 100 per cent.; that the grounds were improved at the expense of the railway company, and were opened to the public as a pleasure resort at the same time the road was finished and opened for travel, no distinct charge being made for admission of the public to those grounds; that the railway company furnished music, a dance hall, and other conveniences for visitors and picnic parties, on Sundays and holidays, at an expense of \$200 to \$300 per month; and that the grounds thus used by the railway company were worth three to four times as much as they would be for any other purpose. The purpose for which such evidence was introduced, and which it served, was to prove that the pavillion grounds were acquired by the railway company for use, and adapted to use, "on or about its said lines of railway;" and thus to identify them as being after-ac-

quired real estate described in the mortgage, or, as may be otherwise expressed, to apply to those grounds the description contained in the mortgage, though the description of itself is unambiguous and sufficiently certain. That parol evidence is competent for this purpose does not admit of a doubt. *Greenl. Ev.* § 287; *Hancock v. Watson*, 18 Cal. 137; *Began v. O'Reilly*, 32 Cal. 11; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Towle v. Coal Co.*, 99 Cal. 397, 33 Pac. 1126.

3. In their reply brief, for the first time, counsel for appellant contend that there is no allegation in the complaint to support the finding that the pavillion grounds were mortgaged otherwise than as appurtenances to the railway. It is alleged in the complaint, after exhibiting the mortgage, that "by said mortgage the railway company did mortgage to plaintiff \* \* \* all its real, personal, and mixed property \* \* \* that it then, on said 1st day of April, 1890, owned, or might thereafter acquire, for use, or adapted to use, on or about said line of railway. \* \* \* That since said 1st day of April, 1890, to wit, on or about November 18, 1891, the said railway company \* \* \* became the owner, and thereafter, until its assignment in insolvency, was the owner in fee, and in possession of," lots and blocks (particularly describing them) "known as the 'Pavillion Grounds.'" Then, after alleging the use of said grounds by the railway company, as above stated, "in and about said railroad," proceeds to allege that said pavillion grounds "were, as plaintiff is informed and believes, and therefore alleges, intended to be, and by said indenture were, mortgaged to this plaintiff to secure payment of said bonds." I think these allegations afford a sufficient answer to the contention that the judgment as to the pavillion grounds is not supported by the complaint. I think the judgment and order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

SMITH et al. v. SABIN. (No. 16,014.)<sup>1</sup>  
(Supreme Court of California. Jan. 30, 1896.)

#### APPEAL—REVIEW.

Where there is a conflict in the evidence, the finding of the trial court will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by William F. Smith and others against John I. Sabin. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

<sup>1</sup> Rehearing denied.

A. Heynemann, for appellants. Stanley, Hayes, McEnerney & Bradley, for respondent.

**BELCHER, C.** The plaintiffs were architects, doing business as partners under the firm name of Smith & Freeman. They brought this action in July, 1893, to recover the balance alleged to be due them for services performed at the request of the defendant, in 1891, in drawing plans and specifications, and procuring bids thereon, for a hotel, to be called "Hotel Edison," and to be situated at the corner of Sutter and Hyde streets, in the city of San Francisco, but which was never constructed. It is alleged that the hotel was to cost about the sum of \$134,000, and that the reasonable value of plaintiffs' services was \$3,350, of which sum \$1,000 had been paid, leaving still due \$2,350, for which judgment was asked. The answer of defendant denied that the proposed hotel was to cost about the sum of \$134,000, and alleged that the plans and specifications prepared by plaintiffs were made under the express agreement that they should not require the expenditure of, and the hotel should not cost, any greater sum than \$100,000; that all of the services performed by plaintiffs were performed under that special contract, and that the plans and specifications made and furnished by plaintiffs required the expenditure of \$134,775, and that no other plans or specifications had ever been prepared by plaintiffs for defendant for the erection of said or any hotel. The case was tried by the court without a jury, and the findings were that the Hotel Edison was not to cost about the sum of \$134,000, but, on the contrary, before the performance of any services by plaintiffs for defendant, it was understood and agreed between them that the plans and specifications to be prepared should not require the expenditure of more than about \$100,000; that the plans and specifications made by plaintiffs were made under the express agreement that the hotel should not, under said plans and specifications, cost any greater sum than about \$100,000; that the only plans and specifications made and furnished by plaintiffs required the expenditure by defendant of the sum of \$134,775; that while the plaintiffs were engaged in drawing said plans and specifications, and while their contract to draw the same was unfinished and unperformed, the defendant, at the request of the plaintiffs, paid on account thereof the sum of \$1,000; and that upon the trial of this case the return of said sum of \$1,000 was waived by defendant; and, as a conclusion of law, it was found that the defendant was entitled to judgment against the plaintiffs for his costs. Judgment was accordingly entered that the plaintiffs take nothing by the action, from which, and from an order denying their motion for a new trial, they have appealed.

In support of the appeal it is earnestly urged—and this is the only point made—that the findings were not justified by the evidence, and hence that the judgment should be reversed. This position cannot be sustained. After carefully going over the record, we are satisfied that there was evidence tending to support the theory of the defense, and to justify the findings. This being so, the case comes within the well-settled rule of this court that where there is a conflict of evidence the findings of the trial court will not be disturbed on appeal. It would subserve no useful purpose to detail the evidence introduced by the respective parties, and it is therefore passed without more particular notice. The judgment and order appealed from should be affirmed.

We concur: **BRITT, C.; SEARLS, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

**POPE v. J. K. ARMSBY CO. (Sac. 81.)<sup>1</sup>**  
(Supreme Court of California. Jan. 30, 1896.)  
**PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S CONTRACT.**

Plaintiff wrote defendant that he had a contract for the sale of fruit, signed in defendant's name, "By W., Agent," and wanted to know if W. was in fact defendant's agent, and if the contract was correct. Defendant's manager replied that W. had bought some apricots "on our advice, but we are not aware he bought them in our name. We will handle them, however, and think there is no question on the money part of the transaction," adding that the writer would be in plaintiff's neighborhood shortly, and would arrange the matter. A few days later, and before plaintiff shipped the fruit to defendant, the manager visited plaintiff's locality, but made no effort to see him. *Held*, that defendant was estopped from repudiating the contract.

Department 1. Appeal from superior court, Colusa county; E. A. Bridgeford, Judge.

Action by J. H. Pope against J. K. Armsby Company to recover money due on a contract. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Daniel Titus, for appellant. H. M. Alberry, for respondent.

**VAN FLEET, J.** Action to recover a balance due upon a contract for the purchase of fruit, alleged to have been made by defendant with the plaintiff. Plaintiff had judgment, and the defendant appeals therefrom, and from an order denying a new trial. The only question involved is whether the evidence sustains the finding that defendant made the contract sued upon; and this question depends upon whether one F. W. Willis, who made the contract with plaintiff, in the name of defendant, was the agent of the latter for the purpose. Whether the evidence is

<sup>1</sup> Rehearing denied.

sufficient to establish precedent authority in Willis, either express or implied, to make the contract in question, is one sharply mooted; the defendant claiming that it is not, and the plaintiff, with apparently equal confidence, contending that it is, ample in the view we take of the case, however, it is unnecessary to state or discuss the evidence upon the divergent views of counsel upon that phase of the controversy, since, in our judgment, the record very clearly discloses a subsequent ratification of the contract by defendant. Defendant's place of business is in the city of San Francisco, where it deals in dried fruits and other commodities. The contract with plaintiff was made on May 19, 1894, at the home of the latter, in the county of Colusa. It was made by Willis, who represented himself to plaintiff as the agent of defendant for the purchase of the fruit, and was in writing, and was signed, "J. K. Armsby Company. By Frank W. Willis, Agent." Subsequently, on May 25, 1894, and before the delivery of any fruit under the contract, plaintiff wrote to defendant this letter: "Colusa, Cal., May 25, 1894. J. K. Armsby Co., San Francisco—Gentlemen: I have sold my green fruit to you, and have a contract signed to that effect, signed 'J. K. Armsby Company,' by Frank Willis, as agent. Now, what I want to know, is F. W. Willis your agent for buying green fruit, and is the contract correct? Your immediate answer and oblige, Yours truly, J. H. Pope." In response, defendant, through its general manager, Mr. Freeman, on May 26, 1894, wrote: "San Francisco May 26, 1894. John H. Pope, Esq., Colusa, Cal.—Dear Sirs: We have yours of the 25th. Mr. Willis bought some apricots on our advice, but we are not aware he bought them in our name. We will handle them, however, and think there is no question on the money part of the transaction. The writer expects to visit your section within the next week or two, and will arrange the matter satisfactorily with you then. Yours truly, J. K. Armsby Co. Freeman." It is at once apparent that this letter from the defendant is not entirely open and ingenuous. It does not answer the question put by plaintiff, whether Willis was its agent in the premises, in a categorical manner, by saying, in terms, that he was or was not such agent. But the language used, and the assurances therein conveyed, authorize, we think, but one inference, and that the one put upon it by plaintiff, that the contract was all right, and defendant would see it carried out. If this is not what the defendant intended plaintiff to understand, it was exceedingly unfortunate in the choice of language to express its meaning. If defendant intended to repudiate the transaction, it was its duty to do so explicitly, and in such terms as to leave no room for plaintiff to be misled by drawing an inference which defendant did not intend to convey. It was not essential that the ratification should be in express

terms, in order to bind the principal. If it is fairly inferable from the words or conduct of the party, it is sufficient. Like the act of conferring antecedent authority upon an agent, it may be either express or implied. *Ralphs v. Hensler*, 97 Cal. 293, 32 Pac. 243; *Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902. It is said that defendant's letter was not a ratification, because it was not written with a perfect knowledge of the transaction; that the terms of the contract were not stated in plaintiff's letter, and they were not known to defendant when its letter was written. In the first place, there was evidence tending to show that Willis, who was admittedly representing defendant in a certain capacity, talked with the manager of defendant over the telephone and told him about the transaction with plaintiff, the same evening the contract was made. But, in the next place, defendant was positively and plainly informed by plaintiff's letter that he had a written contract signed in its name; and it was clearly the duty of defendant, if it did not know the terms or purport of the contract, to inform itself thereof before writing as it did, if it did not wish to be bound thereby. It would have been a very easy thing to have asked plaintiff to send it a copy of the contract, before replying to his inquiry; and not to have taken this simple precaution was negligence on its part, and precludes it from denying the effect of its assurances to plaintiff, which induced the latter to proceed and deliver his fruit under what he had a right to suppose was a valid contract. *Scott v. Jackson*, 89 Cal. 262, 26 Pac. 893. The general rule is that "where a person by word or conduct induces another to act on a belief in the existence of a certain state of facts, he will be estopped, as against him, to allege a different state of facts." 7 Am. & Eng. Enc. Law, 19. Mr. Bigelow defines estoppel in pais to be "a right arising from acts, admissions, or conduct which have induced a change of position, in accordance with the real or apparent intention of the party against whom they are alleged." Bigelow, Estop. (4th Ed.) 445. Defendant did not excuse himself from further inquiry by merely asking its representative, Mr. Willis, if he had made such a contract in its name, and getting his assurance that he had not. It knew that Willis was operating in plaintiff's neighborhood in buying fruit, in which he was to a certain extent representing the defendant; and being explicitly informed that he had made the contract with plaintiff in its name, it was charged with further inquiry of the plaintiff to ascertain the fact. This it had perfect and convenient opportunity to do, through its manager, Mr. Freeman, who was in Colusa only three or four days after the receipt of plaintiff's letter, and before plaintiff had acted under the contract. But Mr. Freeman made no effort to see plaintiff, notwithstanding the statement in his letter to plaintiff that he would do so; and the result

was that plaintiff was left to indulge the inference that everything was all right, and he could count upon the contract being carried out. Under these circumstances we think the defendant clearly estopped from denying the contract. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

# COOPER v. WILDER. (No. 19,566.)

(Supreme Court of California. Jan. 30, 1896.)

PUBLIC LANDS—TIMBER-CULTURE CLAIM—INTEREST OF APPLICANT—DEVISABILITY—RIGHTS OF HEIRS.

1. Testator entered lands as a timber-culture claim, and before performance of all conditions precedent to obtaining title, died, leaving his wife sole beneficiary of his will. Plaintiff was excluded from its provisions, but would have taken as an heir by descent. The property was distributed to the widow, who mortgaged it to defendant, to whom it passed in fee under foreclosure. Subsequently a patent was issued by the United States, conveying the land in terms to the heirs of decedent. *Held*, that the claimant's interest was not devisable, and his heirs took as donees of the United States, and not by inheritance from the claimant.

2. A timber-culture claimant died before obtaining title, and the patent was issued in terms to his heirs. *Held* that, since the United States has no general law of succession, who are the heirs must be determined by the law of the state in which the land is situated.

3. Such heirs took equally, and not according to the laws of descent of the state where the land was situated.

In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Suit by Chas. Edward Cooper, an infant, by his guardian ad litem, against H. G. Wilder, to quiet title to lands. From a judgment in favor of defendant, and an order denying a new trial, plaintiff appeals. Reversed.

W. H. C. Ecker and Haines & Ward, for appellant. James E. Wadham and F. W. Stearns, for respondent.

TEMPLE, J. Action to quiet title to 40 acres of land in San Diego county. The land was entered as a timber-culture claim, in November, 1879, by David Cooper, plaintiff's father. David Cooper died testate in July, 1881, leaving his widow sole beneficiary of his will, and expressly excluding plaintiff from any share of his estate. The property was duly distributed to the widow. In 1892 a patent was issued by the United States, conveying the land in terms to the heirs of David Cooper, deceased. In 1891, before the issuance of the patent, the widow, who was sole devisee of David Cooper, and the sole distributee of the estate, mortgaged the land to defendant, who subsequently foreclosed, and purchased the property at the foreclosure sale, and in due time received a deed therefor. Defendant at the trial proved his deraignment of title from the widow of

David Cooper, deceased. The question is, in whom did the title vest? Appellant claims it as heir; the defendant, that it passed, by the will and the decree of distribution, to the widow of David Cooper, or, if it did not vest under the will and decree, then the widow and the son of David Cooper took equally.

The applicant for the government bounty is required to subscribe an oath to the effect that he makes the filing for the purpose of cultivating timber for his own exclusive benefit, and not for the purpose of speculation, and that he intends to hold and cultivate the land. He is required to break or plow five acres the first year; five acres the second year, and to cultivate the five acres broken or plowed the first year; the third year, to cultivate the five acres plowed the second year and to plant, in timber, seeds, or cuttings, the five acres first plowed, and to cultivate the remaining five acres; and the fourth year, to plant, in timber, seeds, or cuttings, the remaining five acres. To get his certificate he must prove, or, if he is dead, his heirs or legal representatives must prove, that he or they have planted, and for not less than eight years cultivated, that quantity and character of trees, and that there are then growing at least 675 thrifty trees per acre. A failure at any time to perform the conditions works a forfeiture. The property could not be taken in satisfaction of any debt contracted prior to the issuance of the final certificate, which could not be had until full proof of performance, as above stated, was made. Obviously, the privilege or right acquired by the entry and filing is personal, and cannot be transferred except as authorized in the act. The death of the applicant before performance renders him incapable of performance, and that event would end the claim but for the provisions of the act which authorize the heirs to prove that he or they has or have performed. Does the heir in such case take by inheritance from the applicant, or is he, by appointment in the act itself, a substituted beneficiary of the government, to whom the title goes by direct grant? It is admitted, at once, that the condition of the applicant prior to full performance is in no wise analogous to that of a pre-emptor, either before or after the pre-emptor has received his certificate of purchase. The applicant has a right in the land, of which the government cannot deprive him, but which will be lost if he fails to perform; and death, before performance, renders such failure certain, and ends the estate of the applicant. In view, however, of the hardship of such a result, the law continues its offer to certain persons whom it is presumed the applicant himself might have selected; but they take, not by inheritance from the deceased, but as grantees from the government. No case is cited under the timber-culture act, but cases have arisen under other acts of congress which are in all essential respects similar to the

act in question. The Oregon donation act (9 Stat. 496) granted to qualified settlers on public land, who had occupied and cultivated the same for four years, and performed certain acts in regard to making application for the land, proving up, etc., 320 acres of land. The opening words of that act were, "That there shall be, and hereby is granted," and it was provided, in case of death before the expiration of the four years' possession required, "All the rights of the deceased under this act shall descend to the heirs-at-law of such settler." In 1852 one Loring, who had all the qualifications necessary to enable him to take and hold under the act, entered upon 320 acres of land in Oregon, with the intent to acquire the title under the act. He died within one year after his entry upon the land, having by his will devised all his estate. Whether the land or his right was devisable arose in *Hall v. Russell*, 101 U. S. 503. Chief Justice Waite, speaking for the court, said the question was whether "the heirs took by descent from the settler or as donees of the United States. If by descent, it is conceded the settler had a devisable estate; if as donees, he had not." It was held that by entering under the act the settler acquired at once a present right to occupy and maintain possession so as to acquire a complete title to the soil, but got no title until he had completed his four years' continued residence and cultivation. His rights were, however, statutory, and must be ascertained by the language of the act. It is said: "The object of congress undoubtedly was to allow a settler's heirs to succeed to his possessions, and thus keep his rights alive. But for some such provision, all the rights of the settler would have been lost by his death. As the law required full four years' residence by the person who claimed the grant, if no provision had been made for a continuance of his possession, the land would have become vacant on his death, and open for a new settlement by a new settler, if the law authorizing new settlements still remained in force. Hence it was provided that the possessory rights of a deceased settler should go to his heirs, and that they might get the land, on making requisite proof, without further residence and cultivation of their own. Their title to the land was to come, not from their deceased ancestors, but from the United States." Every word of this is as applicable to the timber-culture act as to the Oregon donation act, so far as concerns the question under consideration. Here, as there, a series of acts were to be performed, running through a number of years before the applicant was entitled to a patent, and a failure at any point during that time defeated the claim, and left the land open to another. In each case, the death of the applicant rendered performance impossible, and the right would have entirely lapsed but for a provision giving the heirs of the applicant the privilege of procuring the title which would have gone to

the deceased. *Hall v. Russell* has been followed many times. The cases are reviewed in *Hershberger v. Blewett*, 55 Fed. 170.

Respondent contends that the position of a claimant under the timber-culture act is like that of a homestead claimant before full performance, and he thinks in such case a homestead claimant has a devisable interest. This is, I think, a mistake. The homestead act is, if possible, less doubtful than any of the others; for it is expressly provided that the right to complete performance and receive the patent shall go to the widow, if there be one; if there be none, to the devisee of the deceased, or to his heirs. Obviously, the right is not devisable in any just sense. If there be a widow, the right goes to her; if none, the settler may appoint the grantee. It was so held by the secretary of the interior in *Dorame v. Towers*, 1 Copp's Pub. Land Laws, 438, which is cited by respondent as an authority to the contrary. Towers was in possession of the land before he made his entry, but died within two weeks after the entry. Contest was inaugurated six months afterwards by Dorame, who sought to establish an abandonment, as the heirs did not reside on the land. The secretary said: "The death of the party casts whatever of title or estate the statute has created, directly, by operation of law, upon the first, the widow; second, the heirs or devisees. And, the substitution being effected, the requirement of proof of residence or cultivation attaches to the person or persons succeeding to the right, title, or estate." He further says that by the laws of California the executor was entitled to possession during administration, and that the right of the heirs to possession is subject to this administration, and therefore "the time allowed by the court for the settlement of the estate must either be counted for the heir or devisee, in making final proof, or excluded, in his favor, from the period required by the statute, and further time allowed him, on the ground that, the land being in the custody of the law, the time does not run against the party who is required to perform the acts of residence or occupation upon it." We must hold, therefore, that the land was not devisable, and is not affected by the decree of distribution in the estate of David Cooper, deceased. The grant is to the heirs of David Cooper, but they do not take by inheritance. The heirs will therefore take equally, regardless of the proportions in which they would have taken under the law of succession of the state. The United States has no general law of succession. The heirs must, therefore, be found by the law of the state or territory in which the land is situated. By the law of this state, the widow is an heir of the husband. The plaintiff and the widow would therefore take equally. It would follow that the one-half interest which vested in the widow was subject to defendant's mortgage. A new



trial will be necessary, because the findings would not support the judgment as it would be modified by this opinion, and they are against law. The judgment is reversed, and a new trial ordered.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

### PEOPLE v. SHAW. (Cr. 38.)

(Supreme Court of California. Jan. 30, 1896.)

#### HOMICIDE—EVIDENCE—IMPEACHMENT OF WITNESS.

1. Where an objection to a question is erroneously sustained, and it appears that, notwithstanding the ruling, witness immediately went on, without further objection, and answered the question, the ruling is without prejudice.

2. On a trial for murder, a witness was asked "Did [accused] ever take a meal at your house before?" An objection to the question was sustained. The question was an isolated one, and there was no intimation that the purpose was to show that witness and accused were not intimate acquaintances. *Held* that, in absence of such showing, the ruling was not erroneous.

3. The wife of accused was asked, on cross-examination, "What have you done with the pistol with which your husband killed M.?" The fact of the killing was admitted. *Held*, that the question was without prejudice.

4. The exclusion of evidence that accused was dissuaded from giving himself up to the officers was without prejudice, there being no evidence that accused attempted flight.

5. A witness for the prosecution, near whose house the shooting took place, testified that he stood in his yard at the time of the shooting, and had an unobstructed view of both men. A witness for the defense testified that the prosecuting witness had told him that he stood in the barn. A request for the recall of the prosecuting witness, for the purpose of laying a predicate for his impeachment, was refused. All of the facts in the testimony sought to be impeached had been established by other witnesses, or admitted by accused. *Held*, that the ruling, while not commended, was not sufficient ground for reversal. Beatty, C. J., Henshaw, and Temple, JJ., dissenting.

In bank. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

H. M. Shaw was charged with the murder of Eugene Mason, and was convicted of murder in the second degree. From a judgment on the verdict, and from an order denying a motion for a new trial, the prisoner appeals. *Affirmed*.

S. F. Gell and J. J. Wyatt, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was charged with the murder of one Eugene Mason, and was convicted of murder in the second degree. He appeals from the judgment and from an order denying a motion for a new trial. It is not seriously urged that the evidence introduced is insufficient to justify the verdict, or that the court committed any material error in the matter of instructing the jury; but it is contended that there should be a reversal, on account of certain errors claimed to have been committed by

the court during the progress of the trial, in ruling upon the admissibility of evidence. These alleged errors could and should have been avoided; but criminal cases are too often conducted upon the preconceived theory that defendant is guilty, and that if he be given a fair trial, according to the established rules of evidence, the jury may not convict him. Hence, embarrassing questions are frequently presented on appeal, unnecessarily caused by want of ordinary care and due consideration of the rights of the accused on the part of those who conduct the trial in the court below. The purpose of a criminal trial is to discover and determine whether or not a defendant is guilty; not merely to maintain, at all hazards, a theory of guilt entertained beforehand by any one man, or any community of men. An examination of the points made in the brief of appellant shows that one or two of the rulings of the court complained of were clearly erroneous, and that others, whether strictly erroneous or not, are not to be commended; but we think that it sufficiently appears that said rulings did not prejudice the appellant, or injuriously affect his substantial rights. We will notice them in detail.

1. Mrs. Mary Steele was a witness for the prosecution, and testified that an hour or two after the commission of the homicide the appellant came to her house and made some incriminating statements to her about the homicide. On cross-examination, she testified that Mr. Wyatt, one of appellant's attorneys, had called upon her, and asked her what she knew about the case; and counsel for appellant asked her if she had "refused to give him any information." An objection by the prosecution to this question was sustained. This ruling was clearly erroneous. As tending to prove bias and feeling of the witness against appellant, it was entirely legitimate to show, upon her cross-examination, that, while she had evidently informed the prosecution of her knowledge, she refused to give any information to the appellant. But, notwithstanding the erroneous ruling, the witness immediately went on, without further objection, and said: "I did not give him any information, and did not tell him why I would not give him any; I told him positively I would not tell him anything." This was an answer to the question asked by appellant's counsel; and it is apparent, therefore, that appellant was not prejudiced by the former ruling. (It seems that this witness had been "ordered" not to speak of the case to the appellant's attorneys, under the mistaken notion which some prosecuting officers have that they can order persons whom they want as witnesses not to speak to other persons about what they know.)

2. The same witness (Mrs. Steele) had testified in chief that the statements made to her by appellant were made while he was

eating supper at her house; and she was asked, on cross-examination, "Did Shaw ever take a meal at your house before?" Objection was made to the question, and it was sustained. It would, no doubt, have been proper and fair to have allowed an answer to this question. It was a small matter, and we can hardly see why the prosecution should have objected to it. But we cannot say that the ruling was absolutely erroneous. Appellant's counsel here now argue, correctly, that it was admissible for him to show that the witness and the appellant were not intimate acquaintances, because it would be improbable that he made to a comparative stranger the incriminating statements testified to by the witness. But the question ruled out was an isolated question; its purpose was not disclosed; there was no intimation that it was asked to show want of intimacy; and upon its face it was apparently irrelevant and immaterial, and asked without any legitimate aim in view. Therefore we do not think the exclusion of the question was, under the circumstances, erroneous. And the same may be said of another question asked this witness which was ruled out, namely, "Did you on that occasion request him [appellant] to perform 'some service for you?'"—the occasion being the morning after the homicide, when the witness had seen the appellant.

3. Appellant's wife was a witness for him, and on cross-examination she was asked, "What have you done with the pistol with which your husband killed Mason?" To the question appellant objected, and his objection was overruled. She answered: "I turned it over to Mr. Wyatt, one of the attorneys." Conceding that this question was not proper cross-examination, or was inadmissible on other grounds, it is apparent that the question and answer could have done appellant no injury. It was admitted that appellant did kill deceased with a pistol.

4. The refusal of the court to adjourn the trial of the cause from the middle of the afternoon until the next day was not, under the circumstances, an abuse of discretion.

5. When appellant was testifying on his own behalf, he stated that on the evening of the homicide he went to Paso Robles, and his counsel asked him, "For what purpose did you go to Paso Robles?" The district attorney objected to the question; and appellant's counsel stated to the court that he desired to show that appellant, immediately after the shooting, went to Paso Robles for the purpose of surrendering himself to the officers, but that, acting on the advice of a Mr. Korn, he returned home and waited for the officers to come after him. The court sustained the objection. This question might well have been allowed; and in many cases the refusal to allow such a question would be material error, but in the case at bar there was no evidence, or pretense, that appellant attempted flight, and therefore he

could not have been prejudiced by the rejection of the testimony. The same may be said of the rejection by the court of the offered testimony of said Korn to the effect that he advised appellant not to surrender himself at Paso Robles.

6. We do not think that the alleged misconduct of the district attorney, in saying what he did about appellant's drinking beer, was of importance enough to be seriously considered as a ground of reversal. Neither is there any importance to be attached to the fact that the district attorney was allowed to ask appellant how many times his attorneys visited him.

7. The most serious question in the case arises out of the refusal of the court to allow appellant to recall the people's witness Christopher, for the purpose of laying a foundation for showing that he had made a certain statement contradictory of a part of his testimony. The shooting which resulted in the death of the deceased took place about 80 or 100 yards from the house of said Christopher, who testified to the circumstances of the shooting, and said that he stood in his yard, and had an unobstructed view of both of the men. Appellant called a witness named Eubanks, who testified that he knew Christopher, and had a conversation with him regarding the shooting; and he was then asked, "Did he [Christopher] inform you where he stood when the shooting took place?" To this the district attorney objected, on the ground that "no predicate had been laid for the impeachment of Mr. Christopher," and the objection was sustained. Counsel for appellant then said: "If the court so rules, I desire to have the privilege of recalling Mr. Christopher to lay the foundation. Our attention was just called to this information. We intend to show by this witness that Mr. Millard Christopher told him that he stood right in the barn at the time the shooting took place. It has taken us by surprise. We have just ascertained this information, and we ask the court to be allowed to recall Mr. Christopher for the purpose of laying the predicate." The court denied this request, and appellant excepted. The request was certainly not an unreasonable one; and we apprehend that most courts would have allowed it. But it was a matter of discretion of the trial court, and the question here is whether there was such a gross abuse of discretion as to warrant a reversal; and that depends, in great measure, upon the character and importance of the testimony of Christopher. If the fact that appellant shot the deceased, and thereby caused his death, had been an issue, and Christopher had been the main witness testifying to the shooting, then the judgment would have to be reversed for the said action of the court now under review. But the fact of the shooting was admitted and testified to by the appellant, who claimed that he shot the deceased (Mason) under reasonable apprehension of danger to his own life; and the cir-

circumstances of the shooting were testified to in detail by the witness Richardson who was traveling with appellant at the time, was much nearer the scene of action than Christopher, and had much better opportunity than the latter for closely observing what occurred, and, although called by the prosecution, was evidently not unfriendly to the appellant. And, upon examination of the testimony of Christopher, we do not perceive that it was in any important sense inconsistent with the testimony of Richardson. It is apparent, therefore, we think, that no substantial right of appellant was affected by the refusal to allow Christopher to be recalled at the time appellant made said request. It does not appear that he was in attendance on the court at that time. Moreover, Christopher was afterwards recalled as a witness by the prosecution; and when he was on the witness stand the appellant did not then offer to ask him about his statement to Eubanks. Under these circumstances, while we do not at all approve the court's refusal to allow Christopher to be recalled at appellant's said request, we cannot say that such refusal is sufficient ground for a reversal of the judgment. The judgment and order appealed from are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.

I dissent: TEMPLE, J.

HENSHAW, J. I dissent, being unable to agree with the conclusion reached in the matter discussed under paragraph 7. I think the refusal of the court to allow defendant to recall the witness Christopher, for the purpose of laying the foundation for his impeachment, was an abuse of discretion, which denied the appellant his right to a fair and impartial trial. Christopher's evidence, much more strongly than did Richardson's, indicated that the killing was willful, deliberate, and premeditated. If that evidence was false,—if it could be established to the satisfaction of the jury that Christopher did not witness the occurrences he described, or if his testimony could be legally discredited by showing that he made contradictory statements regarding the facts, a man on trial for his life should not have been denied the important right of proving it. If it does not appear affirmatively that Christopher was present when permission was asked, still the presumption is that he was within call, since the summons commands his presence during the trial of the cause, and it does not appear that he had been excused. To the contrary, it does appear that he was afterwards recalled by the prosecution. It is true that defendant did not then attempt to ask the impeaching question, but the reasons are obvious. He had once asked the privilege, which, under the circumstances, amounted to a right of, examining the witness upon these matters, and had been

denied. He was not to expect that a different result would follow another application. He could not with propriety have asked the questions as tending to impeach the witness upon the evidence he had last given, as that evidence did not bear upon the occurrences of the killing, to which Christopher had declared he was an eyewitness, and upon which alone it was sought to impeach him.

I concur: BEATTY, C. J.

WILLIAMS v. ASHE. (No. 15,656.)<sup>1</sup>  
(Supreme Court of California. Jan. 30, 1896.)

PLEDGE—CONVERSION.

1. Where the pledgee sells the absolute property in the pledge to a bona fide purchaser, the purchaser is entitled to retain the pledge until the pledgor discharges the debt for which it was pledged.

2. In replevin by such purchaser to recover the property from the pledgor, who has taken it from his possession, the fact that he in good faith claimed the absolute title will not defeat his right to recover possession as owner of the pledgee's rights.

3. A complaint in replevin alleging that plaintiff was, "on and after" a certain time, the owner and entitled to the possession of the property, is sufficient, where defendant answered over, without demurring specially.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Thomas H. Williams against R. P. Ashe. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. H. L. Barnes, Gaston M. Ashe, and Ryland B. Wallace, for appellant. W. W. Foote and T. C. Coogan, for respondent.

PER CURIAM. Appeals from the judgment in an action of claim and delivery, and from the order denying a new trial. The action was for the recovery of certain race horses, or their value in case a delivery could not be made, the horses having been taken by defendant from the possession of plaintiff after the sale of them to him by one Kelly. The defendant denied the allegations of the complaint, and averred that he was the owner of the horses, and that he was indebted to one M. J. Kelly in the sum of \$4,721.50. To secure this indebtedness, he executed to Kelly bills of sale of the horses, which bills of sale, absolute in form, were understood by defendant and Kelly to be, and were in fact, mere evidences of a pledge of the horses as security for the debt. Kelly thereafter wrongfully, and without notice to defendant, executed a bill of sale for the horses to plaintiff. Plaintiff took possession of the horses from Kelly, without payment of any consideration, and with full knowledge of the transaction between Kelly and defendant. Defendant tendered to Kelly and to plaintiff the amount of the said indebtedness. Kelly refused to accept it, as did plaintiff, the latter

<sup>1</sup> Rehearing denied.

claiming absolute ownership of the horses. These allegations are set forth in the answer, as matter of defense, as the basis of a counterclaim, and by way of cross complaint. The evidence of the principal witnesses, more or less corroborated, amounted about to this. Defendant testified, as he had pleaded, that the bills of sale were, and were understood to be, only pledges of the horses to Kelly as security. Kelly testified that originally he had held the horses in pledge, but that, becoming dissatisfied with this arrangement, and being about to leave defendant's employ, he had insisted upon receiving, and had received, the horses, and bills of sale therefor, in payment of defendant's debt to him, the defendant being unable to pay him the money, and that he represented to plaintiff, before plaintiff purchased the horses from him, that his title to them was perfect. Plaintiff testified that he bought the horses after these representations in good faith, paying therefor over \$4,000, and owing thereon nearly \$2,000 more. The court instructed the jury that as they determined upon the evidence so should they render their verdict—First, for plaintiff as the owner of the horses, if they found that the bills of sale from Ashe to Kelly were absolute; second, for plaintiff as having an interest in and a lien upon the horses, to the extent of Ashe's indebtedness to Kelly, if they found that Kelly was merely a pledgee, and that the transaction between Williams and Kelly was had with knowledge by Williams of Kelly's position; and, third, for defendant, fixing the amount of any damages he might have sustained, if in their opinion he was entitled to such a verdict. The jury returned a verdict for plaintiff for the return of the property, and found "the value of his interest in said property to be the sum of \$4,909.74." The judgment entered conformed to the verdict, and decreed a return of the horses and a lien upon them for the sum named. The jury thus found that Kelly was merely a pledgee of the property in question, and not the owner; that Ashe was the owner, but that Williams had a lien upon the horses for the amount of the indebtedness owed by Ashe to Kelly,—or, in other words, that Williams had succeeded to Kelly's interest as pledgee. As the corroborated evidence of Kelly was that he was the absolute owner of the horses, and so represented to Williams when the latter purchased from him; and, as Williams' testimony was that he purchased after due inquiry, and upon these representations,—in view of the fact that there is no evidence in the record to charge Williams with knowledge that Kelly was a mere pledgee, and in view of the further fact that Kelly, with possession of the horses under bills of sale from Ashe absolute in form, was thus, by Ashe's acts, enabled to hold himself out to the world as the owner of them, it is not easy to see how the jury could have arrived at any other conclusion than that Williams had acquired full

title. This, of course, would have been the result to one purchasing under such circumstances, in good faith and for value. *McNeill v. Bank*, 46 N. Y. 325; *Weirick v. Bank*, 16 Ohio St. 304; *Fullerton v. Sturges*, 4 Ohio St. 529; *Smith v. Clews*, 114 N. Y. 190, 21 N. E. 160. But, as Williams is not attacking the judgment, it may be assumed that the evidence warranting the finding that the sale did not vest absolute title in him was omitted from the statement.

The essential question thus presented is whether, under the pleadings and proofs, such a judgment can be upheld. Williams, it is to be remembered, is suing primarily for the recovery of the possession of the horses, and is basing his claim upon an absolute purchase of them from Kelly. Kelly insists that he was the owner, and sold the horses (and not any pledgee's interest in them) to Williams; that Ashe's debt to him had been completely extinguished, and that the relation of creditor and debtor did not exist between them at the time he made the sale. Ashe, upon the other hand, has the horses in possession, and asserts that Kelly was but a pledgee, and, having sold contrary to his rights as pledgee, having repudiated the pledge and asserted ownership,—in short, having made a wrongful conversion of the property,—the lien is extinguished, and he is entitled to retain possession against both of them. So far as concerns the rights of one who has a mere lien, as distinguished from one who claims as pledgee, the question has been answered repeatedly. It is the general rule that a lienholder who refuses, upon proper demand, to deliver property, without setting up his lien thereon, or who bases his refusal upon a claim other than that of lien, waives his right to claim a lien after action commenced. It is so held in this state by the cases of *Lehmann v. Schmitt*, 87 Cal. 15, 25 Pac. 161, and *Sutter v. Stephan*, 101 Cal. 545, 36 Pac. 106; and, from the number and uniformity of the authorities examined, it may with safety be said that this rule is universal. Section 2910 of the Civil Code enunciates the same principle. It is also the rule that, if one having but a lien is sued in replevin, and answers claiming absolute ownership, he will not be permitted upon the trial to assert any right as lienor. His lien is absolutely lost. *Mexal v. Dearborn*, 12 Gray, 336; *Tuthill v. Skidmore*, 124 N. Y. 155, 26 N. E. 348; *Everett v. Saltus*, 15 Wend. 474; *Ballard v. Burgett*, 40 N. Y. 314; *Maynard v. Anderson*, 54 N. Y. 641. The latter rule is, however, subject to this manifestly just limitation that, if one who has claimed as owner is afterwards proved to have but a lien, he shall not thereafter be deprived absolutely of his lien, if his claim was honestly, though mistakenly, entertained and pressed; but, before he can be allowed his lien, he must abandon the false claim of ownership. *Hudson v. Swan*, 83 N. Y. 552. The cases in which this question has arisen are usually

those in which the defendant to the action has repudiated his lien, but the principle is no different when it is the plaintiff who maintains the untenable position. *Hudson v. Swan*, *supra*. We are, however, here concerned more particularly with the rights of one who, in the belief that he was purchasing an absolute title, has bought property from a pledgee under circumstances which, as found by the jury, did not vest that title in him. Does the purchaser under such circumstances obtain no property or interest in the goods, or does he at least succeed by purchase to the interest of the pledgee? In the case of a mere lienholder, in the case of bailees generally, and even of factors, it is the rule, as has been said, that a wrongful conversion forfeits the lien. But in the case of a pledgee the rule is otherwise. The reason for the distinction seems to be based upon two considerations,—the first, that the pledgee has a special property in the chattels, which the other class does not possess; the second, that a contract of pledge carries with it the implication that the security may be sold to discharge the obligation, while in the case of a lien (except as aided by statute) the right of lien is not understood to carry with it any general right of sale. *Story, Bailm.* §§ 311–325. But, whatever may be the foundations for the distinction, it is now most firmly established in the law that a pledgee may sell or assign either the property or his interest in it to a bona fide purchaser, who will be allowed to hold the property until extinguishment of the original obligation. *Judge Story (Bailm.* §§ 324, 327) thus states the proposition: "If the pawnee should undertake to pledge the property [not being negotiable securities] for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question which, under the circumstances, would seem to admit of controversy, is whether the creditor should be permitted to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as if the case was a naked tort, without any qualified right in the first pawnee." The hardship and injustice of the latter alternative have been so obvious to the courts that late decisions have removed the doubt expressed by *Judge Story*, until the rule may be taken as settled that the purchaser, under such circumstances, succeeds to the rights of the original pledgee. And there can be no reason seen why it should not be so. If one purchases what he believes to be the absolute title, he should not for his mistake be denied the right of taking the limited property which the seller (the pledgee) could convey. It works no hardship upon the pledgor who, as against the substituted pledgee, has

all the rights he possessed against the original. In the leading case of *Jarvis v. Rogers*, 15 Mass. 389, the authorities are reviewed and the principle thus enunciated: "From these cases it appears that the pawnee may deliver the goods to a stranger without consideration, or he may sell or assign all his interest absolutely, or he may assign it conditionally, by way of pawn, without in either case destroying the original lien, or giving the owner a right to reclaim them on any other or better terms than he could have done before such delivery or assignment." This principle has been still further extended by the supreme court of Illinois under the following facts: Plaintiff had pledged some corn as security. The pledgee made an illegal sale of it to defendant. Plaintiff sued defendant in assumpsit for money had and received, seeking to recover the value of the corn. It was held that, as the original pledgee, had he been sued in assumpsit or for conversion, would have been permitted to set off the amount of his secured debt, the purchaser from the pledgee in such an action should be allowed the same right of recoupment, and should be permitted, even under an illegal sale, to hold the pledged property until satisfaction of the original secured debt. *Belden v. Perkins*, 78 Ill. 449. The supreme court of Colorado, in a case involving rights under an illegal sale of a pledge, has said: "The sale being void upon any hypothesis, the certificate in the hands of the purchaser remained a pledge, as it was before, and every right which *Williams* [the pledgor] had remained unaffected." *Moffat v. Williams* (Colo.) 38 Pac. 914. The case of *Talty v. Trust Co.*, 93 U. S. 321, arose upon an unauthorized sale by the pledgee of a claim or warrant against the city of Washington to defendant. Plaintiff was the pledgor, and sued the defendant in replevin. The court decided that the defendant succeeded to the rights of the pledgee in the claim, quoting *Judge Story* to the effect that, in case of a strict pledge, if the pledgee transfers the same to his own creditors, the latter may hold the pledge until the debt of the original owner is discharged. In this case it is to be noticed that the pledgee made a sale, not of his interest in the pledge, but of the absolute property.

But, after this brief consideration of a few of the cases, it remains to be added that in this state the question was early considered, and decided in accordance with the foregoing views, in the case of *Dewey v. Bowman*, 8 Cal. 145, wherein it is declared that if a pledgee sells the property absolutely, without demand or notice to one having full knowledge of his title, while the absolute title does not pass, still the property remains in the hands of the purchaser as a pledge, with the rights to the purchaser which were enjoyed by the original pledgee. *Williams*, therefore, succeeded to *Kelly's* interest, and to his right of possession, and the verdict

and judgment are within the evidence and responsive to the pleadings. For, as has been intimated, the fact that Williams mistakenly claimed a title larger than the jury found him to own cannot defeat his action of replevin, if he shows that he has even a limited interest in the property, coupled with the right of possession. *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452. And these propositions, at least, he established to the satisfaction of the jury. The objection that the complaint does not state facts sufficient to constitute a cause of action is not well taken. Plaintiff alleged that, "on and after the 17th day of November, 1892, he was the owner and in possession of the property." It is contended that the pleading contains the same defect which vitiated the complaints in the cases of *Afferbach v. McGovern*, 79 Cal. 268, 21 Pac. 837, and *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750. But in both of these cases the radical error was in pleading ownership upon a day certain, and upon no other day, and there was no implication which could be construed as a pleading of continued ownership or right of action at the time of the commencement of the suit. Here, however, the averment is of ownership and possession on and after the date. It was insufficient against a special demurrer, doubtless, but defendant did not demur at all. He answered over. It was not obnoxious to a general demurrer; for, however imperfectly pleaded, there is still by fair intendment to be gathered from the complaint that he claimed ownership and right of possession at the time of the commencement of his action. *Amestoy v. Transit Co.*, 95 Cal. 311, 30 Pac. 550; *Alexander v. McDow*, 41 Pac. 24. The evidence does not show a tender to Williams. The judgment and order appealed from are affirmed.

#### DE LANY v. KNAPP et al. (L. A. 1.)

(Supreme Court of California. Jan. 30, 1896.)

PUBLIC LAND—HOMESTEAD—LIABILITY FOR PATENTEE'S DEBTS—BONA FIDE PURCHASER.

1. Where the patentee of land as a government homestead conveys it, on its subsequent reconveyance to him by his grantee the land is divested of its homestead qualities, and is liable in his hands for debts contracted prior to the issuance of the patent.

2. Where land so apparently divested of its homestead qualities is sold for a debt contracted prior to the issuance of the patent to the creditor who purchased in good faith, that the conveyance by the patentee was with intent to defraud his creditors subsequent to the issuance of the patent does not, as to the patentee or his grantees, affect such purchaser's title.

Department 2. Appeal from superior court, San Diego county.

Action by G. F. De Lany against S. E. Knapp and another. There was a judgment for defendants, and plaintiff appeals. Reversed.

E. W. Hendricks and W. J. Murphy, for appellant. Daney & Wright, for respondents.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. The action was to quiet title to 160 acres of land. The facts of the case are as follows: One Neil, from whom both plaintiff and defendants deraign title, entered the land in controversy under the United States homestead laws, and thereafter, pursuant to the statute, commuted and paid for the land, receiving a patent therefor, which, by way of preamble and recital, declared that "whereas, George Neil, of San Diego county, California, has deposited in the general land office of the United States a certificate of the register of the land office at Los Angeles, California, whereby it appears that full payment has been made by the said George Neil, according to the provisions of the act of congress of the 24th of April, 1820, entitled 'An act making further provision for the sale of the public lands,' and the acts supplemental thereto, for [the land, describing it], which said tract has been purchased by the said George Neil," etc. Upon March 18, 1893, Neil, by deed of grant duly recorded, conveyed the land to Mrs. A. L. Treanor. Upon the 5th day of May following, Mrs. Treanor, by like deed of grant, also duly recorded, reconveyed the same property to Neil. Upon May 10th, five days after, a deficiency judgment was docketed against Neil, and in favor of this plaintiff. The land in controversy was then subjected to levy, and on the 15th day of June, 1893, was sold at public auction, and purchased by this plaintiff. Thereafter, upon the 23d day of November, 1893, Neil executed his deed of grant to the same land to one Pauly, to whose title these defendants afterwards succeeded.

For the reasons hereafter given, we consider it unnecessary to pass upon the question whether, by his commutation, the character of the title Neil received from the government was that inuring under a homestead or that attaching to a pre-emption patent. For the purposes of this consideration, it will be assumed (though not decided) that Neil took the land as a government homestead. So taking, the land was not liable for any debt of Neil contracted prior to the issuance of the patent. Rev. St. U. S. 1878, § 2296. The deficiency judgment of plaintiff against Neil was for such a pre-existing debt. Neil's deed to Mrs. Treanor was upon the face of the recorded instrument a conveyance of all his interest in the property; and, when he subsequently acquired title from her by deed of grant, he took the land divested of its homestead exemptions. The patentee sells his land. It is protected in the hands of the purchaser from any debt of the grantor which could not have been enforced against it while the title remained in him, and this is all that the case of *Russell v. Lowth*, 21 Minn. 167, decided upon the matter. But as with a state homestead, so with a federal; its character and exemptions do not revive on a subsequent repurchase by the original holder, by whom it

has been sold. *Herbert v. Mayer*, 42 La. Ann. 839, 8 South. 390.

But to overcome the effect of the deeds from Neil to Treanor, and from Treanor to Neil, defendants were permitted, over objections and exceptions, to call Mrs. Treanor, who testified that Neil, who was sick, sent for her, and said to her: "My creditors are pushing me pretty hard. Would you object to having my property put in your name, so that it will be beyond the reach of my creditors?" Mrs. Treanor consented, the deed was made under these circumstances, without consideration, and the property thereafter, in like manner, reconveyed by her to him. Plaintiff's claim was for a debt due prior to the issuance of the patent. The land was therefore not liable for it, and plaintiff was not one of Neil's creditors who could have been injuriously affected by the transfer. Upon the other hand, these transactions originated and were executed in fraud. Plaintiff had no knowledge of the secret trust. She bought at the execution sale in good faith and for value, upon the security of the title which stood in Neil, and which by the record was freed from homestead exemptions. Under these circumstances, is she protected against the effect of this private agreement? I think she should be, and is. It is true she was not one of those creditors who could complain of the original fraud, and cause the conveyance to Mrs. Treanor to be set aside. Nevertheless, she was a bona fide purchaser for value and without notice at the execution sale, and her rights are the same as those which would have attached to an innocent third person buying under like circumstances. She is protected against latent equities of which she had no notice. *Riley v. Martinelli*, 97 Cal. 575, 32 Pac. 579. The defendants, deriving their title from Neil after the rights of plaintiff as purchaser had accrued, occupy no better position than would he. Where he would be estopped, so are they; and what binds him concludes them. The fact that plaintiff was not one of those whose injury was intended by the original fraud would not be a reason for permitting Neil to prove it against her, if, in fact, she had innocently suffered by reason of it; and, if Neil could not prove it, neither could those claiming under him. If the transfers had been made with the understanding that they were designed merely to effect an apparent destruction of the homestead character of the land, no one would assert that Neil could prove this fact against one who had changed his situation under a belief in the bona fides of the matter. Yet this is the precise result which, if not intended, necessarily followed the fraud of Neil and Mrs. Treanor. Neil held out to the world that he had purchased the land under circumstances which, by operation of law, freed it from its homestead exemptions. An innocent third person dealing with this property relied upon these circumstances, and bought the property after a levy and sale, which were legal ex-

cept for this secret and fraudulent transaction. Neil cannot, nor can those claiming under him, defeat the title thus obtained by proof of any such "latent equity." The admission of the evidence of Mrs. Treanor was thus error, for which the order denying a new trial must be reversed, and the cause remanded. So ordered.

We concur: McFARLAND, J.; TEMPLE, J.

# SANTA CRUZ ROCK PAV. CO. v. LYONS et al. (No. 15,760).<sup>1</sup>

(Supreme Court of California. Jan. 31, 1896.)

LIEN FOR STREET WORK—FORECLOSURE—"REPUTED OWNER"—CONTRACT BY HUSBAND—LIEN ON LAND OF WIFE.

1. Evidence that a husband signed a contract for street work in front of a lot the record title to which was in the wife, and stated to the contractors that the lot was community property, will sustain a finding that he was the "reputed owner," within Code Civ. Proc. § 1191, as amended, providing that any person performing work on a street in front of a lot at the request of the "reputed owner" shall have a lien on the lot for work and materials.

2. The presumption that property conveyed to a married woman becomes her separate estate (Civ. Code, § 164, as amended) is not conclusive.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the Santa Cruz Rock Pavement Company against Ellen Lyons and another to foreclose a lien for street work. Judgment for plaintiff, and defendants appeal. Affirmed.

Allen, McAllister & Frohman and John B. Carson, for appellants. Parker & Eells, for respondent.

BELCHER, C. This action was brought to recover the sum of \$482.88, alleged to be due from defendants to plaintiff for setting granite curbs, and grading and paving the street, in front of a certain lot in the city of San Francisco, and to foreclose a lien on the lot for the said sum, together with the cost of verifying and filing the claim of lien and a reasonable attorney's fee. The defendants, James M. and Ellen Lyons, were husband and wife, and had been such for about 21 years. It is alleged in the complaint that the defendant Ellen Lyons was at all the times mentioned therein the owner of record of the said lot, and that the same was and is community property; that her husband was the reputed owner of it, and that he requested the plaintiff to do the work while he was such reputed owner; that he entered into a written contract with plaintiff for its performance, "both in his own individual behalf and as the agent of his wife, Ellen, and in her behalf, though in his own name"; that he individually, and on behalf of his wife, promised to pay plaintiff for the

<sup>1</sup> Rehearing granted.

work done; and that she "had full knowledge of said contract and of the performance of said work prior to and during the performance of said work, and that she did not within three days after having obtained knowledge thereof, nor at all, give notice that she would not be responsible for the same, by posting a notice in writing to that effect, in some conspicuous place upon said land, nor upon any land, nor at all"; that the plaintiff duly performed all the terms and conditions of its contract, and that the work was completed on August 1, 1892, and was duly accepted by the superintendent of streets; that the amount due plaintiff under the contract was \$482.88, no part of which had been paid; and that it filed its claim of lien on August 26, 1892. The defendants answered separately. The answer of Mrs. Lyons denied that the lot in question was the community property of herself and husband; denied that her husband was ever the reputed owner of the lot; denied that he, as her agent, ever requested the plaintiff to do the work for which it seeks to recover, or ever promised to pay plaintiff for said work, or ever entered into any written contract with plaintiff for the performance of said work, or any work; denied that at any time mentioned in the complaint she had full or any knowledge of the contract mentioned therein, or that she ever agreed to the same; and alleged that she never at any time entered into any contract with the plaintiff for the performance of any street work, or authorized her husband, as her agent, to enter into any such contract; that he has never had any interest in the property affected; and that she at all the times mentioned in the complaint was the sole and separate owner thereof. The answer of Mr. Lyons denied that the said lot is or ever was community property; that he was ever the reputed owner of it, or had any separate interest in or claim upon it; that he ever entered into any contract with the plaintiff, as the agent of his wife, to improve the street in front of the property, or ever promised on her behalf to pay any sum of money for any street work or improvements in front of it; and alleged that he was never authorized by her to enter into any contract with plaintiff for the performance of any street work in front of said lot. Upon the issues thus raised, the case was tried, and the court found, among other things, that, at all the times mentioned in the complaint, the "defendant Ellen Lyons was, and she now is, the owner of the lot of land described in said complaint as her separate property, but at all said times said James M. Lyons, individually, was the reputed owner thereof; that, while said James M. Lyons was so the reputed owner of said lot of land, he requested said plaintiff to do the work hereinafter named, and he, both in his own individual behalf and as the ostensible agent of his wife, Ellen, and in her behalf, though in his own name, entered

into a written contract with the plaintiff for the performance of the same, and thereupon, at the request of said defendant James M. Lyons, said plaintiff improved the street in front of and adjoining said lot of land, and, in so doing, did the work and furnished the materials hereinafter mentioned." And, as conclusions of law, the court found that the plaintiff was entitled to recover from the defendant James M. Lyons, individually, the sum of \$482.88, with interest thereon from August 26, 1892, and the cost of verifying and filing its claim of lien, its costs of suit, and an attorney's fee fixed at \$50, the whole aggregating \$611.22; and that it had a lien on said lot for the said amount. Judgment against Mr. Lyons, and a decree foreclosing the lien, and directing a sale of the lot, were accordingly entered, from which decree, and an order denying their motion for a new trial, defendants appeal.

It is not claimed that the work for which plaintiff seeks to recover was not well and properly done, or that the amount allowed therefor was not justly due from Mr. Lyons, but it is contended that there was no legal obligation resting upon Mrs. Lyons to pay for the work, and hence that the court erred in determining that the amount allowed was a lien on her lot; and, in support of this position, the finding that Mr. Lyons was the reputed owner of the lot, and, as such, requested the plaintiff to do the work, and entered into the contract therefor, is assailed as not justified by the evidence. The lot in question is 87 feet wide, and is situated on the easterly side of Lyon street, between Post and Sutter streets, in San Francisco; and the contract relied on was to set granite curbs (where necessary), and to pave with bituminous rock Lyon street between the other two streets named. The contract was dated June 29, 1892, and purported to be executed by all the lot owners on both sides of the street to be paved, "whose names are hereunto subscribed, with the number of feet frontage of lots represented and owned by each, respectively, set opposite their respective names, each contracting severally," and each for himself, and not one for the others, promising to pay "for the work done in front of his or her own property, respectively," at certain stipulated rates. At the time the contract was signed, a contract to do the work was about to be let under an order of the board of supervisors. The plaintiff corporation desired to obtain a private contract for the work, and to that end sent two of its solicitors (Mr. Robertson and Mr. Gould) to interview the lot owners. The solicitors went out to the block, and met several of the lot owners, and talked the matter over with them. They were all invited into the house of one of the owners, and others were then sent for, and came in. Among others present was Mr. Lyons. The matter was talked over for a considerable time, and Mr. Lyons said he wanted basalt blocks put down. Mr. Gould told him that



the order of the board of supervisors required bitumen. After further talk, according to the testimony of both Robertson and Gould, Mr. Lyons said he could not sign a contract that night. Mr. Gould asked him why, and he said, "I have got somebody else to see." Mr. Gould asked, "Who is it?" and he said, "My wife." Mr. Gould then asked if it was community property, and he said it was, and that he and his wife owned it together. It was then agreed that the parties would meet again the next evening, at the same place. At the meeting on the next evening, Mr. Lyons signed the contract, his name being the fourth in the list of 13; and, as he was doing so, Mr. Gould again asked him, "Do you own the property, or does you wife own it?" and he said, "We both own it." Mr. Gould then said, "All right; then you sign your name there." The work was commenced two or three days after the contract was signed, and was completed and approved by the superintendent of streets, and the lien filed, as alleged in the complaint. Mrs. Lyons testified that she purchased the lot about two years after her marriage to Mr. Lyons, and paid for it with money derived from the estate of her first husband, and money raised on mortgages, and that she never authorized her husband to sign the contract, and he never told her he had signed it until after the bill was presented; that she "was under the impression that these people were obtaining it from the city." Mr. Lyons testified that he did not own any real estate or other property, and that he was a carpenter, and used the money he earned to raise his family; and, when asked if he did not put his money into paying off mortgages on this property, he answered that he could not tell where it went; that, when he made a few dollars, he gave it to his wife. He also testified that his wife never authorized him to sign the contract; that he signed it of his own will, with the understanding that he would have time to pay for it; that he thought, according to the agreement, that he would have time to make the payment, and he assumed it as a personal affair; and that he never stated to Mr. Gould or Mr. Robertson that the property was community property, or that he had somebody else to see before he could sign the contract. He further said: "I never mentioned at home that I had signed the contract until after the work was going on. It was after everybody could see that it was started. On Thursday evening the contract was signed, and on Saturday morning the work was started. I told her that I would have to pay for it; that is all. Q. By the Court: When did you tell her that? A. After the work was started. Q. How long after that? A. Well, probably the next day or two. Q. You told her you had signed the contract? A. Yes, sir; I told her then."

In 1885, section 1191 of the Code of Civil Procedure was amended so as to read as follows: "Any person who, at the request of

the owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same, has a lien upon such lot for the work done and materials furnished." And in the same year a general law to provide for work upon streets within municipalities was passed (St. 1885, p. 147), by which, in section 16, the word "owner" was declared to be (for the purpose of this law) "the person owning the fee, or the person in whom, on the day the action is commenced, appears the legal title to the lots and lands, by deeds duly recorded in the county recorder's office of each county, or the person in possession of lands, lots, or portions of lots or buildings under claim, or exercising acts of ownership over the same for himself," etc. In 1887 section 1191, *supra*, was again amended by prefixing to the word "owner" the word "reputed," so that it has since read: "Any person who, at the request of the reputed owner of any lot," etc.

The question, then, is, what is meant by the words "reputed owner" as used in the Code? Counsel for appellants argue that there is no material difference in the meaning of these words and that of the word "owner," as used in the statute; and they say that "the legislature therefore could not have contemplated anything else by the expression 'reputed owner' than cases where a person contracts for street work who has the apparent title to property by deeds of record, or who has the apparent possession by reason of exercising acts of ownership over the property for himself." And hence it is insisted that, as shown by the evidence, Lyons was not, and could not have been, the reputed owner of the lot in question. But, if this theory be true, then it is evident that nothing was accomplished by the amendment, and it might as well not have been made. The Century Dictionary defines the words "reputed owner" as "a person who has to all appearances the title to and possession of property." Anderson's Law Dictionary defines the same words as "one who, from all appearance, or from supposition, is the owner of a thing; as of property subject to taxation or to assessment for a municipal improvement." And Burrill's Law Dictionary defines the word "reputed" as "considered; generally supposed." And it is added: "This word has a much weaker sense than its derivation would appear to warrant; importing merely a supposition or opinion derived or made up from outward appearances, and often unsupported by fact. The term 'reputed owner' is frequently employed in this sense. 2 Steph. Comm. 206." Prior to 1889 all property acquired after marriage by either husband or wife was presumed to be community property; but in that year section 164 of the Civil Code was amended by adding the provision that, "whenever property is conveyed to a married woman by an instrument in writing, the presumption is that the title is

thereby vested in her as her separate property." These presumptions are, however, only rules of evidence, which can be met and overcome by proofs, except where a right to property is involved which became vested in a third party before the amendment, in which case the presumption is said to be a rule of property as well as of evidence. *Jackson v. Torrence*, 83 Cal. 529, 23 Pac. 695; *Jordan v. Fay*, 98 Cal. 264, 33 Pac. 95.

Here it appears, as before stated, that the lot was acquired by Mrs. Lyons after her marriage, and hence the fact that she had the record title was not at all conclusive. It might, nevertheless, have been considered or supposed to be community property. And when Mr. Lyons signed the contract as the owner of it, and stated, as the court below must have believed he did, that it was community property, and was owned by himself and wife together, it would naturally be supposed that he was such owner. We conclude, therefore, that the court was justified by the evidence in finding that, for all the purposes of this case, he was the reputed owner of the lot.

Other questions are very elaborately discussed by counsel, but, in view of the conclusion reached on the first point, they need not be considered. We find no material error in the rulings of the court, and advise that the decree and order appealed from be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the decree and order appealed from are affirmed.

#### SOUTHERN PAC. R. CO. v. SOUTHERN CAL. RY. CO. et al. (No. 19,500.)<sup>1</sup>

(Supreme Court of California. Jan. 31, 1896.)  
EMINENT DOMAIN—RAILROAD COMPANY—RIGHT TO APPROPRIATE RAILROAD PROPERTY.

1. Under Code Civ. Proc. § 1240, providing that property appropriated for a public use shall not be taken unless for a more necessary public use than that to which it has already been appropriated, plaintiff railroad company had the right to appropriate part of a street which was purchased by defendant railroad company, subject to the right of the public for highway purposes, and on which it had laid its tracks; such appropriation being necessary for the construction of plaintiff's road, but not materially curtailing defendant's right to operate its road.

2. Defendant's construction of an unnecessary spur track across the line located by plaintiff for its right of way, after the location was made, did not affect plaintiff's right of appropriation.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by the Southern Pacific Railroad Company against the Southern California Railway Company and another to obtain a decree condemning a certain strip of land for the purpose of constructing a railroad.

From the judgment rendered, defendants appeal. Affirmed.

W. J. Hunsaker, for appellants. Harris & Gregg, for respondent.

SEARLS, C. This action is brought to obtain a decree condemning a strip of land 26 feet wide, in and through Park avenue, Lugonia park, city of Redlands, county of San Bernardino, state of California, for the use of plaintiff as a right of way for a railroad from Redlands Junction to Crafton, all in said county of San Bernardino. Plaintiff had judgment, from which judgment, and from an order denying their motion for a new trial, the defendants appeal. The findings of fact by the court below may be epitomized as follows: Plaintiff is a railroad corporation engaged in building, constructing, and operating lines of railroad in the state of California and adjacent states and territories, and owns and operates a main line of railroad extending from San Francisco, in the state of California, to El Paso, in the state of Texas, which passes for many miles through the county of San Bernardino. That it intends to build, and has partially built, a branch or spur railroad from its main line at Redlands Junction, in said county, running in a northeasterly direction a distance, in all, of 7½ miles, passing through the city of Redlands, and terminating at Crafton, in said county, for the purpose of conveying freight and passengers, and for the purpose of conducting a general railroad business upon and over said spur or branch railroad. Park avenue is, and since 1887 has been, a public street or highway in the city of Redlands, and in the building and construction by plaintiff of its said branch railroad a right of way therefor through said Park avenue, having a uniform width of 13 feet, is necessary to the construction and maintenance of plaintiff's said road. The space condemned is described, and is on the southerly half of said avenue, and will be referred to again. Before the commencement of this action, the board of trustees of the city of Redlands, by ordinance, gave and granted to plaintiff a franchise and privilege to construct, maintain, and operate its said branch railroad on and over the south 30½ feet of said Park avenue, which franchise and privilege is still in force and effect. Defendant, the Southern California Railway Company, is also a railroad corporation, is the owner of the fee of Park avenue, subject to the rights of the public for highway purposes, and is the owner of, and for four years before the commencement of this action had owned, possessed, and had operated, and is still operating, a steam railroad for ordinary railway purposes. The center line of defendant's railroad is substantially identical with the central longitudinal line of Park avenue, which said avenue is 100 feet in width. The road of plaintiff, as laid out, will leave a space of 24 feet on the south side thereof,

<sup>1</sup> Rehearing denied.

which the court finds will be sufficient to allow the traveling public to travel with safety. There will also be a space of, say, 21 feet, between the tracks of plaintiff's and defendant's roads, which the court finds will be sufficient for spurs or side tracks for defendant. The space condemned has not been used by the defendant, except as follows: (1) After plaintiff had graded its roadbed, defendant built a spur track thereon, for the purpose of preventing the plaintiff from using the right of way, which spur defendant does not need. (2) Defendant had a small depot building, 16x18 and one story high, on the said condemned right of way, which defendant does not need, and which can readily and without injury to defendant be removed, together with its spur track, from the place where now situate. The court also finds that the use by plaintiff of the land sought to be condemned is a more necessary public use than that to which it has been appropriated by defendant, and that the proposed right of way will furnish to plaintiff the most practicable, safe, and direct route and way for its road, and will be "most compatible with the greatest public benefit and the least private injury," and will not interfere with the successful operation and maintenance of defendant's road, and is not necessary thereto. No question is made as to the damages, and the findings relating thereto need not be noticed. Defendant F. H. Pattee, who is made a party defendant, owns certain lots abutting on Park avenue, and is awarded damages by reason of the construction of the road by plaintiff.

The first point made by the appellants is that the findings are insufficient to sustain the judgment. This contention is based upon the fact that such findings show that the defendant is the owner of the whole of Park avenue, subject only to the rights of the public for highway purposes, that for more than four years prior to suit brought it had maintained a line of railroad upon the center line of said avenue, and had appropriated the same to a public use, and that, as the strip of land in question, to wit, Park avenue, is not in excess of the quantity authorized by law to be taken for railroad purposes, it cannot by condemnation proceedings be taken by plaintiff for the same public use, to wit, for another and parallel railroad. The power of eminent domain is one of the inalienable incidents of sovereignty, which, treated simply as a question of power, may be exercised in favor of public uses over any and all private, and even public, property. In this view, the property and franchises of corporations, as well as of individuals, although dedicated to public uses, may be taken for other public uses. A state may not annul or modify a grant of land, but it may take the land for public use, on making compensation. There is no such thing as extinguishing the right of eminent domain; and any attempt to do so by one legislature has no

binding force upon its successors. But this inalienable power, like most others, is to be exercised under and by virtue of the legislative will, as expressed by the lawmaking power. This being so, it is an accepted canon of the law that the right to exercise the power of eminent domain must be found in some statute of the state, and that such right must be expressly given, or arise by necessary implication from powers expressly given. Among the powers conferred upon a railroad corporation by section 465 of the Civil Code is the right "to lay out its road not exceeding nine rods wide, and to construct and maintain the same with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same." The sixth subdivision of the same section authorizes a railroad corporation "to cross, intersect, join, or unite its railroad with any other railroad, either before or after construction, at any point upon its route, and upon the grounds of such other railroad corporation," etc. Turning to the subject of eminent domain, we find that it may be exercised in favor of a variety of public uses, among which are "steam and horse railroads." Code Civ. Proc. § 1238, subd. 4. Section 1240 of the same Code, in defining the private property which may be taken under the title on eminent domain, enumerates: "Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated." As early as 1863 the supreme court of this state, in *Railroad Co. v. Moss*, 23 Cal. 324, held that one railroad company could not locate its line along and upon the previously located line of another company, except at crossings and intersections, and that, as the law then stood, land appropriated by one company for the purposes of a railroad, and necessary thereto, could not subsequently be condemned by another company for a like use. In *Boston & M. R. Co. v. Lowell & L. R. Co.*, 124 Mass. 363, Chief Justice Gray, now a justice of the supreme court of the United States, said, "The general principle is well settled, and has been applied in a great variety of cases, that land already legally appropriated to a public use is not to be afterwards taken for a like use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication." The authorities in support of this proposition are numerous, and usually uniform. See *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391; *Railroad Co. v. North*, 103 Ind. 486, 3 N. E. 144; *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. St. 511, 6 Atl. 564; *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn. 363, 15 N. W. 684; *Barre R. Co. v. Montpelier & W. R. R. Co.*, 61 Vt. 1, 17 Atl. 923; *In re City of Buffalo*, 68 N. Y., 167.

The foregoing cases, in the main, involve

circumstances under which a former and a later public use may not stand together, or, in other words, cases in which the later use must supersede the former,—cases in which, as was said in *Re New York, L. & W. Ry. Co.*, 99 N. Y. 23, 1 N. E. 27, “were the rule otherwise, this evil would result: A corporation, No. 1, having the right of eminent domain, takes land from a similar corporation, No. 2, having the same right. No. 2 thereupon proceeds again to condemn it for its own use, and No. 1 retaliates. And so the absurd process goes on. It is clear the legislature never intended any such result.” The question is, does the well-understood rule indicated apply to the facts of the present case? We think the question must be answered in the negative for the reasons: (1) The condemnation proceedings here work no substantial injury to the plaintiff, and produce only such inconvenience as may be covered by damages awarded. The object of the rule which prevents the taking of property devoted to a public use for another and not more necessary public use is, not that there is anything sacred in the property as such, considered independent of the public use, but the protection of the use itself, in which the public as well as the owner is interested, and to save the use from annihilation. Defendant purchased from the abutting owners, subject to the right of the public for highway purposes, Park avenue, a strip of land 100 feet wide, and constructed its railroad on the center thereof. As such purchaser its rights were neither greater nor less than they would have been had it acquired a right thereto for a like purpose under the law of eminent domain. It was the intention to dedicate it to a public use, and the actual appropriation to such use, which consecrated it beyond lands held in private proprietorship. So far as it was not thus appropriated, and as it was not reasonably essential to such use, it stood in the same category with other lands held by individuals or corporations, and was liable to condemnation proceedings for a similar or different public use. It is property appropriated to public use which is, under subdivision 3 of section 1240 of the Code of Civil Procedure, protected from condemnation, except “for a more necessary public use”; and as to lands owned by defendant, but which have not been thus appropriated, and are not likely in the future to be needed for the existing public use, the inhibition does not apply. *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va., 812; *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174. “Nor will the general rule be applied to prevent the taking of a small and immaterial part of some of the appurtenances of the company, when the taking is necessary for the right of way of another company or other imperative use.” *Lewis, Em. Dom.* § 267; *Chicago & N. W. Ry. Co. v. Chicago & E. R. Co.*, 112 Ill. 589; *New York, H. & N. R. Co. v. Boston, H. & E.*

*R. Co.*, 36 Conn. 196; *North Carolina R. Co. v. Carolina Cent. R. Co.*, 83 N. C. 489; *Northwestern R. Co. v. Concord & C. R. Co.*, 27 N. H. 183. (2) As before stated, our law permits the taking of “property appropriated to public use, but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.” *Code Civ. Proc.* § 1240, subd. 3.

The question then arises, is the contemplated use by plaintiff of the land in question a more necessary public use than that to which it has been already appropriated by defendant? We think this question must be answered in the affirmative. Treated as a mere question of right in the defendant, it must be admitted that it is the owner of a right of way 100 feet in width for the uses of its railroad, the tracks of which are laid thereon; but we are not now called upon to determine the question from that standpoint, but rather to view it in the light of the necessities of its ownership for a public use. As an incident of defendant's right to own and operate a railroad, it has not been used at all, except that portion covered by defendant's flag station and the small station building or depot, which, according to the findings, can be readily moved across defendant's track without inconvenience to the public or to defendant. All these franchises and rights of way are given and granted upon the theory of public necessity, and of the benefits accruing therefrom to the public. The fact that private persons and corporations, the owners of these franchises and rights, are the recipients of profits arising from the ownership and operation of the property, does not militate against the fundamental theory that the prime object is the benefit to the public. The multiplication of railroads, with the conveniences and competition they bring, all redound to the welfare of the people at large. Who shall say that the strip of land, 13 feet in width, condemned by the court below for the use of plaintiff for its railroad track, and to be used for a railroad, is not a more necessary public use than any to which it has been appropriated or used by defendant? It is not a case of taking, destroying, or curtailing defendant's franchise, or any property essential to its full and complete enjoyment. Were this the case, it would be a taking, not for another and more necessary public use, but the taking of one man's property and conferring it upon another for a precisely similar use,—a proceeding not tolerated in law. The fallacy of appellant's argument on this branch of the case is in confounding the incident with the thing itself,—the defendant's railroad, and its right to the full use and enjoyment thereof, with that portion of its right of way which the court expressly finds is not essential or necessary to such enjoyment. A railroad company is authorized to take a given quantity of land for a right of way, not as a reward for con-

structing a road, but because it is regarded as necessary to the construction and operating its line of railroad, and when a portion of such right of way is not used, and is not necessary for the purposes of its creation and use, either in the present or future, as in this case, then, as to the portion of such right of way not necessary to its operation, the appropriation by another railroad, where necessary to the use of the latter for a road-bed, is an appropriation to a more necessary public use, within the purview of the Code, and may be taken, upon compensation being made. The wisdom of this provision in our law becomes apparent, wherever railroads converge upon cities, towns, mountain passes, etc., and where the right of way of the first appropriator may be in part necessary to subsequently constructed roads, and may be taken by the latter with only such "tolerable interference" as does not materially curtail the rights of the first appropriator, and can be fully compensated in money. I repeat, the appropriation of a portion of the right of way of a railroad, not essential to its enjoyment of its franchise and property, as such, by another railroad, where essential to the construction and existence of the latter, is to and for a more necessary public use, and the fact that some interference may be occasioned thereby, but which does not materially curtail the rights and privileges of the former, does not take the case out of the wholesome rule adopted by our Code. Extended comment is not deemed necessary upon the fact that defendant, after the line of plaintiff's road was located, constructed a spur track across the line of the same, for the reason that the court found that defendant had no use therefor, and constructed the same for the purpose of preventing the plaintiff from having and using such right of way. In such cases, the authorities are to the effect that defendant could gain no advantage thereby. It follows from these views that the findings of the court support the judgment. Appellants further object that "the evidence is insufficient to justify the decision of the court." It must suffice, upon this head, to say that, upon all the points upon which the findings are assailed, there was a substantial conflict in the evidence, and were we to analyze and discuss the evidence at length, it would only lead to the inevitable conclusion that under such circumstances we are not authorized to disturb the findings. The errors of law complained of involve the same questions discussed under the head of the sufficiency of the findings to support the judgment, and need not be further noticed. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

STANFORD et al. v. CITY AND COUNTY OF SAN FRANCISCO. (No. 15,966.)<sup>1</sup>

(Supreme Court of California. Jan. 31, 1896.)

SURFACE WATER — DAMAGE CAUSED BY PAVING — LIABILITY OF CITY.

Surface water, which, before a street was paved, was absorbed by it, after the paving thereof, without any cesspools or other means to allow it to escape, flowed to the part of the street where the grade was lowest, and, collecting, overflowed the sidewalks and flooded a basement. *Held*, that the city was liable for the damage.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hibbard, Judge.

Action by J. B. Stanford and others, partners as G. W. Clark & Co., against the city and county of San Francisco. Judgment for plaintiffs, and defendant appeals. Affirmed.

Harvey T. Creswell, for appellant. Gordon & Young, for respondents.

HAYNES, C. Plaintiffs were the occupants of the basement of a building, No. 720 Mission street, which extended back to the southerly side of Jessie street, and had stored therein a large quantity of wall paper, and other goods used in their business. In the early part of 1888 the defendant caused a sewer to be laid in Jessie street from the center of Fourth street easterly to its termination, in a cul-de-sac at the westerly line of the Grand Opera House, which extends entirely across Jessie street, just east of the premises occupied by plaintiffs. The westerly end of said sewer connected with a sewer in Fourth street. The sewer in Jessie street had two manholes, with covers; but no cesspools were provided to carry the surface water from the street into the sewer, and none were provided for in the contract under which it was constructed. Shortly after the construction of the sewer the defendant also caused the same portion of Jessie street to be paved with basalt blocks, and granite curbs to be laid, and the sidewalks reconstructed. After the street was paved the southerly side was slightly lower than the northerly side, and the easterly end was about 26 inches lower than it was at Fourth street, the distance being about 600 feet. Prior to the paving the surface of the street was covered with loose planks, and, the street being sandy, the surface water was absorbed. On March 13, 1889, large quantities of water accumulated and collected at said easterly termination of Jessie street, by reason of rains; and the water broke over the curbing, and ran into the basement occupied by plaintiffs, and injured their merchandise, to the amount of \$750.81, and this suit is prosecuted to recover damages in said sum. The cause was tried by the court without a jury, and findings were filed and judgment entered for the plaintiffs; and the defendant appeals from the judgment, and from an order denying a new trial.

There is no controversy as to the injuries

<sup>1</sup> Rehearing denied.

sustained by the plaintiffs, nor as to the general facts above stated. Appellant, while contending that the findings do not support the judgment, also contends that the latter part of the eighth finding is not justified by the evidence, and quotes that part, as follows: "That said plaintiffs were damaged in said sum of \$759.81 by reason of the failure of the said defendant to provide cesspools or any means to carry off any accumulation or collection of water from the aforesaid portion of Jessie street." Its contention, as to this finding, is that it was the paving of the street, and not the construction of the sewer, that caused the accumulation of the water, and the consequent damage. But the findings state all the facts connected with the improvement of the street, and the accumulation of the water thereon, as well as the fact that prior to these improvements the sand absorbed the surface water, and does not find that the construction of the sewer caused the water to accumulate upon the street, but attributes the injury to defendant's failure "to provide cesspools or any means to carry off" the water. The existence of the sewer doubtless suggested that cesspools connected therewith would have been a convenient and practicable mode of carrying away the water; thus preventing its accumulation, which was the necessary result of the paving. The question is, therefore, whether there was any legal obligation resting upon the city to provide means for conducting away surface water, the accumulation of which was the necessary consequence of paving the street. Neither of the contracts for the improvement of the street provided for the construction of cesspools, and the omission to construct them was not the result of the negligent performance of the work under the contracts, and therefore the case does not come within the class of cases where injury results from the neglect of the city to see that the contractor properly executes the plan adopted; the execution of the work according to the plan being a mere ministerial duty, and not the exercise of legislative power. Nor is this case within that numerous class of cases where it is held, with almost entire unanimity, "that a municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street." Dill. Mun. Corp. § 1042. Here the grade of Jessie street was not changed, nor is there any claim that the premises occupied by plaintiffs were below grade. Here a street which, before it was paved, absorbed the water falling upon it, by the paving is made to retain and collect the same upon its surface, no means being provided for removing or conducting it away. The portion of the street so paved crossed no street or alley by which it could be diverted, and as the easterly end was more than two feet lower than its westerly end, and was absolutely closed at the lower end by a building which crossed it, it was inevitable that

the water falling on that portion of the street below Fourth street would be collected and retained until it could escape by flowing over the curb and sidewalk, and into the basement occupied by the plaintiffs. It was not simply the water falling upon the street opposite plaintiffs' premises, but it was the collection of all the water falling upon the street below Fourth street; the work being so done that the accumulated water was raised above the grade of the street, and above the grade of plaintiffs' premises, which were up to the grade of the street.

Counsel for appellant cites section 1039 of Dillon's Municipal Corporations, in support of the proposition that "the law regards surface water as a common enemy which every proprietor may fight or get rid of as best he may." That section, and the two following, are devoted to the subject of "Liability in Respect of Surface Water," and the last of these (section 1041) is devoted to the question of the "omission to provide drains." The learned author says: "It is clear that there is no liability on the part of a municipal corporation for not exercising the discretionary or legislative powers it may possess to improve streets, and, as part of such improvement, to construct gutters or provide other means for draining for surface waters, so as to prevent them from flowing upon the adjoining lots." But in note 2 to said section it is said: "If the necessity for the drainage is caused by the city, the doctrine of the text [section 1041], that it is not bound to supply the drainage, does not apply." Even as applied to property below the level of the street, the same learned author says: "It is possible there may be no middle ground, but we are unable to assent to the doctrine that by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the absolute and unconditional legal right intentionally to divert the water therefrom, as a mode of protecting the streets, and to discharge it by artificial means, in increased quantities, and with collective force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner." Section 1042. In a note to this section, in the fourth edition, he says, "The many cases since decided, cited in the notes, have found and defined the 'middle ground,' therein referred to, and adjudged the law to be as stated in the text." In *Ashley v. City of Port Huron*, 35 Mich. 296, it was held that where a city constructed a sewer in such manner as to throw a large quantity of water upon plaintiff's premises, which otherwise would not have flowed there, it was liable for the damage caused thereby. In the opinion in that case, after referring to a great many authorities, Chief Justice Cooley said: "It is very manifest, from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished

by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it, without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives, and never could give, authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of its streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other." In *Selfert v. City of Brooklyn*, 101 N. Y. 136, 142, 4 N. E. 321, it was said: "Municipal corporations have quite invariably been held liable for damages occasioned by acts resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another, whereby injury to his property has been occasioned. *Baltimore & P. R. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719. This principle has been uniformly applied to the act of such corporations in constructing streets, sewers, drains, and gutters, whereby the surface water of a large territory, which did not naturally flow in that direction, was gathered into a body, and thus precipitated upon the premises of an individual, occasioning damage thereto." See, also, note to *Chalkley v. City of Richmond (Va.)* 29 Am. St. Rep. 742, 14 S. E. 339, under the head "Surface Water," where a large number of cases from many different states are cited. In *Los Angeles Cemetery Ass'n v. City of Los Angeles*, 103 Cal. 461, 470, 37 Pac. 375, the same principle is asserted; and in the later case of *De Baker v. Railway Co.*, 106 Cal. 257, 282, 39 Pac. 610, it was said: "But if the work was inherently, and according to its plan and location, a dangerous obstruction to the river, such as ordinary prudence should have guarded against, not only the author of the plan to obstruct the stream [the city of Los Angeles], but the person placing the obstruction, was severally liable for the entire damage." See, also, *Reardon v. City and County of San Francisco*, 66 Cal. 492, 6 Pac. 317, where the city was held liable for an injury to plaintiff's lot caused by work done upon the street, which was the immediate, direct, and necessary effect of the work done. *Corcoran v. City of Benicia*, 96 Cal. 1, 30 Pac. 798, and the other cases cited by appellant on page 5 of his brief, do not conflict with the authorities which we have cited above.

*Corcoran v. City of Benicia*, supra, is to the effect that a municipal corporation is not liable for damages caused by the prevention of the flow of surface water from the lot of a private owner, by raising the street to the grade, where such water does not run in a natural channel across the lot. The distinction between that case and this is obvious, and the other cases cited by appellant rest upon similar facts. It is also true, as stated by appellant, that "there is no duty imposed by law upon the city to construct cesspools in connection with the sewer," if we add the proviso that the improvement of the street by the city does not create the necessity for cesspools.

It is also contended that "the court failed to find any negligence on the part of the city." All the probative facts being found, negligence, if shown thereby, as is the case here, need not be expressly found as an ultimate fact.

It is further contended that "the court erred in admitting evidence that defendant, subsequent to the overflow, put in cesspools." If such evidence is admissible for any purpose, it could only be as a demonstration that the flooding of plaintiffs' premises could have been avoided by that means. But, conceding that the court erred in admitting that fact in evidence, it does not appear that the defendant was, or could have been, prejudiced by it, and it does appear that without that evidence the result must have been the same. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

HAMMOND, JR., Referee, v. CAILLEAUD.  
(No. 15,961.)<sup>1</sup>

(Supreme Court of California. Jan. 31, 1896.)  
PARTITION—SALE—NONCOMPLIANCE WITH BID—  
RESALE—LIABILITY FOR SUFFICIENCY—DIFFER-  
ENCE IN TERMS OF SALE—CONCLUSIVENESS OF  
ORDERS.

1. An order confirming a sale under a decree in partition, not having been appealed from by the purchaser, is conclusive against him that he had no valid reasons for refusing to comply with his bid.

2. An order in a partition suit that the property be resold, at the risk of the purchaser at the first sale who refused to comply with his bid, is binding on him, it being recited that he had notice and was represented by counsel. If such recital were untrue, he should have moved to vacate or modify the order, and, on refusal of his motion, have appealed.

3. Where a referee, in partition to sell the property, makes it one of the conditions of the sale that the title shall be good, the purchaser, who refuses to take the property, cannot be held liable for the difference between his bid and the amount for which it is sold on resale; it having been stated at the second sale that there had been one sale, and the purchaser had refused to

take the title, and that the purchaser at the second sale would take the title as it was,—even if the referee had no authority to make the condition at the first sale,—unless it be shown that the difference in price at the two sales was not due to such difference in the conditions.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Richard P. Hammond, Jr., referee, against Henry Cailleaud. Judgment for plaintiff. Defendant appeals. Reversed.

A. Ruef, for appellant. A. C. Freeman, for respondent.

HAYNES, C. This action was brought by plaintiff as referee in the partition suit of Finnerty et al. v. Pennie et al., to recover the sum of \$1,750 from the defendant. The action of Finnerty v. Pennie was for a partition of a certain lot situate on the corner of Natoma and Mary streets in the city of San Francisco, in which a decree was entered determining the interests of the several parties, the amount and priority of several liens thereon, and adjudging that said lot was incapable of partition, and ordering a sale thereof by Hammond, the plaintiff herein, who was duly appointed sole referee for that purpose, the sale to be subject to confirmation by the court. The referee offered said property for sale at public auction, and at such sale the defendant herein became the purchaser upon his bid of \$7,500, and thereupon deposited with the referee \$750, that being 10 per cent. of the amount bid. The purchaser opposed the confirmation of the sale, upon grounds hereinafter stated, but the court confirmed the sale, and the referee executed and tendered a deed in due form, and demanded payment of the remainder of the sum bid, but the defendant refused to pay said balance or accept the deed. These facts were reported to the court, and afterwards an order was made for a resale of the premises, and directing the referee, in case such resale should not realize said sum of \$7,500, and the costs and expenses of the resale, to collect from defendant, by some proper proceeding, such deficiency. To these facts, alleged in the complaint, the defendant answered, and also filed a cross complaint and counterclaim. The answer, after denying the allegations of the complaint, alleged that said property was offered for sale at public auction on the following terms and conditions, namely: "The property to be sold to the highest bidder, the purchaser to receive a perfect and valid title, free from imperfections, otherwise there to be no sale; the bidder, upon acceptance of his bid, to deposit with plaintiff 10 per cent. of the sum bid, to secure the bid and sale to him, and the balance of the bid to be paid, if the title should prove perfect and valid, upon conveyance to the bidder of said property, with a valid and perfect title thereto, and after examination of said title by the bidder; and if the title should not prove to be perfect and

valid and free from imperfections, nor made so within 30 days after notice by the bidder to plaintiff of defects therein, the said deposit of 10 per cent. to be returned by plaintiff to bidder on demand,"—and that he bid for said property said sum of \$7,500, with the express agreement that if the title to said land should prove imperfect, invalid, and not free from all imperfections, there should be no sale, and that said deposit should be returned to him upon demand. He further alleged that the title to said lot was invalid, and not free from imperfections, that he notified plaintiff thereof, that plaintiff refused to make said title perfect, and that he thereupon demanded the return of his deposit. He admitted that said sale was reported to the court for confirmation, but denied that the terms and conditions thereof were reported; that he filed objections thereto, stating the terms under which his purchase was made, and specifying certain defects in the title, but that the court decided that he would not be bound by the decision of the court thereon, nor by such confirmation, and refused to hear or consider his objections thereto. He admitted the tender of the deed, but denied that such tender was in pursuance of the terms of sale, or that it would have conveyed a valid title, and averred his readiness and willingness to comply with the terms of the sale. He further alleged that the terms and conditions under which the property was resold were different from the terms and conditions of the first sale; that at the second sale it was expressly stated that the purchaser should take the title as it stood, without any agreement that it was perfect, or should be made so upon notice of defects; and that by reason of such change in the terms and conditions of sale the selling value of the property was greatly depreciated. At the second sale, one Denigan became the purchaser, at the sum of \$5,000. The cross complaint and counterclaim were interposed for the purpose of recovering the deposit of \$750. The cause was tried by the court, and findings and judgment were for the plaintiff for said sum of \$1,750, with interest, and from said judgment, and from an order denying his motion for a new trial, the defendant appeals. Appellant's defense to said action is based upon two distinct propositions: (1) That his purchase was conditioned upon his obtaining a good title, and that the title was not good; and (2) that he is not liable for the deficiency or loss, upon resale, because the terms and conditions of the two sales were materially different. To these propositions respondent replies, in effect, (1) that the sale to appellant was confirmed by the court, and, that order not having been appealed from, appellant is concluded as to all questions involved in the confirmation; and (2) as the referee had no power to give or impose any conditions of sale not contained in the decree or authorized by law, and as the rule of caveat



emptor applies to judicial sales, and as he is conclusively presumed to know the law, that he therefore purchased under the conditions imposed by the law, and not under different conditions alleged to have been made by the referee without authority, and, if so, the two sales were made under the same conditions.

1. That the order confirming the sale to Cailleaud, the first purchaser, was appealable, and became conclusive upon his failure to appeal, I think is clear. In *Boggs v. Hargrave*, 18 Cal. 560, it was held, in a foreclosure case, that the purchaser, by his act of purchase, submitted himself to the jurisdiction of the court in that suit as to all matters connected with the sale, and was entitled to apply for such relief as the facts of the case might justify, and that, upon his application, the sale could be set aside, and the satisfaction canceled. In *Hickson v. Rucker*, 77 Va. 135, it was said: "By buying at such sale the purchaser selects his forum, comes into the case, and submits himself to the court as to all questions concerning the sale and his purchase." That in sales under a decree in equity the purchaser becomes a quasi party to the suit, see note to *Mount v. Brown*, 69 Am. Dec., at p. 368, and cases there cited, and *Jones, Mortg.* § 1642. The confirmation of a sale often involves rights of vast importance. A purchaser at a judicial sale may thereby be deprived of a purchase of great advantage to him, or have improperly imposed upon him a burden he should not bear. But it is urged by appellant that there is no provision of the statute under which he could have appealed from that order; that the decree in partition was interlocutory, that he was not a party, and could not appeal therefrom. But the decree in this case was not interlocutory, but final. It not only determined the several interests of the cotenants, and the amounts and priorities of the several liens, but also adjudged the property incapable of partition, and decreed that it be sold, and directed the distribution of the proceeds, which distribution is to be made by the referee when the decree so directs (section 773, Code Civ. Proc.), so that the sale and confirmation were simply steps to be taken in the execution of the decree, and the order of confirmation was an order made after final judgment. The appeal from an interlocutory judgment in partition, provided for in section 963, subd. 2, Code Civ. Proc., is only "from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made." But if the decree did not become final until the sale was confirmed, it then became final, and the purchaser, being then a party to that which made the decree final, had the right to appeal from that part of the decree as to which he was a "party aggrieved." The defendant was, therefore, concluded by the or-

der of confirmation as to all objections made to the confirmation of the sale, and became legally bound to complete the purchase. There are three modes of proceeding in a court of equity, when a purchaser, after confirmation, fails or refuses to complete his purchase: (1) Set aside the sale, release the purchaser, and order a resale; or (2) decree a specific performance of the contract; or (3) order a resale, holding the purchaser responsible for any deficiency. See *Jones, Mortg.* § 1642, and cases there cited. The third of the above modes of procedure is the one pursued in this case.

Upon the trial, the defendant, in order to prove that he never became liable as a purchaser, offered in evidence the following written terms and conditions of said sale (omitting the description): "San Francisco, December 14, 1891. We have this day sold to H. Cailleaud, at the price of \$7,500, in gold coin, the following described property: seven hundred and fifty dollars, cash in hand paid, the receipt of which is hereby acknowledged; \$6,750, payable ten days after date, or upon completion of the examination of title and the other papers connected therewith, as hereinafter specified; ten days (from date hereof) are allowed for the examination of the title. If the title is not found valid, nor made so in thirty days after notice to us of defect therein, the deposit (for which this is a receipt) is to be returned on demand. If the title is found or made valid, within the time herein specified, and the sale is not closed in accordance with the above terms, the sum of \$750 (for which this is a receipt) is to be forfeited. The owner hereof binds himself, upon receipt of the purchase money, to deliver to H. Cailleaud a valid title to said property, unincumbered, unless it is specified above that certain liens are assumed. Time is of the essence of this contract. Subject to confirmation by the superior court of the city and county of San Francisco. Richard P. Hammond, Jr., Referee." "I hereby agree to buy the property above described upon the terms and conditions herein above expressed. Henry Cailleaud." An objection to its introduction in evidence for that purpose was properly sustained, the validity of defendant's purchase having been conclusively adjudicated by the order confirming the sale. The defendant afterwards offered to prove that at the second sale it was expressly stated that the purchaser would take the title as it was, that one sale had been confirmed, and the purchaser had refused to take it; and, in that connection, for the purpose of proving that the terms of the two sales were different, also again offered the writing above quoted. We have held that the order confirming the first sale was appealable, and that, having failed to appeal, the purchaser was bound by the order of confirmation, and could not relitigate the questions arising upon the motion to confirm. But, conceding for the

moment that his objections to the title were groundless, and that therefore the terms and conditions of his purchase were fully complied with, and that, without cause or excuse, he refused to take the property, and deliberately intended to suffer all the legal consequences of such refusal, the resale could not be either a just or legal mode of ascertaining his liability, unless made upon the same terms and conditions as those under which he purchased. *Riggs v. Pursell*, 74 N. Y. 370; *Shinn v. Roberts*, 20 N. J. Law, 435. The court refused to permit the defendant to prove what the terms of the second sale were, as announced by the auctioneer, the court holding that the terms of the second sale were definitely fixed by the order of sale and the published notice, and that the defendant would not be allowed to contradict these; and also refused to permit proof of the terms and conditions of the first sale for the purpose of showing that the conditions of the two sales were different. Conceding that the rule of caveat emptor applies to judicial sales generally, and that the order of sale was silent as to any conditions relating to the validity or invalidity of the title to be acquired by the purchaser thereunder, and further conceding, for the purposes of this opinion, that the referee derived no power from the statute or the order of sale to stipulate with the purchaser that the title should be good and free from imperfections, or the sale be void, it does not follow that the purchaser was bound to accept an imperfect title, if it be true that the referee sold the property under the conditions alleged and offered to be proved by the defendant. If it be true that purchasers are conclusively bound to know the limits of the powers of the officer making the sale, it must follow that, as matter of law, they are not affected or influenced by any representation made by the officer, or by any terms or conditions given or imposed by him, and therefore the sale must, for the purposes of confirmation, as well as for all other purposes, be deemed to have been regular and valid. And not only so; upon that theory, it would be impossible that two sales, made by the same officer, of the same property, under the same order of sale, could be made on different terms; and if so, there could be no foundation for the established rule that, in order to hold the first purchaser liable for the loss upon a resale, the terms and conditions of the two sales must not be different. But that courts do not hold purchasers to such presumptive knowledge, in confirming sales, is well settled. In *Woodward v. Bullock*, 27 N. J. Eq. 507, bidders were misled as to the amount of the incumbrances to which the sale was made subject, both by the sheriff and the successful bidder. The sale was set aside. In *Hayes v. Stiger*, 29 N. J. Eq. 196, the court said: "Where surprise or misapprehension is occasioned by the conduct of the

purchaser, or the officer making the sale, to the injury of a person interested, the court will interfere." In *Black v. Walton*, 32 Ark. 321, the syllabus is as follows: "A sale by a guardian of his ward's land, under an order of the probate court, is a judicial sale, and the rule caveat emptor applies; but if the land is purchased upon the representation of the guardian that the purchaser would acquire a good title, which turns out to be untrue, the purchaser will not be held, at law or in equity, although the guardian may not have known the falsity of his representations." In *Veeder v. Fonda*, 3 Paige, 94, the chancellor said: "As property to a vast extent is sold under the orders and decree of this court, much of which belongs to infants and others who are not able to protect their own rights, it has always been an important object with the court to encourage a fair competition at master's sales. For this purpose, it is necessary that purchasers at such sales should understand that no deception whatever will be permitted to be practiced upon them; that, in a contract between them and the court, they will not be compelled to carry the contract into effect under circumstances where it would not be perfectly just and conscientious in an individual to insist upon the performance of the contract against the purchaser, if the sale had been made by such an individual or his agent. It is, therefore, a principle of the court that the master who sells the property shall not, in the description of the same, add any particular which may unduly enhance the value of the property or mislead the purchaser." These authorities clearly show that for any error, irregularity, or misrepresentation of the officer, whether intentional or otherwise, whereby the purchaser has been misled to his prejudice to such extent as to make it unconscionable that his contract of purchase should be enforced against him, the sale will not be confirmed. But in this case, as here presented, it is not necessary to go further than to hold that if, by the alleged terms and conditions of the sale to appellant, he was led to bid more for the property—to any material extent, at least—than he would if he had been informed, as the purchaser was, at the second sale, that he must take the title as it was, whether defective or not, it is obvious that the resale did not furnish any just measure of damages. No fact or circumstance is disclosed by the record, other than the different conditions under which these sales were made, which tends in any degree to account for the difference between the final bids at these two sales; and, under such circumstances, we must conclude that all above the amount of the second sale which was bid at the first was induced by the condition that the purchaser took no risk as to the title. The owners are estopped from saying that the price obtained upon the second sale was

inadequate, since they are not shown to have opposed confirmation upon that ground, and therefore the presumption is strengthened that the higher price obtained at the first sale was secured by the more favorable conditions given to appellant. If the referee had entirely omitted to publish notice of the sale, and had made a private contract for the sale of the property, and the owners (creditors not being affected) had been satisfied with the terms of sale and the price obtained, and, with knowledge of the facts, had obtained its confirmation, the sale so confirmed would have been valid, and they could not thereafter have objected that they were not bound by the acts of the referee, though made without authority. Here the owners were informed, before confirmation, of the terms of the written contract, and should be held to have ratified that contract as to all its terms and provisions. But, whether that be true or not, this action is brought by the referee, who alone is authorized to maintain the action, unless by assignment he confers that right upon another. *Mayer v. Wick*, 15 Ohio St. 548. In *Galpin v. Lamb*, 29 Ohio St. 529, 534, it was said: "The contract of purchase is made with the officer, as representing all the interests involved in the suit in which the judgment or decree of sale is rendered. He and the purchaser are the only parties to the contract of purchase; and he alone can maintain an action against the purchaser to recover the purchase money"; and, in commenting upon the case of *Mayer v. Wick*, supra, it was said: "In that case the sale had been confirmed, and the officer had thus become responsible for the purchase money. He had tendered the deed to the purchaser, and assigned his right of action to the plaintiff in the decree under which the property was sold, and the latter was allowed to maintain the action for the purchase money." See, also, *Michenor v. Lloyd*, 16 N. J. Eq. 38. If, therefore, the right of the referee to prosecute this action is based upon the contract he made with the purchaser, it would appear to be clear that he should not be permitted to say, "I am not bound by the written contract I made with you, because I had no power to make it, and therefore it did not constitute any part of the terms and conditions of the sale, and you cannot use it for the purpose of showing that the terms of the second sale were different." If, without a resale, the referee had brought suit against the defendant to recover the unpaid purchase money, the action could properly have been sustained, because the order confirming the sale, not having been appealed from, absolutely fixed the defendant's liability as a purchaser; but he was not concluded, by his failure to appeal, from showing the terms of his purchase to have been different from those of the second sale.

As to the order of resale at appellant's risk, made April 7th, I think appellant is

bound thereby. It recites that the purchaser had notice and was represented by counsel. If that were untrue, he should have moved to vacate or modify the order, and, upon a denial of his motion, have taken an appeal. No other questions require notice. The judgment and order appealed from should be reversed, and the cause remanded.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded.

PETERSON v. MACHADO. (No. 19,591.)  
(Supreme Court of California. Feb. 7, 1896.)  
DEED—EASEMENT—RIGHTS OF GRANTOR—INJUNCTION.

1. A deed conveying "a road and right of way over and across" land, "to be forever appurtenant to" adjoining land of the grantee, and providing that neither party shall, "nor shall his successors in interest, grant or give to any other person a right of way over said road," conveys only an easement for a right of way, and not a fee-simple title.

2. An injunction to enjoin a grantee of an easement for a right of way from interfering with the grantor's laying pipes beneath the right of way, to connect with a ram placed in a gulch which encroached on the right of way, should be granted, where the grantor offers to widen the right of way by moving his fence, or by changing the location of the ram, and filling up the gulch.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county.

Action by John Peterson against Domingo Machado for an injunction. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Graves & Graves and F. A. Dorn, for appellant. Wilcoxon & Bouldin, for respondent.

BELCHER, C. The plaintiff was the owner of a tract of land in San Luis Obispo county, which was bounded on its westerly side for a distance of about 2,400 feet by a natural stream of water, known as "Sycamore" or "Los Osos" creek. He resided on this land with his family, his dwelling house being about 1,500 feet distant from the creek, and was engaged in farming the same, and raising stock, consisting of cattle, horses, and hogs. The defendant owned two tracts of land, one adjoining the north side of plaintiff's land, and the other the south side thereof. In October, 1887, plaintiff, by an instrument in writing, granted and conveyed to defendant, and to his heirs and assigns, "a road and right of way for all purposes over and across the aforesaid land of Peterson, and to be forever appurtenant to the aforesaid land now owned by said Machado, which road shall be sixteen (16)

feet wide, shall run along the east side of what is known as 'Sycamore' or 'Los Osos' creek, connecting the aforesaid two tracts of land now owned by said Machado, and the easterly line of which road is described as follows: [Setting out courses and distances.]" The instrument was executed by both parties, and contained numerous covenants to be kept and performed by them, and, among others, that within eight months said Machado "shall build and thereafter perpetually maintain one hog-tight fence along the east line of said road, as above described"; and that "said Peterson shall not, nor shall his successors in interest, grant or give to any other person a right of way over said road granted to Machado across the land of Peterson; and said Machado shall not, nor shall his successors in interest, give or grant to any person or persons who may be owners of his said land, or some part thereof, a right of way over said road." Subsequently, and about two years before the commencement of this action, plaintiff placed a water ram in the bed of the creek, where the same borders upon his land, and connected therewith a pipe, through and by means of which he conveyed water from the stream to his house, to be there used for domestic and culinary purposes and for watering his stock. The pipe crossed the roadway, but was there placed under ground, and so as not to interfere with the use of the right of way. Afterwards, in June, 1894, defendant dug up, cut, and removed that part of the pipe which crossed the roadway, and thereby prevented the flow of any water from the said creek to plaintiff's house. This action was thereupon commenced to obtain an injunction restraining the defendant, his agents, servants, and employees, from cutting or in any way interfering with the said pipe. The case was tried, and the court found that the defendant was the owner of an easement or right of way over the strip of land described, and, among other things: "(10) That the said ram was placed by the plaintiff inside of said way, and inside of fourteen feet from the easterly line of said way, and the said plaintiff has placed eleven feet of pipe over and across the said way, under ground; that the defendant's enjoyment of said way has never been, and is not, obstructed by said water ram and pipe. (11) The said stream in which said ram is placed runs through a gulch about six feet deep. Said gulch is along the west side of defendant's said way, and said ram is at the bottom of said gulch. Said gulch encroaches about six feet into said way of defendant at the point where said ram is placed. The road of defendant is on the bank of said gulch, six feet above said ram." Judgment was entered granting the plaintiff the relief prayed for, but providing: "That defendant is permitted to widen his road along said way by filling up or bridging over the gulch described in said findings where

the same encroaches upon his way. That plaintiff has no right to use said way in any manner that will prevent defendant from using said way for a convenient road, or to prevent defendant from repairing his road in any manner to fit the same for his convenient use." From this judgment, and an order denying a new trial, the defendant appeals.

1. The first point made for a reversal is that the plaintiff, by the instrument above referred to, granted to the defendant the fee-simple title to the strip of land described therein, and hence had no right to lay his water pipe across the strip. The Civil Code declares that "a fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." Section 1105. But grants are to be interpreted in the same manner as other contracts (section 1086), so as to give effect to the intention of the parties, so far as that intention can be ascertained (section 1636); and, to ascertain that intention, "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" (section 1641). *Pellissier v. Corker*, 103 Cal. 516, 37 Pac. 465; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049. Tested by the foregoing rules, does it appear that the instrument in question here was intended to grant to the defendant a fee-simple title? If it was so intended, why did it provide that the "road and right of way" are "to be forever appurtenant to" the land then owned by the grantee? "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way \* \* \* across the land of another." Civ. Code § 862. Again, if it was so intended, why did it provide that the grantor "shall not, nor shall his successors in interest, grant or give to any other person a right of way over said road," and that the grantee "shall not, nor shall his successors in interest, give or grant to any person or persons who may be owners of his said land, or some part thereof, a right of way over said road"? Obviously, if the grantor had no title left in him, he could not grant or give to any other person a right of way over the road, and the provision that he should not was useless; and, if the grantee had a complete title, he could give or grant a right of way over the road notwithstanding the provision that he should not. Looking at the whole instrument, we conclude, therefore, that its object and purpose were to grant a right of way, and nothing more.

2. The next point is that if the instrument conveyed only an easement, and not a fee-simple title, still defendant had a right to dig up and remove the said pipe, because it obstructed and interfered with his right of way. The court below found directly against defendant on this point, and we think there was evidence tending to support the finding. It

was proved that the bank of the creek where the ram was placed was from 6 to 10 feet high, and was nearly perpendicular, and that from the fence to the top of the bank was about 12 feet. The road was therefore narrow at that point, and, as stated by defendant, it was difficult, if not impossible, to drive a four-horse team with a loaded header wagon over it. This was because there was quite a sharp bend in the road there, and also because there was a large sycamore tree standing near, which made the passage round the bend more difficult. Defendant testified that he wanted to cut down the tree, but plaintiff objected to his doing so, and "said the tree belonged to him, and not to do it. He says he sold me the right of way, but never sold me the timber." And one of his witnesses testified that "if the tree would be taken down, and you drive four horses, it will give your leaders more room to swing around the road where the bend is." The plaintiff testified: "I am prepared, at any time that defendant wishes to widen his driveway by putting in a bulkhead, to take my ram further over, and would be willing to set my fence further away. I told Machado that, whenever the rams interfered with his road or his business, I would take them out of there; and, if he wishes to widen his road by putting in a bulkhead, I will take them away. The creek is very crooked; so is the road." In accordance with this offer, the judgment, as we have seen, permits the defendant to widen his road by filling up or bridging over the gulch described in the findings, where the same encroaches upon his way, and limits the plaintiff's right to use the way in any manner that will prevent defendant from using the same for a convenient road, or from repairing the same. As thus entered, the judgment promotes justice, and does no wrong to either party. There was no material error in the rulings of the court. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

**MURPHY v. CLAYTON.** (No. 15,914.)<sup>1</sup>  
(Supreme Court of California. Feb. 4, 1896.)  
**ADMINISTRATORS — RIGHT TO PROPERTY SOLD BY DECEDENT.**

A sale of chattels by decedent, though not accompanied by delivery, having been valid against him and his heirs, and therefore his administrator, recovery thereof by the purchaser from the administrator cannot be defeated, under Code Civ. Proc. §§ 1589, 1590, providing that, when there is a deficiency of assets in the hands of an administrator, he shall sue for, and may recover, for the benefit of creditors, property conveyed by decedent in fraud of creditors; it not appearing that the claims against the estate which have been allowed by the adminis-

trator, or are evidenced by judgment, exceed the assets in his hands.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Ann Murphy against Edward W. Clayton. Judgment for defendant. Plaintiff appeals. Reversed.

Geo. W. Lewis (J. H. Campbell, of counsel), for appellant. Kittredge & Craft, for respondent.

HAYNES, C. This action is in claim and delivery, brought by the plaintiff to recover from the defendant the possession of certain horses. The complaint is in the usual form, and was unverified. The defendant, in his answer, first pleaded a general denial, followed by two separate defenses, the first of which alleged that Daniel J. Murphy, in his lifetime, was the owner of, and in the exclusive possession of, and entitled to the possession of, all said property; that he died intestate June 20, 1893; that on July 21, 1893, the defendant was duly appointed administrator of the estate of said decedent; and that the said properties "all and singular were at the date of decedent's death, and ever since have been, and now are, a part of said estate, and defendant then took them, and has ever since held them, as part of said estate, and for the purpose of administration thereof, as administrator aforesaid, and not otherwise." The second special defense alleged the facts above stated concerning the death of Daniel J. Murphy and defendant's appointment as administrator, and further alleged "that said properties all and singular were at the date of decedent's death, and ever since have been, and are now, a part of said estate for the purpose of its administration, and for the payment of the debts of said decedent and of said estate; that defendant, as administrator, and not otherwise, took said properties, and has ever since held and now holds them, as part of said estate, for the purpose of administration thereof as aforesaid; that the value of the personality of said estate, including said properties, does not exceed \$15,000; that the debts of said estate aggregate \$90,000, and are wholly unpaid." The action was tried by the court, without a jury. The court found that the plaintiff had acquired certain of the horses from her husband, James Murphy, in his lifetime; and these, together with their offspring, the court found she was entitled to recover, together with certain other of the horses which were purchased by defendant's intestate for the plaintiff with her funds; and that the deceased, Daniel J. Murphy, was at the time of his death the owner of two of said horses, known as "Viva" and "Viva Williams." There is no controversy here as to any of the horses above mentioned. The fifth and sixth findings are as follows: "(5) That on or about the 25th day of May, 1892, said Daniel J.

<sup>1</sup> Rehearing granted.

Murphy, in settlement of his accounts with the plaintiff, sold and transferred to the plaintiff, in consideration of said settlement, certain horses in controversy in this action, namely, Carrie Malone, Danton Moultrie, Governor Pico, Clyde, Chloe Thorne, Allen, and her colt foaled in 1893. (6) That on and before the 25th day of May, 1892, and at the time of said sale and transfer, said Daniel J. Murphy was the sole owner of and in the sole possession and control of all said animals in his own name; that said sale was complete and valid between the parties thereto, but was not accompanied by an immediate or any delivery, or followed by an actual or continued or any change of possession of said animals, or any of them, mentioned in finding 5, but said animals remained in the sole possession of said Murphy continuously to the day of his death; that during the same period all other property of the plaintiff was in his keeping, as her general manager and agent." The court further found that Murphy died June 20, 1893; that defendant was appointed and qualified as administrator July 21, 1893; that notice to creditors had been published, but the time for the presentation of claims would not expire until May 27, 1894; that claims against decedent, aggregating, with interest, about \$80,000, had been presented, allowed, and filed, and were unpaid; that the value of said estate is in personalty \$14,377.75, and in realty \$106,835.17; that plaintiff had brought suit, which is still pending, in which she asserts title in herself to a portion of said realty of the value of \$17,500, and had also brought another suit, which is still pending, in which she asserts a life estate of the value of \$10,000; that, in addition to said claims allowed and filed, suits are pending for the recovery of judgments against said estate amounting to \$6,000; that plaintiff had also brought suit against said administrator to recover personal property aggregating in value \$2,869; that the court had awarded to the widow of decedent the sum of \$225 per month, from June 20, 1893, and also certain personalty, as exempt, of the aggregate value of \$1,000, and also a homestead of the value of \$3,000. The court further found "that plaintiff was at the commencement of this suit, and is now, the owner of all the animals mentioned in the complaint, except Viva and Viva Williams"; that she was then, and is now, entitled to the possession of all except Viva and Viva Williams and those named in finding No. 5; and "that she was not then, and is not now, entitled to the possession of said last-named animals." As conclusions of law, the court found that the transfer of the animals mentioned in finding No. 5 was void as to the creditors of the decedent; that the defendant, as administrator, is entitled to retain possession of them "for the purpose of applying the same, if necessary, to the payment of the creditors of said decedent, in due course of administration of said estate." Judgment

was entered accordingly, and this appeal is by the plaintiff, upon the judgment roll, from that part of the judgment which awards to the defendant the possession of the animals mentioned in finding 5, "for the purpose of applying the same, if necessary, to the payment of the creditors of said decedent, in due course of administration of said estate of D. J. Murphy, deceased."

Counsel for appellant contends that the findings, so far as they relate to that portion of the judgment involved in this appeal, are outside of the issues; that, as between the plaintiff and her son Daniel J. Murphy, the sale of the horses to her was good and valid; and that in order to avoid the sale, in the interest of creditors, the facts which it is claimed made such sale void as to creditors must be alleged, and could not be proved under an allegation of ownership of the decedent at the time of his death, nor under a general denial of plaintiff's ownership and right of possession. In this contention I think that appellant is clearly right, though respondent asserts that the evidence upon which the findings were based was introduced without objection that it was inadmissible under the pleadings, and that, therefore, the judgment cannot be reversed upon that ground. This controversy between counsel becomes immaterial in view of the conclusion, hereafter reached, that the findings do not support that part of the judgment appealed from. The court found that, as between the plaintiff and her son, the sale was valid, and that she was the owner of the property in question; and therefore, unless other facts existed affecting the transfer or the property transferred, it could not have been part of Daniel J. Murphy's estate. The sale, being valid between the plaintiff and the heirs of the deceased, to whom his estate descended, and therefore valid as against the administrator, gave him no right of possession resulting merely from his appointment and qualification as administrator; nor could he assume the existence of any facts or circumstances which, if shown to exist, might authorize him to acquire the possession by a judicial proceeding. Besides, the possession of the deceased after the sale was as the general agent of the plaintiff, and his possession was her possession. The record contains no statement or bill of exceptions, and the circumstances attending the possession by the deceased, and giving it character, are not before us; and we must therefore accept the finding, and assume for the purposes of the case that the change of possession was not such as the statute requires.

The only authority given executors or administrators to recover, for the benefit of creditors, property conveyed or transferred by the deceased in his lifetime, is found in sections 1589 and 1590 of the Code of Civil Procedure. These sections are as follows:

"Sec. 1589. When there is a deficiency of assets in the hands of an executor or admin

istrator, and when the decedent in his lifetime has conveyed any real estate, or any rights and interests therein, with intent to defraud his creditors, or to avoid any right, debt or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditor all such real estate so fraudulently conveyed; and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

"Sec. 1590. No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of the creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor as the court, or a judge thereof, shall direct."

Assuming (without deciding) that section 1589, Code Civ. Proc., applies to transfers which are void as against creditors under section 3440 of the Civil Code, as well as to transfers and conveyances made with intent to defraud creditors, specified in sections 3439 and 1227 of the same Code, and that an administrator is one on whom a decedent's estate "devolves in trust for the benefit of others than himself" (sections 3439 and 3440, Civ. Code), the facts found by the court in this case would not have authorized the administrator to have prosecuted an action to recover the property in question, and therefore do not constitute a defense to this action, or sustain the judgment appealed from. In *Fied v. Andrada*, 108 Cal. 107, 110, 39 Pac. 323, it was said: "The obvious intent and meaning of this section is that two things must concur to authorize the administrator to commence an action to set aside a deed of his intestate as void against creditors: (1) There must exist creditors to be paid; and (2) there must be an insufficiency of assets in the hands of the administrator to meet their demands. Both of these facts must coexist to bring the case within the limitations of the statute. *Ohm v. Superior Court*, 85 Cal. 545, 26 Pac. 244. If there are no creditors, or, there being creditors, the administrator has sufficient assets of the estate in his hands to meet their demands, in either case he is without power to maintain the action. \* \* \* It is held in *Ohm v. Superior Court*, *supra*, that, to constitute a creditor within the meaning of the statute, 'he must be a creditor whose claim has been allowed by the administrator, or is evidenced by a judgment;' citing *Mesmer v. Jenkins*, 61 Cal. 153; *McMinn v. Whelan*, 27 Cal. 300."

Under these authorities, claims against the

estate which have not been accepted or allowed by the administrator, or which have not been reduced to judgment, do not bring the claimants within the category of creditors; and it therefore appears from the findings that there is not a deficiency of assets in the hands of the administrator to meet the demands of creditors, and therefore the circumstances do not exist which would authorize a recovery against the plaintiff by the administrator. The findings therefore do not support the judgment appealed from, but require a judgment for the plaintiff as to all the property except the two horses *Viva* and *Viva Williams*. The statement in the eleventh finding "that she [the plaintiff] was not then, and is not now, entitled to the possession of said last-named animals" (the ones here in question), is an erroneous conclusion of law from the facts precedently stated. We therefore advise that that part of the judgment appealed from be reversed, with directions to the superior court to enter judgment in favor of the plaintiff for the animals mentioned in the fifth finding.

We concur: SEARLS, C.; VANOLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment awarding the defendant the possession of the animals mentioned in the fifth finding is reversed, with directions to the superior court to enter judgment upon the finding in favor of the plaintiff for the possession of said animals, or for the value thereof as found by the court in case a delivery thereof to the plaintiff cannot be had.

KILBURN et al. v. LAW, Judge. (S. F. 287.)  
(Supreme Court of California. Feb. 8, 1896.)

REMOVAL OF BANK EXAMINER—CRIMINAL PROSECUTION—WRIT OF PROHIBITION—JURISDICTION.

1. An accusation under Pen. Code, § 772, requiring the superior court, on presentation of a sworn statement accusing a public officer of malfeasance or neglect of duty, to cite such officer to appear, and to hear the accusation and evidence, and, if the charge is sustained, to enter decree of removal, and judgment of \$500 in favor of the informer, is a criminal, and not a civil, proceeding.

2. Bank examiners cannot be prosecuted under Pen. Code, § 772, providing for the removal of public officers from office for malfeasance or neglect of duty, since, by *Id.* §§ 888, 889, prosecutions for removal can only be maintained against district, county, municipal, or township officers.

3. The fact that the objection that a complaint does not state a case is in the nature of a demurrer, of which the superior court has jurisdiction, cannot be urged against the jurisdiction of the supreme court to entertain an application for prohibition to stay proceedings in the superior court in a case where no facts could be alleged which would give the lower court jurisdiction.

In bank. Application by Paris Kilburn and others, bank commissioners of the state of California, against J. K. Law, judge of the

superior court, for writ of prohibition. Granted.

R. B. Carpenter, for petitioners. Andrew J. Clunie and V. G. Frost, for respondent.

TEMPLE, J. This is an application for a writ of prohibition against Hon. J. K. Law, judge of the superior court of Merced county, commanding him to desist from any further proceedings against the petitioners as bank commissioners in the matter of the accusation of W. N. Sherman against them. October 8, 1895, said Sherman filed in the superior court of Merced county a verified accusation charging that the bank commissioners had willfully neglected to perform the duties of their office, in that, having the means to do so, they did not, up to September 1, 1895, ascertain that the Merced Bank was insolvent and unable to fulfill its obligations, and that it was unsafe to continue business, and that, having the means to ascertain these facts, they did not report the same to the attorney general of the state of California, as required by law, and that having ascertained on the 12th day of September, 1895, that said bank was insolvent and in an unsafe condition, they did not report, and have not since reported, such facts to the attorney general. The accusation also charged that the Merced Bank was insolvent and unsafe, and that on the 16th day of October, 1894, it suspended payment and closed its doors, and that said suspension has ever since continued, and the bank has paid no part of the sums due its depositors, and that the neglect of duty on the part of the bank commissioners has entailed great loss on the part of depositors in said bank. The petitioners state that neither of them was a citizen of the county of Merced, wherein the accusation was filed, but were then temporarily at Merced when this proceeding was commenced, engaged in the discharge of their official duty. Upon the presentation of said accusation to the superior court of Merced county, it is averred, the court issued a citation, which was served upon the petitioners, requiring them to appear and answer the accusation; and the petitioners charge that notwithstanding said accusation was filed without authority of law, and the proceeding is illegal, respondent will, unless restrained, entertain the same, and will enter judgment removing petitioners from office. The answer admits all the material allegations, except that respondent denies that he will proceed to remove petitioners from office, but avers that he will proceed to hear the accusation, and determine the same, as required by section 772 of the Penal Code.

Petitioners contend that, inasmuch as the bank commissioners are state officers, and not district, county, municipal, or township officers, they cannot be prosecuted and removed from office under section 772 of the Penal Code, and they claim that sections 888

and 889 expressly so provide. In answer to this it is suggested that, although section 772 is in the Penal Code, the proceeding there authorized constitutes a civil case; it is simply a law misplaced. It is even contended that an action upon a statute to recover a fixed penalty was at common law an action of debt,—that is, a civil action,—and the legislature cannot, by providing for such a case in the Penal Code, thereby convert that which is essentially a civil action into a criminal proceeding. That the legislature intended to make it a criminal prosecution is, to my mind, clear. It is a proceeding for the punishment of an offense in its nature criminal. No one denies that willful neglect of official duty is, or may be made by statute, a crime. It has always been so treated. That this section is in the Penal Code is, of itself, sufficient to indicate the legislative intent. But this is not all. Section 682 of the Penal Code provides that every public offense must be prosecuted by information or indictment, except (1) "Where proceedings are had for the removal of civil officers of the state," etc. Section 888, that offenses triable in the superior courts must be prosecuted by indictment or information, except as provided in the next section. Section 889: "When the proceedings are had for the removal of district, county, municipal or township officers, they may be commenced by an accusation or information, in writing, as provided in sections seven hundred and fifty-eight and seven hundred and seventy-two." Here is an express provision for the prosecution of certain officers for public offenses under section 772. This is equivalent to an express declaration by the legislature that the proceeding authorized by section 772 is the prosecution of a public offense. Is there anything in the nature of the proceeding authorized by section 772 which would make it a case at law, rather than a criminal prosecution? There are many civil actions, the result of which may be highly penal, and which partake of the nature of criminal prosecutions. And yet, since the purpose is to redress or prevent a private injury, they cannot be classed as criminal proceedings. But when the object is to punish the defendant for the commission of an act, and the public, and not individuals, as such, are interested in the judgment sought, and where, as here, the act is declared a public offense,—and especially if at common law it was so considered,—the presumption is very strong, if not conclusive, that the proceeding is a criminal prosecution. The features of section 772 which gave it the appearance of providing for a civil action are: (1) The defendant is cited to appear and answer; (2) the court must proceed to hear the evidence in a summary manner, which, it is claimed, means that a jury is not required; (3) the court must enter a decree depriving the accused of his office, and judgment in favor of the informer for \$500 and costs; and, (4) as



it is claimed, the proceeding is not in the name of the people, as directed by section 684 of the Penal Code. Probably no one would think any one of these provisions sufficient to constitute the proceeding a civil case, in view of the provisions alluded to, which declare that this is a criminal proceeding, but it may be thought that all together plainly indicate a civil case. The first cannot be of consequence. The legislature may provide for the prosecution of a criminal action without the arrest of the defendant. If the fact that it is a criminal proceeding implies the right to a trial by jury, it would follow that, in a prosecution under this section, defendants are entitled to a jury, and the decree and judgment provided would follow a verdict of guilty. The judgment imposing a fine, which, in whole or in part, shall go to the informer, is not such an anomaly in criminal practice as to require discussion. Perhaps a prosecution under this section ought to be in the name of the people. There is nothing indicating a contrary intent in the statute. The cases have been entitled as they were under the act of 1853. This was natural, as that act seemed to make it a proceeding by the informer against the person accused. The matter does not appear to be of much consequence; and it is enough to say that the statute has not provided that the action shall be in the name of the informer, and if section 684 is applicable, as I think it is, it ought to be in the name of the people. It follows that the point that such prosecution cannot be had, under this section, against the bank commissioners, must be sustained. They are not district, county, municipal, or township officers; and, by sections 888 and 889, prosecutions under section 772 can only be maintained against such officers.

It is said that the objection that the complaint does not state a case of which the court has jurisdiction is in the nature of a demurrer, and that the superior court has jurisdiction to consider all such questions, and they cannot be made the ground for a writ of prohibition. This point cuts too deep, and, if sustained so broadly, would deprive this court of all power to issue writs of prohibition in cases where a lower tribunal is exceeding its jurisdiction. It certainly is not good in a case like this, where no facts could be alleged which would give the lower court jurisdiction. Let the writ issue as prayed for.

We concur: MCFARLAND, J.; HENSHAW, J.; VAN FLEET, J.; HARRISON, J.

BEATTY, C. J. I concur in the judgment.

GAROUTTE, J. I concur in the foregoing opinion, and cite the recent cases of *In re Curtis* (Cal.) 41 Pac. 793, and *Wheeler v. Donnell* (Cal.) 43 Pac. 1, as directly deciding

that an accusation brought under section 772 of the Penal Code is a criminal proceeding.

SILVA v. SPANGLER. (S. F. 104.)  
(Supreme Court of California. Feb. 7, 1896.)

NUISANCE—PLEADING—DEMURRER—WAIVER—  
WAY—DEDICATION AS HIGHWAY.

1. Under Code Civ. Proc. § 430, the failure of a complaint, in an action to abate an embankment, to allege any damage to plaintiff different or peculiar from that resulting to the common public, is not a ground of demurrer, though, in a proper case, the objection may be urged, under a demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

2. Under Code Civ. Proc. § 434, providing that if objections to a complaint are not taken, either by demurrer or answer, the defendant must be deemed to have waived the same (with certain exceptions), the objection that a complaint is ambiguous or uncertain, that being a specific ground of demurrer, is waived, if not raised by demurrer.

3. The fact that a strip of land, over which a private right of way had been granted by the owner to two others: landowners, to enable them to reach a highway from their land, is used, without objection, by others, going to and from their own lands, or the places of the two grantees, does not establish a dedication to the public.

4. In an action to abate an embankment, thereby throwing surface water over plaintiff's right of way, where there is no allegation that the right of way was a public one, it is unnecessary to allege any special injury differing from that resulting to the public.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Emanuel P. Silva against Antonio Spangler. Decree for plaintiff, and defendant appeals. Affirmed.

Wm. L. Gill, for appellant. C. L. Witten and Jackson Hatch, for respondent.

SEARLS, C. This action is brought to abate an embankment constructed by defendant, whereby the surface water is alleged to be prevented from flowing from and over a private right of way owned and possessed by him, the said plaintiff, and to enjoin defendant from maintaining such embankment. Plaintiff had a decree as prayed for, and this appeal is from the judgment, and from an order denying defendant's motion for a new trial. The amended complaint of plaintiff was demurred to, upon two grounds, viz., "that said amended complaint does not state facts sufficient to constitute a cause of action," and upon the further ground "that plaintiff does not allege any damage different or peculiar than that resulting to the common public." The last cause of demurrer assigned is not one for which a demurrer can be properly interposed, under section 430 of the Code of Civil Procedure. The same cause may, however, be urged, in a proper case, under the objection that the "complaint does not state facts

sufficient to constitute a cause of action." The contention of appellant seems to be based upon the theory that the amended complaint contains no allegation that the roadway in question is a private road, and that the complaint does not state in any allegation whether the road in question is a private or public road. In support of the last proposition we are referred to the case of *Grimes v. Linscott* (not yet officially reported; decided May 24, 1895) 40 Pac. 421. In that case, there was a demurrer interposed, upon the ground of ambiguity and uncertainty, which was sustained. By failure to raise this objection by demurrer in the present case, it was, under section 434, waived. We are unable to agree with appellant in his deduction of facts from the amended complaint. Succinctly stated, the amended complaint avers that plaintiff and one J. P. Silva are now, and since October 27, 1884, have been, the owners and in the possession and enjoyment of a private right of way, for road purposes, over and along a tract of land, which is described by courses and distances and by metes and bounds, being 30 feet in width, and which was conveyed to them by Henry Curtner, by deed dated October 27, 1884, etc.; that plaintiff is the owner of a tract of land, containing 53 acres (describing it), used by him for farming purposes, and that his only means of egress and ingress thereto, and the only means of reaching any public highway therefrom, is by said private right of way described in the first paragraph of the complaint. Then follow allegations as to the ownership by defendant of 40 acres of land south of and adjoining the strip of land of plaintiff, 30 feet wide, as aforesaid; that the land on the north of said roadway is higher, etc., and the land of the defendant is lower, than the roadway; and that, down the slope to and over the roadway, and over the land of defendant, the surface water, which in the rainy season is in large volume, has been accustomed to flow, etc.; that defendant constructed an embankment upon said roadway, and upon his own land adjoining, whereby the surface water was prevented from flowing down, and was penned back on the roadway, rendering it unfit for travel, and destroying all connection by roadway from plaintiff's land to any county or public road, etc. The further allegations in relation to injury, etc., need not be stated. In all the complaint, we fail to find any intimation that the strip of land, and the private right of way thereon, is a public highway, or that the public has any easement or right therein or thereto. The complaint states a cause of action, and the demurrer was properly overruled.

2. It is further objected by appellant that the evidence is insufficient to justify or support either the first or ninth findings of fact. These findings are to the effect that the strip of land 30 feet in width was a private right of way for road purposes, held, possessed, and

enjoyed by the plaintiff and J. P. Silva, as tenants in common, and that the said roadway so obstructed by defendant was at all times, "and is, a private right of way, and is not a public road or highway, and never has been." The evidence tended to show that in October, 1874, one Henry Curtner, owner of a larger parcel of land, conveyed to plaintiff and his brother, J. P. Silva, a parcel thereof, consisting of 113.57 acres, and also a strip of land 30 feet wide as a right of way, for the purposes of a road extending from the land so conveyed to a public road or highway, which strip of land is accurately described by courses and distances. Plaintiff has succeeded by mesne conveyances to the ownership of the 53 acres of land described in his complaint. In 1887, defendant purchased from said Henry Curtner a tract of, say, 40 acres of land, which is described as "commencing at a point in the southerly line of road, known as the 'Silva Road,' and running thence along the southerly line of said road, etc., and as being bounded "on the north by said Silva road," etc. Henry Curtner, the former owner, testified as to his sale of the right of way to plaintiff and J. P. Silva, and said he had never conveyed this right of way to the county, or to any person other than the Silvas. He added: "It is, in fact, used by whoever chooses to pass over it, as every one does on private roads,—go through them when they wish,—generally pretty neighborly; \* \* \* we let anybody go through that wishes it; it is an open thoroughfare. I don't shut up my place against no neighbors; there are no gates on it." Question: "Been used by the general public for years past?" Answer: "No, not by the general public, but those who have business in there," etc. Various of the witnesses spoke of the road as a public road or public highway, but generally without stating facts in evidence thereof, except that certain gates thereon had been removed; that the road was fenced, and that parties who have purchased land from Curtner bordering on the road have used it, or portions of it, to get to their land. All this was consistent with the idea of a license from plaintiff, and left the question of a dedication of the way to public use open to further inquiry. "No route of travel used by one or more persons over another's land shall hereafter become a public road or highway by use, or until so declared by the board of supervisors, or by dedication by the owner of the land affected." Pol. Code, § 2621. There is no claim that this road was ever declared a highway by the board of supervisors. It only remains, then, to inquire, did the owners thereof dedicate it to the public use? It is said that "if the donor's acts are such as indicate an intention to appropriate the land to the public use, then, upon acceptance by the public, the dedication becomes complete." Elliott, *Roads* & S. § 92. The question of intent is paramount, and, unless such intent expressly appears, or can be fairly inferred from the acts of the donor, there is no valid

dedication. *People v. County of Marin*, 103 Cal. 224, 37 Pac. 203. Tested by this rule, the court was justified in finding that the way in question never became or was a public highway, and that it was and is a private way. The findings are ample to support the judgment. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

RUDOLPH et al. v. SAUNDERS, Constable.  
(No. 19,579.)

(Supreme Court of California. Feb. 3, 1896.)

ATTACHMENT—VALIDITY—EVIDENCE.

A finding of invalidity of an attachment of growing crops, which can be attached only under Code Civ. Proc. § 542, subd. 5, by leaving with the person having such property in his possession, or under his control, a copy of the writ and a notice that the property is attached, will not be disturbed, the return failing to show that the officer served on defendant in attachment, who was in possession of and had the crops under his control, a copy of the attachment or notice that the property was attached, but merely stating that he attached the property "by taking in my custody," and the officer's testimony that a copy of the attachment and a notice, as required by statute, were served, being contradicted by the defendant in attachment.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by John Rudolph and another, partners, as J. & J. C. Rudolph, against J. N. Saunders. Judgment for plaintiffs. Defendant appeals. Affirmed.

W. I. Nichols, for appellant. Grant Jackson, for respondents.

SEARLS, C. This action was brought by the plaintiffs, as copartners, to recover from the defendant, as constable of township 5, county of Santa Barbara, \$521.15, and interest, on account of certain beans levied upon by him under and by virtue of execution. Plaintiffs had judgment for \$601.60, interests and costs, from which judgment, and from an order denying his motion for a new trial, defendant appeals.

One James S. McBride was indebted to plaintiffs upon a promissory note in the sum of \$521.15, with interest at 12 per cent. per annum from the date thereof, viz. from June 8, 1893, and secured by a chattel mortgage executed by said McBride, under date of June 8, 1893, and duly recorded June 12, 1893. On the 10th day of June, 1893, a writ of attachment duly issued out of justice court, in an action therein pending against said mortgagor, James S. McBride, which writ of attachment was placed in the hands of the defendant as constable for service, and was by him,

on said 10th day of June, 1893, either levied, or attempted to be levied, upon the same property covered by plaintiffs' chattel mortgage, to wit, upon about 30 acres of growing beans, upon that portion of the Salsipuedes rancho known as the "James Wells Tract," being farmed to beans by said James S. McBride. If the writ of attachment was properly levied, its lien was prior to that of plaintiffs' mortgage, and the judgment should have been for defendant. If not prior to such mortgage, it became the duty of the defendant, as constable, when thereafter an execution was placed in his hands in the same case, and upon levying on the mortgaged property, to pay off plaintiffs' mortgage, as provided in sections 2968 and 2969 of the Civil Code, and, having failed to do so, the judgment is proper.

The return to the writ of attachment was as follows: "I hereby certify that under and by virtue of the within and hereunto annexed writ of attachment by me received on the 10th day of June, 1893, I did on the 10th day of June, 1893, attach the following described personal property in the possession of James McBride: Thirty acres of beans, more or less, now growing on the Salsipuedes rancho, on the land formerly farmed by James Wells, and attached the same by taking into my custody, and not putting a keeper in charge. J. N. Saunders, Constable." Subdivision 5 of section 542 of the Code of Civil Procedure provides that "debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ." In *Raventas v. Green*, 57 Cal. 254, it was held that a growing crop is personal property not capable of manual delivery, and may be properly attached, when in the possession of the defendant in the attachment proceedings, by compliance with the subdivision of section 542 quoted above. The return of the constable fails to show that he served upon the defendant any notice that the property was attached, or that he served a copy of the attachment upon him. The return is not as full as that in *Bruse v. Gates*, 80 Cal. 462, 22 Pac. 284, which was held invalid. It is true that was an attachment upon real property, but the requirement of the statute in reference to a service of copy of the writ and notice is in such a case similar to the requirement in attaching personal property not capable of manual delivery; and the reasoning of that case is applicable to, and conclusive of the insufficiency of, the return in the case at bar. See, also, *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *Sharp v. Baird*, 43 Cal. 579. Proceedings by attach-

ment are statutory and special, and the provisions of the statute must be strictly followed, or no rights will be acquired thereunder. *Gow v. Marshall*, 90 Cal. 567, 27 Pac. 422, and cases there cited. It is true the return states that defendant attached the property "by taking in my custody"; but the property, being a growing crop, not capable of manual delivery, could only be attached by service of the writ and a notice as provided by subdivision 4, § 542, Code Civ. Proc.

The return of the constable was insufficient to show a valid levy of the attachment. To remedy this defect, and to show, not in contradiction of the return, but that the requisite acts in addition thereto essential to a valid levy were performed, defendant was permitted to testify, and did testify, that a copy of the attachment and a notice as provided by the statute were served upon McBride, the defendant therein. On the other hand, McBride was called as a witness on the part of plaintiffs, and testified pointedly that no notice of attachment whatever was ever served upon him. The finding of the court below is in favor of the plaintiffs, and, in the face of this marked conflict of evidence, we are not at liberty to disturb such finding. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

**PER CURIAM.** For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

#### PRATT v. PARSONS.

(Supreme Court of Utah. Feb. 6, 1896.)

CONSTITUTIONAL LAW—JURY TRIAL—UNANIMITY OF VERDICT.

The act of the legislature (Sess. Laws 1892, c. 44) which provides that in civil actions a verdict may be rendered by a concurrence therein of nine or more jurors does not conflict with article 7 of amendments to the constitution of the United States, which provides that in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved. *Hess v. White*, 33 Pac. 243, 9 Utah, 61, followed.

(Syllabus by the Court.)

Appeal from district court, Third district; before Justice S. A. Merritt.

Arthur Pratt against E. H. Parsons. Judgment for plaintiff. Defendant appeals. Affirmed.

Rawlins & Critchlow, for appellant. Williams, Van Cott & Sutherland, for respondent.

**BARTCH, J.** This action was brought by the plaintiff to recover a certain amount which he claims is due him under the terms of a contract between him and the defendant. The case was tried before a jury consisting of twelve jurors, nine of whom concurred in rendering a verdict in favor of the plaintiff,

for the amount claimed in the complaint. Judgment was entered thereon, and the defendant appealed. The only question raised is whether a judgment entered on a verdict concurred in by only nine jurors is valid. This question has been decided in the affirmative several times by this court, and we adhere to our former decisions in this class of cases, the first one of which is *Hess v. White*, 9 Utah, 61, 33 Pac. 243. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

#### SNOW v. SNOW.

(Supreme Court of Utah. Feb. 4, 1896.)

CONTEMPT—FAILURE TO PAY ALIMONY—RIGHT OF APPEAL—MODIFICATION OF DECREE—EVIDENCE.

1. A distinction exists, upon principle and authority, between that class of contempt proceedings wherein it is sought to vindicate the authority and dignity of the court, or where the contempts consist in the doing of a forbidden act injurious to the opposite party, wherein the process is criminal in its nature, and wherein conviction is followed by a penalty of fine or imprisonment, or both, which is merely punitive, and that other class of contempts where the proceeding is remedial in its nature and is intended for the benefit or advantage of the opposite party, to compel the doing, or omission to do, an act necessary to the administration of justice in enforcing some private right in a civil proceeding.

2. When contempt proceedings are instituted, after judgment, to enforce an order for the payment of alimony and costs for the benefit of the opposite party to a civil proceeding, such proceeding is civil and remedial in its nature, and an appeal lies under Comp. Laws 1888, § 3632, and section 3635, subd. 1.

3. The evidence presented on the trial of this cause held sufficient to support the judgment for the order of arrest.

4. Where the court below, on application, refused to modify the decree for alimony, on the husband's claim of his inability to pay the alimony allowed, and the further claim that a settlement had been made by the parties prior to the institution of divorce proceedings, *h'd.*, that under section 2606, Comp. Laws Utah 1888, such question was one of fact, and that the evidence, though conflicting, was sufficient to support the judgment.

5. Any man attaining his majority, who voluntarily enters into the marital relation, should be willing to assume those ordinary and reasonable obligations of a husband which naturally follow and attend such relation. These duties require him to provide the wife and children with a reasonable maintenance and support during the continuance of such relation, and such as is commensurate with his means and station; and, in case of separation and divorce occasioned by his fault, he should not complain that the duties so assumed should be held a continuing obligation on his part.

(Syllabus by the Court.)

Appeal from district court, Third district; before Justice George W. Bartch.

Bill by Geneva M. Snow against C. Edgar Snow for divorce. Defendant appeals from an order adjudging him guilty of contempt in refusing to pay permanent alimony. Affirmed.

R. H. Jones, for appellant. Powers, Straup & Lippman, for respondent.

**MINER, J.** The record shows that on November 20, 1893, after a personal service of the summons, the respondent was granted a decree of divorce, and the custody of a minor child, and \$10 per month alimony, payable monthly during her life as long as she remained unmarried, and also costs of suit. This decree was not appealed from, and the costs and alimony were not paid. In February, 1895, the respondent caused a copy of the decree, with demand for payment, to be served on appellant. On the 13th of February, 1895, plaintiff served notice, and took proceedings to modify the decree, by striking out the allowance of alimony. A hearing was had thereon. The motion was denied, and appellant was adjudged guilty of contempt of court for his refusal and neglect to pay the alimony allowed with costs, and was given 30 days time in which to purge himself of the contempt, or show cause why he should not be punished for such contempt. No cause being shown to the contrary, on May 2, 1895, the court ordered that a warrant of arrest issue, and that the appellant be committed to the custody of the marshal until he purge himself of such contempt. From these orders, made after the decree, this appeal is taken. Several grounds for reversal, based upon the insufficiency of the evidence, and an alleged former settlement between the parties, are also relied upon by appellant's counsel.

The first question presented by the appeal is whether an appeal will lie to this court from an order adjudging the appellant guilty of contempt in refusing to pay alimony and costs ordered by the court. Counsel for the appellant insists that the judgment for contempt was a civil proceeding, under section 3632, Comp. Laws Utah 1888, which provides that "a judgment or order in a civil action, except when expressly made final, may be reviewed as prescribed in this Code, and not otherwise"; and subdivision 1, § 3635, Comp. Laws Utah 1888, which provides that "an appeal may be taken from a final judgment in an action or special proceeding commenced in the court in which the same is rendered," authorizes the appeal in question. In the case of *People v. Owens*, 8 Utah, 20, 28 Pac. 871, this court held that it would not review proceedings in contempt when the court below had jurisdiction. In that case the court below ordered the party to produce in evidence certain records which he had in his possession, and he was adjudged guilty of contempt in disobeying the order of the court, and a fine was imposed upon him, from which judgment he appealed. In *Ex parte Whetstone*, 9 Utah, 156, 36 Pac. 633, the defendant was convicted under section 725, Rev. St. U. S., in a criminal proceeding for contempt, for procuring a witness who was duly subpoenaed to appear be-

fore the grand jury, and testify in a criminal case, to leave the territory, and not appear as such witness. This court refused a writ of habeas corpus to review his commitment for contempt, when the trial court had jurisdiction. In *Re Kelsey*, 43 Pac. 106, decided at the last December term, this court refused a writ of habeas corpus to the relator, who was adjudged guilty of contempt by the trial court for refusing to pay a monthly allowance and costs of the proceeding pending divorce proceedings, and before judgment; the court holding that the order of conviction was an interlocutory order made pendente lite, and not a final judgment, from which an appeal would lie. In *Ex parte Whitmore*, 9 Utah, 441, 35 Pac. 524, this court held that an appeal would not lie from an order adjudging the appellant guilty of contempt, and imposing a fine for willfully and contemptuously violating the decree and injunction of the court in removing a measuring box placed in the channel of a stream for the purpose of measuring and diverting the water of the stream for irrigation purposes, in direct violation and disobedience of such injunctive order, holding this to be a criminal contempt, and therefore the order of conviction was not appealable. In this case the court carefully examined and discussed the question of civil and criminal contempt, holding that the proceedings in the case which culminated in the conviction and fine appealed from were for a criminal contempt, and were not instituted to bestow the damages to be recovered for the injury complained of upon the injured party, because his rights had been infringed upon, but that the proceeding had been brought in the name of the people, for the purpose of punishing the party who had contemptuously disobeyed and violated the direct order and command of the court; that the injured party obtained no pecuniary benefit from the order of conviction, and that, if he had any remedy for damages, it was not under this proceeding; that the fine, if paid, would go to the territory, and not to the injured party. The court said: "The act restrained had been done, and it was out of the power of the petitioner to undo it. The water had been appropriated by him, and the measuring box had been taken away and destroyed, in violation of the express order and command of the court. The main object of the proceeding was to vindicate the authority of the court. Where the contempt is such that it results in a violation of the rights of the public or of the rights of an individual, which have been adjudicated and fixed by the court, and a punishment is imposed in the interest of public justice, and not in the interest of any individual litigant as a money indemnity, the offense is necessarily of a public or criminal nature, and is clearly covered and made punishable by our statutes as a public offense. In such cases, if a fine is imposed, its limit is fixed and determined by

the statute, and is not fixed by the injury demanded or sustained by the individual injured. The proceeds, when collected, go into the public treasury, and not for the benefit of the party injured." The contempt consisted in doing a forbidden act, that was not only injurious to the opposite party, but was a contemptuous violation of the express commands of the court. The process was therefore criminal in its nature, and the conviction was properly followed by fine and costs that did not exceed the sum that the court was authorized to impose, under Comp. Laws Utah 1888, § 3821, subd. 5, and section 3830. The fine is a punishment, and not an indemnity; and, if imprisonment is also imposed, it is in the interest of public justice, and becomes a penalty, and in no way becomes an indemnity to the individual injured. *People v. Court of Oyer and Terminer*, 101 N. Y. 248, 4 N. E. 259; *State v. Davis* (N. D.) 51 N. W. 942; *State v. Giles*, 10 Wis. 101; *In re Murphey*, 39 Wis. 286. In discussing the same subject, this court said: "There is another class of contempt proceedings, which are purely remedial in their character. This class embraces such contempt proceedings as were resorted to by a successful litigant in equity to secure the fruits of his litigation in case of the refusal of the defeated party to obey the order or decree made in such action. Such a proceeding, while in form a contempt proceeding, was never instituted primarily to vindicate the court's authority, but for the sole purpose of giving the successful suitor the fruits of his litigation." It is true that many states have enacted statutes regulating proceedings as for contempt in civil cases, and the decisions upon the subject are somewhat conflicting, and almost irreconcilable. Upon this subject the supreme court of Nevada, in *Phillips v. Welch*, 11 Nev. 187, says: "If the contempt consists in the refusal of a party to do something for the benefit or advantage of the opposite party which is ordered to be done, the process is civil, and he stands committed until he complies with the order. The order in such cases is not punitive, but coercive. If, on the other hand, the contempt consists in the doing of a forbidden act injurious to the opposite party, the process is criminal, and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive. In the former case the private party alone is interested in the enforcement of the order; and, the moment he is satisfied, the imprisonment terminates. In the latter case the state alone is interested in the enforcement of the penalty. It is true the private party receives an incidental advantage from the infliction of the penalty, but it is the same sort of advantage precisely which accrues to the prosecuting witness in a case of assault and battery, the advantage being that the punishment operates in terrorem, and by that means has a tendency to prevent

a repetition of the offense. The principle of distinction between the civil and criminal processes for contempt here indicated, though not expressly recognized in any of the cases that have fallen under our observation, is entirely consistent with all the decisions, and is the only means of rendering them consistent with each other. It may therefore be considered established by them." *Rap. Contempt*, §§ 21, 22.

From a careful inspection of the authorities, it is evident that a clear distinction exists, both upon principle and authority, between that class of cases where it is sought to vindicate the authority or dignity of the court, or where the contempt consists in the doing of a forbidden act, injurious to the opposite party, wherein the process is criminal or of a criminal nature, and wherein conviction is followed by a penalty of fine or imprisonment, or both, which is merely punitive, and that other class of contempts where the proceeding is remedial, and intended for the benefit of the opposite party, to compel the doing or omission to do an act necessary to the administration of justice in enforcing some private right in a civil proceeding. This distinction between civil and criminal contempt is recognized in the following cases: *Lester v. People* (Ill. Sup.) 37 N. E. 1004; *Lester v. Berkowitz*, 125 Ill. 307, 17 N. E. 706; *Howard v. Durand*, 36 Ga. 346; *Crook v. People*, 16 Ill. 534; *Phillips v. Welch*, 11 Nev. 187; *Tome's Appeal*, 50 Pa. St. 285; *Cobb v. Black*, 34 Ga. 162; *Hawley v. Bennett*, 4 Paige, 163; *Androscoggin & K. R. Co. v. Androscoggin R. Co.*, 49 Me. 392; *State v. Knight* (S. D.) 54 N. W. 412; *Ruhl v. Ruhl*, 24 W. Va. 279; *Buck v. Buck*, 60 Ill. 106; *Robbins v. Gorham*, 25 N. Y. 588; *People v. Diedrich*, 141 Ill. 669, 30 N. E. 1038. In the case of *Lester v. People* (Ill. Sup.) 37 N. E. 1004, the court said: "When the contempt consists of something done or omitted in the presence of the court, tending to impede or interrupt its proceedings or lessen its dignity, or, out of its presence, in disregard or abuse of its process, or in doing some act injurious to a party protected by the order of the court, which has been forbidden by its order, the proceeding is punitive, and is inflicted by way of punishment for the wrongful act, and to vindicate the authority and dignity of the people, as represented in and by their judicial tribunals. In such cases, although the application for attachment, when necessary to be made, may be made and filed in the original cause, the contempt proceeding will be a distinct case, criminal in its nature, and may properly be docketed and carried on as such, and the judgment entered therein will exhaust the power of the court to further punish for the same act and offense. *Ex parte Kearney*, 7 Wheat. 42; *Cartwright's Case*, 114 Mass. 238; *New Orleans v. Steamship Co.*, 20 Wall. 392; *Ingraham v. People*, 94 Ill. 428. Cases of that character are clearly distinguishable from

cases where a party to a civil suit, having the right to demand that the other party do some act for his benefit and to his advantage in the litigation, obtains an order of the court commanding it to be done; and, upon refusal, the court, by way of execution of its order, proceeds as if for contempt, for the purpose of advancing the civil remedy of the other party to the suit. In this class of cases, while the authority of the court will be incidentally vindicated, its power has been called into exercise for the benefit of a private litigant, and not in the public interest, or to vindicate any public right, and the proceeding is regarded as coercive merely. In *People v. Court of Oyer & Terminer*, 101 N. Y. 247, 4 N. E. 259, the court say: 'If imprisonment is ordered, it is awarded, not as punishment, but as a means to an end, and that end the benefit of the suitor in some act or omission compelled, which is essential to his particular rights of person or property.'

\* \* \* If, in this class of cases, there exist traces of vindication of public authority, they are faint, and are utterly lost in the characteristic, which is strongly predominant, of protection to private rights imperilled, or indemnity for such rights defeated.' "

*Lester v. People* (Ill. Sup.) 37 N. E. 1004.

In the light of these authorities, and those from our own court upon the subject, which are entirely consistent therewith, we must hold that the order to pay alimony and costs in this case was a proceeding remedial in its nature, and intended for the benefit and advantage of the respondent, to compel the doing of an act necessary and proper in the administration of justice in the enforcement of a private right, decreed in a civil proceeding for her benefit, and that an appeal lies from such order. On the subject of this being an appealable order, see *People v. O'Neill*, 47 Cal. 109; *Ex parte Hollis*, 59 Cal. 405; *Hayne*, New Trials & App. p. 594, § 196; *Comp. Laws Utah*, 1888 §§ 3632-3635; *State v. Knight* (S. D.) 54 N. W. 412.

This proceeding was commenced after decree allowing alimony, and after the time had expired for an appeal from the judgment in the original case. The record shows that prior to the commencement of these proceedings, in April, 1892, the respondent had agreed to receive \$500 in full for her interest in her husband's property, etc. This sum was subsequently paid from the sale of a house and lot held as a homestead. The appellant contends that this was a settlement of all claims for alimony and support of the wife and minor child. The testimony in the case tends to show, although there is some conflict, that, after the divorce proceedings were commenced, the appellant agreed to pay the sum afterwards allowed as alimony. The decree was granted allowing alimony, and was not appealed from. The court, on application, on a full hearing, refused to modify this decree, as would have been allowable under section 2806, *Comp. Laws Utah* 1888.

We see no good reason for disturbing such order.

The question of the ability of the appellant to pay was a question of fact, to be determined by the court making the order. Upon the evidence presented upon that hearing, the court found that he was able to comply with the order, and he was found guilty of contempt in refusing to comply with it. *Ex parte Cottrell*, 59 Cal. 418. We think such finding is supported by the evidence. Any man attaining his majority, who voluntarily enters into the marital relation, should be willing to assume those ordinary and reasonable obligations of a husband which naturally follow and attend such relation. These duties of the husband require him to provide the wife and children with a reasonable and suitable maintenance during the continuance of that relation; and, in case of separation and divorce occasioned by his own fault, he should not complain that the duties so assumed should remain a continuing obligation upon his part.

Upon the record as presented, we find no reversible error. The judgment and orders of the district court are affirmed, with costs.

ZANE, C. J., and YOUNG, J., concur.

## KRANTZ v. RIO GRANDE WESTERN RY. CO.

(Supreme Court of Utah. Jan. 30, 1896.)

### APPEAL—DISMISAL.

An appeal from a judgment or order which the district court entered in exact accordance with the mandate of this court upon a previous appeal will be dismissed upon motion of the appellee.

(Syllabus by the Court.)

Appeal from district court, Third district; before Justice S. A. Merritt.

Action by Joseph Krantz against the Rio Grande Western Railway Company. Judgment for plaintiff. Defendant appeals. Dismissed.

Bennett, Marshall & Bradley, for appellant. C. S. Varian and E. W. Taylor, for respondent.

BARTCH, J. This action was brought in the court below to recover damages for personal injuries alleged to have been sustained by the wrongful acts of the servants of the defendant company. The complaint contained two counts, and at the trial the court directed a verdict to be given for the defendant on the first count; and, the cause having been submitted to the jury on the second count, a verdict was returned for the plaintiff. The defendant thereupon moved the court for a new trial on the second cause of action, which motion was granted. The plaintiff then appealed from the action of the court directing a verdict for the defendant on the first count, and also from the order grant-

ing a new trial on the second, and the appellate court affirmed the action of the lower court on the first, and reversed its order granting a new trial on the second count, and ordered the original judgment to be reinstated. In pursuance of the mandate of the appellate court, said judgment was reinstated, and, from the judgment so entered, the defendant prosecuted this appeal, which is now being considered, on motion to dismiss, on the ground that it is substantially a second appeal on the same state of facts.

The only material question raised by this motion is whether, under the circumstances apparent from the record in this case, an appeal will lie from a judgment entered in pursuance of the mandate of the appellate court. Counsel for the appellant contend that this appeal is proper because the former one was simply from an order granting a new trial, and not from the judgment which was vacated by said order; that, after the original judgment was reinstated, it was subject to appeal, to present questions which could not be raised on the appeal from the order granting a new trial; and that the defendant had no previous opportunity to appeal from the judgment. We think the position assumed by the appellant is not well taken. It had an opportunity to appeal from the judgment in the first instance, and all the matters of which it now complains could have been reviewed. Instead of that, it moved for a new trial, which was granted, and then the respondent herein appealed. That appeal brought up the entire record for examination, and, with that record before it, the appellate court had power to consider, not only questions respecting the rulings of the court, made in the course of the trial, but also to consider the question whether or not the verdict was excessive. Comp. Laws Utah, § 3400. While it is true, as a general rule, that questions respecting the sufficiency of the complaint cannot be considered by the court on motion for a new trial, nor on an appeal from an order granting a new trial, because such questions are not comprehended in the statutory ground for such motion (Comp. Laws Utah 1888, *supra*; *Jacks v. Buell*, 47 Cal. 162; *Mason v. Austin*, 46 Cal. 385), still, if the appellant herein seriously doubted the sufficiency of the complaint, it could have been tested, and all the points now insisted upon could have been considered, by an appeal from the judgment, instead of a motion for a new trial. The attempt now to present them for review, on appeal from the judgment which was entered in pursuance of the mandate of the appellate court, must fail, because it is, in effect, an appeal from our own judgment. In deciding this case on the former appeal, this court said: "We are of the opinion from this record that the appellant is entitled to recover from the railroad company, and are not disposed, and do not find it necessary, to put him to the expense and trouble of a new trial. \* \* \* The judgment upon the verdict as to the first

count is affirmed, and the order granting a new trial as to the second count is reversed, and the original judgment upon the verdict reinstated as of April 28, 1894, the date of the original entry." This court had the right to direct the lower court to enter a proper judgment or order (Comp. Laws Utah 1888, § 3006); and, while the last sentence quoted is not strictly in the form of a direction, still, we think, it amounts to that, and it appears that the judgment was entered by the trial court precisely in accordance with our mandate. All the alleged errors now complained of occurred during the proceedings of the trial court before the motion for a new trial was heard, and there is no question made as to any errors having been committed in the proceedings subsequent to the mandate. Nor are we asked to review such proceedings. It is evident that this is an attempt to have another review of the rights of the parties, on the same record which was reviewed on the former appeal, when it was held that the plaintiff had the right to recover. Under such circumstances, an appeal from a judgment entered by an inferior court in pursuance of a mandate of the appellate court cannot be sustained; and this rule is not only in accordance with authority, but is founded on reason and justice, for, if successive appeals were allowed on the same state of the record, there would be no end to litigation and appeals, and the courts themselves could be turned into instruments of injustice by an obstinate litigant. In *Stewart v. Salamon*, 97 U. S. 361, where a decree had been entered by the circuit court in accordance with the mandate of the supreme court of the United States, and an appeal taken therefrom, in dismissing the appeal the supreme court, speaking through Mr. Chief Justice Waite, said: "An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and, if it conforms to the mandate, dismiss the case, with costs. If it does not, the case will be remanded, with appropriate directions for the correction of the error." *Roberts v. Cooper*, 20 How. 467, 490; *Humphrey v. Baker*, 103 U. S. 736; *State v. Levelle*, 38 S. C. 216, 16 S. E. 717, and 17 S. E. 30; *Zimmerman v. Turner*, 24 Wis. 483; *Mackall v. Richards*, 116 U. S. 45, 6 Sup. Ct. 234; *Smetling Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4; *Smith v. Shaffer*, 50 Md. 132; *Martin v. Platt*, 131 N. Y. 641, 30 N. E. 565. Examining the record for the purposes of this motion, we see no error which would entitle the appellant herein to be heard on this appeal. The appeal is therefore dismissed.

ZANE, C. J., and MINER, J., concur.



## PEOPLE ex rel. PACE v. VAN TASSEL.

(Supreme Court of Utah. Feb. 8, 1896.)

## JUSTICE OF THE PEACE—REQUIRING DEPOSIT OF JURY FEES—MANDAMUS.

1. Comp. Laws Utah, 1876, § 1091, was not repealed by the Code of Civil Procedure of 1894; and a justice of the peace should require a party demanding a jury to deposit the fees to which they may be entitled.

2. If a justice of the peace refuses to try a case of which he has jurisdiction, because the plaintiff refuses to deposit the fees of the jurors summoned at the instance of the defendant, a writ of mandate will issue to compel him to try it, though he may have entered a judgment of dismissal.

(Syllabus by the Court.)

Appeal from district court, First district; before Justice H. W. Smith.

Application for mandamus by the people, on the relation of William J. Pace, against James D. Van Tassel. Petition denied, and relator appeals. Reversed.

W. I. Snyder and Bismark Snyder, for appellant. Wm. Buys and Warner & Knight, for respondent.

ZANE, C. J. This is an appeal by the relator from a judgment of the district court denying his petition for a writ of mandate. He assigns as error the ruling of the court sustaining a demurrer to his petition on the ground that it did not state facts sufficient to constitute a cause of action. It appears from the petition that the plaintiff advanced \$10, the sum demanded, and commenced suit against one Parley Neely, in the court of which the respondent was justice, and of which the justice had jurisdiction; that a jury was summoned at the request of the defendant in the case; that before commencing the trial the justice, on motion of defendant, ordered the plaintiff to deposit the fees of the jury; that he declined to do so, and insisted upon a trial; that the justice refused to try the case, and dismissed it, against plaintiff's protest. This statement presents for our consideration and decision the question, was the justice authorized to require the plaintiff to pay the fees of the jury summoned upon the demand of the defendant in the case? Comp. Laws Utah, 1876, § 1091, provides that, "before any party before a justice is entitled to a jury, the party demanding the jury shall deposit the fees to which they will be entitled, and the same shall be included in the judgment as part of the costs to be received if adjudged against the party who did not advance them." This section made it the duty of the magistrate, before issuing the venire, to require the party demanding the jury to advance their fees. It did not authorize him to require the opposite party to pay them before trial. But the defendant insists that the foregoing section was repealed by section 817 of the Code of Civil Procedure, approved March 13, 1884 (being section 3628 of the Compiled Laws of Utah, 1888), viz.

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"Justices of the peace may in all cases require a deposit of money, or an undertaking as security for costs before issuing summons." The relator complied with this section, by depositing the sum demanded by the justice, which was more than should have been demanded. The Code of Civil Procedure makes no provision for the advancement of jury fees by either party, when one is summoned. Section 14, same Code (section 2998, Comp. Laws 1888), declares that "no statute, law or rule, is continued in force because it is consistent with the provisions of this Code on the same subject; but in all cases provided for by this Code, all statutes, laws and rules, heretofore in force in this territory, whether consistent or not with the provisions of this Code, unless expressly continued in force by it are repealed and abrogated." This section declares that the provisions of the Code do not continue in force provisions of a former law on the same subject, and that provisions of existing laws are repealed, so far as the Code makes provision on the same subject, unless expressly continued in force. While the section of the Code referred to authorizes the justice to require a deposit of money or an undertaking before issuing summons, it makes no provisions for the payment in the first instance of jury fees by the plaintiff, when the jury is demanded by the defendant. If, upon a continuance, or upon trial, costs should be taxed against plaintiff, the jury fees should be included. We have also been referred to section 1288 of the same Code (section 3982, Comp. Laws 1888), viz. "All acts, and parts of acts, in contravention of this Code are hereby repealed." We have already seen that section 1091 is not repugnant to the Code of Civil Procedure. The justice should have required the party demanding the jury to advance the fees. He had no right to refuse to try the case because the plaintiff would not deposit them. It was the plain duty of the justice to try the case, and he had no legal right to arbitrarily refuse to do so.

The respondent insists that the writ of mandate could not issue, because the plaintiff might have appealed from the order of dismissal. Comp. Laws 1888, § 3731, provides that "this writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." For causes of action within the jurisdiction of a justice of the peace, that court furnishes a more speedy, simple, inexpensive, and convenient remedy than the district court. Such courts are especially convenient and inexpensive for parties residing in precincts remote from the place of holding the district court. Upon such considerations, justices' courts are provided in the various precincts of the county, and any person having a cause of action within a justice's jurisdiction, against a resident of his precinct, may have it tried in a justice's

court therein, unless removed in pursuance of law; and such justice has no discretion to refuse such trial without reason sufficient in law.

We are of the opinion that the court below erred in sustaining the demurrer to the relator's petition. The judgment appealed from is reversed, and the cause is remanded, with directions to the district court to set aside the order sustaining the demurrer to the petition and alternative writ, and to overrule said demurrer. Costs are awarded against the respondent.

**BARTCH and MINER, JJ., concur.**

### GILL v. HECHT.

(Supreme Court of Utah. Feb. 3, 1896.)

**NEW TRIAL—ASSIGNMENTS OF ERROR—AMENDMENT.**

1. Assignments and specifications of error are an essential part of the statement on motion for a new trial, and, if omitted, the court may disregard the statement on the hearing of the motion, under Comp. Laws 1888, § 3402, subd. 3.

2. The trial court has a discretion to allow amendments, by adding assignments and specifications of error to the statement; and the refusal to allow such amendment is not an abuse of such discretion, in a case such as is presented by this record.

(Syllabus by the Court.)

Appeal from district court, Fourth district; before Justice H. W. Smith.

Action by J. D. Gill against Charles Hecht. Judgment for plaintiff. Motion for new trial denied, and defendant appeals. Dismissed.

Maginnis & Weber, for appellant. Evans & Rogers, E. M. Allison, Jr., and A. G. Horn, for respondent.

**MINER, J.** This action was brought by the respondent to recover from the appellant a commission upon an alleged contract between the parties, wherein it is alleged that appellant agreed to pay respondent \$1,000 in the event that respondent could effect a certain trade and exchange of real estate belonging to the appellant, in Colorado, for certain lands in the city of Ogden, Utah. The exchange was perfected, and, upon refusal of appellant to pay the commission, this action was brought. The case was tried before a jury, and recovery had for the contract price and interest.

Upon the argument of the motion for a new trial, respondent's counsel objected to the hearing of said motion on the ground that no assignments or specifications of error in law occurring at the trial, and excepted to by the appellant, were designated or pointed out in the statement. Thereupon appellant's counsel orally moved the court to permit an amendment to the statement, by incorporating therein his specification of errors, which he claimed were inadvertently omitted. The court denied the motion, disregarded the statement,

and overruled the motion for a new trial. The notice of intention to move for a new trial only embraced the general grounds: First, insufficiency of the evidence to justify the verdict; second, errors at law occurring at the trial, and excepted to by appellant. Subdivision 3, § 3402, Comp. Laws 1888, provides that: "When the notice of motion designates as the ground of the motion, the insufficiency of the evidence to justify the verdict, or other decision, the statement shall specify the particular in which such evidence is alleged to be insufficient." "When the notice designates as the grounds of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely." "If no such specification be made, the statement shall be disregarded on the hearing of the motion." Specifications of errors are an essential part of the statement on motion for a new trial, in all cases where the notice designates the grounds of the motion, under the statute above quoted; and courts have uniformly held that a statement in which the assignment or specification of errors is omitted should be disregarded upon the hearing of the motion for a new trial. *Barstow v. Newman*, 34 Cal. 90; *Patridge v. City of San Francisco*, 27 Cal. 416; *Richardson v. Kier*, 37 Cal. 263; *Haynes, New Trials & App.* 417-422; *Green v. Killey*, 38 Cal. 201. We are of the opinion that the trial court, upon a proper showing, had the discretionary power to allow the amendment proposed, under section 3256, Comp. Laws 1888; but we do not hold that the failure of the trial court to exercise such discretion and grant the motion to amend was such a gross abuse of discretion as to warrant the interference of this court in such a case as is presented by the record. The record presents no case for us to review. The appeal in this case is dismissed.

**ZANE, C. J., and BARTCH, J., concur.**

### CAMPBELL v. IRVINE.

(Supreme Court of Montana. Feb. 3, 1896.)

**ACTION—ASSIGNMENT OF INTEREST—CONTINUATION BY SUBSTITUTED PLAINTIFF.**

As Code Civ. Proc. § 22, provides that an action shall not abate by a transfer of the party's interest therein, but shall be maintained by his successor in interest, and in case the action has been begun the court shall allow the action to be continued by his successor in interest, it was proper to allow the assignee of a claim for material furnished to be substituted as plaintiff in an action thereon, after it had been commenced, and to admit testimony as to the assignment, though the same was not pleaded.

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Action by Thompson Campbell, assignee of J. G. Davies, against E. H. Irvine, on an account. From a judgment for plaintiff, defendant appeals. Affirmed.

Forbis & Forbis, for appellant. Chas. R. Leonard and Thompson Campbell, for respondent.

DE WITT, J. This action was commenced by the original plaintiff, Davies, asking for judgment against the defendant, Irvine, for the value of material furnished in the erection of a certain building, and for a foreclosure of a lien upon the real estate. An answer to the complaint was filed by the original defendant. Afterwards, upon the application of Thompson Campbell, the court made an order substituting him as plaintiff. Afterwards Campbell, as substituted plaintiff, filed a replication. The case was tried to the court without a jury. Judgment was rendered in favor of the plaintiff. The defendant appeals from the judgment. The alleged error upon which he relies is saved by a bill of exceptions.

Plaintiff offered to prove upon the trial that the account of Davies had been assigned to him, and that he was the owner of the same. Defendant objected because there was no allegation in the complaint that Davies had assigned the account to Campbell. The objection was overruled, and the evidence was admitted. We are of opinion that this was not error. Ordinarily, it is true that an assignee must allege and prove the assignment, in order to commence an action. But in this case an action had been commenced, and a complaint and answer had been filed. Our statute provides (Code Civ. Proc. 1887, § 22) as follows: "An action, or cause of action, or defense, shall not abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, but shall, in all cases, where a cause of action or defense arose in favor of such party prior to his death, marriage or other disability or transfer of interest therein, survive and be maintained by his representatives or successors in interest; and in case such action has not been begun or defense interposed, the action may be begun or defense set up in the name of his representatives or successors in interest; and in case the action has been begun or defense set up, the courts shall, on motion, allow the action or proceeding to be continued by or against his representatives or successors in interest. In case of any transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." This seems to be a case contemplated by section 22,—a case where the action had been begun, the complaint and answer had been filed; and the court was authorized, on motion, to allow the action to be continued by Campbell, the successor in interest of Davies. Davies himself was in court, testifying that he had assigned to Campbell, as was also Campbell. If a judgment were entered in favor of Campbell, Davies would be

bound thereby. *Meadowcraft v. Walsh*, 15 Mont. 544, 39 Pac. 914. The defendant, Irvine, could make no objection; for, if he satisfied the judgment, Davies would be bound thereby. See case last above cited, with authorities therein quoted; also, *Virgin v. Brubaker*, 4 Nev. 38. The court allowed it to be shown on the trial that the claim of Davies had been assigned to Campbell. For the reasons expressed above, we think this was not error.

Furthermore, the appellant complains that, as it had appeared that the assignment from Davies to Campbell was a written one, the writing was the best evidence. The court allowed oral testimony of the assignment. Appellant moved to strike it out. Respondent thereupon said that, if they could not account for the loss of the written assignment, they would consent that the oral evidence be stricken out. The bill of exceptions does not certify that it contains all of the evidence upon the question of the assignment. It appears that after the remarks of the counsel, last above quoted, the court took a recess. It does not appear from the bill of exceptions that the court ever struck out the oral testimony upon this point. The bill of exceptions not pretending to contain all of the testimony upon the subject, it does not appear but the written assignment was afterwards produced, or its loss sufficiently accounted for. The fact that the court did not strike out the oral testimony upon this point is suggestive that the written assignment was produced, or its loss accounted for by other testimony. These seem to be the only important questions raised upon the appeal. We are therefore of opinion that the judgment must be affirmed.

PEMBERTON, C. J., concurs.

#### BALDEN v. THOMASEN.

(Supreme Court of Montana. Feb. 3, 1896.)

##### ASSIGNMENT—PLEADING—JUSTICE COURT.

The assignment of an account must be pleaded, though the action thereon is brought in justice court.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by F. Balden against A. Thomason on an account. From the judgment rendered, defendant appeals. Reversed.

John Lindsay, for appellant.

PEMBERTON, C. J. The plaintiff instituted this suit in a justice's court in Silver Bow county, on the following account: "Andrew Thomason to F. Balden, Dr.: To board and lodging, \$47.00" Judgment was rendered in favor of plaintiff for the amount of the account, and the defendant appealed therefrom to the district court of said county. In the district court the case was tried to a jury, and a verdict returned in favor of the plaintiff.

From the judgment rendered on the verdict, and an order of the court overruling the defendant's motion for a new trial, this appeal is prosecuted.

The evidence all shows that the sum mentioned in the account in suit was an amount due and owing from the defendant to one Antone Vidmar on an account for board and lodging, which account Vidmar had left with the plaintiff to collect and apply on an indebtedness from Vidmar to the plaintiff. This evidence was all admitted over the objection of the defendant that no assignment of the account was pleaded or shown on the account sued on; said account, on its face, purporting to be an indebtedness due directly to the plaintiff. The admission of the evidence tending to show an assignment of the account by Vidmar to plaintiff is the only error assigned. Counsel for the defendant contends that no proof of an assignment of the account was admissible without an allegation thereof in the pleadings. This contention renders it necessary to discuss what is essential to good pleading in a justice's court. In Murfree's Jurisdiction of Justices, this question is thoroughly discussed. See section 376 et seq. After quoting largely from the courts of states whose statutes are similar to ours, this author says, "As abundantly shown, it is necessary that a complaint shall not only present distinctly the ground of the plaintiff's demand, but that ground must be so distinctly set forth that it will preclude another action for the same cause." Would a judgment on the account in suit in favor of plaintiff be a bar to an action thereon by Vidmar or his representatives? There is nothing in the pleadings or judgment roll to show that Vidmar ever assigned the account to plaintiff. If the account had shown on its face such assignment, the defendant could have denied the assignment, or could have pleaded payment to Vidmar, or any other defense he may have had. But there is nothing in the pleadings to advise him that it is the Vidmar account on which he is being sued, so as to enable him to prepare any defense he might have against Vidmar. It will not be disputed that a complaint in the district court on an assigned account would be bad, without an allegation of assignment, and that evidence of assignment without such allegation would not be admissible. If it be necessary to allege an assignment in one count, as a prerequisite to proving it, why not in another? While formalities and technicalities are largely dispensed with, by statute, in justice's courts, still it cannot be said that all substance and essentials in pleadings have been dispensed with, also. The account, complaint, or statement in a justice's court should contain the substantial averments of a cause of action, so stated as to apprise the defendant fairly of the cause of action relied on, "and so distinctly that it will preclude an other action for the same cause." We think the account sued on, which is the only pleading in the case, is fatally defective in these re-

spects, and that the action of the court in admitting evidence of an assignment of the account, without any allegation thereof in the pleading, was erroneous. 1 Cowdery, Justices, § 248. The facts and circumstances of this case widely distinguish it from Campbell v. Irvine (decided this day) 43 Pac. 628. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

DE WITT, J., concurs.

#### KNOWLES v. NIXON.

(Supreme Court of Montana. Feb. 3, 1896.)

##### TRIAL—CHARGE ON WEIGHT OF EVIDENCE.

An instruction that as a general rule the statements of a witness as to verbal admissions of a party should be received with caution, as that kind of evidence is subject to much imperfection and mistake, is erroneous, as a comment on the weight of evidence. *Wastl v. Railway Co. (Mont.)* 42 Pac. 772, followed.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by Mary Knowles against S. M. Nixon on a note. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed.

John W. Cotter, for appellant. Geo. Haldorn and Oliver M. Hall, for respondent.

PEMBERTON, C. J. This is an action to recover a balance alleged to be due on a promissory note. The answer admits the execution of the note, but pleads payment. The case was tried with a jury, and a verdict returned for the plaintiff in the sum of \$231.15. From the judgment rendered thereon, and the order of court denying a motion for a new trial, the defendant appeals.

The assignment of error principally relied upon by the appellant is the giving of the following instruction by the court: "The court instructs the jury that although parol proof of the verbal admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often affords satisfactory evidence, yet, as a general rule, the statements of a witness as to verbal admissions of a party should be received by a jury with caution, as that kind of evidence is subject to much imperfection and mistake. The party himself may have been misinformed, or may not have clearly expressed his meaning, or the witness may have misunderstood him; and it frequently happens that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party did actually say. If it appears to the jury, from the circumstances proved, that the party himself may have been misinformed, or may not have expressed his own meaning clearly and understandingly, or that the

witness may have misunderstood him, or that the witness had no reason or motive for remembering the exact language used, or where, for a lapse of time, or any other reason, the jury can see that the witness is liable to be mistaken, or unable to give the exact words really used by the party, or their equivalents, these matters should be considered by the jury in determining the weight to be given to the testimony." This instruction is substantially like the instruction commented on with disapproval by this court in *Wastl v. Railway Co.*, 42 Pac. 772. The instruction is evidently taken from *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481. The California court held it to be erroneous, not only because in violation of the constitution of the state, but because it "is, in substance, an argument to the jury with respect to matters of fact that had been presented at the trial, and a comment by the court upon the weight which they should give to the testimony." The court further said: "Whether the facts and circumstances proved in the case were sufficient to cause the reason of the jury to make this inference was fair matter of argument for the counsel of the respective parties, but the court forsook its judicial position when it assumed the office of commenting upon the weight and credibility of this evidence. The closing paragraph in the instruction, to the effect that it was for the jury to give to the evidence the consideration to which it was entitled, did not obviate the error, as by its remarks the court had, in substance, said to them that, as a matter of law, the evidence was not entitled to any great consideration." The only issue in the case was whether the note sued on had been fully paid. The court instructed the jury that the burden of proving this issue devolved upon the appellant. The appellant swore positively to the payment. The respondent testified positively the other way. The only corroborating evidence the appellant had as to payment was the testimony of three or four witnesses that the respondent had admitted to them that appellant had paid the note. In this view of the case, the appellant was entitled to have the admissions of the respondent as to the payment of the note go to the jury for what they were worth in law and fact. The law does not attach slight weight, or treat as a matter of little or doubtful significance, the voluntary admissions of a party against his own interest. The comment and argument of the court contained in the instruction complained of were calculated to cause the jury to attach little weight or significance to the admissions of respondent shown by the evidence. This was calculated to prejudice the appellant. Under our law, it is error for the court to comment, or make an argument, in the instructions, on the weight to be given to the testimony by the jury. The appellant contends that the evidence is insufficient to support the verdict. There is a conflict in

the evidence, and, as that was a matter properly within the province of the jury to determine and settle, we do not feel that we would be authorized to disturb the result on the ground of the insufficiency of the evidence to support it. On account of the error of the court in giving the instruction treated above, the judgment and order appealed from are reversed, and the cause remanded for new trial. Reversed.

DE WITT, J., concurs.

## CONGDON v. BUTTE CONSOLIDATED RY. CO.

(Supreme Court of Montana. Feb. 8, 1896.)

CONSTRUCTION OF STATUTES — RE-ENACTMENT OF LAWS PASSED AT DIFFERENT DATES — REPEAL BY IMPLICATION — SERVICE OF PROCESS ON CORPORATIONS.

1. One act will not be construed as repealing by implication another act passed at the same session, unless they are irreconcilably repugnant.

2. Where two acts passed at different sessions are subsequently re-enacted in a revision of the statutes, they will be considered as the acts of one legislature, and effect, so far as possible, given to each.

3. The provision of Comp. St. 1887, div. 1, § 75 (originally enacted in 1883), providing that any corporation doing business in the state may be served by serving the summons on the president or other officer, and, if they cannot be found, then by serving the same on certain subordinate employes, does not repeal section 72 (re-enacted from Rev. St. 1879), allowing service on the managing agent of a domestic corporation in the first instance; and a return of service on such agent need not, therefore, show that the president or other officer could not be found.

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Action by E. E. Congdon against the Butte Consolidated Railway Company to recover for services. Defendant defaulted, and, from an order denying a motion to open the default, defendant appeals. Affirmed.

This is an appeal from an order of the district court denying the defendant's motion to open a default. Among other grounds relied upon for opening the default was alleged excusable neglect by the defendant. That position is abandoned upon this appeal, and the only question now presented is as to the service of the summons. The defendant is a domestic corporation. The plaintiff commenced his action for work and labor performed for defendant, at its request. A summons was issued, and served by William M. Wilson, who makes the following return of the service: "State of Montana, County of Silver Bow—ss.: William M. Wilson, being duly sworn, says that he is a male citizen of the United States of America, and of the state of Montana, and is a resident of the county of Silver Bow, state of Montana, and is over the age of eighteen years; that he is not in any way interested in the above-entitled action; that

on the 19th day of April, A. D. 1894, he received the annexed summons, and personally served the same on the defendant therein named, by exhibiting the original and handing to and leaving with J. R. Wharton, managing agent of defendant corporation, a true and correct copy thereof, on the 8th day of May, A. D. 1894, at Butte, county of Silver Bow, state of Montana. William M. Wilson. [Duly verified.] It is not questioned that William M. Wilson was a competent person to make the service. The service purports to have been made under the provisions of section 72, Comp. St. 1887, which section, in its first paragraph, is as follows: "The summons must be served by delivering a copy thereof, as follows: First, If the suit is against a corporation formed under the laws of this state, to the president, or other head of the corporation, secretary, cashier, or managing agent thereof." This portion of the law as to service of summons comes from the Revised Statutes of 1879. Later in time, to wit, March 8, 1883, the legislature enacted the following provision: "Any corporation doing business in this state may be served with summons or other process by serving a copy of such process upon the president, secretary, treasurer, or other officer of the corporation, or upon the agent designated by such corporation as the person upon whom service shall be made, as required by law; and if none of the persons above mentioned can be found in the county, then service may be made upon any clerk, superintendent, general agent, cashier, principal director, ticket agent, station keeper, managing agent or other agent, having the management, direction, or control of any property of such corporation. If none of the persons in this section described can be found in the county in which such action is commenced, then service may be made, as provided in this section, upon any of the persons herein described, in any county of this state." Comp. St. 1887, div. 1, § 75. These two provisions of the law as to service of summons were together re-enacted in the Compiled Statutes of 1887. It appears by the return of the summons that service was made upon the managing agent of the corporation. It is not questioned but this service would be good under the provisions of section 72. The defendant defaulted, and judgment was rendered against it. Motion to set aside the default was made, the defendant contending that section 75 repealed section 72 as far as the contentions in this case are concerned, and that the service was not good under said section 75. The motion to open the default was denied. From this order the appeal is taken.

Corbett & Wellcome, for appellant. Thompson Campbell, for respondent.

DE WITT, J. (after stating the facts). The question here is whether section 75, Code Civ.

Proc., repeals subdivision 1 of section 72, so that a service of summons upon a domestic corporation made in full accordance with the provisions of subdivision 1 of section 72 is void if such service does not also fulfill the requirements of section 75. Under the provisions of section 72, service may be made upon a domestic corporation by serving the summons upon the president or other head of the corporation, secretary, cashier, or managing agent thereof. Under section 75, any corporation doing business in this state may be served by serving the summons upon the president, secretary, treasurer, or other officer of the corporation, or upon their designated agent. The section then provides, in case these officers cannot be found, for a service upon certain subordinate employees of the corporation. As the service in this case was not made upon the president, secretary, or treasurer, or, as appellant claims, any other officer, or upon a designated agent, it is contended that the return should have shown that such officers could not be found, and that for that reason service was made upon the managing agent. This section 75 provides that the service may be made upon any other officer. We are not prepared to hold that the managing agent of the corporation was not such "other officer." He himself, in making an affidavit to set aside the default, admits that he was the managing agent, and does not claim that he was not an officer of the corporation, nor do any of the affidavits filed by the appellant pretend that the person served was not an officer. Under these circumstances, there is much reason to hold that the managing agent served was an officer of the corporation, within the purview of section 75. But we will pass this question, and advance to another consideration. Unless subdivision 1 of section 72 was repealed by section 75, the service in this case was good. Section 75 did not directly repeal subdivision 1 of section 72. If there was a repeal at all, it was by implication only. Repeals by implication are not favored. *U. S. v. 196 Buffalo Robes*, 1 Mont. 495. Furthermore, both section 72 and section 75 were re-enacted in the revision of 1887, and thus may be considered as the acts of one legislature. It is said in *Sutherland on Statutory Construction* (section 156) as follows: "Though a revision operates to repeal the laws revised, whether repugnant or not, those portions that are re-enacted are continuations. The revision is, however, a re-enactment, and to be alone consulted to ascertain the law when its meaning is plain; but, when there is irreconcilable conflict of one part with another, the part last enacted in the original form will govern; and, when it becomes necessary to construe language used in the revision which leaves a substantial doubt of its meaning, the original statutes may be resorted to for ascertaining that meaning." Upon the same subject, this court, through Mr. Justice Hunt, made the following remarks in *State v. Rotwitt* (Mont.) 41 Pac. 1006: "We

conclude, therefore, that the legislature enacted both laws,—the one, title 11, as adopted, by way of new enactment; the other, by express retention of the act of March 8, 1893. As before stated, we regard the repealing clause in the 1893 act as ineffective against the new legislation of 1895. Both laws must therefore be upheld if, by fair and reasonable interpretation, they may be made to operate in harmony, and without absurdity. *Suth. St. Const. § 152.* There is a presumption that the legislature did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. 'In an endeavor to harmonize statutes seemingly incompatible, to avoid repeal by implication, a court will reject absurdity as not enacted, and accept with favorable consideration what is reasonable and convenient.' *Id.* It is also a rule of construction that, where two acts were passed at the same session of the legislature, effect should be given to each, if possible. In such a case the presumption is strong against implied repeal. *Railroad Co. v. Ford*, 53 Tex. 364; *Smith v. People*, 47 N. Y. 330; *Suth. St. Const. § 153.*"

These two sections under review having, in effect, been passed by the same legislature, the question is whether section 75 is so repugnant to subdivision 1 of section 72 that the latter cannot stand. We think not. Section 72, in its two subdivisions, called 1 and 2, provides for service upon domestic corporations and foreign corporations. Section 75 names any corporation doing business in this state. It is apparent in reading section 75 that it is an extension of the facilities of serving a corporation. Section 72 provides simply for service upon principal officers of a corporation, whether domestic or foreign. Section 75 also provides for service upon principal officers, and, furthermore, if such officers cannot be found, gives the privilege of service upon certain employees, and it extends this privilege to employees of apparently very low degree. It provides for service upon a clerk, ticket agent, or station keeper. In other words, it would seem that, if service cannot be obtained under the provisions of section 72, it may be obtained under the more liberal provisions of section 75. It does not appear to us that the two sections are necessarily repugnant. We are of opinion that there is nothing in section 75 which is repugnant to the provisions of section 72 allowing service upon the managing agent of a domestic corporation. *Telephone Co. v. Turner*, 88 Tenn. 265, 12 S. W. 544.

It is argued, and Mr. Sutherland is quoted to the effect, that where there are two statutes on the same subject, passed at different dates, and it is plain from the framework and substance of the last that it was intended to cover the whole subject, and to be a complete and perfect system or provision in itself, the last statute must be held to be a legislative declaration that whatever is embraced in it

may prevail, and whatever is excluded is discarded and repealed. But it appears to us that section 75 does not seem to be a complete and perfect system in itself, to the exclusion of section 72. It does not cover the whole subject of service upon corporations, domestic and foreign. For instance, it makes no provision at all for service by publication. And, if section 75 is to be considered the only complete system in itself, then service by publication cannot be made at all. But service by publication is expressly provided for in section 72 and section 73. We do not consider that the provisions for service in this way were intended to be repealed by section 75; but, if section 75 is a complete system in itself, then there is no such procedure as service upon a corporation by publication. We cannot hold that section 75 was a complete substitute for all other provisions for service upon corporations, nor that it was necessarily repugnant to the provisions of section 72, allowing service upon the managing agent of a domestic corporation. We are therefore of the opinion that the service of summons made in this case was good, and that, therefore, the district court did not err in refusing to open the default and set aside the judgment. The order appealed from must therefore be affirmed.

PEMBERTON, C. J., concurs.

#### FLOYD v. JOHNSON.

(Supreme Court of Montana. Feb. 3, 1896.)

#### PLEADING—MOTION FOR JUDGMENT ON THE PLEADINGS.

Under a rule of court providing that when a demurrer is overruled the demurrant may answer or reply within 24 hours, in case an answer to a good complaint in an action on a note sets up a good defense of alteration, and both parties make a motion for judgment on the pleadings, it is error, on overruling plaintiff's motion, to render judgment for defendant on the ground that plaintiff's motion confessed the answer, a replication having been filed within 24 hours after plaintiff's motion was overruled.

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Action by John Floyd against Samuel Johnson and another. There was a judgment for defendant Johnson, and plaintiff appeals. Reversed.

The plaintiff sued the defendant on a promissory note. Defendant concedes that the complaint was perfectly good. Defendant filed an answer, in which he set up that, after making and delivering the note, the same was materially altered by adding the words, "and interest at the rate of five per cent. per annum"; that this alteration was made before the commencement of the action, with the knowledge and consent of the plaintiff, and that neither of the defendants consented to said alteration. There were two defendants in the action originally. One, Eldridge, confessed judgment. The defendant

Johnson is the only one now concerned in this appeal. Upon the filing of the answer, each party made a motion for judgment on the pleadings. The plaintiff's motion for judgment on the pleadings was denied, for the reason, as stated, that it appeared to the court that the answer set up a defense. The defendant's motion for a judgment on the pleadings was granted. The reason for this action, as given by the court, was, not because the complaint did not set up a cause of action, but because the plaintiff, by himself moving for judgment on the pleadings, confessed the allegations of the answer to be true, and, being true, and a defense thus stated, judgment should be for the defendant. On the same day that the court sustained the motion for judgment on the pleadings against the plaintiff, the plaintiff filed a replication to the answer of the defendant. The replication denied the affirmative matter set up in the complaint. One of the rules of the district court was as follows: "When a motion to correct a pleading, or demurrer to the same, is overruled, the party interposing the same shall answer or reply, or make such other motion as may be allowed by law, within twenty-four hours from the time of such ruling, unless the court extend the time, or the parties agree to such extension. When such motion to correct the pleadings or demurrer is sustained, and leave granted to amend, such amendment or amended pleading shall be filed within five days, unless the court extend the time, or such extension be agreed to by the parties. Whenever the day following the day on which a ruling is made is a Sunday or legal holiday, it shall not be counted, but the time shall begin to run from the morning of the next succeeding day which is not a Sunday or legal holiday." The court afterwards rendered and entered judgment in favor of the defendant Johnson.

W. I. Lippincott and F. T. McBride, for appellant. Oliver M. Hall, for respondent.

DE WITT, J. (after stating the facts). If there is an issue framed by the pleadings, judgment on the pleadings is error. *Horsky v. Moran*, 13 Mont. 267, 34 Pac. 360; *Bach, Cory & Co. v. Produce Co.*, 15 Mont. 345, 39 Pac. 291. The complaint in this case set up a cause of action. This is conceded. Therefore judgment could not be rendered upon the pleadings for want of sufficient allegations in the complaint. It is conceded that the answer set up a defense. But, even if that were true, judgment on the pleadings could not be rendered, because the defense set up in the answer would frame an issue. That issue must, therefore, be tried. See cases last cited. This judgment cannot be sustained at all upon the ordinary principles governing the rendition of judgment on the

pleadings. But respondent claims that it must be sustained, for the following reason: Plaintiff had also moved for judgment on the pleadings, and he thereby confessed the truth of the allegations of the answer, and claimed, as he would upon a demurrer, that, although the answer was true, yet the facts there stated did not constitute a defense; and that he, the plaintiff, having thus confessed the truth of the answer, and the court holding that the facts of the answer were a sufficient defense, therefore the defendant's motion for judgment on the pleadings must be sustained. This was the view of the district court. The situation is somewhat curious. The defendant's motion in itself was not good at all, for the reason that the complaint did set up a cause of action, which cause of action could not be swept away simply by a defense being pleaded in the answer, the parties not having yet reached a point where the facts alleged in the pleadings could be proved by testimony. Therefore defendant's motion was wholly unsustainable. And it was not attempted to sustain it by its own weight or virtue. It was sustained by an extrinsic reason, namely, because the plaintiff had moved for judgment. Without passing upon this rather unusual condition of affairs, we will leave this branch of the case, having stated it for the purpose of introducing and explaining the following conditions: A motion for a judgment on the pleadings bears a very close resemblance to a demurrer (*Power v. Gum*, 6 Mont. 5, 9 Pac. 575), and in some respects is simply a demurrer. The plaintiff's motion for a judgment in this case asked for judgment because the answer did not set up facts constituting a defense. The court denied the motion. The rule of the court was, as shown in the statement above, that when a demurrer was overruled the party, as a matter of right, had 24 hours in which to answer or reply, or make some other motion. The plaintiff replied within 24 hours. We think that the plaintiff's right to reply, and his attempt to do so, were wholly within the spirit and intent of the rule of the court. In any event, we are of opinion that the conditions were sufficiently within the spirit and intent of the rule to make it appear that it was not a wise exercise of discretion by the lower court to render final judgment against the plaintiff without allowing the issues to be made up by the filing of the replication; for, by its action, the court wholly deprived the plaintiff of a trial upon the merits, and so deprived him by what seems to us a strained and unnatural application of the court's rule. This judgment is therefore reversed, and the case is remanded to the district court, with instructions that the replication be allowed to remain as filed.

PEMBERTON, C. J., concurs.



**MANTLE v. LARGEY.**

(Supreme Court of Montana. Feb. 3, 1896.)

**JUDGMENT BY DEFAULT—VACATION—APPEAL—  
REVIEW—DISCRETION.**

On motion to set aside a default judgment, it appeared that plaintiff had commenced, in different departments of the same court in a certain county, two suits against defendant, each of which involved their relations to a certain mine. Defendant employed counsel, told him that he had been sued by plaintiff in that court, and asked him to look after the case. The counsel found the suit filed in one of the departments, to which he made appearance, but failed to search for or find the suit in the other department, in which the default judgment was rendered. *Held*, that it was not an abuse of discretion to vacate such judgment.

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Action by Lee Mantle against Patrick A. Largey. From an order vacating a judgment for plaintiff, he appeals. *Affirmed*.

Corbett & Wellcome, for appellant. F. T. McBride, for respondent.

DE WITT, J. This is an appeal from an order of the district court setting aside the default of the defendant, and the judgment in favor of plaintiff in pursuance to that default. There are a number of questions which have been argued upon the appeal, among them the claim that the summons in this case was insufficient. But we are of opinion that the order of the district court may be sustained, upon one proposition only. It appears by the record that the plaintiff commenced two suits against the defendant. Each suit involved matters concerning the relations of the plaintiff and defendant as to a piece of mining property, called the "Speculator Lode Mining Claim." The defendant, being served, went to his counsel, Mr. McBride, and informed him of that fact, and requested him to look after his case. There are two departments of the district court in Silver Bow county, where these actions were commenced. Counsel went to department No. 1, and found the suit, filed under the title of Lee Mantle v. Patrick A. Largey. He appeared in that case, pursuant to the instructions of his client. The other case, with precisely the same title, but with a different number, and also involving the relations of the parties to the Speculator mining claim, was in department No. 2 of the same court. Mr. McBride did not discover the case in department No. 2. He did not understand that there were two cases commenced. Finding the case in department No. 1, and having appeared therein, he supposed that he had performed his duty under his retainer. Long afterwards he discovered the case in department No. 2, and also discovered the fact that Mr. Largey was in default in that case. He then at once informed the counsel of Mr. Mantle of the facts. Some conversations ensued between counsel on both sides, which

we do not think are material in the decision of this appeal. Mantle's counsel proceeded to take default in this case, which was the case in department No. 2. Application was made to open the default. The facts above recited were shown. The court granted the motion, and set aside the judgment, and opened the default. From this order the appeal is taken.

We are very clearly of opinion that this order must be sustained. Such orders are largely in the discretion of the trial court. There surely was no abuse of discretion in this case. The two cases were filed under the same title, and involved the same subjects. They were in different departments of the same court. Defendant's counsel was informed that he (defendant) had been sued in the matter of the relations of the parties to the Speculator mining claim. As counsel did not understand that there were two suits, and as he did find one, and appeared therein, we think that it was excusable neglect that he did not discover the other suit, by the same title, involving to some extent the same subjects, and in the other department of the court. It is true that defendant's counsel did not make application to be allowed to appear in this case at once upon discovering that the time for appearing had expired. But we are of opinion that it fairly and honestly appears that he omitted to do so wholly by reason of negotiations pending between the parties. Argument has been made upon the construction of the language used in the affidavits of defendant and his counsel. But we are of opinion that the whole matter fairly appears as above recited. Under those facts, the order of the district court, setting aside the default and the judgment, must be sustained. *Affirmed*.

PEMBERTON, C. J., concurs.

**IHRIG v. SCOTT et al.**

(Supreme Court of Washington. Jan. 30, 1896.)

**PRINCIPAL AND SURETY—OFFICIAL BONDS.**

1. A bond given by a contractor to a school district, pursuant to Laws 1887-88, p. 15, for the protection of persons furnishing labor and materials for the erection of a schoolhouse, is an official bond.

2. Proof of a judgment against the principal on a bond given by a contractor to a school district under Laws 1887-88, p. 15, for the protection of persons furnishing labor and materials for the erection of a schoolhouse, is prima facie sufficient to warrant a recovery against the sureties.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by C. W. Ihrig against John Scott and others on a bond. From a judgment of nonsuit, plaintiff appeals. *Reversed*.

The bond in suit was a contractor's bond given to the directors of a school district, pursuant to Laws 1887-88, p. 15, for the pro-

tection of persons furnishing labor and materials for the erection of a schoolhouse which defendant Scott, the principal obligor, had contracted to build for the district.

Edward Pruyn, for appellant. H. J. Snively, for respondents.

**SCOTT, J.** This is the second appeal in this action. For the first one, see 5 Wash. 584, 32 Pac. 466, where the cause was reversed and remanded for a new trial as against the sureties on the bond. When the cause came on for a retrial, the plaintiff introduced in evidence the bond and original contract between the school district and defendant Scott; the judgment obtained by him against said Scott on the former trial, with proof that it had not been paid,—and sought to prove by parol the contract between himself and said Scott, upon which the judgment aforesaid had been obtained. This proof was objected to and excluded on the ground that the contract was in writing. The plaintiff not being able to produce the writing, or lay a sufficient foundation for the introduction of parol testimony, the court granted a motion for a nonsuit. Whereupon the plaintiff appealed, and he contends that it was not necessary to prove the contract between himself and the defendant Scott; that the proof of the judgment obtained against Scott was sufficient, *prima facie*, to sustain a recovery against the sureties, and, if so, the court erred in granting the nonsuit. We are of the opinion that this point is well taken. The bond in question was a statutory one, and official in character. *Faurote v. State* (Ind. Sup.) 23 N. E. 971. And a judgment obtained against the principal upon such a bond is *prima facie* sufficient to warrant a recovery against the sureties. *Masser v. Strickland*, 17 Am. Dec. 668; *Evans v. Com.*, 34 Am. Dec. 477; *Stephens v. Shafer* (Wis.) 3 N. W. 835; *City of Lowell v. Parker*, 43 Am. Dec. 436. It follows that the nonsuit should not have been granted. Reversed.

**HOYT, C. J., and ANDERS and GORDON, JJ., concur.**

#### PRICE v. SCOTT et al.

(Supreme Court of Washington. Jan. 30, 1896.)

PRINCIPAL AND SURETY—LIABILITY OF SURETY—  
RECITAL IN BOND—ESTOPPEL—TRIAL—FILING  
ADDITIONAL ANSWER—REVIEW ON APPEAL.

1. Where a bond given for the protection of those furnishing materials for the erection of a schoolhouse recites that the principal obligor has duly entered into a contract with the school district to erect said structure, the sureties are estopped from disputing the validity of such contract.

2. The refusal to allow defendants to file an answer to a cause of action, which it was claimed they had inadvertently neglected to deny, was not reversible error, the application not being made till plaintiff had introduced his

testimony, and it being apparent that the defense would have been the same as that to the other causes of action which were denied, and would not have availed.

3. The admission of a bond without proof of its execution cannot be assigned as error, where the record fails to show that it was objected to on that ground when offered.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by E. C. Price against John Scott and others on a bond. From a judgment rendered on a verdict directed for plaintiff, certain of the defendants appeal. Affirmed.

A. Mires, D. H. Carey, J. M. Ashton, and Frank H. Rudkin, for appellants. Mitchell Gilliam, for respondent.

**SCOTT, J.** This is an action upon a bond given by the defendants, under the provisions of the act of January 31, 1888, for the protection of those furnishing labor and materials to the defendant Scott in the erection of a schoolhouse for school district No. 3 in Kittitas county. Said bond was before the court in *Ihrig v. Scott*, 5 Wash. 584, 32 Pac. 466, and the substance of it is set forth in the opinion in that case. The plaintiff sues to recover for labor and materials furnished said contractor. A number of defenses were interposed, the principal one being that the bond was void in consequence of a want of authority on the part of the officers of the school district to enter into the contract for the erection of the schoolhouse. At the conclusion of the plaintiff's case, a motion for a nonsuit by the defendants was overruled, and the court directed the jury to bring in a verdict for the plaintiff, and this appeal is prosecuted from the judgment rendered thereon.

Much of the argument was directed to the proceedings upon the part of the district relating to the letting of the contract, and the several elections called to authorize and ratify the same, the appellants contending that the original election held was void, and that the subsequent election did not have the effect of validating the prior action of the board, and that, conceding it did validate the letting of the contract, it could not operate to validate the bond, as against the sureties. But, from the view we have taken of the case, we have not found it necessary to enter upon a consideration of these questions, for the bond executed by the defendant sureties recites as a fact that the defendant Scott, the principal in the bond, had duly entered into a contract with said school district to erect said school building, and we think the sureties are concluded by this statement from disputing the validity of the contract. The parties furnishing the labor and materials had a right to rely upon the statements of the bond as to these matters. After having asserted, over their own signatures, that the contract had been duly entered into, the defendants should not be permitted to deny the execution of such con-

tract, in an action brought upon the bond by the parties for whose benefit it was given. Brandt, Sur. (2d Ed.) par. 42; People v. Hunsen (Cal.) 20 Pac. 369; Moore v. Earl (Cal.) 27 Pac. 1087; People v. Jenkins, 17 Cal. 500; Mayor, etc., v. Harrison, 30 N. J. Law, 73; Town of Hendersonville v. Price, 96 N. C. 423, 2 S. E. 155; Middleton v. State, 120 Ind. 166, 22 N. E. 128.

It is further contended that the court erred in not allowing the defendants to file an answer to the third cause of action, which it is claimed they had inadvertently neglected to deny. It is apparent, however, that the defense to this would have been the same as that to the others, which were denied, and would not have availed the defendants anything; and, if otherwise, we cannot say that the court abused its discretion in refusing to permit such an answer to be filed, as application therefor was not made until after the plaintiff's testimony had been introduced.

It is further contended that the court erred in admitting the bond in evidence without proof of its execution, but the record fails to show that it was objected to on that ground when offered. Affirmed.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

#### CITY OF PUYALLUP v. SNYDER.

(Supreme Court of Washington. Jan. 30, 1896.)

##### POLICE JUSTICE—CHANGE OF VENUE.

2 Hill's Code, § 1468, provides for a change of venue from one justice to another on filing an affidavit of prejudice. Section 25 confers on justices jurisdiction for violations of city ordinances. 1 Hill's Code, § 657, relating to police justices in cities of the third class, provides that all proceedings before them shall be governed by the laws relating to justices of the peace. *Held*, that one charged with selling liquors in violation of a city ordinance before such police justice is, upon filing a proper affidavit, entitled to a change of venue to a justice of the peace.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Prosecution brought by the city of Puyallup against M. V. Snyder for selling intoxicating liquors in violation of a city ordinance. Defendant was convicted before the police justice of said city, but the judgment was vacated on certiorari from the superior court, and the city appeals. Affirmed.

Arthur O. Dresbach, for appellant. Charles E. Claypool, Francis W. Cushman, and Edward E. Cushman, for respondent.

GORDON, J. The appellant is a city of the third class, organized and existing under the provisions of the act of March 27, 1890. It instituted proceedings before the police justice of said city charging the respondent with the sale of intoxicating liquor contrary to the provisions of its ordinance upon the

subject. Said ordinance provides a fine not to exceed \$99 as a penalty for its violation. The respondent, upon being arraigned before said police justice, duly presented an affidavit and request for a change of venue. It is conceded that said affidavit was sufficient in form and substance. His application for a change of venue having been denied, he was found guilty, and fined \$30 and costs by said police justice. Thereafter a writ of certiorari was issued from the superior court of Pierce county, requiring such justice to certify and send thereto a transcript of the proceedings, and subsequently said superior court set aside the judgment of said police justice, upon the ground that said justice erred in refusing to grant respondent's application for a change of venue. From the judgment and order of the superior court vacating and setting aside said conviction, the case is brought here upon appeal.

In the present condition of the record, we are called upon to determine a single question. It is whether a change of venue lies from a police justice of a city of the third class in this state to a justice of the peace within said town or city. We think that the right exists. Section 1468, 2 Hill's Code, is as follows: "If, previous to the commencement of any trial before a justice of the peace, the defendant, his attorney or agent, shall make and file with the justice an affidavit that the deponent believes that the defendant cannot have an impartial trial before such justice, it shall be the duty of the justice to forthwith transmit all papers and documents belonging to the case to the next nearest justice of the peace in the same county. \* \* \* And section 25 of volume 2 of said Code confers upon justices of the peace "jurisdiction over all criminal cases coming under any city or town ordinance." Section 657 of volume 1 of said Code, being section 138 of the act of March 27, 1890, relating to charters of cities of the third class in this state, and providing for the election in such cities of a police justice, contains this provision: "All civil or criminal proceedings before such justice of the peace, under and by authority of this chapter, shall be governed and regulated by the general laws of the state relating to justices of the peace, and to their practices and jurisdiction, and shall be subject to review in the court of the proper county by certiorari or appeal, the same as in other cases. All officers elected by the council are subject to removal by that body at any time. \* \* \*" We think it quite clear from a consideration of the foregoing provisions of the statute that, in a proceeding before a police justice for a violation of a city ordinance, the party charged is entitled to a change of venue as a matter of right, upon making the affidavit contemplated by section 1468, supra. Our conclusion, therefore, is that the superior court did not err in vacating and setting aside the judgment of conviction entered by the

police justice of respondent city, and the judgment and order appealed from will be affirmed.

HOYT, C. J., and ANDERS, SCOTT, and DUNBAR, JJ., concur.

STATE ex rel. MILES v. SUPERIOR  
COURT OF SPOKANE  
COUNTY et al.

(Supreme Court of Washington. Jan. 20,  
1896.)

MANDAMUS—TO COMPEL JUDGE TO SETTLE STATE-  
MENT—CONTENTS OF STATEMENT—STENO-  
GRAPHER'S TRANSCRIPT.

1. A mandamus will not be granted to compel a judge of the superior court to settle a statement of facts presented, where his return shows that he has not refused, but, being engaged in another trial, postponed the matter for examination.

2. A party applying for settlement of a statement of facts in the superior court cannot be compelled to embody therein a transcript of the stenographer's notes taken on the trial.

Application by George Miles for mandamus against the superior court of Spokane county and Norman Buck, judge. Refused.

Plummer & Thayer, for petitioner. J. W. Feighan, for respondents.

SCOTT, J. This is an application for a writ of mandamus to compel the respondent to settle a statement of facts in the case of *The State v. George Miles*. The petition shows that a proposed statement had been filed by the relator, and that no amendment had been offered thereto, but that the judge had refused to settle the same; and it is contended that such refusal was based upon the ground that the relator had not obtained a copy of the stenographer's notes taken upon the trial of said cause, and the prosecuting attorney who appeared for the state in said action contends that it was necessary for the relator to obtain a copy of said notes, and present a full transcript thereof in said proposed statement, and he further contends that the statement proposed was so defective and incomplete as to warrant the court in refusing to act upon it at all. The judge, however, in his return, makes no finding as to the character of the statement offered, but certifies, in substance, that he had not acted thereon for want of time to consider the same, and that he had not refused to settle the statement in said action. He further contends that, at the time said statement was presented to him for settlement, he was engaged in the trial of another action, and that, instead of refusing to settle the facts to be used upon said appeal, he informed the attorney for the relator that he was unable to say at that time whether the statement was correct or not, and he continued the matter until he could have an opportunity to examine the same, and the objections made thereto. Under this state of

facts, the writ should not issue, for there was no refusal upon the part of the court to act upon the statement proposed, nor to consider the objections urged against the same upon the part of the state. We may say, however, that we are of the opinion that the relator cannot be required to furnish a copy of the stenographic notes. The stenographer was not an officer of the court, and the notes taken were not a part of the record in the cause, and there would be no means of compelling him to furnish a copy of the same.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

MILLER v. BEAN et al.

(Supreme Court of Washington. Jan. 21,  
1896.)

APPEAL—EVIDENCE TO SUSTAIN VERDICT—CUSTOM.

1. Where there is any evidence to warrant the verdict, and the trial court has refused to set it aside, it will not be reversed on appeal.

2. In an action to recover on a contract with a partnership, proof of the custom of doing business by one of the partners is inadmissible.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by C. P. Miller against C. O. Bean and James M. Morrison, partners as Bean & Morrison. Judgment for plaintiff, and defendants appeal. Affirmed.

T. W. Bean, for appellants. Thos. Carroll and Hagerman & Carroll, for respondent.

GORDON, J. Respondent began this action in the superior court of Pierce county to recover compensation for services as a civil engineer and surveyor alleged to have been rendered by him to the appellants, and also for like services rendered to the appellants by one G. L. Miller, an account for which last-mentioned services was assigned by the said G. L. Miller to the respondent prior to the commencement of the action. To each of said causes of action the appellants filed a general denial, and upon trial a verdict was rendered for the respondent, and thereafter judgment was entered upon it in his favor for the sum of \$693.55, from which judgment, and from an order denying a new trial, appellants prosecute this appeal. The principal contention of appellants is that the evidence upon the trial was insufficient to justify a verdict, and that the amount of the recovery was too great. We have carefully examined all of the evidence submitted upon the trial, and from such examination we find that there was a substantial conflict, such as under well-settled rules forbids our interfering with the verdict. The learned judge who presided upon the trial and heard the testimony of the witnesses has declined to interfere with the verdict, which affords an additional reason why this court should not

In *Bucklin v. Miller*, 40 Pac. 732, this court said that "the verdict and judgment must be sustained if there was any testimony which would warrant the jury in coming to the conclusion to which it did, however much the testimony to the contrary might preponderate." It would be of little service to enter upon an analysis of the evidence, and we pass from this branch of the case without further comment. The only remaining question to be considered relates to an offer of counsel to prove the custom of the appellant Bean with reference to the assumption of liability by him, while engaged in business of his own, prior to the formation of appellants' partnership, for services similar to those for which the respondent is claiming compensation in this case; appellants contending that, while the services for which respondent was claiming compensation in this case were actually rendered, nevertheless, the same were not to be paid for by appellants' firm until said firm obtained, from the person ordering the work from it, pay for such work. The lower court sustained an objection to this offer, and, we think, rightfully. No complaint is made as to any other ruling by the trial court, nor as to the charge given to the jury, and we conclude that the judgment should be, and it is, affirmed.

HOYT, C. J., and ANDERS, SCOTT, and DUNBAR, JJ., concur.

#### STATE v. NELSON.

(Supreme Court of Washington. Jan. 22, 1896.)

##### APPEAL—REVIEW—DISCRETION—RECEPTION OF EVIDENCE—WITNESS—CORROBORATION.

1. A conviction will not be disturbed, except for abuse of discretion, because the court permitted the state to introduce in rebuttal evidence which should have been put in in chief.

2. That the state introduces evidence tending to show a different state of facts from that testified to by a witness for defendant is not an impeachment of defendant's witness so as to entitle defendant to introduce evidence to sustain such witness.

Appeal from superior court, Columbia county; R. F. Sturdevant, Judge.

Sam Nelson was convicted of burglary, and appeals. Affirmed.

Griffitts & Nuzum, for appellant. Will H. Fouts, for the State.

HOYT, C. J. Defendant was convicted of the crime of burglary, and from the judgment and sentence imposed has prosecuted this appeal. The first reason assigned for reversal is that the superior court had no jurisdiction, because the necessary facts which would entitle the prosecuting attorney to file an information did not exist. The argument upon this question proceeded upon the theory that the record of the court

below did not show that any of the conditions required by the statute, upon which the prosecuting attorney was authorized to file an information, existed. From the original transcript nothing was made to appear in relation to this question, but by a supplement thereto sent up by the respondent it appears that the defendant was in custody on a charge of felony, and that the court was in session and the grand jury not in session. Hence, the conditions required by the statute were shown to exist, and were sufficient to authorize the filing of the information.

The only other errors assigned are founded upon rulings of the court in the admission and rejection of testimony. As to the admission of testimony, the only complaint is that the court allowed certain testimony to be put in by way of rebuttal that should have been introduced as a part of the plaintiff's principal case. But the statement of facts fails to disclose any such circumstances as would authorize us to reverse the judgment for the reason that the court abused its discretion, even if we should come to the conclusion that the contention of the appellant that the testimony should have been introduced as a part of the principal case was correct. The appellant had introduced one Hayden as a witness, who testified to certain facts. Afterwards the respondent introduced testimony tending to show a different state of facts. Then appellant sought to put in additional testimony in support of the statements of Hayden. The ground upon which he sought this was that the respondent by its testimony had impeached the witness Hayden, and that on that account he was entitled to sustain him. If testimony had been introduced which was strictly in impeachment of the witness Hayden, there would be force in the contention of appellant that he should have been allowed to put in testimony to sustain him. But evidence tending to establish a different state of facts from that testified to by Hayden was not impeaching testimony, within the meaning of the rule which allows a party to sustain a witness who has been impeached by testimony offered on the part of the other party. The judgment and sentence must be affirmed.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

#### SWEET, DEMPSTER & CO. v. DILLON et ux.

(Supreme Court of Washington. Jan. 22, 1896.)

##### HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—LIABILITY FOR DEBTS CONTRACTED BY HUSBAND.

The separate property of the wife is not liable for debts contracted by the husband in a business carried on by him for the benefit of the community.

Appeal from superior court, Cowlitz county; A. L. Miller, Judge.

Action by Sweet, Dempster & Co., a corporation, against W. F. Dillon and wife. From a judgment for plaintiff against the husband alone, it appeals. Affirmed.

J. B. Thompson and W. F. Magill, for appellant. Thomas N. Strong and E. W. Ross, for respondents.

SCOTT, J. The defendants Dillon were, during all the times hereinafter mentioned, husband and wife, and the defendant W. F. Dillon was engaged in the mercantile business in this state, and while so engaged became indebted to the plaintiffs for goods purchased of them in carrying on said business. Thereafter the plaintiffs brought suit against the defendants to recover a balance due for the goods sold. The only ground of liability alleged against respondent Elizabeth Dillon, and the one upon which the plaintiff's claim against her is based, is because of her being the wife of the other defendant, and it is contended that because the business conducted by W. F. Dillon was conducted for the benefit of the community plaintiffs were entitled to a judgment against both of the defendants for the amount of their claim. W. F. Dillon did not appear in the action, and a judgment was rendered against him by default. Elizabeth Dillon appeared and defended, and the judgment of the court was that the plaintiff's claim might be enforced against the community property of the defendants, and against the separate property of W. F. Dillon, but that the plaintiff was not entitled to a personal judgment against the respondent wife. This is the first time that this precise point has been presented to this court for adjudication, although the appellant contends that certain other cases heretofore decided by this court sustain their claims in this appeal; but, without considering those cases in detail, we are of the opinion that none of them bear strongly upon the point in controversy here, and are furthermore of the opinion that the plaintiff was not entitled to a personal judgment against the respondent Elizabeth Dillon. It is true the business carried on by the husband was a community business, and the liabilities incurred therein were properly charged against the community, and, inasmuch as he was the controlling and contracting party, might also be a charge upon his separate estate; but this is as far as the law goes, in our opinion. The wife here was a noncontracting party, the business was transacted by the husband, she had no control over it, and it would be contrary to the spirit of the law to hold her separate estate liable for his contracts, whether incurred for the benefit of his separate estate or for the community. The judgment of the superior court is affirmed.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

#### SMITHSON v. WOODIN et al.

(Supreme Court of Washington. Jan. 24, 1896.)

#### APPEAL—JURISDICTION—REQUISITES—BOND.

The giving of an appeal bond is essential to appellate jurisdiction.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by H. O. Smithson, administrator, against Ira Woodin and others. There was a judgment for defendants, and plaintiff appeals. Dismissed.

Olise & King, for appellant. Edward Von Tobel and W. E. Humphrey, for respondents.

PER CURIAM. It having been suggested at the hearing, and, upon examination of the record, found, that no bond was given by appellant upon appeal from the judgment and order in this case, the court considers that it is without jurisdiction, and for that reason the appeal will be dismissed.

#### STATE ex rel. GANNON v. HITT et al.

(Supreme Court of Washington. Jan. 27, 1896.)

#### MANDAMUS—WHEN LIES.

2 Hill's Ann. Code, § 736, provides that the writ of mandamus shall not issue in any case where there is any other plain and adequate remedy at law. 1 Hill's Ann. Code, § 776, par. 9, provides for an appeal within 30 days, to the superintendent of public instruction, from the decision of the county board of examiners refusing to issue a teacher's certificate. Held, that mandamus would not lie to compel the board to issue such certificate.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Application by the state on the relation of Frank I. Gannon against J. M. Hitt and others for a writ of mandamus. From a judgment granting the writ, defendants appeal. Reversed.

Newman & Howard, for appellants.

GORDON, J. The relator, Frank I. Gannon, instituted this proceeding in the superior court of Whatcom county to compel the appellants, the board of school examiners of said county, to issue a teacher's certificate of the third grade, entitling respondent to teach in the common schools of said county for a period of one year. The alternative writ, issued upon respondent's affidavit and motion, recites that appellants constitute the board of school examiners of said county; that in February, 1894, said board held a public examination of teachers, at which respondent was examined, in accordance with law, in all branches requisite for a certificate of that grade; that at said examination he received an average grading of 69.08 per cent, thereby, as he alleges,

being entitled to a third-grade certificate. It further recites that he is a person of good moral character, and had furnished said board satisfactory proof thereof, and that he possessed all the qualifications required by law to entitle him to said certificate, but that said board wrongfully and unlawfully refused, upon demand, to issue the same. The appellants demurred to the alternative writ, on the ground that the court had no jurisdiction of the subject-matter of the action, and that the same did not state facts sufficient to entitle respondent to the relief sought. The demurrer was overruled, and the appellants, reserving an exception to such ruling, filed an answer. Thereafter the court proceeded to try the issue of fact, and, upon such trial, rendered judgment against appellants, making the alternative writ peremptory, from which judgment, and the order overruling the demurrer, this appeal is taken. We think the demurrer should have been sustained. It has long been settled at the common law, and by statute in nearly, if not all, of the American states, that mandamus, being an extraordinary legal remedy, will not be awarded where the relator has any other adequate remedy. The language of our statute (section 736, 2 Hill's Ann. Code) is: "The writ shall not be issued in any case where there is any other plain and adequate remedy." Paragraph 9, § 776, 1 Hill's Ann. Code, and section 781 of the same volume, provide for an appeal to the superintendent of public instruction from the decision of the county board of examiners. Paragraph 14 of said section 776 provides that the county superintendent shall "appoint, for one year, two persons holding the highest grade certificate in his county, and such persons, with the county superintendent, shall constitute a board of examiners for the examination of teachers." Paragraph 9 of the same section requires the superintendent "to keep in a suitable book an official record of all persons examined for teachers' certificates, showing the name, age, nationality, date of the examination, and grade of certificate issued. He shall also retain, for six months, a list of the questions, and the written answers to the same, of all applicants, and hold the same subject to the order of the superintendent of public instruction; and in case any teacher or applicant shall feel aggrieved at the result of an examination, or in case a certificate is revoked by the county superintendent, the right of appeal to the superintendent of public instruction shall not be denied the teacher or applicant; provided, that said appeal be taken within thirty days from the date of the notice of such grievance, revocation or refusal." Section 781, 1 Hill's Ann. Code, provides that "when an applicant for a certificate at a regular examination shall feel aggrieved at the decision of the county board of examiners, and shall appeal to the superintendent of public

instruction, the questions used and the answers given shall be examined by him, and if the decision of the county board of examiners be reversed, the superintendent of public instruction shall issue to the appellant a certificate of such grade as the answers to the questions used shall warrant, and said certificate shall be valid in the county where the applicant was examined. \* \* \* We think it very plain that the relator has mistaken his remedy. The judgment appealed from will be reversed, and the cause remanded to the superior court, with directions to sustain appellants' demurrer to the alternative writ.

HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, JJ., concur.

#### AH HOW v. FURTH et al.

(Supreme Court of Washington. Jan. 27, 1896.)

#### STATUTE OF LIMITATIONS—WHEN BEGINS TO RUN —WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

1. Where one is employed for an indefinite period at a specified sum per month, and continues in the service of his employer for a number of years without interruption, receiving partial payments during the time, the contract of employment will be treated as continuous, and the statute of limitations will not begin to run until the service ends.

2. In an action against an administrator for a balance due for services rendered by plaintiff for deceased, testimony of plaintiff that he worked at deceased's house, and as to the character of the work performed by him, is not testimony in relation to a "transaction had by him with, or any statement made to him by," deceased, within 2 Hill's Code, § 1646.

3. In such case the account book of plaintiff is not inadmissible on the ground that it is in effect permitting plaintiff to testify to a transaction with deceased.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Ah How against Jacob Furth and Minnie G. Yesler, as administrators of the estate of Henry L. Yesler, deceased, to recover for services performed by plaintiff as a domestic in deceased's family. From a judgment for plaintiff, defendants appeal. Affirmed.

Carr & Preston, White & Munday, and H. E. Shields, for appellants. James Leddy, for respondent.

GORDON, J. The appellants are the administrators of the estate of Henry L. Yesler, deceased. Respondent brought this action to recover from said estate for services performed as a domestic in the family of the deceased, between the 9th day of February, 1882, and the 1st day of December, 1891, at the agreed salary of \$60 per month. The amount of his wages for the entire term is in the complaint alleged to be \$6,760, of which amount \$4,849 was paid by said Henry

L. Yesler during his lifetime. The appellants, in addition to a general denial, set up two affirmative defenses: (1) That "all claims and demands of the plaintiff \* \* \* were by the said Henry L. Yesler fully paid, satisfied, and discharged"; and (2) that the statute of limitations has run against the claim. Upon the trial of the cause below, a jury was expressly waived, and the court made its findings of fact and conclusions of law, upon which judgment was entered for the respondent in the sum of \$1,767.47, from which judgment this appeal is taken. It is stated in the brief of appellants that "the principal legal contention is upon the question whether or not the statute of limitations had run, and the admission of certain testimony." We think that the lower court was right in finding against the appellants upon the plea of payment and discharge of said claim during the lifetime of the decedent. From a somewhat careful and painstaking examination of the entire record, we think there was but one employment and one service; that it began February 10, 1882, and ended October 1, 1891, during all of which time the employment was continuous and uninterrupted, except for the period of about five months during the year 1885, when respondent was obliged, for business reasons, to make a trip to San Francisco. But he went with the intention of returning to his employment, and he did so return, and the character of his employment, and contract was not affected by such interruption. The lower court found, and, we think, upon sufficient evidence, that the employment of the respondent by the said deceased was for an indefinite period, at the agreed wages of \$60 per month. It also appears that numerous partial payments were made by the said Yesler in his lifetime, some of said payments being in money direct to respondent. In other instances cash was paid by said deceased to other parties on account of respondent, for which credit was duly given. Other items of credit relate to rent of a dwelling house which was occupied by respondent for a number of years while he was engaged in such service. Henry L. Yesler died on the 16th day of December, 1892. This action was brought in February, 1894, and the last item of credit was on the 2d of October, 1891. The lower court found that at no time prior to the 2d of October, 1891, did a period of three years elapse between the dates of said payments or credits, and that "at no time did any balance of said indebtedness remain due and unpaid for a period of three years, or become barred by the statute of limitations." We think that the contract of service was a continuous one, and that the statute of limitations did not begin to run until the completion of the service,—or, in other words, until the 1st day of October, 1891. "Where services are rendered under an agreement which does not fix any certain time for payment, nor when

the services shall end, the contract of employment will be treated as continuous, and the statute of limitations will not begin to run until the services are ended." *Graves v. Pemberton* (Ind. App.) 29 N. E. 177. To the same effect may be cited *Knight v. Knight* (Ind. App.) 30 N. E. 421; *Carter v. Carter*, 36 Mich. 207; *Taggart v. Tevanny* (Ind. App.) 27 N. E. 511. Section 132, 2 Hill's Code, is as follows: "When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made." The legislature of this state, in enacting this provision, has adopted substantially the common-law rule, and "by such payment a new date [is fixed] from which the limitation of actions thereon [on contracts] commences to run." *Creighton v. Vincent*, 10 Or. 56.

Upon the examination of the respondent as a witness, he stated that he was a cook during the year 1882. The following question was then propounded: "Tell the judge where you were cooking." This was objected to, on the ground that the witness was incompetent to testify. The court, in ruling, said: "Any transaction with Mr. Yesler, or any conversation with him, is certainly covered by the statute, but the fact of where he was engaged during a certain period, or where he was, will not come within the rule. Objection overruled to that extent." The witness then proceeded to state that between February, 1882, and October, 1891, he did the cooking, washing, and ironing at the home of the deceased, but did not detail any conversation between himself and the deceased. The appellants contended below, and insist here, that this testimony was improper, under section 1646, 2 Hill's Code. We think, however, that the ruling of the lower court was right. The testimony of respondent that he worked at the house of the intestate, and the character of the work performed by him, was not testimony in relation to a "transaction had by him with, or any statement made to him by," such intestate. Such testimony related solely to acts of the witness, and was, we think, entirely competent. *Foggeth v. Gaffney* (S. C.) 12 S. E. 260; *Dysart v. Furrow* (Iowa) 57 N. W. 644; *Stevens v. Witter* (Iowa) 55 N. W. 535; *Lerche v. Brasher*, 104 N. Y. 157, 10 N. E. 58. For the same reason, and upon the same authorities, respondent's Exhibit A, which purported to be an account book kept by the respondent, was properly received in evidence, and its admission was not in effect permitting the plaintiff to testify to a transaction with the deceased. The judgment will be affirmed.

HOYT, C. J., and SCOTT and ANDERS, JJ., concur.



## ROTH v. UNION DEPOT CO.

(Supreme Court of Washington. Jan. 27, 1896.)

## RAILROAD COMPANIES—INJURY TO PERSONS ON TRACK—LIABILITY FOR NEGLIGENCE—GROSS NEGLIGENCE—IMPUTED NEGLIGENCE—EXCESSIVE DAMAGES.

1. Where from 50 to 100 people, daily, for four or five years, use a railway track for foot travel, with the acquiescence of the railroad company, such acquiescence creates a right, which imposes on the company a duty of ordinary diligence to avoid injury to persons so using the track.

2. Where a railroad company, because short of help, detaches cars from its switch engine, and permits them to run, unattended, at a rapid rate, down a grade and around a curve, out of sight of its employes, over a track used daily by from 50 to 100 people as a pathway, it is guilty of gross negligence.

3. A child cannot be held to the same degree of care in avoiding danger as an adult, and the care or caution required is according to the capacity of the child, to be determined, ordinarily, by its age.

4. In an action for injuries to a child, brought for the child's benefit, the negligence of its parents cannot be imputed to it.

5. A judgment for \$15,000 in favor of a child nine years old, for the loss of one leg, is not excessive.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Albert John Roth, an infant, by Frank Roth, his guardian ad litem, against the Union Depot Company, for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Cotton, J. M. Ashton, and Lester S. Wilson, for appellant. D. W. Henley and Fenton & Saunders, for respondent.

DUNBAR, J. The defendant is a railway terminal company in the city of Spokane. Its railway tracks and yards lie parallel with the Spokane river, near its north bank, in that city. North of the defendant company's tracks and yards there is an addition to Spokane city, on which lived, at the time the accident alleged in this case occurred, a number of families, variously estimated in the testimony at from 25 to 50. The railway lines and switches of the appellant ran in a westerly direction across Washington street, at a right angle therewith, and near the north bank of and parallel with the Spokane river, and ran northerly from Washington street, thence in a northwesterly direction, making a short curve around a high bluff of rocks, and thence in a straight line to and beyond the east line of Mill street, of said city, extended north. At a point east of the east line of Mill street, so extended, the appellant had located a switch, from which diverged several side tracks, running parallel with each other, in an easterly direction, around said sharp curve. The railway tracks on the said switches were located on a down grade from Mill street, in an easterly direction, around the said sharp curve; and cars detached from an engine above

the switches would, by reason of the down grade, run of their own momentum down to and across Washington street at a rapid speed. For many years before the construction of appellant's yards at this point, the people residing north of the appellant's right of way were in the habit of using several footpaths, which converged into a well-defined path as they reached the appellant's right of way near Howard street, and the people residing between Washington street and Mill street were accustomed to go to the south side of the river by these footpaths, which converged into one path near Howard street, and thence directly down the right of way of the appellant to Washington street; and there was also a path leading across the tracks of appellant, running along the north bank of the river to Washington street; but, after the construction of appellant's tracks, the path leading from the tracks along the north bank of the river was abandoned as a footpath, and the people residing north of the tracks, after reaching the tracks, used the right of way of the company until they reached Washington street, it being a more convenient and shorter route to the city than any other way they could travel. It is insisted by the respondent, and the testimony shows without any doubt, that the appellant, and its servants and agents operating its cars at this point, knew of the existence of this footpath, and that the people of all ages residing to the north of the track were accustomed, at almost every hour of the day, to use this footpath and the right of way of appellant from the point where the path entered the right of way to Washington street; that it was not only used by people who lived north of the tracks, but that it was used indiscriminately. On the 12th day of April, 1892, the plaintiff and respondent, Albert John Roth, a boy nine years of age, while going down through this path on the right of way of appellant, was knocked down by a car, the wheels of which passed over one of his legs, crushing it so that amputation of that limb became necessary. It seems that the appellant's agents, in switching the cars, sometimes, when help was short, instead of sending an engine down with the empty car, would, in railroad parlance, "kick" the car, and let it go down the track unattended by a brakeman; that it was not the usual way to send the cars unattended by a brakeman, but that they sometimes did so; and it is conceded that that was the manner of switching the cars at the time of this accident. It seems that, at the same time that the respondent, who was in company with his sister and another boy of about his own age, came down the path, two cars were "kicked" down the track behind them on appellant's tracks, and the respondent, in order to avoid being injured by one of these cars, started to cross one of the tracks, and in doing so was run over by a car going down the track which he was attempting to cross. By reason of the close proximity of these

cars, he became confused, and in attempting to escape from one, was run down by the other. Neither of these cars was attended by any person, but they were "kicked" down, through the cut around the sharp curve, out of sight of the employes who "kicked" them, and they acquired a considerable speed by reason of the down grade of the track. It is conceded that there was no brakeman or any person along the track to look out for the cars, or to warn any person who might be on the track way of danger. The respondent, at the time of the injury, lived with his father and mother, north of the track, and was accustomed daily to go to the south side of the river to sell newspapers to support himself and his family. An action was brought in his interest, by Frank Roth, his guardian ad litem, and a verdict was rendered for \$15,000 damages. Judgment followed, and an appeal has been taken to this court.

The overwhelming weight of testimony is to the effect that, for three or four years immediately preceding this accident, it had been the custom of the people north of the track, and of others, to use this right of way as a footpath; that from 50 to 100 people passed over it daily; that this custom was known to the appellant; that it made no objection to it; and that it posted no notices warning people not to travel upon the path. There was some little testimony offered in defense to the effect that people had been told not to go through there, but this was a question of fact, which was submitted to the jury, and, under the testimony, they were amply justified in coming to the conclusion that the travel was as alleged by the respondent. This condition of things was testified to, not only by numerous citizens, but by many of the employes of the company, or men who were employes during that time. One witness testified, "They used it just about the same as you would a sidewalk;" another, that persons traveling over this route could be seen every hour in the day. Witness L. N. Davis, who had worked for the company, and who lived in that neighborhood, testified, "Well, there is people, most all the times you would look out, traveling; especially at train time you would see them, all kinds of ways, going; see them taking little wagons, hauling trunks through there, and baby carriages, and everything." This witness testified that that was the main pathway of all the people north of the track. So that the essential question in this case is, was the respondent a licensee or a trespasser at the time he was traveling on the appellant's right of way, or does an acquiescence by a railway company in travel on its right of way imply a license? for it is an admitted fact in this case that the respondent was not there by special invitation of the appellant, that he was not there for the benefit of the appellant, but that he was there simply for his own convenience and pleasure. A number of

cases are cited by the appellant to sustain the contention that, notwithstanding the fact that a railroad company acquiesces in such travel by the public, and does not take any steps to stop them, no implied consent to such use is established, and that such acquiescence does not vary the company's duties as to trespassers; and it may be conceded at the outset that a railroad company does not owe any duty to a trespasser, for there is no presumption that a trespasser, or a person without consent, actual or implied, will be upon the track.

We have carefully examined the cases cited by the appellant, and a majority of them we think can be easily distinguished from the case at bar. The case of *Chenery v. Railroad Co.*, 160 Mass. 211, 35 N. E. 554, was an action for running down the plaintiff at a point on defendant's track where it was crossed by a private way, along which she was traveling. The court instructed the jury that, as a matter of law, if people were accustomed to cross a railroad track at a certain place, and the company made no objection, license from the company was implied, and that such a license imposed a duty to use reasonable care to protect the crossers; and the court in that case simply held that this was a question of fact for the jury to determine. *Railway Co. v. Phillips*, 112 Ind. 59, 13 N. E. 132, was a case where a track was laid upon a public street, and the court held that the rights of the public and the railroad company respecting the use thereof were mutual, though those of the latter were paramount; that a person was not a trespasser who walked along such track, and if in so doing his foot became fastened in an opening which existed by reason of the negligent construction of the track, and he was run upon by a train of the railroad company which was negligently managed, he being without fault, the railroad company was liable for the injury sustained. This was what was decided in this case, though the court indulged in a general discussion of the subject involved in the present case, and said that, on the hypothesis that the place where the person received his injury was exclusively the roadway of the company, something must be superadded to the negligence of those in charge of the train in order to justify a recovery, and that a trespasser had no right to exact care from a railroad company. The question of license or acquiescence did not arise in that case, and was not discussed, and we can see nothing in the case, either of dicta or decision, which bears upon the case at bar. In *Railway Co. v. Brown* (Tex. Sup.) 18 S. W. 670, the court held that evidence that a person had been in the habit of traveling on a track, and that the engineer had seen persons on that part of the track, but no more frequently than on other parts of the track similarly situated, and that no measures had been taken to prevent such use of the track, was not

sufficient to establish a license to the public to use the track. In that case the locality was remote from any station, and the court especially announced in its decision this fact, and the further fact that there was nothing in the facts of the case to show that the company assented to or knew of the use of the track by others, and that the facts of that particular case were not sufficient to establish an implied consent to the use of the track on which a license could be assumed to have existed, and the further fact that there was nothing in the testimony to show any acts of negligence on the part of the appellants, but, on the contrary, that it showed an entire absence of negligence,—a different case from the one under discussion, where the track was in a thickly-settled locality, and where a uniform travel by the public had been established for a period of from three to four years. Persons are seen, not infrequently, by engineers, traveling on tracks in country places, and in districts where frequent travel is necessarily impossible; and, of course, the knowledge that a person occasionally traveled upon a track in such a place as that would not be sufficient to establish a license to the public generally,—and that is all that was decided in that case. *Railroad Co. v. Brinson*, 10 Ga. 207,<sup>1</sup> seems to be a miscitation, as the case is not reported in that volume. *Gaynor v. Railroad Co.*, 100 Mass. 208, simply decides that this is a question for the decision of the jury. In the case of *Railroad Co. v. Hummell*, 44 Pa. St. 375, there is no question of license or acquiescence discussed. The court held, in rather rabid language, that there was an intrusion upon the rights of the railway company; that the company had no reason to suppose that either man, woman, or child might be upon the railroad where the accident happened; that it had a right to presume that no one would be upon it, and to act upon the presumption. The main contention there was that the company did not blow the whistle of the locomotive. The court held that they were not bound, under the circumstances of that case, to do so. But this case is mentioned and distinguished by other subsequent cases in Pennsylvania, which hold that a license could be established by acquiescence. *Davis v. Society*, 129 Mass. 367, was a case where a woman had been invited to attend a meeting held at a house of worship, and was injured by reason of the dangerous condition of the society's premises; and the court held that whether the plaintiff was in the exercise of due care, or whether the way was reasonably safe, were questions of fact for the jury. The case in no way bears upon the case under discussion. *Benson v. Traction Co.*, 77 Md. 535, 26 Atl. 973, was a case where the principal of a school had asked permission for a class of students to visit the company's

power house, for the purpose of viewing the machinery; and in passing through the power house one of the students fell into a vat of boiling water; and it was there very properly held that the traction company was under no obligation to especially provide against accidents. The court, in its discussion of the question, quotes the case of *Hounsell v. Smith*, 7 C. B. (N. S.) 738, which case is quoted in several subsequent cases, where the court said, "Suppose the owner of land near the sea gives another leave to walk on the edge of the cliffs,—surely, it would be absurd to contend that such permission cast upon the former the burden of fencing." But this case can have no bearing upon the question discussed here. It certainly would not impose the burden of fencing; but if, after he had given a person permission to walk on the edge of the cliffs where there was a single path, and no way of escape from it accessible, he had sent a blind car down the path after him, a different liability might reasonably have been established. *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, decided that where a woman went to a building for her own convenience to inquire about a matter which concerned herself alone, she could not recover from the owner of the building for injuries received by striking her head upon a projecting sign placed on a post at the corner of the landing. This case seems to us clearly not to be in point. *Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182, was a case where the members of a fire patrol forced open the door of a building then on fire, and entered the main floor and basement; and, while using an elevator, the rope broke, and one of the patrolmen was injured. The owner of the building was not present, and did nothing to induce the entry. The court held that the owner of the building was not liable to the party injured, although the elevator and its appliances were not safely constructed and maintained. The court in its opinion says, "There is nothing in the case to indicate an invitation, either express or implied, to either enter the premises or use the elevator, and, there being no invitation or inducement on the part of appellee, no duty was imposed upon him to leave the elevator in such condition, when the building was closed at night, as that it could be operated with safety." It would seem that it would be stretching the law to hold that the owner of a building would reasonably contemplate an emergency such as the burning of the house, and that, by reason of the contemplation of such emergency, he should be held to have invited the patrolmen to use a dangerous appliance. The case of *Railway Co. v. Schwindling*, 101 Pa. St. 258, involves no question of license. The case of *Wright v. Railroad Co.*, 142 Mass. 296, 7 N. E. 866, may tend to support the contention of the appellant, though it does not very clearly appear from the opinion what the real circumstances of the case were, or what

<sup>1</sup> See 70 Ga. 207.

the court would have held under the circumstances of this case. The case of *Railroad Co. v. Godfrey*, 71 Ill. 500, seems to decide squarely in favor of the appellant's contention that the simple acquiescence of a railroad company in the use of its track or right of way, by persons passing along it, as a footway, does not give such persons a right of way over the track, and does not impose upon the company the duty of protecting or providing safeguards for persons so using its grounds; and this case was followed by the supreme court of Illinois in the case of *Blanchard v. Railway Co.*, 128 Ill. 416, 18 N. E. 799, and the supreme court of Maryland in the case of *Baltimore & O. R. Co. v. State*, reported in 19 Am. & Eng. R. Cas. 83. These cases hold that the relative rights of the railroad company and the injured party are not changed by reason of the acquiescence on the part of the company in the use of its track or right of way, and it follows from the logic of the cases that the company would be held responsible only for such gross negligence as indicated willfulness. The case in 71 Ill. 500, cites, in support of its conclusion, the case of *Railroad Co. v. Hummell*, supra, and *Gillis v. Railroad Co.*, 59 Pa. St. 129. We think the Illinois supreme court mistook the logic of those cases; and such was the opinion of the supreme court of Pennsylvania, which reviewed the *Hummell* and *Gillis* Cases in the case of *Kay v. Railroad Co.*, 65 Pa. St. 269, and in some subsequent cases, and distinguished them from a case where license by user had been established.

Probably the strongest case supporting the views contended for by the appellant is the case of *Glass v. Railroad Co.*, an Alabama case reported in 10 South. 215, where it was held that the fact that persons living in the neighborhood of a railroad track are accustomed to walk upon the track without objection of the company does not make them any the less trespassers; that, where such track is used without the direct consent of the company, the company could be held only for negligence amounting to wantonness or an intention to inflict injury; and further held that such wantonness and intention could not be inferred unless the employes actually knew of the peril of the decedent, and failed to make reasonable effort to avert it. We think that all the cases cited can be distinguished, possibly, from the case at bar, so far as the doctrines announced are concerned, excepting this one; and this court, we think, went too far in holding that wantonness could not be inferred unless the peril of the decedent was actually known to the employes of the company. Conceding, for the moment, the doctrine that the plaintiff in this case was a trespasser, and conceding, further, that the defendant could be held only for gross negligence, we think the circumstances of this case did most emphatically indicate gross

negligence; and we are of the opinion that, under the circumstances of the case, the defendant ought to be held to have presumed that when it threw a car out of its sight around a curve, on a down grade, in a thickly-settled community, where it had knowledge that its track was used by from 50 to 100 people a day, somebody's life would be imperiled by this careless mode of switching its cars, and that it carelessly and wantonly placed itself in a position where it could not see the peril of the passers-by. The evidence shows that it was not its general custom to switch its cars in this way, but that it did so only occasionally, when short of men. The rule as laid down by many writers is that such a duty is imposed upon a railroad company in operating its trains as would be imposed upon an honest man in the transaction of his business. It seems to us that no honest or humane person would be guilty of transacting his business in the reckless manner in which the appellant in this case transacted its. Duties are relative, and that which would not be a duty under certain conditions would become a most imperative duty under others. The people of modern times hold life and limb in too high regard to allow them to be weighed in the scale with mere convenience or selfish property interests. This is the sentiment of humanity, and a sentiment which ought to be reflected by the decisions of the courts. This appellant, to save the expense of an employé for a few minutes, hurled not only one, but two, blind cars down this right of way, regardless of the fact, which it must have known, under the circumstances, as shown by the testimony, that they were liable to cause the death or permanent injury of some one; and we think that this fact alone establishes gross and willful negligence, notwithstanding the fact that none of the employes saw the danger of the plaintiff in this case; and, of course, under all the authorities, a railroad company is not allowed to run down and destroy a naked trespasser who is upon its track, but is held to be responsible for an attempt to prevent his injury after his peril is discovered. Very much more in accordance with the plainest principles of humanity was the doctrine announced in *Railroad Co. v. Donovan*, 84 Ala. 141, 4 South. 142, viz. that those who are operating a railroad in a town or city, or through a thickly-populated district, where there is occasion for people to pass along the track, and a usage to that effect, owe the duty of keeping a vigilant lookout for such persons at such places. See, also, *Glass v. Railroad Co.*, supra. The two Illinois cases which we have just noticed seem to have lost sight of the doctrine of comparative negligence, which was announced by the supreme court of Illinois in the case of *Railroad Co. v. Hammer*, 72 Ill. 347, and the opinion in 71 Ill. 500, supra. must be construed somewhat with reference

to the principles enunciated in the later case, where it was held that, while it was negligence for a person to travel on the track of a railroad at its depot grounds, where everybody had notice that cars were constantly passing and engines switching cars, it was also negligence on the part of the company to have flying switches passing on a track, without an engine attached or a bell ringing or a whistle sounding; and, where both parties were at fault in these respects, it was for the jury to determine, under all the circumstances, whether the negligence of the plaintiff was slight and that of the defendant gross; and, if the negligence of the plaintiff was slight and that of the defendant gross, that the plaintiff could recover. The court, in that case, announced that the rule had not been at all times accurately stated, and that, inadvertently, courts had laid down the rule that a plaintiff who was guilty of negligence could not recover, but that the true rule was that he could recover, notwithstanding his negligence, if his negligence had been slight and that of the defendant gross; that where persons go upon or pass over the grounds connected with railroad depots, they are presumed to know that the place is dangerous, and hence are required to use care and prudence commensurate with the known dangers of the place; but that, on the other hand, the servants of the company knowing that it is a place where persons are constantly passing, their duty to exercise caution and prudence is also enhanced. "In such places," says the court, "they must use more effort and precaution for the preservation of life and limb than at places where persons have no right to be, and the employes have no right to expect them. While the great commercial and business interests of the country demand their protection, still the lives and personal safety of persons are paramount. All other circumstances must yield to this, the first and greatest and most important of all rights, for which governments are organized and laws enacted." The court does not stop with the announcement that they must use more effort for the preservation of life and limb at such places than at places where persons have no right to be, but coupled with that is the further provision that they must use more precaution than at places where they have no right to expect to find persons. In the case at bar, they did have a right to expect to find people on this track, where these two insensate objects were sent, without control, notwithstanding the fact that people had no legal right to be there.

In opposition to the doctrine announced by these few cases, however, we cite, first, the case of *Kay v. Railroad Co.*, 65 Pa. St. 269, where it was held directly that the company had the right to detach cars and send them on, without a brakeman, out of sight around a curve, but that this would be different when, by license to others and by sufferance,

they permitted the public to enjoy a privilege of passage which would bring them into danger. It is true that in this case certain privileges were granted over the right of way to certain persons, for the purpose of unloading and shipping lumber, but this privilege was not granted to the plaintiff nor to the public in general, and cannot affect the principles announced in the decision. This was a case where a woman carried her 19 months old child with her to where she went to wash, near the railroad track. After having crossed over the track to get some water, she set the child down before a chair, and engaged again in washing. In three or four minutes, she missed the child. It had strayed upon the track, and was run over by a lumber car, which was detached and sent around a curve in the siding, on a slight down grade, unattended by a brakeman. Both of the child's arms were so crushed that they had to be amputated. "Conceding the right of the railroad company," said the court, "to the exclusive use of its tracks over the lot, \* \* \* the true question is whether the circumstances created a different duty. The ownership of the lot gave to the company the right to use it as the most convenient and expedient in moving its cars; and no one can gainsay the right to detach and send cars ahead without a brakeman, even out of sight and around a curve. But the case is altered when, by a license to others, they have devoted this ownership to a use involving their interests and their safety, and, by sufferance, permitted the public to enjoy a privilege of passage which might bring their persons into danger." The court then, after noticing the fact that the way was used to unload lumber, proceeds to say: "It also suffered its track to be used by the neighboring population as a way across the lot from one part of the city to another. \* \* \* The presumption of a clear track at this place could not reasonably arise, \* \* \* but greater precaution against injury to those thus permitted to use the lot and the tracks of the company became a duty." And, in speaking of the negligence in sending the car round the curve where people were liable to pass, the court said: "Its only purpose was to save a few hundred feet of travel to the engine, by detaching it from the car when in motion, and stopping the engine before it reached the switch, in order to permit it to run forward on the main track to hitch onto other cars. To save this short time and distance, a life was periled, and a serious injury inflicted." And the court, as we have before indicated, in reviewing the instructions of the court below, who relied upon the cases of *Railroad Co. v. Hummell*, and *Gillis v. Railroad Co.*, supra, distinguished those cases from the case then under consideration, and found that the trial court had erred in applying the principles enunciated in those cases to the case at bar; and, in quoting from the language of the court in the *Hummell*

mell Case, this expression, "precaution is a duty only so far as there is reason for apprehension," says that that is the very feature which distinguished that case from the case under discussion. So, in this case, accepting that maxim, that "precaution is a duty only so far as there is reason for apprehension," and applying it to the circumstances of this case, it must be convincing to the mind of every reasonable person that there was reason for apprehension that a car, thrown around this curve, unattended, under the circumstances of the travel proven, would do incalculable damage to some traveler. *Hooker v. Railroad Co.* (Wis.) 44 N. W. 1085, was a case where a woman was walking across a high trestle, accompanied by two children. It was conceded that she was not there in the interest or for the benefit of the railroad company, but that she was there simply for the purpose of amusing and entertaining the children, and that they had to walk across this bridge or trestle on ties. While on the bridge, they were overtaken by a passing train, and were all killed. The testimony tended to prove that the bridge, for many years, and up to the time of the accident, had been habitually and constantly used, by men, women, and children, going back and forth through that part of the city, as a foot pathway, without any objection or warning by the company that it should not be so used, until after the accident. The court held that, by reason of said acquiescence in the travel of the public, Mrs. Dacey, who was using the bridge with the children, was not a trespasser; that she was using it properly and lawfully, and that the defendant should be held to the ordinary rule of negligence. In *Swift v. Railroad Co.*, 25 N. E. 378, a New York case, it was held that the acquiescence of a railroad company in the habit of certain persons crossing its track at a place not a public highway amounts to a license, and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury; that the sufficiency of the warning required at such crossings is a question for the jury. The court, in the course of its opinion, says: "The legal principles applicable to the facts appearing here have been frequently enunciated by this court, to the effect that, where the public have, for a long time, notoriously and constantly, been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad company, such acquiescence amounts to a license, and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury." It will be noticed that in these last two cases there is no question of any affirmative action on the part of the companies in granting licenses to people to travel on their tracks, but the decisions were based squarely

upon the doctrine of acquiescence. In the case of *Troy v. Railroad Co.* (N. C.) 6 S. E. 77, the same principle was decided, and the court there, in discussing the proposition, and noting the contention of the defendant that the plaintiff's intestate was a trespasser in being wrongfully on the track, and that the injury was the result of his own wrong,—in which case *Bacon v. Railroad Co.*, 15 Am. & Eng. Ry. Cas. 409, was cited,—said: "We think that, upon a careful examination of the cases cited by counsel for the appellant, it will be found that in the most of them the injury was the result of the contributory negligence of the party injured, proximately causing it, and not resulting directly from the negligence of the defendant; and, where they have gone beyond this, they are not in accord with the rulings of this court, nor in harmony with the current of authority;"—citing *Byrne v. Railroad*, 104 N. Y. 362, 10 N. E. 539, where it was said that "when the public, for a series of years, had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted to a license or permission to cross at the point, and imposed the duty upon it, as to all persons so crossing, to exercise reasonable care in the movement of its trains, so as to protect them from injury." To the same effect are: *Kelly v. Railway Co.*, 28 Minn. 98, 5 N. W. 588; *Barry v. Railroad Co.*, 92 N. Y. 289; *Railroad Co. v. Troutman*, 6 Am. & Eng. Ry. Cas. 117; *Taylor v. Canal Co.*, 113 Pa. St. 162, 8 Atl. 43. In the last-mentioned case, the court, quoting from *Barry v. Railroad Co.*, 92 N. Y. 289, said: "The company had a lawful right to use the tracks for its business, and could have withdrawn its permission to the public to use its premises as a public highway, assuming that no public right therein existed; but, so long as it permitted the public use, it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated, to prevent wayfarers from injury. \* \* \* The company, in such case, is an actor, at the time, in creating the circumstances which imperil human life; and it would be an alarming doctrine that it was under no duty to exercise any care in the movement of its trains." See, also, *Delaney v. Railway Co.*, 33 Wis. 67; *Davis v. Railway Co.*, 58 Wis. 646, 17 N. W. 406; *Townley v. Railway Co.*, 53 Wis. 626, 11 N. W. 55; *Barry v. Railroad Co.*, supra. In fact, the overwhelming weight of authority seems to be to the effect that acquiescence creates a right, which imposes upon the railroad companies the duty of ordinary diligence; and, as the instructions of the court on this proposition were all based upon this theory, and the objections to such instructions were based upon the opposite theory, it is not necessary to specifically review them. It is sufficient to say that we think the instruc-

tions were given in accordance with the great weight of authority.

And the instruction in regard to contributory negligence, we think, was also properly given. By the overwhelming weight of authority, a distinction is made between the responsibility of a child and that of an adult. It seems to us that it would be a monstrous doctrine to hold that a child of inexperience—and experience can come only with years—should be held to the same degree of care in avoiding danger as a person of mature years and accumulated experience. In the simplest transactions of life we recognize this distinction. It is recognized by the law in all of the turntable cases. It was recognized by this court in the case of *Navigation Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, where it was held that the testimony of the company that it had been in the habit of leaving the turntables unlocked (in an action against such company for the death of a child of tender years) was not admissible. No court would hold that an adult who would deliberately put his feet down between the wall and a turntable when it was in motion, so that they would be ground off, was not guilty of contributory negligence. His experience would naturally teach him better. But everybody, and especially people who are employing dangerous agencies, must deal with children just as they are, and must take notice of their lack of judgment and lack of experience. The care or caution required is according to the capacity of the child, and this is to be determined, ordinarily, by the age of the child. In the case of *Mowrey v. Railway*, 51 N. Y. 666, the court said: "The old, the lame, the infirm, or the young are entitled to have their condition and ability, mental and physical, considered in diminution of the degree of care exacted of them." The rule is, however, laid down by *Shear. & R. Neg. § 73*, as follows: "It is now settled, by the overwhelming weight of authority, that a child is held, so far as he is personally concerned, only to the exercise of such a degree of discretion as is reasonably to be expected of children of his age." Another point made by the appellant is that it was not allowed to show that the accident was caused by the negligence of the parent. This being an action brought for the benefit of the child, and not for the benefit of the parent, the negligence of the parent cannot be imputed to the child. The only remaining question is as to the amount of the judgment recovered. It is contended by the appellant that the amount of the verdict is excessive, showing prejudice and passion on the part of the jury. We are not willing to say that \$15,000 will more than recompense the plaintiff for hobbling through life maimed and disfigured. We are aware that many courts have held, in similar cases, that the amount of this verdict was excessive, but we think it probable that if such injuries had happened to the judges themselves, or to mem-

bers of their families, their views as to excessive damages would have undergone a radical change. The judgment will be affirmed.

SCOTT and GORDON, JJ., concur.

RICHARDS v. KLICKITAT COUNTY et al.  
(Supreme Court of Washington. Jan. 18, 1896.)

COUNTY—FUNDING INDEBTEDNESS—ELECTION—NOTICE—REBATE ON TAXES—WARRANTS—VALIDATION—BONDS—HARMLESS ERROR.

1. Under Laws 1895, c. 170, § 1, providing that any county having outstanding indebtedness evidenced by warrants, whether issued originally within the limits of the constitution of the state or of any law thereof, or whether such outstanding indebtedness has been or may hereafter be validated, may provide for funding the same, a county has authority to fund outstanding warrants issued before the adoption of the present constitution.

2. And said county may fund warrants issued on the day of the adoption of the constitution for indebtedness incurred prior thereto.

3. An election to validate certain outstanding indebtedness was not void because the board of county commissioners, in its resolution calling for the election, did not provide that notice of said election should be given, and did not designate a newspaper in which such notice should be published, where the notice was actually given in a newspaper having the largest circulation in the county.

4. An election to validate county warrants of indebtedness which were submitted to the voters in separate classes was not rendered ineffectual by reason of the fact that the indebtedness, as set forth in the resolution and notice of election, did not in all respects agree with the amounts actually outstanding.

5. Outstanding warrants issued as rebate on taxes which a county had no right to collect need not be validated.

6. As Laws 1895, c. 170, requires that bids for bonds to fund outstanding county indebtedness shall be made by the series, separately, and the notice for bids correctly stated the series, the amount of each series, and the time that each series was to run, the fact that there was a mistake in the notice as to the total amount of the bonds was harmless.

Appeal from superior court, Klickitat county.

Action by I. C. Richards against Klickitat county and others to enjoin the county from issuing bonds to fund certain outstanding indebtedness against the county. From the judgment rendered, plaintiff appeals. Affirmed.

George A. Hurd, Coleman & Quinby, and W. B. Presby, for appellant. C. H. Spalding, for respondents.

DUNBAR, J. This is an action brought by a taxpayer of Klickitat county to enjoin the county from issuing negotiable bonds to fund certain outstanding indebtedness of the county. A portion of the warrants attempted to be funded were outstanding at the time of the adoption of the state constitution; certain other of the warrants were issued on November 12, 1889, the date of the adoption of the

constitution, for services rendered to the county prior to November 1, 1889, the claims for which services were duly audited, allowed, and ordered paid, prior to the date of issuance; third, warrants issued between November 12, 1889, and March 9, 1893. It is conceded that the warrants outstanding at the time of the adoption of the state constitution were issued for county purposes, and were within the legal limit of indebtedness, as defined by the laws governing county indebtedness at the time of their issuance. The warrants issued between November 12, 1889, and March 9, 1893, and outstanding, it is conceded were issued in excess of  $1\frac{1}{2}$  per cent. of the assessed valuation of the county, but such warrants were attempted to be validated under the act of March 9, 1893, entitled "An act to enable counties to validate certain indebtedness attempted to be incurred on the part of such counties by the corporate authorities thereof in excess of their legal authority." Laws 1893, p. 181. The county commissioners, under this act, on the 7th day of July, 1894, by resolution, ordered a special election to be held on the 4th day of September, 1894, for the purpose of submitting to the qualified voters of Klickitat county the question of validating this indebtedness. The election was held in pursuance of said resolution. More than three-fifths of the qualified electors of the county voting at this election voted in favor of validating the warrants submitted to their consideration at such election.

We do not think the contention of the appellant that the county has no power to fund these outstanding warrants can be sustained. It is true that a portion of these warrants were issued prior to the adoption of the state constitution. But we think that a reasonable construction of chapter 170 of the Laws of 1895, "An act providing for authorizing counties, cities and towns to issue bonds to fund outstanding indebtedness," must lead to the conclusion that such warrants and such indebtedness, were contemplated by that act. The first section of the act provides that "any county, city or town in the state of Washington which now has or may hereafter have an outstanding indebtedness evidenced by warrants or bonds, whether issued originally within the limitations of the constitution of this state, or of any law thereof, or whether such outstanding indebtedness has been or may hereafter be validated or legalized in the manner prescribed by law, may, by its corporate authorities, provide by ordinance or resolution for the issuance of funding bonds with which to take up and cancel such outstanding indebtedness in the manner hereinafter described." These warrants represent an indebtedness against the county as certainly and effectively as though they had been issued after the inauguration of the state government. They have to be considered in determining the indebtedness of the county, and it was no doubt the intention of the law to provide for their disposition in the same manner as warrants that

were issued subsequent to the adoption of the state constitution.

Here we may, out of its order, dispose of the contention that the warrants issued upon the 12th of November, the date of the adoption of the state constitution, being concededly warrants issued for services rendered prior to the date of their issuance, fall within the same provisions of law as do warrants which were issued prior to the date of the adoption of the constitution. See *Childs v. City of Anacortes*, 5 Wash. 452, 32 Pac. 217.

It is objected by the appellant that the third class of warrants were not validated, for the reason that the board of county commissioners did not specify, in their resolution calling for the election, that notice of said election should be given, and did not designate a newspaper of general circulation in the county in which notice of such election should be published; and, second, because the several classes of indebtedness, as set forth in the resolution and notice given of the election, do not in all respects agree with the amounts that were actually outstanding in the different classes. It appears from the testimony, and is found by the court, that while the resolution omitted the mentioning of the newspaper and the direction of the notice, notice was actually given in a newspaper in the county, which newspaper was not only a paper of general circulation, but, as conclusively appears, was a newspaper of the largest circulation of any paper in the county, and had a larger circulation than all the other papers in the county,—so that the notice to the voters was actually given; and this court, in accordance with universal authority, has so often held that mere irregularities, in question of notice, will not defeat an election, that it is scarcely worth while to enter into a discussion of that question here. See *Williams v. Shoudy* (Wash.) 41 Pac. 169; *Seymour v. City of Tacoma*, 6 Wash. 427, 33 Pac. 1059; *State v. Smith*, 4 Wash. 661, 30 Pac. 1064. In the last-mentioned case this court said: "In all such cases there must appear some substantial reason why courts should interfere to overthrow an election, in the absence of any allegation of fraud to the effect that, had there been a larger number of votes cast, the result would have been different." The result in this case could not have been affected by the omission of the commissioners to specify the notice in the resolution, because the notice—and competent notice—was actually given.

The other objection is equally without merit, for the submission of these warrants for validation was in separate classes, and the voter was notified of exactly the warrants which he was called upon to validate, and he was in no way misled. The only class of warrants which could have been affected, and which was in excess, was that where the outstanding warrants exceeded the amount set out in the resolution, and those were warrants which did not need any validation, being rebate on taxes. This money was illegally col-



lected by the county, on account of excess of taxes levied; was voluntarily refunded by the county, in the shape of warrants in lieu of the money which it had received, and which it confessed had been wrongfully received. See *Hintrager v. Richter* (Iowa) 52 N. W. 188.

So far as the notice for bids for the bonds is concerned, while there was a mistake in the total amount, such mistake misled no one, for the reason that the notice correctly stated the series, the amount of each series, and the time that each series was to run; and, inasmuch as the law provides that bids shall be made by the series separately, the attention of the bidders was called directly to the different series, instead of to the total amount named in the notice, and no bidder could have in any way been misled by this mistake. The judgment, in all things, will be affirmed.

SCOTT and ANDERS, JJ., concur.

#### JUSTICE *et al.* *v.* ELWERT.

(Supreme Court of Oregon. Feb. 10, 1896.)

**CONFLICTING EVIDENCE — REVIEW — MECHANIC'S LIENS — NONCOMPLETION OF CONTRACT — CERTIFICATE OF SUPERINTENDENT — WAIVER.**

1. Findings on conflicting evidence will not be disturbed on appeal, unless clearly against the weight of the evidence.

2. Failure of contractors to complete a building according to contract will not prevent a lien from attaching in their favor for so much of the work as was actually performed according to the contract, where such failure to complete was due to an act of the owner.

3. The owner of a building, by preventing contractors from completing their contract, waives the right to demand, under the contract, the certificate of the superintendent that the work has been completed according to the contract.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Action by J. W. and A. Justice against J. B. Elwert and another. From a judgment for plaintiffs and her codefendant, J. B. Elwert appeals. Affirmed.

B. B. Beekman and E. Mendenhall, for appellant. J. F. Boothe and G. G. Gammons, for respondents.

**WOLVERTON, J.** This is a suit to foreclose a mechanic's lien. The lien is claimed by virtue of a contract, entered into between plaintiffs and the defendant J. B. Elwert, by which plaintiffs agreed to furnish the materials, and do certain painting, graining, and calkmining, for Elwert, upon her buildings at Portland, Or., at the agreed price and consideration of \$285, to be paid 30 days after completion of the work. The work was to be done in accordance with certain specifications, "in a good, workmanlike, and substantial manner, to the satisfaction and under the direction of the said owner or superintendent, to be testified by a writing or certificate under

the hand of the said contractor." While engaged in the performance of this contract, plaintiffs claim that they furnished extra materials and did certain extra work for Elwert, at her instance, of the agreed value of \$132. The claim of lien was filed to secure these two sums, less \$16, allowed as a credit. The defendant F. E. Beach also seeks to foreclose a lien claimed upon the same property, to secure payment of the sum of \$153.76, for paints, oils, and other materials furnished to Justice Bros., and which were used by them in and upon the buildings. The defendant Elwert's defense to Justice Bros.' lien is that they have not performed the conditions of the contract as required by its stipulations, nor secured the certificate of the contractor or superintendent showing performance of the work to his satisfaction. She denies absolutely that Justice Bros. did any extra work at her instance or request, or that she ever agreed to pay them anything therefor. The plaintiffs do not claim to have fully performed the contract upon their part, but insist that the nonperformance was excused by the acts of defendant Elwert; that they completed the work under the contract, in the main, but that defendant forbade and prevented them from performing entirely. The defense against the Beach claim is confined to the legal question as to whether he is entitled to a lien unless it is established that Justice Bros. performed their contract. The court below, among other things, found that plaintiffs had completed their contract so far as they were permitted by Elwert; that she, without cause, refused to allow a full performance, and that plaintiffs were entitled to the sum of \$250 for the materials furnished and work done under the contract. That plaintiffs furnished extra material and did extra work, at the request of Elwert, of the value of \$107, which, with the contract obligation, amounted to \$357, against which Elwert was entitled to a credit of \$86.20, leaving a balance of \$271.80. The court further found that F. E. Beach furnished plaintiffs materials, used in and upon said buildings, of the value of \$149.16, which, being deducted from plaintiffs' claim, leaves a balance of \$122.64, bearing interest from November 20, 1893. As conclusions of law, the court found that plaintiffs have a lien to secure the sum of \$148, and the defendant Beach a lien for \$179.37, which amounts include interest, attorneys' fees, and costs of filing liens. Upon these findings, a decree was entered, and defendant Elwert appeals.

The position of appellant is stated by her attorneys, in their brief, thus: "Upon their face, the notices of lien appear to be sufficient, and we presume no authorities are necessary to support the proposition that, in order to entitle plaintiffs to enforce their lien for work under their contract, they must have performed its conditions on their part to be performed. \* \* \* We claim that, as a matter of law, plaintiffs are not entitled to any lien, for the reason that they have failed to

perform their contract;" and "that if the plaintiffs failed to perform their contract, so as to entitle them to recover, then Beach & Co. are not entitled to any lien." This pertains to the contract and its fulfillment by plaintiffs, considered aside from the said claim for extra materials and labor. The question thus propounded is a mixed one, consisting of both law and fact. The plaintiffs, however, admit that they have not fully performed, but claim that whatsoever has been left undone by them was excused by the acts of Mrs. Elwert. The court below found that she refused to allow or permit plaintiffs to fully comply with the conditions of the contract, which finding appears to be supported by the testimony, although we find much conflict therein. But the court having seen the witnesses, heard them testify, and observed their demeanor while upon the stand, its finding ought not to be disturbed, unless clearly against the weight of evidence. The real question, then, comes to this: Can the lien be maintained without full performance of the contract upon which it is based, where such performance is prevented by the owner, who is a party to the contract? Regarding this proposition, the author of Phillips on Mechanics' Liens (section 138) states the rule as follows: "It is, however, universally true that no loss of lien is occasioned for the work actually performed in accordance with the contract, when the work has been stopped or abandoned in consequence of the default of the owner." To this rule some of the authorities make an apparent exception, in the case of nonpayment of installments by the owner, but it is evidently true that, as to this the contract stipulations may make the payment of such installments conditions precedent, and thus the nonpayment thereof would become a material default upon the part of the owner. See section 138, *supra*. But, where the owner has, by positive acts, as in the case at bar, prevented the full performance upon the part of the contractors, there can be no question but they will have a lien for materials furnished and labor performed, so far as they have in good faith proceeded under the contract. See *Howes v. Reliance Wire Works Co.*, 46 Minn. 47, 48 N. W. 448; *Charnley v. Honig*, 74 Wis. 163, 42 N. W. 220, *Smith v. Norris*, 120 Mass. 63, and *Bank v. Dashiell*, 25 Gratt. 625. And this rule also has a like application in excusing the plaintiffs from the necessity of procuring the certificate of the architect or superintendent showing a satisfactory compliance on their part. The court below found that, as far as plaintiffs were permitted, they had substantially performed, and this finding is warranted by the testimony. Hence, plaintiffs were entitled to their lien for materials furnished and labor performed under the contract, and it follows that Beach is also entitled to his lien. All other findings of fact are in substantial accord with the testimony, and hence the decree of the court will be affirmed.

# DAY v. SCHNIDER et al.

(Supreme Court of Oregon. Feb. 10, 1896.)

## REMOVAL OF CLOUD ON TITLE—PLEADING.

1. Where the statute makes a tax deed prima facie evidence of title, in an action to remove a cloud created by a tax deed, an allegation in the complaint that the tax deed is regular on its face sufficiently shows its apparent validity.

2. In a suit to cancel a tax deed as a cloud on title, naming in the complaint several reasons why the deed is invalid does not render the complaint demurrable as joining several causes of suit.

Appeal from circuit court, Lane county; J. C. Fullerton, Judge.

Action by Thomas Day against Mike Schnider and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

A. E. Wheeler, for appellant. L. Bilyeu, for respondents.

BEAN, C. J. This is a suit to remove a cloud upon the title to the N. W.  $\frac{1}{4}$  of section 22, township 15 S., range 1 E., in Lane county, created by a tax deed. The complaint alleges, in substance, that the plaintiff is the owner and in possession of the real property in question; that the defendant Schnider claims some right or title thereto adverse to the plaintiff, under a sheriff's tax deed of date February 13, 1894, which on its face appears to be regular, and recites that said land was levied upon by the sheriff as the property of Frank Burgess for the taxes of 1890, amounting to \$7.20, and on the 5th day of February, 1892, sold the same to defendant for the sum of \$18.85, being the amount of said taxes and accruing costs. It then proceeds, in six separate and distinct paragraphs, to aver facts which, if true, show the deed to be invalid, and a cloud upon plaintiff's title. It further alleges that the plaintiff offered to pay, and tendered to the sheriff of the county, the taxes for the years 1891, 1892, and 1893, but he refused to receive the same, or any part thereof, claiming that the taxes for all of said years had been paid by the defendant Schnider; that, prior to the expiration of two years from the date of the tax sale, plaintiff sought to redeem the land, and inquired both of the sheriff and county clerk how much, or what sum, was required to redeem the same, but that both of said officers refused to make or permit redemption to be made, but referred him to the defendant, who held the certificate of sale, and who also refused to make or allow redemption thereof to be made, or to say for what sum he would relinquish his claim thereto; that since the execution of the tax deed, and prior to the commencement of this suit, the plaintiff offered and tendered to defendant the entire amount paid by him on account of his purchase, with 20 per cent. per annum interest on the original purchase price, and 10 per cent. per annum

on all other liquidated charges against said land, for a quitclaim thereto; that he deposited with the clerk of the court \$50, from which the court might reimburse the defendants for such outlay, in case he should be found liable therefor; that any and all payments by defendants for said premises and subsequent taxes thereon have been voluntary on their part, and not at the request or wish of plaintiff, but against his wishes and will; that the reasonable value of said land is \$1,000. A motion and demurrer to the complaint having been sustained, and plaintiff refusing to plead further, a decree was entered dismissing the complaint, from which he appeals.

The only questions necessary to be determined on this appeal are the objections to the sufficiency of the complaint. It is urged by the defendants that the complaint is defective because it does not sufficiently show the apparent validity of the tax title claimed by the defendant Schnider. The general rule, in a suit to remove a cloud from title, is that the complaint must set out the facts which show the apparent validity of the outstanding title, and also those showing its invalidity; but where, as in this state, the statute declares a tax deed to be prima facie evidence of title, the mere naming of the instrument, and alleging that it is regular upon its face, is sufficient to show its apparent validity. Code, § 2823; Black, Tax Titles, § 440; *Loan Soc. v. Ordway*, 38 Cal. 679.

It is next claimed that the motion and demurrer were properly sustained because several causes of suit are improperly united in the complaint. But this contention is without merit. The object and purpose of the suit are to remove a cloud from the plaintiff's title, and the several reasons given in the complaint why the tax deed is invalid do not constitute separate causes of suit. No sufficient reason is suggested by respondents' counsel why the complaint does not state a cause of suit, and none has occurred to us. The decree of the court below will therefore be reversed, and the cause remanded, with directions to overrule the motion and demurrer to the complaint, and for such further proceedings as may be proper and right in the premises.

#### STATE ex rel. MAYS et al. v. MASON.

(Supreme Court of Oregon. Feb. 3, 1896.)

ATTORNEY—DISBARMENT ON CONVICTION OF LIBEL  
—STATUTE—PUNISHMENT—DISCRETION  
OF COURT.

1. Libel is a misdemeanor involving moral turpitude, within Code, § 1047, authorizing the removal or suspension of an attorney on his conviction of a felony or "misdemeanor involving moral turpitude."

2. Under Code, § 1047, authorizing the removal or suspension of an attorney on his conviction of any felony or misdemeanor involving moral turpitude, of which the record of his conviction is conclusive evidence, the court may go behind the record of conviction to determine the extent of the punishment.

3. In proceedings for disbarment of an attorney for conviction of a misdemeanor involving moral turpitude, under Code, § 1047, where it appears that his conviction was against him as proprietor of a paper, for a libel published without his knowledge, he will be suspended for six months.

Proceedings by the state, on relation of F. P. Mays and others, against O. P. Mason, for his disbarment, on the ground of his having been convicted of libel. Judgment of suspension entered.

C. M. Idleman, Atty. Gen., and F. A. E. Starr, for relators. O. P. Mason, in pro. per.

PER CURIAM. This is a proceeding to disbar an attorney, instituted by the state upon the relation of the members of the grievance committee of the Oregon State Bar Association. The facts are that O. P. Mason, a licensed attorney, was indicted, tried, and convicted of the crime of libel, upon proof of the publication of defamatory matter in a newspaper published at Portland, Or., known as the Sunday Mercury, while he was its editor. Whereupon the relators filed an information against him in this court, alleging such conviction, and that the offense of which he was so convicted is a "misdemeanor involving moral turpitude," and prayed a judgment of removal against the accused. The defendant, upon being cited to appear, filed his answer to the information, in which he denies that the misdemeanor of which he was convicted involved moral turpitude, and alleges that he was found guilty thereof by construction of law only, which renders the manager, editor, or owner of a newspaper criminally liable for the publication of a libel, whether he wrote the article or not, or had any knowledge of its publication; that he did not write the alleged libelous article, nor see it or know of its publication until after the newspaper was in circulation. The reply having put in issue the allegations of new matter contained in the answer, the cause was referred to C. H. Sholes, who took and reported the evidence to this court, from which it appears that Mason, upon the argument of a demurrer to said indictment, stated to the court that he had seen the article before it was published, but did not consider it libelous, nor did he at that time so regard it; that at the trial of said criminal action, as a witness in his own behalf, he testified that the statement so made by him to the court was erroneous; that at the time he argued the demurrer he thought he had seen and corrected the proof of the article, but, upon examining the original manuscript, he found he had never seen it, nor did he know of its publication until after the newspaper was in circulation. The foreman of the Sunday Mercury testified that he was acquainted with and knew Mason's handwriting, that he set the type for a part of the article complained of, and that the defendant neither wrote it, nor corrected the proof thereof. No evidence was introduced to contradict Mason's testimony, and hence we

must conclude that it is true, and also that he was convicted by reason of his carelessness, as editor, in suffering a libelous article to be published in a newspaper of which he was editor. *State v. Mason*, 26 Or. 273, 33 Pac. 130. The statute provides that an attorney may be removed or suspended upon his being convicted of a misdemeanor involving moral turpitude, in which case the record of his conviction is conclusive evidence. 1 Hill's Ann. Laws Or. § 1047.

The answer impliedly admits the conviction, the record of which is made a part of the evidence submitted; and this, being conclusive thereof, necessitates an interpretation of the term "moral turpitude." Mr. Newell, in his work on Defamation, Slander and Libel (section 12), in speaking of the term, says: "'Moral turpitude' may therefore be defined as an act of baseness, villainess, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." In actions of libel and slander, moral turpitude has been held to have been involved by imputing to another the commission of the following crimes: Abortion. *Filber v. Dautermann*, 26 Wis. 518; *Bissell v. Cornell*, 24 Wend. 354; *Widrig v. Oyer*, 13 Johns. 124. Adultery. *Ranger v. Goodrich*, 17 Wis. 80. Bribery. *Hoag v. Hatch*, 23 Conn. 585. Burglary. *Alfele v. Wright*, 17 Ohio St. 238. Forgery. *Alexander v. Alexander*, 9 Wend. 140. Fornication. *Pollard v. Lyon*, 91 U. S. 225. Keeping a bawdyhouse. *Martin v. Stillwell*, 13 Johns. 275. Larceny. *Redway v. Gray*, 31 Vt. 292; *Perdue v. Burnett*, Minor (Ala.) 138. Libel. *Andres v. Koppenhefer*, 3 Serg. & R. 254. Removing boundary marks. *Young v. Miller*, 3 Hill, 21; *Dial v. Holter*, 6 Ohio St. 228. It has been assumed, also, by way of argument, that moral turpitude is not involved in the commission of the following misdemeanors: Assault and battery, breaches of the peace, forcible entry and detainer, trespass, and sales of intoxicating liquor without a license. *Redway v. Gray*, supra; *Smith v. Smith*, 2 Sneed, 473; *Andres v. Koppenhefer*, supra. No unintentional wrong or improper act, innocent in purpose, can involve moral turpitude. *Pullman Palace-Car Co. v. Central Transp. Co.*, 65 Fed. 158. The term lacks precision, and necessitates the examination of the works of moral and ethical authors, rather than the textbooks of legal writers, to ascertain whether a given case falls within or without the rule. *Skinner v. White*, 1 Dev. & B. 471; *Birch v. Benton*, 26 Mo. 153. In *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, Mr. Justice Blatchford, commenting upon an ultra vires contract, says: "The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party re-

ceiving may be made to refund, to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received." So, too, in *Spring Co. v. Knowlton*, 103 U. S. 49, Mr. Justice Woods, commenting upon a similar contract, says: "It is to be observed that the making of the illegal contract was *malum prohibitum*, and not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud." "This element of moral turpitude," says Lowrie, J., in *Beck v. Stitzel*, 21 Pa. St. 522, "is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community." An assault and battery is a crime *malum in se*, the commission of which rarely involves moral turpitude. *McCuen v. Ludlum*, 17 N. J. Law, 12. It is apparent from the foregoing authorities that the term is vague, and that moral turpitude is involved only when so considered by the state of the public morals, and hence it might be applied in some sections, and denied in others; thus rendering a satisfactory definition of the term difficult, if not impossible. But inability to properly define the term, however, does not preclude us from saying that it is, and of necessity must be, involved in the willful publication of a libel. The case of *Andres v. Koppenhefer*, supra, was an action for slander, founded upon the following language: "What is a woman that makes a libel? She is a dirty creature, and that is you. You have made a libel, and I will prove it with my whole estate." It was held that the crime of libel, imputed to the plaintiff, involved moral turpitude; *Tilghman, C. J.*, saying: "The man who wantonly, maliciously, and falsely traduces the character of his neighbor is no better than a felon. He endeavors to rob him of that, in comparison with which, gold and diamonds are but dross." We think there can be no doubt that the willful publication of a malicious libel by the manager of a newspaper, when made either to vent his spleen upon the object of his wrath, or to cater to the perverted taste of a small portion of the public, clearly involves moral turpitude, and manifests, on the part of the libeler, a depraved disposition and a malignant purpose.

The statute prescribes and enumerates the causes which may subject an attorney to the penalty of removal or suspension. Code, § 1047, provides that: "An attorney may be removed or suspended by the supreme court for either of the following causes, arising after his admission to practice: (1) Upon his being convicted of any felony or of a misdemeanor involving moral turpitude, in either of which cases the record of his conviction is conclusive evidence; (2) for a willful disobedience or violation of the order of a court requiring him to do or forbear an act con-

nected with or in the course of his profession; (3) for being guilty of any willful deceit or misconduct in his profession; (4) for a willful violation of any of the provisions of section 1038." This last section prescribes the duties of an attorney. Here is a statutory regulation of the power of the court to strike an attorney's name from the roll. The power itself exists, inherently and independent of the statute, and "is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients." Weeks, Attys. at Law, 154. A proceeding for disbarment is quasi criminal in its nature (Thomas v. State, 58 Ala. 365; State v. Tunstall, 51 Tex. 81), and the statute has fixed the penalty at removal or suspension. While the court must necessarily have a wide discretion in fixing the extent of the punishment to be administered, yet conviction in this court, in a proceeding like this, must be followed by the penalty, as in ordinary criminal cases in other courts after a verdict of guilty by the jury.

Now, as regards the case at bar, the defendant has been convicted of a misdemeanor, and, as has been shown, one involving moral turpitude. The record of his conviction is made conclusive evidence thereof, so that the production of such record established his guilt in the disbarment proceedings. The court may, however, go behind the record, for the purpose of determining upon the extent or severity of the punishment to be administered. To illustrate, we quote from Lord Esher, M. R., in *Re Weare*, 62 Law J. (N. S.) 601,—a recent case from England: "Where a man has been convicted of a criminal offense, that, *prima facie* at all events, makes him a person unfit to be a member of an honorable profession. You must not carry that to the length of saying that, wherever he has committed a criminal offense, the court is bound to strike him off for that."  
\* \* \* Baron Pollock held, and Mr. Justice Manisty held, that although his being convicted of a crime *prima facie* made him liable to be struck off the rolls, yet the court still had a discretion, and must inquire into what kind of a crime it was of which he had been convicted, and that the court might punish him to a less extent than if he had not been so punished. As to striking off the rolls, I have no doubt myself that the court might say, 'Under these circumstances, we shall do no more than admonish him;' or the court might say, 'We shall do more than admonish him, and make him pay the costs of the application;' or the court might suspend him, or the court might strike him off the rolls. The discretion of the court in each particular case is absolute." In that case the court was apparently possessed of a wider discretion than we are here, as it extended to an admonishment of the attorney. Here the penalty is removal or suspension, with

full discretion as to which shall be adopted, and, if the latter, then as to the duration and limitation thereof. So we look behind the record here for the purpose only of determining the punishment that should be inflicted. The fact that the defendant has been convicted in the criminal action, and suffered the penalty thereto attached, and that, in amelioration of the crime for which he was convicted, he has shown that he was only nominally editor of the *Sunday Mercury*, which contained the libelous publication, and was perhaps not cognizant of the contents or insertion of the article until after that number of the paper had been issued, has had large influence with us in softening the penalty incurred. Yet the character of the newspaper with which he allowed his name to be associated was calculated to warn him that he might at any time be subjected to just such a prosecution, and is not such as to commend him for the imposition of a punishment merely nominal. The judgment of the court will therefore be that he be suspended from practicing as an attorney in all the courts of the state for the term of six months, that the state recover of the defendant the costs and expenses of this proceeding, and that the same be paid by the state in the first instance.

#### ARMENT et al. v. YAMHILL COUNTY.<sup>1</sup>

(Supreme Court of Oregon. Feb. 3, 1896.)

#### COUNTIES—CONTRACT FOR PLATS—CONSIDERATION—CONSTRUCTION.

A contract with county commissioners for plats and lists of taxable real estate within the county provided that, as a "consideration," \$50 was to be paid on their delivery; that in addition thereto the contractors were to receive, "for compensation," (1) "An amount equal to the levy of the total tax of 1890 on all such taxable real estate as shall be found unassessed," etc., and (2) "an amount equal to one-half of the levy \* \* \* of the year 1891," etc., payment "to be made from month to month, as the said tax shall have been collected by the sheriff of said county, and placed to the credit" of the contractors. *Held*, that the additional consideration provided was not for the payment absolutely of amounts equivalent to the designated parts of the levies of 1890 and 1891, but for the payment of the designated part of such levies actually collected by the sheriff, payable from month to month, as collected.

Appeal from circuit court, Yamhill county; George H. Burnett, Judge.

Action by J. A. Arment and another against Yamhill county on a contract for making plats and lists of taxable real estate within the county. From a judgment for defendant, plaintiffs appeal. Affirmed.

This is an action to recover upon the following contract, as modified after the date of its execution by the parties thereto, viz.: "This agreement, made and entered into this 8th day of January, A. D. 1891, by and between the county commissioners of Yamhill county, state of Oregon, in regular session

<sup>1</sup> Rehearing pending.

assembled, parties of the first part, for and in behalf of said county of Yamhill, state of Oregon, and W. T. Shurtleff, J. A. Arment, and Paul A. Ozanne, parties of the second part, witnesseth that: Whereas, said parties of the second part have submitted to the commissioners of said county a proposition to furnish said county a list of all the taxable real property lying within its boundaries, and also precinct plats showing the separate tracts and individual ownership thereof, as disclosed by the records of said county; and whereas, said proposition of the parties of the second part has this day been accepted, ratified, and approved by said commissioners, for and in behalf of said county of Yamhill, state of Oregon: Now, therefore, be it known that the conditions of this agreement, to which we, the parties of the first part, for and in behalf of said county, and we the parties of the second part, are held and firmly bound, are as follows, to wit: First. The said parties of the second part, for and in consideration of the sum of fifty dollars, and in further consideration of the conditions hereinafter mentioned, hereby agree to furnish said county precinct plats of all the taxable real property lying within the boundaries of said county, as at present subdivided into precincts, said precinct plats to show the individual ownership of all the taxable real property lying therein, as disclosed by the records of said county at the date of the delivery thereof; said precinct maps not to include the plat of any town or towns lying therein. Second. Said parties of the second part further agree to furnish said county with a list or roll of all said taxable real property lying within said county, and showing the individual tracts and ownership of the same, as disclosed by said precinct plats; said roll book and indices to same, to be furnished by said county. Third. Said list or roll above mentioned to contain a sufficient description of the real property therein described, so that tax deeds may readily be drawn from said descriptions, if found necessary. Fourth. Said precinct plats and roll to be delivered on or before the first day of September, 1891. Fifth. The parties of the second part, in addition to the consideration first above mentioned, are to receive for compensation for such services the following, to wit: 1st. An amount equal to the levy of the total tax of 1890 on all such taxable real property as shall be found unassessed on or after this date, whether found by the said parties of the second part or otherwise, the usual fee allowed the sheriff of said county for the collection of said tax to be deducted therefrom. 2d. An amount equal to one-half of the levy of the total tax of 1891, as made by the county court of Yamhill county for county purposes, less one-half of the usual fee allowed the sheriff of said county for the collection of said tax. 3rd. The parties of the second part shall further be entitled to receive an amount equal to one-half of all

the collectible taxes in arrears for the five years preceding the year 1890 upon all such property as shall hereafter be found unassessed. \* \* \* 6th. The assessment upon all real property hereafter found unassessed shall be fairly and equitably made. 7th. The fifty dollars first above mentioned shall be paid to said second party upon the delivery of said precinct plats and assessment roll, and the remaining payments to be made from month to month, as the said tax shall have been collected by the sheriff of said county, and placed to the credit of said parties of the second part." On March 13, 1891, this contract was modified by substituting township for precinct maps. On September 15th, the time for completing the maps and roll was extended to October 1, 1891, and thereafter clause numbered "3rd" was stricken out. In other respects the contract sued upon remained as executed. It appears from the complaint that the plaintiffs found unassessed 65,471 acres of real property and numerous city and town lots within the county, which the sheriff afterwards assessed for the year 1890 at \$279,366. The tax levy for the year named was 22 mills on the dollar, which would produce \$6,146.05. Deducting the sheriff's fees, \$133.31, there would remain a balance of \$6,012.74. Of this tax so levied the sheriff has collected about \$1,200 the exact amount of which is unknown to plaintiffs. The plaintiffs have been paid out of the general funds of the county \$2,022.94, leaving a balance due them on this account of \$3,989.80. The tax levy for county purposes for the year 1891 was 4.93 mills on the dollar and the entire levy upon such unassessed lands and town lots was \$1,391.24, one-half of which, after deducting the usual fee allowed the sheriff, amounts to \$688.67. Of this \$385.30 has been paid by the county, leaving a balance due from this source of \$303.37. It is alleged that about March, 1892, the defendant and said sheriff ceased all further efforts to collect the tax levied upon said assessments, and that Shurtleff had assigned his interest in the contract to plaintiffs. The prayer is for judgment against defendant for \$4,293.17, and costs and disbursements. The complaint contains other allegations pertinent to the cause, but the foregoing statement of the facts is sufficient, under the view we take of the contract, to give the reader a proper understanding of the opinion. A demurrer was interposed, which being sustained, judgment was entered dismissing the complaint, from which plaintiffs appeal.

O. P. Coshow and R. T. Platt, for appellants. W. M. Ramsey, for respondent.

WOLVERTON, J. (after stating the facts). The contract which we are called upon to construe was certainly not drawn by the hand of an adept in the business, as, without its modifications, it would seem the

draftsman had been peculiarly felicitous in stating as much of what was not wanted to be stated as that which was pertinent. Even in its present condition, plaintiffs are not claiming under it as its literal interpretation would seem to import. But, like all other contracts in writing, this must be construed by taking it at the four corners and looking through the whole instrument from the identical standpoint of the contracting parties when it was entered into, and that construction must be given it, if possible, which will give effect to all its parts and carry out the obvious intention of the parties, and which will make the contract legal, rather than one that will render it void. *Hildebrand v. Bloodsworth*, 12 Or. 80, 6 Pac. 233; 2 Para. Cont. 500, 505. The parties differ widely as to the proper interpretation of those provisions of the agreement touching the nature and amount of the additional consideration, and the time and manner of its payment by the county, the plaintiffs contending that the "1st," "2d," and "3rd" clauses, read in connection with the "7th," determine the measure of the additional consideration to be an amount equal to the levy of the total tax of 1890 on all such taxable real property as should be found unassessed on or after the date of the contract, plus an amount equal to one-half of the levy of the total tax of 1891, for county purposes only, upon such taxable real property, less the usual fee allowed the sheriff for collection, and that in effect the county obligated itself to pay these amounts, absolutely, at the expiration of a reasonable time within which to make the collections; in other words, that the county incurred an absolute liability by entering into said contract, upon its performance by plaintiffs, to pay under the "1st" clause \$6,012.74, and under the "2d" the sum of \$688.67, all of which was payable, unconditionally, at the expiration of a reasonable time within which to collect the sums named from the taxpayers. Upon the other hand, the defendant claims that the additional consideration which the plaintiffs were to receive was made conditional, and dependent upon the collection of the taxes designated, that the identical money (taxes) collected should be placed to the credit of plaintiffs, and paid to them from month to month, and none other, and that the liability of defendant is commensurate only with the amount of such taxes actually collected. So we are to extract from this contract the nature and amount of the additional consideration provided for, and the time and manner of its payment. The nature and amount of such consideration is the pivotal question, the time and manner of payments are but incidents thereto; yet the provisions of the contract touching the latter are of vital force in determining the former. It will be unnecessary to make a critical analysis of the contract, as the controversy, thus narrowed,

must be determined by the effect of a few controlling elements, considered from the standpoint of the parties at the time of its execution.

The duties of sheriff as tax collector are well known. He is in no way subject to the control and direction of the county court in the exercise of such duties, and can in no way be affected by its action touching the assessment of omitted property and the collection of taxes, except as its exercise of discretionary powers touching settlements with that officer upon his return of the tax rolls, and at the annual accounting required in July of each year, may incidentally affect him. As tax collector, he is not an officer of the court, to execute its orders and mandates, but is simply accountable under the statute and upon his official bond, as other officers known to the law. By clause "6th" the county has stipulated that "the assessment upon all real property hereafter found unassessed shall be fairly and equitably made." Thus far it vouches for the acts of the tax collector, that the assessment when made by him shall be fair and equitable; otherwise it does not undertake that his duties shall be faithfully performed, and especially is it true that the county does not undertake that he shall collect the whole tax to be levied. Taxes of the kind contemplated by the contract,—state, county, and school, and especially the county tax,—are the funds and property of the county in which they are levied. See *Hume v. Kelly* (just decided) 43 Pac. 380. Now, in the light of these conditions, it was stipulated, in contradistinction to the consideration of \$50 which was to be paid absolutely, upon the delivery of the plats and assessment roll, that the parties of the second part are to receive for compensation, in addition to the \$50 payment, "1st. An amount equal to the levy of the total tax of 1890 on all such taxable real property as shall be found unassessed, \* \* \* the usual fee allowed the sheriff of said county for the collection of said tax to be deducted therefrom," and, "2d. An amount equal to one-half of the levy," etc., of the year 1891 for county purposes, with the same provision as to the "usual fee allowed the sheriff." Then comes a stipulation for the payment of these equivalent amounts, which is "to be made from month to month, as the said tax shall have been collected by the sheriff of said county, and placed to the credit of said parties of the second part." We think a reasonable deduction to be drawn from all this is that the additional consideration which the plaintiffs were to receive was made contingent and conditional upon the sheriff's making collection of the taxes named, which should constitute a fund to be set aside by the county for their benefit, and should be paid to them from month to month as collected. If the contract does not mean this, why make and sustain the distinction all the way

through between the two kinds of consideration, and why provide for the collection, setting aside, and payment of a special fund to the plaintiffs? It would have been a simple and easy matter to have provided directly just what the consideration should be. Not having done this, it is but a reasonable inference that no absolute consideration was intended, aside from the \$50 named. Under this construction of the contract stipulation, *Noland v. Bull*, 24 Or. 479, 33 Pac. 983, and other authorities of like tenor relied upon by plaintiffs, can have no application. The doctrine there established is that, "where there is a present indebtedness due absolutely, and the happening of some future event is fixed for a convenient time for payment, merely, and such future event does not happen, the debt is payable within a reasonable time." Here there is no present or absolute indebtedness; indeed, no debt, aside from the \$50, was contemplated; but provisions were made looking to the creation of a fund, to be paid to plaintiffs as it accumulated, and to which they were to look solely for compensation, aside from the consideration first named in the contract. Viewed in the light of this construction of the agreement, the complaint shows upon its face that plaintiffs have been paid even more than they were entitled to, and hence the judgment of the court below will be affirmed.

#### CAWSTON v. STURGIS.<sup>1</sup>

(Supreme Court of Oregon. Feb. 3, 1896.)

**FRAUD — REPRESENTATION AS TO FACTS WITHIN PLAINTIFF'S MEANS OF KNOWLEDGE — REPRESENTATIONS RECKLESSLY MADE — DAMAGES.**

1. A grantee is not precluded from recovery for a fraudulent representation by the grantor as to the number of square feet in an irregularly shaped lot, alleged to have been based on the estimate of a surveyor, on the ground that the means of ascertaining the area was as much within the knowledge of the grantee, who saw the lot.

2. Representations recklessly made as of one's own knowledge, without in fact knowing whether they are true or not, are actionable as fraudulent.

3. In an action against a grantor for fraudulent representations as to the area of the land conveyed, the measure of damages is not the difference in value between the land as it actually existed and the consideration paid therefor, but the grantee may recover such a proportion of the purchase price as the deficiency bears to the represented area.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Sidney H. Cawston against Ira B. Sturgis. There was a judgment for plaintiff, and defendant appeals. Affirmed.

H. M. Cake and E. B. Watson, for appellant. S. R. Harrington, for respondent.

**BEAN, C. J.** This is an action to recover damages. On the 16th of July, 1891, the plaintiff purchased of the defendant a tract of land in Raven's View addition to Port-

land, known and designated on the plat as "lot No. 5," for the sum of \$5,000. His cause of action, as stated in the complaint, is, in substance, that for the purpose of cheating, defrauding, and deceiving him, and inducing him to buy said land, the defendant falsely and fraudulently represented that it contained an area equal to 2½ lots, 50 by 100 feet each; that he had had it measured and computed by a skillful surveyor and engineer; that said representations were known to the defendant to be false and fraudulent, and were made for the purpose of deceiving the plaintiff, and plaintiff relied thereon; that, owing to the irregular shape of the land, plaintiff was unable to calculate its area, but relied solely on the representations of the defendant in making the purchase and paying the consideration; that the said lot did not contain the area as represented, or any greater area than 2 lots, 50 by 100 feet; and, by reason of said false and fraudulent representations, plaintiff claims to be damaged in the sum of \$1,000. The plaintiff also claims damages in a like sum for the failure of defendant to construct and grade the street about said lot 5. The answer denies the allegations of the complaint, and, upon the issues thus joined, a trial was had, which resulted in a verdict and judgment in favor of plaintiff for the sum of \$995 on the first cause of action, and \$1 on the second; and therefore the only questions material to be considered on this appeal are the assignments of error which relate to the first cause of action.

The evidence given at the trial tended to show that, during the negotiations for the sale of the land, the defendant represented and stated to plaintiff that it contained an area equal to 2½ lots, 50 by 100 feet in size; that Brown, the engineer who had laid out the addition for him, had computed the area of the lot, and that he had a memorandum of the estimate made by Brown; that plaintiff saw the property at two different times before he made the purchase, and saw four stakes which were set to mark its boundaries, but that it was of such an unusual and irregular shape that its contents could only be estimated by a person skilled in such matters; that plaintiff made no effort to ascertain its contents or the truth of defendant's representations, although the defendant told him where Brown resided; that these representations were false; and that Brown had never estimated the area of the lot for plaintiff, or told him it contained two lots and a half; and that, in truth and in fact, it only contained 12 square feet over two lots. Upon this state of the evidence, the defendant contends that, because plaintiff examined the land prior to his purchase, the means of ascertaining its quantity was as available to him as to the defendant, and, having failed to measure it or cause it to be measured, he

<sup>1</sup> Rehearing pending.



cannot now be heard to say that he relied upon the defendant's representations, and was thereby deceived. But we think this contention is without merit. The land is of a peculiar and irregular shape, and, although plaintiff saw it before purchasing, it is manifest that, without an actual measurement by one skilled in such matters, he could not tell or even form a reasonable estimate as to its supposed area. The plaintiff, therefore, had a right to rely upon defendant's positive statement that he had the area of the lot calculated, and that it equaled  $2\frac{1}{2}$  lots, 50 by 100 feet each, and was not bound to measure or cause it to be measured for himself. To turn him out of court under such circumstances, because he did not go to the trouble and expense of having the area of the land ascertained by actual measurement, but chose to rely upon defendant's representations, would be offering a premium upon fraud and deceit. Mere knowledge of the boundaries did not charge him with knowledge of its area, so as to relieve the defendant from responsibility for his false and fraudulent representations in reference thereto. *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355; *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496; *Lynch v. Trust Co.*, 18 Fed. 486; *Antle v. Sexton*, 137 Ill. 410, 27 N. E. 691; *Jackson v. Armstrong*, 50 Mich. 65, 14 N. W. 702; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *Ledbetter v. Davis*, 121 Ind. 119, 22 N. E. 744.

It is next claimed that it does not appear from the evidence that the representations of defendant were made with an intent to deceive the plaintiff, or that he relied upon them in making the purchase. A sufficient answer to this position is that the jury found against the defendant on both of these contentions. As all the evidence is not in the record, we must assume that such findings are supported by the testimony. And, besides, as Mr. Kerr says, "there is fraud in law if a man makes a representation which he knows to be false, or does not honestly believe to be true, with a view to induce another to act on the faith, who does so accordingly, and, by so doing, sustains damage, although he may have had no dishonest purpose in making the representation." *Kerr, Fraud. & M.* 55.

The court, after instructing the jury that, to entitle plaintiff to recover, it must, among other things, appear that defendant knew the representations were false when he made them, proceeded to say: "There is a modification of that doctrine to this extent: When a party undertakes to make representations concerning a matter that he is bargaining about with another, he must know what he represents to be true, if he knows that the other party is relying upon his statements. He is held equally responsible, whether he actually knew that the representations were false, or if he negligently made representations without knowing whether they were true or false.

A party may be charged with a fraud by making representations to another which that other relies upon, and he knows that the other is relying upon them, without knowing whether they are true or not. In such case he is responsible for the damages resulting from the false representations as much as if he knew they were not true when he made them." This instruction substantially states the law as we understand it. An action of deceit will lie against one who makes a false representation of a material fact upon which another acts to his injury knowing it to be false, or when he makes it recklessly as of his own knowledge, without knowing whether it is true or not; and this is, in effect, the rule laid down by the trial court. *Kerr, Fraud. & M.* 54; *Hamlin v. Abell*, 120 Mo. 188, 25 S. W. 516; *Leavitt v. Sizer*, 35 Neb. 85, 52 N. W. 832; *Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168; *Holcomb v. Noble*, 69 Mich. 396, 37 N. W. 497; *Busterud v. Farrington*, 36 Minn. 320, 31 N. W. 360; *Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551; *Cooper v. Schlesinger*, 4 Sup. Ct. 360; *U. S. v. Camp (Idaho)* 10 Pac. 227. Nor do we think there is anything in *Rolfes v. Russel*, 5 Or. 400, in conflict with this view, when the opinion is read in the light of the facts upon which it is based and the question actually before the court at the time.

The court instructed the jury that the measure of damages in this case is "such a proportion of the \$5,000 that has been paid as equals the deficiency in the land, assuming the different portions of the land are of equal value, and there is a deficiency in the tract, and not two lots and a half,—you having found what I have already suggested is necessary to find,—then the defendant is chargeable with that deficiency, and the value of the land proportional to the price paid for the whole,—the value of the land required to make up the amount represented." The giving of this instruction is assigned as error. The contention for the defendant is that the measure of damages is the difference, if any, between the value of lot 5, as it actually existed and what plaintiff paid for it; and, in accordance with this view, he offered to show that the tract was actually worth the purchase price, although not as large as represented by the defendant. But, according to the verdict of the jury, the plaintiff paid for and supposed he was buying land equal in area to two lots and a half, when in truth and in fact he actually received land in area equal to little over two lots; and if, by the fraud of the defendant, he was deceived and paid for more than he actually received, it seems to us the minimum recovery should be the amount paid for the deficiency, irrespective of the actual value of the true tract. This rule enables a vendee who, relying upon the false and fraudulent representations of his vendor as to the quantity of land purchased, pays for land he does not receive, to recover back, in an action for damages, the

amount of money paid on account of such fraud. It works substantial justice, and is amply supported by authority. *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355; *Smith v. Kirkpatrick*, 79 Ga. 410, 7 S. E. 258; *Tyler v. Anderson*, 106 Ind. 185, 6 N. E. 600; *Parker v. Walker*, 12 Rich. (S. C.) 138; *Flint v. Lewis*, 61 Ill. 299; *Hallam v. Todhunter*, 24 Iowa, 166; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205.

This disposes of all errors relied upon for the reversal of the judgment, and it is therefore affirmed.

#### LEICK v. BEERS et al.<sup>1</sup>

(Supreme Court of Oregon. Feb. 3, 1896.)

MECHANIC'S LIEN—NOTICE OF CLAIM—COSTS—REVIEW.

1. A claim for a mechanic's lien reciting that claimant "have, by virtue of a contract heretofore made with B., \* \* \* in the furnishing sketches, plans, \* \* \* and superintendence of a certain dwelling house. The ground on which said dwelling house was constructed being at the time the property of said B., who caused said house to be constructed,"—is insufficient, for failure to state the person to whom the services were rendered, as required by the Code.

2. The failure to allow cost in an equity case will not be reviewed, except for abuse of discretion.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Suit by C. W. Leick against C. W. Beers and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

J. H. Woodward, for appellant. Geo. H. Williams, for respondents.

**BEAN, C. J.** This is a suit to foreclose a mechanic's lien for the services of plaintiff as architect in the construction of a dwelling house. The plaintiff was employed by and rendered the services to Mr. and Mrs. C. W. Beers, but the building was erected upon land owned by the investment company, for which Mrs. Beers had a bond for a deed. Mr. Beers had no interest in the building, or real estate upon which it was erected, other than as husband of the obligee in the bond from the investment company, but he signed the contract for the erection of the building, and acted in reference thereto as if he was the owner, and the referee and court below found that he was the reputed owner thereof. The lien claim, as filed, so far as material to any question presented on this appeal, is as follows: "Know all men by these presents that C. W. Leick, of the city of Portland, in the county of Multnomah, Oregon, have, by virtue of a contract heretofore made with C. W. Beers, of the county of Multnomah, Oregon, in the furnishing sketches, plans, specifications, details, contract, and superintendence as architect in the construction of a certain dwelling house. The ground upon which said dwelling house was constructed

being at the time the property of said C. W. Beers, who caused the said house to be constructed, said dwelling house and land being known and particularly described as follows," etc. The court below held the lien insufficient, because it states that C. W. Beers was the owner of the property, and not the reputed owner thereof; and there is respectable authority to support the ruling; *McElwee v. Sandford*, 53 How. Prac. 89; *Malter v. Mining Co. (Nev.)* 2 Pac. 50. But it is unnecessary for us to place our decision upon that ground, as the lien is clearly insufficient, within *Rankin v. Malarkey*, 23 Or. 593, 32 Pac. 620, and 34 Pac. 818, and *Dillon v. Hart*, 25 Or. 49, 34 Pac. 817. The refusal of a trial court to allow costs to either party in a suit in equity will not be reviewed here, except in case of an abuse of discretion, which is not shown in this case. Code, § 543; *Lovejoy v. Chapman*, 23 Or. 571, 32 Pac. 687; *Cole v. Logan*, 24 Or. 305, 33 Pac. 563. The decree of the court below is affirmed.

#### COMMERCIAL BANK OF VANCOUVER v. SHERMAN.

(Supreme Court of Oregon. Feb. 10, 1896.)

FOREIGN BANKING CORPORATIONS—STATUTORY REQUIREMENTS.

A foreign corporation purchasing a note in the state, and having no purpose to do any other act in the state, is not "transacting business" in the state, within *Hill's Ann. Laws*, § 3276, providing that a foreign banking corporation, "before transacting business" in the state, must record a power of attorney in each county where it has "a resident agent," which, so long as the company has "places of business" in the state, shall be irrevocable.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by the Commercial Bank of Vancouver against D. F. Sherman. Judgment for plaintiff. Defendant appeals. Affirmed.

Chas. H. Carey, for appellant. Geo. H. Williams, for respondent.

**BEAN, C. J.** This is an action against the defendant, as indorser of a promissory note. The facts are that on June 27, 1891, at Portland, Or., J. L. Lewis and others made, executed, and delivered to the defendant their negotiable promissory note for \$9,204, and that in August, 1891, the plaintiff, a banking corporation organized under the laws of the state of Washington, and doing business therein, through its authorized agent, purchased the note of the defendant at Portland, and it was at the latter place sold, indorsed, and delivered by defendant to plaintiff, and, not being fully paid at maturity, this action was commenced to recover the unpaid balance. The defense is that, the note having been sold and transferred to the plaintiff within this state, no action can be maintained against the indorser, because the plaintiff corporation had

<sup>1</sup> Rehearing denied.

not, at the time of making the contract and purchase of the note, complied with section 3276, Hill's Ann. Laws, which provides that a foreign banking corporation, "before transacting business in this state, must duly execute and acknowledge a power of attorney, and cause the same to be recorded in the county clerk's office, of each county where it has a resident agent, which power of attorney, so long as such company shall have places of business in the state, shall be irrevocable, except by the substitution of another qualified person for the one mentioned therein as attorney for such company." It must be conceded that the contracts of any of the foreign corporations named in the title of the act of 1864, of which the section referred to is a part, carrying on business here without first having executed and caused to be recorded a power of attorney, as required by the statute, are void, and no action can be maintained thereon by the corporation. *Bank v. Page*, 6 Or. 431; *Hacheny v. Leary*, 12 Or. 40, 7 Pac. 329; *In re Comstock*, 3 Sawy. 218, Fed. Cas. No. 3,078; *Semple v. Bank*, 5 Sawy. 88, Fed. Cas. No. 12,659. But the record shows that, at the time the plaintiff made the contract upon which this action is based, it was not carrying on, or proposing to carry on, its corporate business in this state; and, so far as appears, the purchase of the note in question was the only business ever done or contemplated by it here. The single inquiry presented by this record, therefore, is whether a foreign banking corporation purchasing a promissory note in this state, and with no purpose of doing any other act here, is "transacting business" in the state, within the meaning of the statute. It seems to us this question must be answered in the negative. In our opinion, the statute, when reasonably construed, was intended to prohibit certain foreign corporations coming into this state for the purpose of transacting their ordinary corporate business without first appointing some resident agent, upon whom service of summons could be had in case of litigation between them and citizens of the state, and was not designed or intended to prohibit the doing of one single isolated act of business by such a corporation, with no intention apparent to do any other act or engage in business here.

It will be noticed that the statute does not require the power of attorney to be recorded before "doing any business," but "before transacting business," and that it shall be filed in every county where the corporation has "a resident agent," and shall be irrevocable except by the substitution of another qualified person for the one named therein so long as the corporation shall have "places of business" in the state. These provisions would seem necessarily to indicate that the statute was intended to apply to a corporation whose actual or contemplated business in the state is such as to admit of its hav-

ing resident agents or places of business therein; and, to have a resident agent or place of business, it must be carrying on, or intending to carry on, its ordinary corporate business; for a corporation doing but a single act of business, with no intention of doing more, could not, in the nature of things, be expected to have a resident agent or place of business. To require a foreign banking corporation to execute and file the power of attorney required by the statute as a prerequisite to its right to purchase a promissory note, or take a mortgage to secure a debt, or to do any other single act of business, when there was no purpose or intention to engage in banking here, would be a very narrow, harsh, and, we think, an unwarranted, construction of the statute. The following authorities, although under statutes differing in detail from ours, tend to support this conclusion: *Murfree, Foreign Corp.* § 65 et seq.; *Manufacturing Co. v. Ferguson*, 118 U. S. 727, 5 Sup. Ct. 739; *Dry-Goods Co. v. Lester*, 60 Ark. 120, 29 S. W. 84; *Potter v. Bank*, 5 Hill, 490; *Gilchrist v. Railroad Co.*, 47 Fed. 593. There is nothing in the former decisions of this court or of the federal court construing our statute which, in our opinion, conflicts with these views. In *Semple v. Bank*, *Re Comstock*, and *Bank v. Page*, supra, the bank was regularly engaged in the transaction of its corporate business in the state. The case of *Hacheny v. Leary*, supra, involved the construction of a statute of the then territory of Washington as applied to a contract made in the territory. That statute differed in many respects from the one now before us, and, besides, the case discloses that the corporation had an agent in Washington actually engaged in the business of soliciting and receiving applications for insurance. For these reasons, the case is distinguishable from the one under consideration. It follows that the judgment of the court below must be affirmed, and it is so ordered.

**BROWER & THOMPSON LUMBER CO.  
v. MILLER et al. (HAMILTON  
et al., Garnishee).**

(Supreme Court of Oregon. Feb. 3, 1896.)

ASSIGNEE OF CONTRACT—LIABILITY FOR DEBTS OF  
SUBCONTRACTOR.

One who contracted for certain street improvements with a city agreed to pay all sums due for materials furnished, and gave a bond to the city to the same effect. *Held*, that as he was not liable, either under the contract or the bond, to creditors of a subcontractor for materials furnished, an assignee of the contract incurred no greater liability.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by Brower & Thompson Lumber Company against Miller & Giddings, defendants, and Hamilton & Howard, garnishees. There was a judgment dismissing the gar-

nishment proceeding, and plaintiff appeals. Reversed.

This case is here on appeal from a judgment in proceedings against garnishees. On May 5, 1894, plaintiff commenced an action against Miller & Giddings, and recovered a judgment therein for \$328.59. When the action was commenced, a writ of attachment was issued, and Hamilton & Howard were served with garnishee process, to which they first made answer that they were indebted to Miller & Giddings in the sum of \$249.80, but afterwards amended their certificate so as to show an indebtedness of 62 cents only. The amended certificate being unsatisfactory, the plaintiff had Hamilton & Howard cited to appear before the court, and their answers to the allegations and interrogatories served upon them disclose the status of their indebtedness which it was sought to reach by the garnishment. We state the facts out of which the indebtedness arose from the garnishees' standpoint, as their sufficiency is tested by exceptions which form the basis of the judgment appealed from. It seems that one J. D. Wickliff, having entered into a contract with the city of Portland to make certain street improvements, and to furnish the labor and materials therefor, executed to the city a bond, with B. S. Reilly and George W. Bower as sureties, conditioned that he should well and faithfully perform all the stipulations of the contract. On the same day, Wickliff, for the consideration of five dollars, assigned the contract to Hamilton & Howard. Concerning these transactions it is alleged: "That, although said bond appears to have been given by J. D. Wickliff, said contract had in fact already been assigned to these garnishees. They had succeeded to all the rights and privileges of said Wickliff under said contract, and had assumed all the liabilities and responsibilities thereunder. That said B. S. Reilly and George W. Bower signed said bond as sureties for these garnishees, and not for said Wickliff. That, at the time said contract was assigned, it was understood and agreed by and between the parties to said assignment that these garnishees should stand in all respects as the original contractors for said street improvement; that said Wickliff should have no further interest in said contract; that he should be relieved of all liability thereunder; and that all rights and claims thereunder should accrue to these garnishees; and that these garnishees should be responsible for all liabilities or responsibilities arising thereunder." The contract contains the stipulation required by the ordinances of the city of Portland, as follows: "That said party of the first part [Wickliff] shall, within ninety days after completion of the work herein agreed to be performed, pay all sums of money due at the completion of said work, or thereafter to become due, for materials used in and labor performed on or in connection with said work." Hamilton & How-

ard let to Miller & Giddings a subcontract for furnishing the nails and labor requisite for carrying out said contract with the city, one-half the contract price to be paid in cash, and the other half in city warrants. Miller & Giddings furnished nails and labor of the value of \$988.64, all of which Hamilton & Howard paid except \$249.80. That S. D. Powell furnished nails of the value of \$114.80, at the request of Miller & Giddings, for use in the completion of said contract. That Henry Aschenbrenner, John Kruger, and Fred Hyde performed labor for them, for which they claimed \$51.46, \$7.99, and \$34.03, respectively, and that each of said individuals made demand of Hamilton & Howard for the amount due him for such nails and labor, and claims a right to recover against them directly under and by virtue of the original contract with the city of Portland. Under this state of facts, the garnishees claimed that they were responsible to these several individuals in the various sums demanded, and not to Miller & Giddings. The court dismissed the proceeding, and rendered judgment against plaintiff for costs, from which plaintiff appeals.

R. R. Duniway, for appellant. G. C. Moser, for respondents.

WOLVERTON, J. (after stating the facts). We presume that, if Powell, Aschenbrenner, Kruger, and Hyde have each an action directly against the garnishees upon their several demands, the fact that such rights of action exist would constitute a good defense to an action by Miller & Giddings against the garnishees; and, if good against Miller & Giddings, it would also constitute a sufficient defense under the garnishee process. It is intimated, but not strongly insisted upon, that Wickliff's bond to the city forms a sufficient basis upon which actions by Powell and others against the garnishees may be founded, but this cannot be so for two reasons: First, Hamilton & Howard are not parties to the bond, and an action based thereon could not go against them; and, second, it is settled by *Parker v. Jeffery*, 26 Or. 186, 37 Pac. 712, that they have no action upon the bond even as against Wickliff. In that case, which was an action upon a similar bond, given in pursuance of the same ordinances, a party had furnished materials directly to the contractor, and it was held that the bond furnished him no remedy. It is stoutly contended, however, that Hamilton & Howard's liability to Powell and others is established by the clause in the contract wherein it is "further stipulated and agreed on behalf of the party of the first part that said party of the first part shall, within ninety days after the completion of the work herein agreed to be performed, pay all sums of money due at the completion of said work, or thereafter to become due, for materials used in, and labor performed on or in connection with, said

work," upon the doctrine, as asserted generally by some of the authorities, that, where a party makes a promise to another for the benefit of a third, the latter may maintain an action upon it, though the consideration did not move from him.

Before reaching this question, there is another which is involved in some doubt, and that is whether Hamilton & Howard occupy the same position under the contract, with reference to these parties, as Wickliff; but we will pass the latter, and assume that Hamilton & Howard are liable in all respects under the contract as if they were the original contractors.

It may be premised that the city of Portland was not directly liable to Powell or the other parties asserting demands against the garnishees at the time the contract was entered into, so that the consideration to be paid for the performance of its conditions does not in any way constitute a trust fund in the hands of the contractors for the payment of its obligations; nor can it be said that the contractors have, for a consideration, undertaken to pay the obligations of the city. By the very strong current of recent authority, the doctrine contended for by counsel has been much limited and qualified; and as was said by Mr. Justice Brown in *Constable v. Steamship Co.*, 154 U. S. 73, 14 Sup. Ct. 1062, "it is by no means a universal rule that a person may sue upon a contract made for his benefit, to which he was not a party." In *Jefferson v. Asch*,<sup>1</sup> 25 Lawy. Rep. Ann. 257, a recent and well-considered case from Minnesota, to which is added an exhaustive annotation of the authorities by the authors of these most excellent Reports, Chief Justice Gilfillan, in tracing and discussing the limitations to the rule as generally stated, makes the following deductions from the New York authorities to which he gives his sanction as correct in principle: "To give a third party who may derive a benefit from the performance of the promise an action, there must be—First, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two (the promisee and party to be benefited), and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." "There must be either a new consideration, or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement"; and "there must be some legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." Like deductions are made from the Massachusetts authorities. From these a further and a more direct and explicit deduction is discernible, being that which finds support

in trust relations, which relations give rise to an implied promise. Such is the result of an investigation of the subject by Bean, C. J., in *Parker v. Jeffery*, supra. He says: "In nearly, if not quite, every case coming under our notice in which the action has been sustained, unless on a bond or obligation authorized by law, there has been some property, fund, debt, or thing in the hands of the promisor upon which the plaintiff had some equitable claim, and from which the law, acting upon the relationship of the parties or the fund, established the privity, implied the promise, and created the duty upon which the action was founded." This deduction is re-enforced by the principle established by *Washburn v. Investment Co.*, 23 Or. 436, 36 Pac. 533, and 38 Pac. 620, that where the principal contract is executory in its nature, and there are no funds in the hands of the promisor, or debt or obligation due from him, and he has simply obligated himself to pay the debts of another to a third party, who is neither a party to the contract or consideration, no action will lie in favor of such third party against the promisor. For additional authorities bearing upon the question not cited in the two authorities last referred to, see *Constable v. Steamship Co.*, supra; *Burton v. Larkin* (Kan. Sup.) 13 Pac. 398; *Anderson v. Fitzgerald*, 21 Fed. 294; *Weller v. Goble*, 66 Iowa, 113, 23 N. W. 290; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49; *Parlin v. Hall*, 2 N. D. 473, 52 N. W. 405; *Morrill v. Lane*, 136 Mass. 93.

Now, do Hamilton & Howard bring themselves within the purview of the rule thus limited and circumscribed, and show themselves obligated in an actionable capacity to Powell, Aschenbrenner, and others? We do not think they do. An effort has been made to distinguish *Parker v. Jeffery* from the case made by the facts herein stated, but we think the principle established is alike applicable to the one case as to the other. The contract with the city is executory in its nature, and it contemplates that the consideration for the intended improvements shall be paid directly to the contractors when the work is completed, without limitations as to its use by them. To be sure, they stipulated with the city that they would within 90 days pay all sums of money due at the completion of the work, or thereafter to become due, for materials used and labor performed in connection therewith, which is a wholesome and salutary provision, required by ordinance, and which inures incidentally and indirectly to the benefit of the material men and laborers; yet it would seem the primary object of the stipulation was for the benefit of the city, as it has exacted a bond in its individual capacity to insure its faithful performance, together with other conditions, of the contract. Counsel for respondents invokes in aid of his contention the case of *City of St. Paul v. Butler*, 30 Minn. 459, 16 N. W.

<sup>1</sup> 55 N. W. 604.

862, but the case does not help him. In reality, it is an authority the other way. The contract therein stated provided that the contractor should "pay all just claims for all labor performed or materials furnished for or on account of said contract as aforesaid," but the bond entered into to secure its faithful performance was given to the city "for the use of all persons who may do work or furnish materials" in pursuance of its provisions. The court expressly held that neither the laborers nor material men had any claim against the contractor by reason of the contract, but decided that the bond gave the action upon the like principle as actions are given under our statute upon official statutory bonds to the party sustaining an injury. See *Hill's Ann. Laws Or.* §§ 340, 341; *Crook Co. v. Bushnell*, 15 Or. 169, 13 Pac. 886; and *Hume v. Kelly* (just decided) 43 Pac. 380. So, we conclude that the contractors (the garnishees herein) have incurred no greater liability in this respect under the contract than they have or would have incurred under the bond had they executed it, instead of Wickliff, the effect of which liability upon the bond was declared in *Parker v. Jeffery*, 37 Pac. 712; and the doctrine there enunciated and settled applies with like vitality and cogency here.

It follows from these considerations that the judgment of the court below should be reversed, and remanded, with directions to enter judgment in favor of plaintiff, and against the garnishees, for the sum of \$249.80; and it is so ordered.

#### TRACKMAN v. PEOPLE.

(Supreme Court of Colorado. Jan. 15, 1896.)

WITNESS—COMPETENCY OF CONVICT—STATUTES—EXPRESSION OF SUBJECT IN TITLE—REPEAL.

Gen. St. 1883, § 944, makes one convicted of burglary incompetent to testify; and Act 1883 (Gen. St. 1883, pp. 1062, 1063), entitled "An act relating to the competency of witnesses in civil action and criminal prosecution, \* \* \* and to repeal certain sections of chapter one hundred and four of the General Laws," provides that one convicted of crime may testify, and expressly repeals designated sections of the General Laws, without mentioning section 944, and also repeals "all acts and parts of acts in conflict herewith." *Held*, that Const. art. 5, § 21, requiring every act to express its subject in its title, did not limit the effect of the repealing act to the designated sections.

Error to district court, La Plata county.

Albert Trackman was convicted of forgery, and brings error. Affirmed.

T. C. Perkins and G. T. Sumner, for plaintiff in error. Byron L. Carr, Atty. Gen., and F. P. Secor, Asst. Atty. Gen., for the People.

GODDARD, J. The plaintiff in error was convicted of the crime of forgery, and sentenced to imprisonment in the penitentiary for the term of 27 months. To reverse this

sentence, he brings the case here on error. The only error assigned is the ruling of the court below allowing the witness Arthur Farr to testify, over the objection of plaintiff in error, he having been convicted of the crime of burglary, and at the time of giving his testimony was undergoing a sentence therefor in the state penitentiary. The objection to this testimony was predicated upon section 944, Gen. St. 1883, which provides: "Each and every person who may be convicted of the crime of \* \* \* burglary \* \* \* shall be deemed infamous, and shall be therefor incapable \* \* \* of giving testimony." This objection, therefore, presents for our consideration the question whether that statute is in force so far as it provides that a person convicted of any of the crimes enumerated is incompetent to give testimony. This provision was originally enacted in 1861, and remained in force until the act of 1870 (except in so far as it was limited by section 10 of article 7 of the constitution), which removed the disability of a convicted felon so far as to render him a competent witness in civil cases. *Palmer v. Hanna*, 6 Colo. 55.

In 1883 an act was passed entitled "An act relating to the competency of witnesses in civil action and criminal prosecution, and other judicial proceedings, and to repeal certain sections of chapter one hundred and four of the General Laws of the State of Colorado," and which enacts:

"Section 1. All persons without exception, other than those specified in the next three sections, and in the second, third, fourth, seventh, and eighth sections of chapter one hundred and four of the General Laws, may be witnesses. Neither parties nor other persons who have an interest in the event of an action or proceeding shall be excluded; nor those who have been convicted of crime; \* \* \* but the conviction of any person for any crime may be shown for the purpose of affecting the credibility of such witness," etc.

"Sec. 5. Sections one, five and six, of chapter one hundred and four of the General Laws of the State of Colorado, and all acts and parts of acts in conflict herewith, are hereby repealed."

Gen. St. 1883, pp. 1062, 1063.

It is contended by plaintiff in error that, by reason of its title, the latter act was limited in its repealing force to the specified sections of chapter 104, and did not in any way affect or repeal section 944, Gen. St. 1883, notwithstanding, in express terms, it attempted to repeal all acts or parts of acts in conflict therewith, since to give such an effect to the act would be to defeat, by indirection, section 21, of article 5 of the constitution, which provides: "No bill \* \* \* shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the ti-

tle, such act shall be void only as to so much thereof as shall not be so expressed." In this view we cannot concur. It is not necessary, in order to conform to this constitutional requirement, to state in the title the effect of the subject-matter of the act in repealing some prior law, since the repeal of a prior law is necessarily connected with the subject-matter of the new law on the same subject; and a repealing section in the new statute is valid, notwithstanding the title is silent as to such repeal. The act of 1883 contained but one subject, which was clearly expressed in its title, to wit, the competency of witnesses in civil and criminal prosecutions; and the subject-matter of the act relates only to the subject so expressed, and hence is in conformity to the constitutional requirement. Therefore, the rule that it affirmatively enacts in regard to the competency of witnesses must prevail as against all prior legislation repugnant thereto, and effectually repeal such statutes, although not among those specifically enumerated in its title. We think, therefore, that the act of 1883 repeals so much of section 944 of the General Statutes as disqualified witnesses on account of conviction for crime; and the witness Farr was a competent witness, whose credibility was exclusively a matter for the jury to determine. This being the only error rolled on, the judgment and sentence of the court below must be affirmed. Affirmed.

# LIVERMORE v. TRUESDELL et al.

(Court of Appeals of Colorado. Feb. 10, 1896.)

## APPELLATE COURT—JURISDICTION.

Under Code 1887, § 388, appeals were only allowed to the supreme court when the judgment amounted to \$100. Act 1891, creating the appellate court, gave it jurisdiction to review final judgments in all civil cases, and raised the limit, in case of appeals to the supreme court, to \$2,500, and, by section 4, subd. 3, provided that appeals should lie to the appellate court in the same manner as may be provided by law for appeals to the supreme court. *Held*, that all final judgments in civil cases, irrespective of the amount involved, were appealable to the appellate court.

Appeal from district court, Arapahoe county.

Action between Charles T. Livermore and Fred A. Truesdell and another. From a judgment for the latter, the former appeals. Heard on motion to dismiss. Denied.

O. B. Liddell, for appellant. Wolcott & Vaile, for appellees.

PER CURIAM. This motion to dismiss is principally based on the form of the judgment. It was for costs, and, of course, was not for \$100, nor did it involve a franchise or a freehold. Motions to dismiss appeals on this ground are so frequently made, we deem it best to express our views respecting this class of applications. Under section 388

of the Code of 1887, appeals were only allowed to the supreme court when the judgment or decree was final, and amounted to \$100, exclusive of costs, or related to a franchise or freehold. Ever since the court of appeals was created, it has been assumed by many courts, and a large number of the profession, that this limitation was applicable to appeals to this tribunal. Neither of the appellate courts accepts this doctrine. The act of 1891, which created the court, gave it general jurisdiction to review final judgments of courts of record in all civil cases. We are not concerned with the distinction between the final and the intermediate jurisdiction. The latter permits parties to bring cases here of which the supreme court has the power of ultimate review. The act, in effect, repealed section 388, in so far as concerns the limitation of the right of appeal to judgments which, in amount, equal \$100. This limit was raised to \$2,500, and no appeal or writ of error can be prosecuted to the supreme court unless the judgment is in that sum, or involves some of the other questions which are preserved for the final determination of that tribunal. Regardless of this repeal, however, we are of the opinion that the grant of jurisdiction to this court to review final judgments is made applicable, in express terms, to all civil cases wherein judgments have been rendered by courts of record. The third subdivision of section 4 provides that writs of error or appeals shall lie within the same time, and in the same manner, as may be provided by law for such reviews by the supreme court. This is the general language of this subdivision. We do not regard it as a limitation on the general grant of power contained in the first paragraph. It would be impossible so to construe it, for this would necessitate the conclusion that no appeal would lie to this court unless the judgment should amount to \$2,500, or involved a franchise or freehold. By necessary implication, the act of 1887 was repealed by the provision of the first section of the act of 1891, and there is no other guide than the last-named section by which the jurisdiction of the supreme court can be determined. Manifestly, then, this limitation as to time and manner has no reference to the fundamental condition which controls the right of appeal. It simply relates to the procedure by which cases are brought to this tribunal for review. This is the natural, and, we might almost say, the necessary, construction of the act; and we have therefore uniformly held that appeals would lie to this court in all civil cases, regardless of the amount of the judgment, and subject only to the limitation that the judgment or decree is final, and has been rendered by a court of record. In this opinion we have not discussed the criminal jurisdiction, and only incidentally referred to the matter of our jurisdiction which is not final. What we have

said is broad enough to indicate our views, and to serve to guide the nisi prius courts and the profession in the matter of appeals to this court. For these reasons the motion to dismiss is denied.

**ASHENFELTER v. WILLIAMS et al.**  
(Court of Appeals of Colorado. Jan. 13, 1896.)

**MINING PARTNERSHIP—WHAT CONSTITUTES.**

1. A contract providing that the one party should have a certain undivided interest in all ores extracted from certain mines, and should bear a proportionate share of the expense of extracting the same, the other parties to have remaining interest in the ore, and to bear the balance of the expense, and also that the first party should furnish a mill for concentrating the ore, the expense of concentrating and rental of the mill to be divided among the parties, renders them partners in the extraction of the ore.

2. A subsequent verbal agreement that the first party should receive a certain price for each ton of ore concentrated, to be paid from the proceeds of the ore, he to pay the rental of the mill, repairs, and improvements, does not prevent the parties from being partners.

3. After the formation of a mining partnership, an agreement that one of the parties shall ship the ore after concentration, receive the proceeds, and pay out the money under the direction of another partner, who was to manage the mine, does not affect their relations as partners.

Error to district court, Ouray county.

Action by John Ashenfelter against Ralph Williams and others. There was a judgment for defendant Williams, and plaintiff brings error. Reversed.

Emerson & Bradshaw, for plaintiff in error.  
Lyman I. Henry and Carl J. Sigfrid, for defendants in error.

**THOMSON, J.** This suit was brought by the plaintiff in error against John P. Karns, W. E. Young, Harry Walsh, and the defendant in error, Ralph Williams, as copartners, to recover from the alleged copartnership a balance of \$755.13, due him for hauling ore from some time in the month of June, 1892, to the 30th of November, 1892. Williams answered, denying any copartnership between himself and the other defendants. The court tried the case without the intervention of a jury, and found from the evidence that there was a copartnership between the defendants Karns, Young, and Walsh, but that Williams was not a partner, or liable as such. Judgment was rendered in the plaintiff's favor against Karns, Young, and Walsh, and in favor of Williams against the plaintiff. From this judgment against him, the plaintiff brings error. At the trial, the execution of the following contract was admitted: "Articles of agreement, made and entered into this 10th day of June, 1892, by and between W. E. Young and John P. Karns, parties of the first part, and Ralph Williams, party of the second part, all of the county of Ouray and state of Colorado, as follows: The parties of the first

part are engaged in extracting ores from what is known as the 'Wheel of Fortune' group of mines in said county, and they agree to furnish to the party of the second part, at the city of Ouray, in said county, at that certain concentrating mill formerly known as the 'Strout Concentrating Mill,' seven (7) tons of concentrating ore, each and every day during the term of this agreement, from the said group of mines, or as many tons, not to exceed seven tons per day, as can be treated at the said mill. The said party of the second part agrees to reduce and concentrate such ore so furnished in a good and workmanlike manner, according to the plan of treatment in the said mill, at and for the agreed price of five dollars per ton, and agrees to treat seven tons of ore per day at the said mill, or as many tons, not to exceed seven tons per day, as can be treated in the said mill, and to render to the parties of the first part good and reliable assays of pulp and tailings, so as to show what is the percentage of the saving, to sack all concentrates, and to deliver such concentrates at said mill without any delay. And it is further agreed and understood by and between the parties hereto that, in case the said parties of the first part fail to furnish the said seven tons of ore from the said mines each and every day, or so much ore as is necessary to run the said mill, then, and in that case, the party of the second part shall have the following interest, and the following terms shall be held binding on all the parties hereto, the same as if made the agreement in the first instance: Provided, always, that in case such failure to so furnish said ores arises from any unforeseen accident, not the fault or negligence of the parties of the first part, then, so long as such hindrance remains, without the negligence or fault of the parties of the first part, the above terms of forfeiture shall not become operative; and it is understood that, in case such accident does arise, it shall be the duty of the parties of the first part to immediately inform the party of the second part. In case the parties of the first part fail or refuse to so furnish ores from said mines, as aforesaid, then, according to the foregoing conditions, the above agreements shall cease to be binding on all parties hereto. The party of the second part shall have an undivided one-fourth interest in and to all ores of the second class that may be extracted from said mines during the term ending June 10th, 1893, and the same interest in and to all ores of the second class that may be now or may be hereafter extracted or taken from the said mines by the said parties of the first part; and ores of the second class shall be such ore as, when sorted and separated at the mine from the rock, shall run fifty ounces in silver or less per ton. The party of the second part shall pay one-fourth of all proper and proportionate expenses in the extraction, shipping, and milling of such second-class ores, up to the time that the same shall have been milled or disposed of, and the party of the second part

<sup>1</sup> Rehearing denied Feb. 10, 1896.



shall receive one-fourth of all profits arising from the sale of such ore. It is further agreed and understood that the parties of the first part shall pay three-fourths of all costs and expenses incurred, wherein the said party of the second part is to pay one-fourth, and the parties of the first part shall receive three-fourths, of all profits arising from the sale of such ores. It is further agreed and understood, by and between the parties hereto, that the party of the second part shall furnish under this agreement and, in this contingency, the said Strout mill, and the cost of running the same, the rental and charges thereof, shall be divided among the parties hereto as expenses in the same proportion as above stated; and the party of the second part hereby agrees, in such event, not to charge any rental over and above what he is compelled to pay for said mill. It is expressly understood and agreed that it is the purpose to extract the greatest amount of ore, and to mill the same at the greatest profit possible. All terms and agreements herein contained shall extend and continue for the period of one year from the date hereof, to wit, until June 10, 1893; and in case the first provisions herein contained are not carried out, then the following conditions and agreements shall extend for the remaining portion of the year, as above fixed. It is further agreed and understood that the parties of the first part shall have six days in which to begin the furnishing of ore, according to the first terms herein contained. In witness whereof, the parties hereto have hereunto set their hands and seals in duplicate, the day and year first above written. W. E. Young. [Seal.] John P. Karns. [Seal.] Ralph Williams. [Seal.] The amount of the original claim of the plaintiff was also admitted; and it was further agreed that the unpaid balance was largely, if not entirely, due from persons operating the Wheel of Fortune mine, for freighting second-class or milling ore from the mine to the concentrating mill; that Young, Walsh, and Karns, by virtue of a lease and option upon the mine, and by virtue of an agreement among themselves, were carrying on mining operations upon the property; and that the only controverted questions concerned the relation of Williams to the others. The evidence was that ore was not furnished as required by the contract, and that the failure was not due to any accident or cause mentioned in the contract as excusing it. Thomas Downer was bookkeeper and business manager of the plaintiff, and kept the plaintiff's accounts and collected his bills. Having heard from some source that Williams was a partner in the business, Downer had several conversations with him while the freighting was in progress. He presented bills to Williams, at different times, for the hauling. The latter, in one conversation, objected to the bill presented, saying that it contained items that he had nothing to do with, that all he was interested in was the ore that came to

his mill,—the second class ore. On another occasion, upon being presented with a bill for \$700, Downer and Williams figured up the amount due on ore that was brought to the mill, and found it to be \$500. This amount Williams promised to pay out of the proceeds of a car of concentrates then ready for shipment. Williams paid Downer, for the plaintiff, upon the bills, at one time \$100, and at another \$200. On one occasion, Williams found fault with the price that the plaintiff was charging for hauling the ore,—\$2.50 per ton. Williams said this was excessive, and the work must be done cheaper,—that it ought to be done for \$1.50 per ton. The plaintiff's contract for hauling the ore was made with Mr. Young, and not with Mr. Williams. The defendant, Williams, testified in his own behalf that, after the execution of the written agreement, the other contracting parties were unable to comply with its terms in the matter of furnishing ore, and Mr. Young had an interview with him on the subject. He told Young that the agreement was objectionable to him, because it did not provide a fixed charge for the use of the mill, to enable him to pay the rent of the building and water power, and keep the mill in repair, and furnish it with such machinery as might be needed. Thereupon, it was verbally agreed between him and Young that he (Williams) should furnish the mill, pay the rent on the building and water power, keep the mill in repair and running order, be allowed for this purpose, \$2 per ton on crude ore run through the mill, ship the concentrates in his own name, receive the returns, and, after deducting the expenses mentioned, and the cost of transportation of the ore, and the wages of the men at the mill and at the mine, retain one-fourth of what was left, turning over to Mr. Richardson, the agent of the other parties, the remaining three-fourths. The disbursements for expenses were to be made under the direction of Mr. Young. The witness said that the verbal agreement was in lieu of the written one, and that he had no interest, or voice, or direction, in the working of the mine; also that all payments by him were made under Young's direction. The verbal agreement was made about a week or ten days after the one in writing. Mr. Walsh testified that he was present when the verbal agreement was made, and gave the conversation between Williams and Young substantially as Williams stated it. Karns testified that he never had any knowledge of this verbal agreement. It was after this that the shipments of ore from the mine took place. These shipments, as well as the working of the mine, were in charge of Young. Walsh was not a party to the written contract, but seemingly acquiesced in it, and in everything that took place subsequently. There was no substantial disagreement among the witnesses. The court found specially, as its conclusions of law, that the original agreement did not constitute a partnership among the parties, that

It was abrogated by the subsequent verbal agreement, that Williams had not held himself out as a partner, and that there was no partnership liability against him.

We find ourselves unable to agree with the court in any of its conclusions. The original written contract embraced two agreements, the second of which was to take effect in the event of the failure of the first. The parties operating the mine were to furnish a certain quantity of ore daily for concentration; but if they should fail to do so for any reason, except unforeseen accident, an interest of one-fourth in the second-class ore would immediately vest in Williams,—he to pay one-fourth, and the others three-fourths, of all expenses of mining, shipping, and milling, and the profits to be divided in the same proportions. The first of these agreements was abandoned, and the second became binding upon the parties, and, except as it may have been afterwards modified, was the only agreement between them. This agreement made the parties copartners in the second-class ore. It contained every element of a partnership. There was a community of interest in the subject-matter of the agreement. The expenses were to be borne, and the profits shared, by the parties, in proportion to their respective interests. If the expenses should exceed the profits, so as to result in a loss, then, by virtue of the agreement, the loss would be ratably borne. The common business embraced both the mining and milling operations. It is patent that by the terms of this agreement there was a partnership *inter se*. The subsequent verbal agreement did not displace the other. We shall not discuss the right of Young, Walsh, and Williams to alter the terms of the written contract without the consent of Karns, but shall, for the purposes of our decision, treat the verbal arrangement as binding upon all the parties. It is clear, from the testimony, that this was, and was intended to be, only a modification of the original contract. It changed the original contract in only one—and that a comparatively unimportant—particular. Williams was dissatisfied with the provision concerning the use of the mill. The rental, and the cost of running the mill, were to be divided, but there was no provision concerning repairs, or the furnishing of additional necessary machinery. These were left as a burden upon Williams, and he wanted the expense distributed. He made an estimate of the cost of rent of building and water power, and of repairs and machinery, and concluded that the whole would be covered by a fixed charge of two dollars per ton. It was agreed that this should be allowed, not against the other parties, but to be taken out of the gross receipts, so that each party would bear his own proportion of the amount. There was no talk of superseding the written contract. There was no suggestion of change, or of desirability of change, except in that one particular fea-

ture. It is evident from Williams' testimony that the interests of the parties in the partnership business were to remain in all respects the same as before. It is true, Williams testified that the verbal agreement was in lieu of the written one, but that is only a conclusion of his own, and is not a conclusion warranted by the facts. The law draws its own conclusions, uninfluenced by his. The agreement that Williams should ship the concentrates, receive the returns, and pay out the money, under the direction of Young, in no way affects the partnership agreement, or the rights of the partners under it. Williams says he exacted this for his own protection, and there was no impropriety in his doing so. It would enable him to protect himself against possible default of his copartners in discharging partnership obligations. This was the part of the business allotted to him, while Young managed the mine. After a partnership has been formed, an agreement assigning particular departments of the partnership business to the several partners is not uncommon. Indeed, if the business conducted is of any considerable magnitude, it would seem that its proper management requires a division of duty; but an agreement of this kind is one of convenience only, it does not divest a partner of any power or right with which the law clothes him. There is nothing in the record from which it can be found that the original written contract of partnership was ever abandoned; and, as modified by the verbal agreement, it remained in full force until it expired by its own terms. But, if we should concede to counsel that the verbal agreement was entirely independent of the other, and was intended to, and did, supplant it, we do not see wherein Williams would be benefited. The conversation which constituted it was general, and not very precise, but it contemplated the carrying on of a business by the parties in which they had a common interest. It contemplated the extraction, shipment, and milling of ores, for their benefit. The expenses were to be shared, and the profits divided, among them in certain proportions. Each had a specific interest in the profits, as profits, and not as mere compensation for services. The profits to be divided were net results,—what remained after payment of all charges against the business,—and, until division, were the common property of the persons interested. A business conducted along the lines, and in the manner, contemplated by that conversation, is a partnership business, pure and simple. *Le Fevre v. Castagnio*, 5 Colo. 564; *Manville v. Parks*, 7 Colo. 123, 2 Pac. 212; *Refining Co. v. Rucker* (Colo. App.) 40 Pac. 853. From what we have said, it would seem superfluous to devote any time to the acts and declarations of Williams in connection with the business which the plaintiff was transacting, but we cannot forbear saying that he presented the appearance of a

partner. He analysed the plaintiff's bills, and criticised his charges; he promised payment, and made payments; he assumed an authority which belonged to a partner; and, even if he had not been a partner in fact, his conduct would have justified the plaintiff in believing him to be such. Our conclusions throughout are diametrically opposed to those of the trial court, and its judgment must be reversed. Reversed.

# GATES IRON WORKS v. COHEN.<sup>1</sup>

(Court of Appeals of Colorado. Jan. 18, 1896.)

ATTACHMENT—RIGHTS OF THIRD PERSONS—SALE—WHEN TITLE PASSES—FOREIGN CORPORATIONS—WHAT CONSTITUTES DOING BUSINESS.

1. In the absence of statutory provision to the contrary, the lien of an attachment does not affect rights in third persons outstanding at the time it is acquired.

2. Intervener agreed to furnish a concentrating mill to defendant which would perform certain work, defendant promising to pay for it if, on being tested, it proved capable of performing the required work. The mill was erected on defendant's land in a building belonging to defendant, on a foundation of solid masonry, to undergo the agreed test; but, before it had been fully tested, a creditor of defendant levied upon it, and also upon the land on which it stood. *Held*, that such creditor acquired no interest in the mill, title thereto having never passed to defendant.

3. A single sale of machinery within the state by a foreign corporation is not within a statute prohibiting such corporations from "doing business" in the state before complying with certain conditions.

4. The filing of a petition in intervention by a foreign corporation is not within a statute forbidding such corporations from "doing business" in the state before complying with certain conditions.

Appeal from district court, Park county.

Action by Samuel Cohen against the Emmons Mining Company. The Gates Iron Works intervened, and from a judgment for plaintiff intervener appeals. Reversed.

T. J. O'Donnell and W. S. Decker, for appellant. R. D. Thompson and C. A. Wilkin, for appellee.

THOMSON, J. On the 24th day of October, 1891, the Gates Iron Works and the Emmons Mining Company entered into an agreement in writing as follows: "This agreement, made and entered into at the city of Denver, county of Arapahoe and state of Colorado, this 24th day of October, A. D. 1891, between the Gates Iron Works, a corporation of the state of Illinois, doing business at the city of Chicago, in said state, party of the first part, and the Emmons Mining Company, a corporation of the state of Colorado, having an office in the city of Denver, in said state, party of the second part, witnesseth: That the party of the first part agrees to furnish the machinery for a concentrating plant, having capacity of fifty (50)

tons in twenty-four (24) hours, for the sum of twelve thousand five hundred (\$12,500) dollars, f. o. b. Chicago; said sum to include also the services of a man to superintend the erection and starting of the plant. The items of machinery to be furnished under this agreement are as follows: 1 No. 2 Gates rock breaker; 1 chain ore drier; 1 set Gates improved Cornish rolls, with lathe; 1 set extra shells for above rolls; 1 sizer, 80 mesh; 5 Card concentrators; 10 Gates wet slime concentrators; 2 40 horse power half arch front standard tubular boilers; 1 50 horse power stationary engine, for crusher, etc.; 1 20 horse power detached portable engine, for concentrators; feed-water pump, heater, piping, shafting, hangers, pulleys, belting, etc., to make a complete plant. That the party of the first part also agrees to furnish full plans and specifications for the mill. That the party of the first part guaranties to save eighty (80) per cent. of all the concentrating values in the ore in the shape of galena, argentiferous galena, iron and copper pyrites, native silver, native gold, and any mineral or metal which is possible of concentration, wet or dry, by any machine; it being understood that the ore is to be treated as a concentrating problem, and in no sense as a free milling proposition. That the party of the second part agrees to pay the said sum of twelve thousand five hundred dollars (\$12,500) in cash when the plant is completed and successfully fulfilling the conditions of the above guaranty, and further agrees, when the order is given, to put up as security in escrow a sufficient amount of the stock of the Emmons Mining Company, at 45 cents per share, as earnest to secure the payment as above. The party of the first part is to ship the machinery in its own name, and to hold possession of same until payment of cash, as above provided; and if the said party shall fail to make the payment in cash, as above provided, upon said conditions, then said first party shall have the right to sell the stock put up as security in the market, and apply the proceeds on its claim. That the party of the second part agrees to push the construction of the mill as rapidly as possible, and to use every reasonable effort to complete the work as per accepted plans. The party of the second part further agrees to furnish the ore as soon as the plant is completed, so that the tests can be made. Executed in duplicate. Witness the signatures of W. L. Card, for the Gates Iron Works, of Chicago, as per their written authority, and of the president of the Emmons Mining Company, attested by the secretary thereof, under their corporate seal. Gates Iron Works, by W. L. Card, Agent. Attest: F. R. Miller, Secretary. The Emmons Mining Co., by George F. Batchelder, President. [Seal.]" Afterwards, on the 16th day of December, 1891, the parties entered into a supplementary agreement, which, after reciting an experiment made upon the ore of the min-

<sup>1</sup> Rehearing denied February 10, 1896.

ing company by W. L. Card, the agent of the iron works, resulting, as Card reported, in a saving of 91 per cent. of concentrating values, contained the following provisions: "It is therefore understood and agreed that the method used by Mr. W. L. Card, in his foregoing report of the test, to show a saving of ninety-one per cent. of all values in said ore which are possible of concentration, shall be used in determining whether said contemplated mill fulfills the condition of saving eighty per cent. of such values; and if said mill shall reduce and concentrate fifty (50) tons (of 2,000 pounds) of said ore per day (twenty-four hours), and shall save eighty per cent. of the values, to be determined by said agreed upon method, then it shall be considered to have fulfilled the conditions of the attached agreement, and the twelve thousand five hundred (\$12,500) dollars therein named shall be due and payable at once."

The shipments of the machinery commenced in the summer of 1892, and continued until the following October or November. It was put in place under the supervision of David Cole, an agent of the iron works. It was placed in a building belonging to the company, upon the company's land; and, although not attached to the walls of the building, it, together with its framework of heavy timbers, rested on, and was fastened to, a foundation of solid masonry, constructed for the purpose. This manner of placing it was necessary to enable it to undergo the tests to which it was to be subjected. After the concentrating mill was completed, and had been, at least, partly tested, Samuel Cohen, the appellee, brought suit against the company, in which he caused a writ of attachment to be issued and levied upon the machinery, and also upon the land on which the machinery stood. The iron works intervened, claiming the ownership and right of possession of the machinery, and praying judgment accordingly. The answer of the plaintiff put in issue the material allegations of the petition, averred a want of compliance by the intervener with the provisions of our statute prescribing the conditions upon which foreign corporations are authorized to do business in this state, and alleged that the machinery was attached to the land and buildings in such manner as to constitute it part of the realty, so that it was embraced in the levy upon the land, and the intervener was precluded from claiming it as personal property. The evidence was that, after the completion of the mill, some tests were made. The largest quantity of ore handled in 24 hours was 31 tons. What percentage of the ore values was saved was not shown, but the undisputed evidence was that it did not nearly reach the requirements of the agreement. The mill was used for no other purpose than that of making these tests. It was never accepted by the mining company, and, at the time of the levy, the final test to determine its ability to per-

form the work for which it was intended had not yet been made. The mill was insured during the whole time in the name of the intervener, and was most of the time in charge of its agent. The plaintiff testified that, when the attachment was levied, he had no knowledge of the contracts between the intervener and the company; but he also testified that, prior to his attachment, he had conversations with Mr. Cole, the intervener's agent, and Mr. Webber, the company's superintendent, on the subject of the ability of the mill to treat the ore, in which he was possibly told, but did not recollect whether he was or not, that the machinery was there for the purpose of being tested to ascertain its sufficiency for that purpose. In his talk with Mr. Webber, he recommended another machine, which he thought would do the work better. There was no material controversy over the facts, and upon the evidence, the court made the following special findings: "(1) That there was a conditional sale of the property in question by intervener, the Gates Iron Works, etc., to the defendant, the Emmons Mining Company. (2) That the machinery herein in dispute was and is so affixed to certain realty belonging to said the Emmons Mining Company, and that it was so affixed thereto, under such circumstances and conditions, and for such purposes, that so far as plaintiff's rights against said machinery as an attaching creditor of the said the Emmons Mining Company, for the various amounts involved in the main suit, are concerned, it (said machinery) became, was, and is part and parcel of said realty. (3) That plaintiff acquired an attachment lien upon and against said realty, including the property herein in dispute, for a bona fide debt due him from said Emmons Mining Company, before he had any notice, either constructive or actual, of intervener's alleged ownership and right to the possession of the property herein in controversy. (4) That the agreement between the intervener, the Gates Iron Works, and the defendant, the Emmons Mining Company, in relation to the property herein in dispute, whatever may be its force and effect between the parties thereto, was and is not good against or binding upon said plaintiff after said property became affixed, as aforesaid, to a part of the realty of said company, and after said plaintiff had obtained, as he did, an attachment lien thereon, without notice of that agreement or any claim at all of the Gates Iron Works in and to said property. (5) To make out a case against plaintiff, the attaching creditor, with an attachment lien already secured on the property in dispute as realty, it was and is incumbent upon the intervener to establish, affirmatively, not only his ownership and right to the possession of the disputed property, as against the attachment debtor, under the agreements upon which he relies, but also that attachment plaintiff had notice of said agreements, either con-

structive or actual." Judgment was rendered upon these findings in favor of the plaintiff, from which the intervener appealed.

The first question to be considered relates to the status of the title to the property in controversy, as between the intervener and the mining company. The language of the contracts is not as lucid and free from obscurity as it might have been, but we think that, taking them together, and considering them in the light of the surrounding facts, we shall be able without much difficulty to discover the intentions of the parties to them. The intervener agreed to furnish a concentrating mill to the mining company, which would reduce a certain amount of ore every 24 hours, and save a certain percentage of its value. The mining company agreed to pay for the mill if, upon being tested in accordance with a certain specified method, it proved itself capable of doing the work required. The object of the company, obviously, was to obtain a concentrator which would handle its ores with a certain amount of expedition, and without losing more than a certain proportion of their value. Tests were necessary to determine whether this machinery would accomplish the desired purpose, and, until it should establish its ability to do so, there was no obligation upon the company to take it or pay for it. The contracts amounted to an agreement on the part of the intervener to sell, and on the part of the company to buy, the machinery, provided it should, upon being subjected to the proper tests, reduce the amount and save the value specified. When it should demonstrate its ability to do this, the result would be to pass the title out of the intervener, and fix the liability on the company; but until that time the title would remain in the intervener, and whatever possession the company might have in the property would be that of bailee, and not of owner. At the time of the levy it had not fulfilled the conditions of the agreement; no new contract had been made; the company had not accepted it, and, as between the company and the intervener, it belonged to the latter.

The next question in the case is whether the company, by any of its acts or omissions, in the course of the transaction, had precluded itself from asserting its title as against the attachment plaintiff. The court found that, at the time of the levy, the plaintiff had no notice of the intervener's title or right of possession, and that, by reason of the manner in, and the circumstances under, which the machinery was affixed to the land, as between the intervener and the plaintiff, it became a part and parcel of the real estate, so that the lien which he acquired by levying his attachment upon the land embraced and held the machinery. It is to these findings of the court that the argument on both sides is principally directed. If the controversy were between the intervener and a purchaser

of the real estate for value, and without notice of the intervener's claim, the question whether, under the facts in evidence, his purchase would embrace the machinery as part of the realty, might be troublesome; but a party whose only claim upon the property arises from the levy of an attachment occupies a different position in relation to the title. He has parted with no value. If his levy fails of its purpose, he sustains no loss, and is in no worse position than he occupied before the attachment. So that the reasons for extending protection to innocent purchasers, who have parted with their money upon the faith of an apparent title, do not apply to his case. In the absence of statutory provision to the contrary, an attachment can operate only upon the title which the defendant actually has when the attachment is made. The lien of an attachment or of a judgment binds the property upon which it operates against any subsequent act of the defendant, but it does not affect rights in third persons outstanding at the time it is acquired. *Drake, Attchm. § 234; Savery v. Browning*, 18 Iowa, 246; *Reed v. Ownby*, 44 Mo. 204; *Brown v. Pierce*, 7 Wall. 205; *Dix v. Cobb*, 4 Mass. 508; *Welton v. Tizzard*, 15 Iowa, 495; *Davis v. Owenby*, 14 Mo. 170; *Pom. Eq. Jur. §§ 685, 720*. By the terms of our statute concerning conveyances, instruments in writing affecting title to real estate do not take effect as to subsequent bona fide purchasers, or incumbrancers by mortgage, judgment, or otherwise, not having notice thereof, until they are filed for record in the office of the recorder of the county in which the real estate is situate. *Gen. St. § 215*. By these statutory provisions, the lien of an attachment would take precedence of an outstanding interest in the land, where such interest is evidenced by an unrecorded deed or contract of which the attachment or judgment creditor had no notice. The statute changes a rule which, prior to its passage, was of universal application, so as to place attachment and judgment creditors upon the same footing with purchasers in respect of land or a legal or equitable interest therein which has been conveyed, but the deed not recorded. The purchase made, or the attachment or judgment lien acquired, without notice of the unrecorded conveyance, will prevail against the outstanding title. But the statute stops there. It makes no further innovation. Except in the instance specified, the law remains as it was. Counsel undertake to reason from that statute to this case; but the attempt is necessarily abortive, because there is no conceivable analogy between a case like this and one to which the statute was intended to apply. The contracts here related to personal property, and not to real estate. The machinery was shipped by the intervener, and placed upon the land of the mining company, for the purpose—First, of proving its fitness for the work required by the company; and,

second, if the experiment should be successful, of selling it to the company. At the time of the attachment, there had been no sale to the company. The intervener had never parted with its title, even conditionally. Until a sale should be completed, the machinery remained personal property. As between the parties, it is immaterial how firmly it was affixed to the land; it became no part of the real estate; and the plaintiff, as an attaching creditor, stood upon precisely the same footing with his debtor. His lien embraced the interest of his debtor in the attached property, and nothing more.

Entertaining these views, we deem it unnecessary to go into an investigation of the law of fixtures. In so far as the plaintiff is concerned, the concentrator was not a fixture, and his attachment of the real estate did not include it.

The question whether, at the time of the levy, the plaintiff had notice of the intervener's rights, is of no importance. His own testimony seems to indicate that he had, at least, sufficient notice to put him upon inquiry; but the extent of the right which he acquired by his attachment is in no way affected by his notice or want of notice.

There is nothing in the objection that the intervener had not complied with the requirements of the statute concerning foreign corporations which calls for any extended consideration. The statute prescribes certain conditions upon which a foreign corporation may do business in this state; but this single transaction with the Emmons Mining Company was not doing business in this state within the meaning of the law, neither was the filing of the petition in intervention. *Tabor v. Manufacturing Co.*, 11 Colo. 419, 18 Pac. 587; *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 490, 25 Pac. 325; *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739.

Taken as a whole, the findings of the court were erroneous, and the judgment based upon them must be reversed. **Reversed.**

#### SMYTH v. LYNCH.<sup>1</sup>

(Court of Appeals of Colorado. Jan. 18, 1896.)

POWER OF ATTORNEY — PRINCIPAL AND AGENT — RATIFICATION — SURETSHIP — CONSIDERATION — PLEADING AND PROOF — VERDICT.

1. A power of attorney to act for the principal in all matters pertaining to the appointment of a receiver for a corporation, "and in all other matters connected with the affairs of said company in which I have an interest as a stockholder," does not authorize the attorney to sign his principal's name as surety on a bond to release the corporate property from attachment in a suit not commenced or contemplated at the time the power is given.

2. Under a complaint which alleged merely the due execution and delivery of the bond sued on, it could be shown that a party whose name had been affixed to the bond as surety by another without authority ratified the signature.

3. Where one assuming to act as agent, without authority, signs another's name as surety on a bond concurrently with its execution by the principal, a subsequent ratification will bind the person whose name is so signed, without any other consideration than that inuring to the principal at the time the bond was executed.

4. Where one assuming to act as agent, without authority, signs another's name as surety on a bond for the release of an attachment, mere silence on the part of the person whose name is so signed, after receiving information of the act after the property is released, is not of itself a ratification, since his failure to repudiate works no injury to the obligee in the bond.

5. Since a bond for the release of an attachment need not be under seal, a parol ratification thereof is sufficient, though the bond was in fact executed under seal.

6. In an action on a bond to which defendant's name was signed as surety by one assuming to act as agent, without any authority, an instruction that the alleged ratification by defendant must have been made with full knowledge of all the material facts is rendered erroneous by adding, "or with such knowledge as he would with reasonable diligence have obtained"; as defendant was not obliged to make inquiries.

7. In an action on a bond to recover the amount of a judgment, which exceeds the penalty of the bond, if the jury return a verdict for a sum less than the penalty they should be sent back with instructions to find either a verdict for the amount of the penalty or for defendant.

Appeal from district court, El Paso county. Action by J. Thomas Lynch against Edward Ferris and Clement B. Smyth on a bond. From a judgment for plaintiff, defendant Smyth appeals. **Reversed.**

The River & Rail Electric Company was doing business in 1889 and the early part of 1890 in Colorado Springs. The dissensions among the parties interested in the company, and business reverses, led to a litigation, out of which the present suit sprang. The disagreement respecting the management of the corporate affairs bred a purpose on the part of the stockholders to start proceedings for the appointment of a receiver. Clement B. Smyth, the present appellant, lived in Delaware, and was a large stockholder in the company. One of the principal persons engaged in the management of the company's business was Edward Ferris, who appears to have been looking after Smyth's interests in the company in Colorado. In evident preparation for the contemplated suit for the appointment of a receiver, Smyth executed a power of attorney to Ferris for certain specific purposes, in the following terms: "My true and lawful attorney, for me and in my name, to act fully for me in all matters pertaining to the appointment of a receiver for the River & Rail Electric Company, and in all other matters connected with the affairs of said company in which I have an interest as a stockholder in said company, and to do all lawful acts requisite for effecting these premises, hereby ratifying and confirming all that the said attorney shall do therein in virtue of these presents." Shortly afterwards, Lynch, the appellee, brought suit against the Rail & Electric Company to recover money which he had advanced to fur

<sup>1</sup> Rehearing denied February 10, 1896.

ther its operations. In some manner, which is not fully disclosed, and which it would be needless to state, he seems to have been identified with one Leach, and the two appear to have been opposed to the other faction, which was in the active management of the company's affairs. Lynch sued out an attachment in aid of his suit, and caused the writ to be levied on a large amount of personal property belonging to the corporation. Lynch's suit was begun on the 24th of February, on which day the writ was levied. On the 25th, the company undertook to execute a bond to release the property. In terms the bond provided that if the plaintiff should recover judgment, and the attachment be not dissolved, and the defendant company pay Lynch whatever judgment he might recover, the undertaking should be void. This bond was executed by the corporation by Metcalf, its president. Metcalf and Ferris signed the bond as sureties. In addition to the signatures of Metcalf and Ferris, which were personally executed, Ferris signed Smyth's name to the bond, by himself as attorney in fact. For some reason, a scroll seal was attached to the signatures of the several parties who executed as sureties. Ferris and Metcalf justified, but there was no justification by Smyth's attorney in fact. There was no attempt by the plaintiff in the present suit to establish any authority to execute the bond for Smyth, except what was conferred by the power of attorney, which has been stated. Ferris was not otherwise Smyth's agent, nor had he, by parol designation or by written authority, any power to act on Smyth's behalf. Matters stood in this way until considerably later in the year of 1890. It is conceded Smyth had no knowledge of the execution of the bond, at the time it was given, nor, in any event, for two or three months after. There is a controversy respecting the exact time at which information respecting the bond first came to Smyth. Ferris, the agent, was unable to state when he first spoke to Smyth about it. Lynch gave testimony tending to show a statement to Smyth respecting it in April or May, 1890. This, Smyth absolutely denies. He denies ever having had any conversation such as Lynch testified to, and denies any conversation with Lynch about it at that or any other time. He does state, however, that he acquired knowledge of the giving of the bond in the following fall, on his return from Europe. The knowledge which he obtained did not go so far as to advise him of the character, the form, or the terms of the obligation, nor of any facts which would give him much exact information about the instrument, other than the general fact that his name had been signed to some bond which had been given in the course of the litigation about the company's affairs. Lynch himself in no way testified to any fact tending to show that he gave Smyth any other knowledge than such as

would be furnished by the general fact of the execution of a bond in Smyth's name. It would appear that the contemplated suit for the appointment of a receiver had been started by Smyth, wherein an injunction was given, which led to some correspondence between the parties as to the probable results of the failure of that particular litigation. Smyth seems to have been informed, by a letter from Ferris, that if the injunction was dissolved it might be necessary to give a forthcoming bond in the attachment suit against the company. In this letter, however, Ferris gave no intimation that it would be necessary for Smyth to sign it, or that he contemplated affixing his name to any such bond or undertaking if it should be given. On the 19th of May, 1890, Lynch's attachment suit went to judgment against the company in the sum of \$11,896.35 and costs, \$24.60. It was appealed, and went through various vicissitudes, but was ultimately affirmed for the full sum of the original recovery. It was not paid, and thereupon Lynch brought this suit on the bond against Ferris and Smyth to recover \$14,824.50, with interest from June 5, 1893, at 8 per cent. on the amount of the original recovery. It is thus apparent the judgment to which Lynch was entitled against these bondsmen was the full amount of the penalty named in the bond. The case went to trial, and the jury found a verdict for the plaintiff, and assessed his damages at \$12,250. Whereupon an appeal was prosecuted to this court from that judgment.

Rogers, Cuthbert & Ellis, for appellant. R. D. Thompson and Lunt, Armit & Brooks, for appellee.

BISSELL, J. (after stating the facts). The first thing to be settled is Smyth's status with reference to the bond. His signature was affixed by Ferris, who assumed to act as his agent. If Ferris had authority, no question could arise respecting Smyth's responsibility. In the aspect which the case assumes on this appeal, it must be conceded Ferris was without the specific designation of authority requisite to the execution of this particular instrument. The appellee cannot insist on it, because the court instructed the jury that the power of attorney did not authorize him to sign the undertaking. The appellee took no exception to this instruction, and no question respecting it is presented to this court on any error assigned by him. On the case as made, it must be assumed the letter did not grant the authority. By its terms, Ferris was authorized to act with reference to all matters pertaining to the appointment of a receiver for the company. This language can in no manner be construed to authorize the execution of the undertaking sued on. The letter of attorney contains a general clause, authorizing Ferris to act in all other matters affecting Smyth's

interests as a stockholder in the company. According to the usual canon of construction, these general words are limited and controlled by the terms in which the specific authority is granted. *Billings v. Morrow*, 7 Cal. 171. At the time the power was executed and sent, Lynch's suit had not been commenced, nor is there anything in the record to show that such a suit was in contemplation. The disagreement among the parties interested in the company had undoubtedly led up to some negotiations and discussions respecting the commencement of a suit by the stockholders for the appointment of a receiver, whereby their interests were to be protected. The letter of attorney was with reference to this specific matter, and the general clause must be taken to have reference only to matters which would naturally and incidentally arise in the prosecution of such proceedings. We do not think the court erred when it instructed the jury that Ferris was not authorized by the power to execute the undertaking. Since this is our conclusion respecting the only written authority produced, the next inquiry is whether there is any proof of another appointment by Smyth whereby Ferris acquired the right to act. There is no pretense of an antecedent grant of authority, and if Smyth is in any way to be held it must be by the application of some other recognized principle embraced in the law of agency. The only possible doctrine which at all affects the question is that of ratification. The appellee seeks to invoke this very thoroughly settled rule, and thereby bind Smyth by Ferris' act. The evidence touching this matter lies within a narrow compass, and is easily stated. There is no pretense of an express ratification. Of this no one speaks. There is no testimony tending to show that Smyth at any time, either with or without knowledge of the execution of the instrument, assented to it, agreed to be bound by it, or by act or express words adopted what his assumed agent did. The whole contention respecting the ratification by Smyth rests on his silence and failure to repudiate his agent's act. Whether, so far as Lynch was concerned, he was called on to act definitely, is a matter about which we shall speak farther. According to Lynch's own testimony, when he first told Smyth that he was on the undertaking, Smyth neither repudiated the act nor adopted it. Lynch, according to his testimony, had some conversation with Smyth about their controversy, but he does not contend that he made any attempt to particularize the bond, the suit in which it was given, or relate its terms and substance. There is possibly some room for argument on the query whether what Smyth said, if the jury accepted Lynch's version of the conversation, indicated a knowledge on his part of what had been done and an intention to adopt it, but the general verdict under the instructions given do not resolve the ques-

tion. It will be remembered, Smyth denied this entire conversation. He concedes some general information about the bond came to him in the fall, on his return from Europe. Whether this was full enough to advise him of the terms of the instrument, the extent or character of his liability, or the person or persons to be affected by it, in no way transpires. At all events, Smyth did not thereafter inform Lynch, or anybody else interested, that he would not be bound by what Ferris had done. This is the ratification by which it is sought to make Smyth liable. As the case now stands, it is a ratification by silence. In so far as they are necessarily included in the verdict, it must be conceded the jury settled the questions of fact involved in this inquiry against the appellant. We shall not undertake to disagree with the jury, or so largely discuss the evidence respecting it as to indicate our opinion on the matter. There would be a manifest impropriety in proceeding otherwise, because the case must, under our conclusions, be again submitted to the learned court and a jury, whose province it is to pass on these questions. Recognizing the legitimacy of this restriction, we shall proceed as cautiously as may be with whatever discussions involve questions of fact. Since the case goes back for another trial, we are obligated to express our opinion respecting much which has been presented on this appeal, because similar questions will arise on the subsequent trial, and it is important the law be correctly stated to the jury, whose conclusions on the facts can then be accepted as determinative of the rights of the parties.

The evidence on the subject of the ratification was frequently objected to, and the position is taken that it was inadmissible under the pleadings. The action was directly on the bond. The complaint averred the execution and delivery of the instrument, assigned the breach in apt terms, and prayed the appropriate judgment. The objection is put on the alleged necessity to aver a ratification, if the plaintiff relies on such proof to maintain his cause of action. This does not seem to be the law. The execution may be proved in either way, and the one is as effectual as the other to fix a liability on the principal. *Mining & Milling Co. v. Donat*, 10 Colo. 529, 16 Pac. 157; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207; *Hubbard v. Town of Williamstown*, 61 Wis. 397, 21 N. W. 295. The circumstances of the execution of the bond are taken by the appellant as affording support to a position which he assumes as to the necessity of a new consideration to support such an instrument. We find no well-considered case which would relieve a surety from his obligation because no new consideration moved to him at the time he executed the obligation, when his execution was concurrent with that of the principal debtor. It is, of course, wholly unnecessary to discuss a class of cases which show a state of facts



totally different from the present. If Smyth, the surety, is to be bound in the present instance because he has ratified what his agent has assumed to do for him, he must be taken to have done it at the time when his agent acted, and under the conditions which attended the performance. The bond was executed by the agent at the time the property was released to the principal debtor, the Rail & Electric Company. If the release of the attachment would furnish a consideration sufficient to bind the principal, and the advantage to him was adequate in law to make the undertaking valid, the same consideration must be taken to inure to the benefit of the surety, and therefore support the contract into which he has entered. This has been adjudged in several well-considered cases, and we find none to the contrary, where a similar matter has been involved. *Bank v. Warren*, 15 N. Y. 577; *Drakeley v. Gregg*, 8 Wall. 242.

Another matter must be discussed, which would seem to be foreign to the case and irrelevant to our conclusion; but the question has been pressed on our attention in so many different ways as to lead us to conclude the appellant attaches a good deal of importance to the proposition. It bears with considerable force on the principal matter which we make the real basis of the reversal. It also deserves consideration because its elimination will largely tend to simplify the issue on which the jury must ultimately pass, and relieve the trial court of some difficulty. There is a very wide difference between a ratification which involves some of the elements of an estoppel in pais, and a ratification which follows the act done, whereby no injury has come to the plaintiff, who seeks to recover because the other has ratified what his agent has done. In the one case, the fact of ratification may be found by the jury because the principal has failed to repudiate on the receipt of information of what his agent has done. This statement, of course, is subject to some exceptions. It is only given as a general proposition. In the other, no such conclusive presumption follows, where there is an absence of proof which shows that equity and fair dealing would forbid the defendant, who was the principal, to deny his agent's authority. It is almost universally held inapplicable, where the act is complete before knowledge comes to the principal, and the plaintiff is not shown to have been in any wise injured by the principal's failure to act. Such a case presents none of the features which are essential to the application of the doctrine of estoppel. *Breed v. Bank*, 4 Colo. 481; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248; *Palmer v. Williams*, 24 Mich. 329; *Brown v. Rouse*, 104 Cal. 672, 38 Pac. 507; *Spofford v. Hobbs*, 29 Me. 148. The present case falls clearly within the line of these decisions. The attachment was levied, and the property seiz-

ed, on the 24th of February. It was released, on the execution of the bond, the next day. The bond was executed by two persons, who brought themselves within the requirements of the statute, as householders and freeholders and worth the penalty specified in the bond. The sheriff was the officer authorized to receive the instrument and release the property, and if the bond was not good without Smyth's signature, and the attorney in fact had no right to sign it, the sheriff himself, with his bondsmen, would undoubtedly be liable to the plaintiff in the action for any resulting damages. Lynch had nothing whatever to do with the acceptance of the bond, the discharge of the property, or the acts of the sheriff about it. The sheriff had a perfect right to act according to his own discretion, and Lynch's remedy, if any, was against him and his bondsmen, if he failed in the discharge of his duty. The act was done, and the property was released,—and had been, even according to Lynch's own contention, for some time before Smyth received any information about it. Under these circumstances, it cannot be successfully contended that Lynch was harmed by Smyth's failure to inform him of his repudiation of Ferris' act, even though we take as true Lynch's statements as to the time and circumstances under which he informed Smyth about it.

The resolution of the principal inquiry is in no manner affected by the character of the instrument sued on. The undertaking is provided for by the statute, and is to be taken by the officer on the release of the property. It is a statutory instrument, authorized to be given under certain circumstances, and secures to the debtor certain privileges respecting the possession of his property. The statute does not provide for the execution of these undertakings under seal. In this state, a seal is unnecessary to the execution of any instrument by which the title to property is transferred, or wherein parties contract with others. Seals were essential at the common law to the due execution of divers instruments, and many refined distinctions were based on this fact in resolving the matter of the liability of parties on contracts into which they had entered. A specialty could not be declared on, like a parol contract, and the matter of consideration was solemnly imported because the seal had been affixed. Because of these and many other differences between specialties and parol contracts, the pleader was bound to specify these distinctions, and, when he declared on a parol contract, could not recover on proof of a specialty. The converse rule was of equal force. This led to the establishment of a collateral doctrine, which is undoubtedly supported by many of the earlier cases, to wit, that a sealed instrument cannot be ratified except by a paper of equal solemnity, and bearing the seal of the individual who ratifies it. The tenden-

cy of modern times has been to depart from this doctrine, and a very large number of cases can be found in the books which hold the seal wholly unnecessary, both in those cases where a seal is not required and in those cases where a seal must be affixed to the instrument to make it valid. Under the first line of decisions, even though a seal was essential to the validity of the undertaking, the ratification may be by parol, and the principal bound as effectually as if his ratification had been by a sealed instrument. Nearly all agree that, where the instrument need not have been originally under seal to be valid, a parol ratification is good as to the sealed instrument. *Ingraham v. Edwards*, 64 Ill. 526; *Lawrence v. Taylor*, 5 Hill, 107; *Hammond v. Hannin*, 21 Mich. 374; *Holbrook v. Chamberlin*, 116 Mass. 155; *Peine v. Weber*, 47 Ill. 41; *Drumright v. Philpot*, 16 Ga. 424; *McDonald v. Eggleston*, 26 Vt. 154. The more liberal doctrine commends itself to our consideration. The policy of our state has resulted in the abolishment of seals. They are no longer necessary to the validity of any contract between parties. The statute which provides for the release of attached property permits the undertaking to be executed without a seal. The fact that the agent undertook to affix a seal to this document neither adds to its force nor in any manner affects its validity. To hold the principal must execute a sealed instrument to ratify what was perfectly valid without one is to establish a rule which seems to be destitute of any good reason on which to base it, and a rule which is altogether too technical for this age and for modern times. We therefore conclude, as a matter of law, if a ratification may be found from the facts proved, it will be quite as effectual as though there had been an express adoption of the agent's act over the seal of the principal.

This brings us to the troublesome inquiry whether this ratification was satisfactorily established and the jury were duly instructed respecting their duty in the premises. We are somewhat restrained in the argument by our purpose not to overstep the boundaries we have set in the discussion of the evidence, that neither the parties nor the court may be embarrassed by the expression of our personal views. Whoever seeks to enforce a contract executed by an unauthorized agent is bound to prove a ratification, with full knowledge of all the material facts attending the transaction. Mistake, ignorance, or misapprehension of any of the essential matters will relieve the alleged principal of any responsibility. In these cases, the law lays the same burden of proof on the plaintiff as in those matters of contract executed by an agent who possessed the requisite original authority. As, in the one, he would be bound to establish by satisfactory proof the existence of the power, so, in the other, he must demonstrate an adoption, with full knowledge of what has been done in his

name and on his behalf. The principal is under no obligation to accept the assumed agent's act. He need neither sanction nor adopt it. The law imposes on him no duty to make inquiries about it. Where there is no legal obligation, the question of negligence or diligence is of no importance. Whoever, therefore, relies on a ratification, is obliged to show it was made under circumstances which in law will bind the principal. The duty of making inquiries and ascertaining what has been done is not cast on the one who is under no legal obligation to take on himself the responsibility, but it rests with the party who would gain a benefit by the enforcement of the contract. The requisite information is justly assumed to be within the reach and control of him for whose advantage the contract was made. Concerning these details the principal is presumed to be a stranger. While he may not close his eyes to what is within his own control, he is not to be charged because he has failed to make inquiries. He may not be held because he was negligent, or because his information might have been enlarged, or his misapprehension corrected, by diligence to ascertain the facts. *Combs v. Scott*, 12 Allen, 493; *Murray v. Lumber Co.*, 143 Mass. 250, 9 N. E. 634; *Nixon v. Palmer*, 8 N. Y. 398. This accepted doctrine of the law of agency was ignored by the court in its instructions to the jury. By the twelfth instruction the jury were undoubtedly told they must believe from the evidence that Smyth's alleged ratification was made with a full knowledge of all material facts, but he attached a limitation which destroyed the force and effect of the instruction, and imposed a duty on Smyth which is not recognized by the precedents. The court added this clause, "or with such knowledge as he could, with reasonable diligence, have obtained." From this the jury might have readily concluded it was possible for Smyth, when he learned of the execution of the bond in the fall of 1890, to ascertain, by inquiry of Ferris, or of Lynch, the fact of the execution of the bond, and all the circumstances attending it, and if they further concluded that he failed to repudiate the act, and remained silent respecting his agent's authority, he was holden, as upon proof of a ratification with full knowledge. We must conclude the jury were liable to be misled by this statement of the law. The effect of it is apparent. Under the testimony, the jury could legitimately find that Smyth might have obtained full knowledge of all the facts and circumstances attending the execution of the bond, its character and purport, and the proceedings taken under it, by using reasonable diligence in making inquiries about it when the fact of the execution of the bond was first brought to his attention. Reaching this conclusion, it was an easy matter for them to find that Smyth had ratified his agent's acts, with a full

knowledge of all the material facts. Whatever may have been his ignorance or his misapprehension, he could have obtained full knowledge by inquiry; the exercise of reasonable diligence would have led him to make it; and the verdict is but a legitimate deduction from the findings which could be rightfully made under that instruction. The qualification made the instruction undoubtedly erroneous, and the verdict may not, therefore, be accepted as conclusive on the main question of fact. Ratification cannot be accurately defined, as a legal term. Generically, the word always expresses the same idea, and in legal effect is always the adoption of the act of one who has assumed to be an agent without the grant of an antecedent authority. In its application to different conditions, legal accuracy requires the observance of very wide differences in the significance of the term. There is a marked difference between the ratification of the acts of an agent possessing a general authority to represent the principal, who steps outside the usual limits of his business; or the adoption of what has been done by one having a special authority, which he has exceeded in the terms of the engagement into which he entered, which might otherwise have been deemed authorized; or the liability incurred by the principal who has permitted another to be misled by the conduct of his agent, and who has received the benefits of the transaction, or suffered injury to come to the other, whereby he is estopped; and the case of a ratification of a completed act, performed by one without authority, where the failure to repudiate worked no injury, and the principal has not accepted or received any benefit from the transaction. These distinctions are recognized in all the cases, and wherever different principles are apparently expressed, it is due to the application of the general rules of law governing agency in their application to the varying conditions represented by the different controversies. The present case, by proof, falls entirely within the limit of the class of cases last suggested. Ferris was never authorized by Smyth to act as his agent in all business transactions, or in all business transactions of a particular character. It is not, therefore, a case where an agent has overstepped the limits of an apparent authority, where his act will be presumed to have been adopted with very slight proof of acceptance on the part of the principal. Neither was he a special agent deputed to do a particular thing, of which the one under investigation might well be taken to be a part, where a similar amount of proof might suffice to support the plaintiff's right to recover, on slight evidence of ratification. Neither is the case brought by the proof at all within the limits of those cases which presume ratification from the silence of the principal, after he has procured general knowledge of the act performed, because the

one who has relied on the agent's authority has been misled to his prejudice, and suffered injury, because of the principal's failure to repudiate the agent's acts. It seems to be universally conceded that the principal shall be estopped to deny the agent's authority, if the other has been misled to his prejudice, or would sustain injury or loss of property, which otherwise would not have fallen on him, had the principal promptly repudiated the agent's act. The jury may never be told, in a case like the present, that they may find the act has been ratified, because the principal has failed to repudiate the agency with reasonable promptness after acquiring information of the act. It is, doubtless, true, the jury may take the silence into consideration, as a circumstance or matter of evidence, and as part of the chain of proof which the plaintiff must produce to establish the ultimate fact on which his recovery depends. The principle was early recognized in the state, in the case of *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, cited *supra*. The strength of the circumstance, the force and effect to be given to it, always depend on the situation of the parties at the time the information comes, and the injury which will happen to the plaintiff by reason of the principal's failure to act. *School Dist. No. 6 v. Aetna Ins. Co.*, 62 Me. 330; *Ladd v. Hildebrandt*, 27 Wis. 135; *Bank v. Morley*, 19 Wis. 72; *Kerr v. Sharp*, 83 Ill. 199; *De Land v. Bank*, 111 Ill. 323; *Craighead v. Peterson*, 72 N. Y. 279; *Hamlin v. Sears*, 82 N. Y. 327; *Railway Co. v. Jay*, 65 Ala. 113. These and many other cases approve the distinctions which have been stated. Applied to the case at bar, we find them relevant and controlling. The bond was signed by Ferris without an antecedent grant of express authority. It was neither directly conferred by the power, nor was it within the scope of the special authority which had been theretofore granted. The plaintiff, Lynch, parted with no right, and, according to the present record, lost no claim, which he had possessed by virtue of the execution and service of his writ, nor did he, so far as the evidence shows, even at the time when, as it is claimed by him, he first informed Smyth that he was on the bond, part with any valuable thing, lose any existing right, or suffer damage because of Smyth's failure to immediately repudiate the transaction. Both of the other sureties were then, so far as we know, perfectly solvent. The case, therefore, is an exception to the class of which *King v. Rea*, 13 Colo. 69, 21 Pac. 1064, is an example. The bond was given to the sheriff, under the statute, to release property which had been seized by the officer. The plaintiff was not an active party in procuring the acceptance of the bond, nor was he possessed of the right to except to the sheriff's action. He might hold the sheriff liable on his official security for any failure on his part to comply with the statute. There are but two

sections of the Code which authorize the execution of a bond to relieve a defendant from the effects of the writ. These are sections 97 and 112 of the Code. It is unnecessary to give an exact construction of those sections, and determine whether, when a bond is given in the form and with the penalty mentioned in the first, it may be held operative, and secure to the defendants the rights provided for by the last. We prefer not to enter on a discussion of this question, because it is unessential to our conclusion. But, it may be suggested, the writ had been levied, and the bond was given, to secure the release of the property. The only person who could take that bond, exercise any supervision over it or discretion about it, accept or refuse it, approve or reject the security, was the officer who was authorized to take it, to wit, the sheriff. In the absence of any statutory authority to that end, the plaintiff in the suit was remediless to compel the execution of a new bond, the procurement of additional sureties, or in any wise to take advantage of the default of the sheriff, otherwise than by proceeding against the officer himself and his bondsmen. Whether the plaintiff would have a remedy, and what it might be, in case the bond became worthless after delivery, we do not inquire. *Drake, Attachm. § 316a; Wade, Attachm. §§ 183, 184; People v. Wayne, Circuit Judge, 39 Mich. 15.*

Under these circumstances, it cannot be successfully urged that harm came to Lynch from Smyth's failure to repudiate Ferris' act, even though it be conceded full knowledge came to Smyth of the circumstances attending the making of the instrument. This demonstrates the fatal error into which the court fell when it gave its first instruction to the jury. Therein the jury were told, if they found, from the evidence, Smyth knew of the existence of the bond shortly after its execution, and thereafter failed, within a reasonable time, to give Lynch notice that he repudiated Ferris' act, and, by reason of this failure, plaintiff was prevented from collecting his debt, such failure,—that is, failure to give notice,—and such silence, might be taken as a ratification of the act. The instruction is bad. There was no evidence tending to show that Lynch lost his debt because of Smyth's failure to notify him that he repudiated what Ferris had done. It is not easy to see what principle of good faith or fair dealing required Smyth, either to pursue his inquiries to the extent of acquiring full knowledge about it, or to give notice to Lynch that he would not be bound. We must not be understood as holding it error for the court to receive proof on this subject, and submit it to the jury as evidence which may be taken in connection with the other proofs in the case, and used as a basis for their finding. We simply hold that silence may not be taken as a ratification.

To dispose of all the matters presented to

our attention, we need consider but two further matters, which are relatively unimportant. The plaintiff offered in evidence the entire record in the suit of *Smyth v. The River and Rail Co., Leach, and Stetson*, which, as has already been stated, was brought to procure the appointment of a receiver of the affairs of the corporation. We are not quite able to understand the theory on which this record was produced and offered in evidence. Appellee's contention seems to be that, because in that case Ferris acted on behalf of Smyth, as his agent, and signed a bond to secure the injunction which was prayed for, the jury were entitled to take that circumstance into consideration as an evidence of Ferris' authority to execute the bond in suit. It does not seem to us to have been either relevant or proper. Ferris was especially authorized to act in that proceeding, by a power of attorney given for the purpose. What he did was in full execution of his authority, and must be taken to have been fairly within the terms of the power granted. Ferris' acts in this particular neither tend to show an authority to execute the present bond, nor in any wise support the appellee's contention that the act was ratified by Smyth's subsequent conduct. The other matter concerns the verdict of the jury. What we shall say about it is to be taken more as a guide to the court on the subsequent trial, than as an absolute expression of the law, or as a suggestion that because of this error, were it the only one, the case would of necessity be reversed. The circumstances under which the same difficulty might occur in another case would not necessarily constitute error, though in all cases resembling the present one the verdict must necessarily deviate from the issue, and fail to be an accurate finding on the question which it presents. The suit was on a bond, to recover the amount of a judgment, which was capable of exact proof, and which was accurately established by the evidence. The principal and interest amounted to more than the penalty of the bond, which was \$15,000. If the plaintiff recovered anything, he was certainly entitled to recover this sum, but the verdict was for \$12,250. This is incomprehensible, and on no possible hypothesis did the evidence justify it. Such a departure of the verdict from the issue has often been held fatal to a judgment. *Tourtelotte v. Brown, 1 Colo. App. 408, 29 Pac. 130; Dorsett v. Crow, 1 Colo. 18; Hatch v. Attrill, 118 N. Y. 383, 23 N. E. 549; Moody v. Keener, 7 Port. (Ala.) 218; Garland v. Davis, 4 How. 131; 2 Thomp. Trials, § 2606; Parker's Adm'r v. Moore, 29 Mo. 218; Robeson v. Miller (Colo. App.) 35 Pac. 880.* The trial court should not have permitted the verdict for \$12,250 to stand. On the receipt of it, the jury should have been sent out, and instructed to find a verdict for the penalty of the bond or a verdict for the defendant. That was the proper place in which to correct the error,

and trial courts should not hesitate to exercise their authority in such matters. In the statement preceding the discussion of this proposition, we do not intend to criticize the rule, or in any manner dissent from it. The question which we desired to reserve is whether, if this were the only error disclosed by the record, it would operate to reverse the case, since it could not by any possibility tend to the appellant's prejudice. For the errors committed by the trial court in instructing the jury, this case will be reversed and remanded. Reversed and remanded.

### WILDER v. CAMPBELL, Sheriff.

(Supreme Court of Idaho. Jan. 31, 1896.)

#### REDEMPTION FROM MORTGAGE SALE — EXTENSION OF TIME.

Mortgage was foreclosed, decree of sale awarded, and land sold by virtue thereof, certificate of sale issued to purchaser. Purchaser, on expiration of time allowed for redemption, demands a deed. Sheriff refuses to execute deed, on the ground that the legislature has extended the time for redemption. *Held*, that the act of the legislature extending time of redemption does not affect sales under foreclosure of mortgages, where the same were executed and recorded prior to the passage of the act.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by E. J. Wilder against Frank Campbell, sheriff of Latah county. From a judgment overruling a demurrer to the complaint, defendant appeals.

On the 23d day of April, 1893, Oscar Schuman and wife executed a note and mortgage to the Vermont Loan & Trust Company for the sum of \$2,800. The note was due May 1, 1898. It provided for the payment of interest annually, at the rate of 7 per cent. per annum, on November 1st of each year. Default was made in the payment of interest which was due November 1, 1894. The mortgage was foreclosed, a decree of sale awarded; and the land was sold, by virtue of the decree, on the 28th day of March, 1895, pursuant to notice theretofore given according to law. The Vermont Loan & Trust Company, the mortgagees, became the purchasers. A certificate of purchase was thereupon issued to the said purchasers. The certificate was afterwards sold and transferred to the plaintiff herein. On September 30, 1895, the plaintiff returns said certificate of purchase to the sheriff, tendering said sheriff his fee of three dollars for making a deed, and demanded a deed. The sheriff refused to make the deed, because one year had not elapsed since the sale. Said Schuman and wife refused to surrender said premises to this plaintiff. It also appears that they are insolvent. The plaintiff demanded judgment against the sheriff for \$150 damages and costs of suit. The defendant demurred to this complaint, and gave, as a reason therefor, that it does not state facts sufficient to

constitute a cause of action. The demurrer was overruled by the court. The defendant refused to plead further, and judgment was rendered against the defendant for \$150 and costs of suit. The defendant appeals from this judgment to this court. Affirmed.

S. S. Denning and Mitchell & Orland, for appellant. Forney, Smith & Moore, for respondent.

MORGAN, C. J. (after stating the facts). The only question presented to this court is, is the assignee or purchaser entitled to his deed at the end of six months from the date of sale, or must the mortgagor be allowed one year in which to redeem, under the amendment to section 4492, Sess. Laws 1895, p. 34, approved March 5, 1895. By this amendment to section 4492 the judgment debtor or redemptioner is given one year from the date of sale within which to redeem real estate sold under execution or decree of foreclosure. Under the law as it existed prior to this amendment, section 4492 gave the judgment debtor only six months within which to redeem such property. It is claimed by the respondent that the law referred to above does not apply to mortgages entered into before its passage, and that in this case the mortgagor has but six months in which to redeem from a sale under a decree, and that therefore he was entitled to his deed at the time the demand was made, to wit, on the 30th day of September, 1895. This amendment to the section not only affected the remedy given to the mortgagee, inasmuch as it prevents him from getting the ownership and possession of the mortgaged property as soon as he otherwise would by the law which was in force at the time the contract was made; it also gives the mortgagor an equitable estate in the land which, before the passage of this act, he did not have. In *Bronson v. Kinzie*, 1 How. 320, the supreme court of the United States, in a similar case, in speaking of the laws of Illinois passed after the mortgage in that case was given, says: "As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to ingraft upon it new conditions injurious and unjust to the mortgagee."

It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for 12 months after the sale. If such rights may be added to the ordinary contract by subsequent legislation, it would be difficult to say at what point they must stop. The equitable interest in the premises may in like manner be conferred upon others, and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything

like its value. This law gives to the mortgagor an equitable estate in the premises, which he would not have been entitled to under the original contract, and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Such modification of a contract by a subsequent legislature, without the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the constitution. In the case of *Louisiana v. New Orleans*, 102 U. S. 206, Mr. Justice Field, in delivering the opinion of the court, says: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of a contract, the obligation of the latter is to that extent weakened. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition." In *Green v. Biddle*, 8 Wheat. 84, the supreme court of the United States says: "The objection to a law or the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is that if the creditor agrees with his debtor to postpone the day of payment, or in any other way to change the terms of the contract without the consent of the surety, the latter is discharged, although the change was for his advantage." See, also, *Watkins v. Glenn* (Kan. Sup.) 40 Pac. 316; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190. *Sutherland on Statutory Construction*, at page 625, has the following language: "A law which takes from a mortgagee the right of possession until after foreclosure, a law postponing the right to sue on the note or bond until after foreclosure, extending redemption, or shortening redemption, impairs the obligation of the contract, and is within the prohibition of the constitution." The case of *Cargill v. Power*, 1 Mich. 369, is a case in point. The facts are as follows: A mortgage containing a power of sale was given in January, 1847, and the mortgaged premises were advertised and sold under the power in July, 1848. Between the giving of the mortgage and the sale, the law regulating the time of redemption by the mortgagor was changed from two years to one year. It was held that the law in existence at the time the mortgage was executed and delivered was a part of a contract, that the mort-

gagor had two years from the sale to redeem it, and that the law in force at the time the sale took place, restricting the redemption to one year, was unconstitutional so far as it respected mortgages in existence at the time the law took effect. In *Edwards v. Kearzey*, 96 U. S. 595, the court holds: A remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of a state which so affects that remedy as to substantially impair and lessen the value of a contract is forbidden by the constitution of the United States, and is therefore void. Further on, the court says, in illustration of the principle, "That it is the established law of North Carolina that stay laws are void, because they are in conflict with the national constitution. This ruling is clearly correct. Such laws change the terms of a contract. It impairs its obligations by making it less valuable to the creditor, and it does this solely by operating on the remedy. The contract is not otherwise touched by the offending law. \* \* \* Let us suppose a case. A party recovers two judgments,—one against A., and the other against B.,—each for the sum of \$1,500, upon a promissory note. Each debtor has property worth the amount of the judgment, and no more. The legislature thereafter passes a law declaring that all past and future judgments shall be collected in four equal annual installments. At the same time, another law is passed which exempts from execution the debtor's property to the amount of \$1,500. The court holds the former law void, and the latter valid. Is not such a result a legal solecism? Can the two judgments be reconciled,—one postponing the remedy, and the other destroying it? If it may exempt property to the amount here in question, it may do so to any amount. It is as regards the mode of impairment we are considering. It would annul the inhibition of the constitution, and set at naught the restrictions it was intended to impose." In *Goenen v. Schroeder*, 8 Minn. 387 (Gil. 344), the following are the facts: A mortgage was executed on the premises in question by the defendant and wife, on the 3d day of August, 1853, which was to pay a certain sum of money in eight months from this date. Default was made on the 26th day of October, 1861. The land was sold by virtue of the power contained in the mortgage, and purchased by the plaintiff for the sum of \$280.59. The proper certificates were executed by the sheriff, and the premises not being redeemed by the 1st day of November, 1862, the sheriff on that day executed and delivered to the plaintiff, as purchaser, a deed to the same. On the 7th day of April, 1863, the plaintiff demanded possession of the premises of the defendant, who refused to deliver them up. This action was brought to recover the premises. The law in force at the time the mortgage was given gave the mortgagor but one year

in which to redeem after sale under power and foreclosure by judgment. The court held that the act of March 10, 1860, passed after the making of the mortgage and before the sale of the land by virtue of the mortgage, which extended the time of redemption to three years, did not apply to mortgages, executed before its passage, which contained powers of sale and were foreclosed under them; and says, further, that: "It is clear that the legislature of 1860 had no power to change the time of redemption in the mortgage under consideration. \* \* \* The cases we have decided under this law hold this, without qualification, and place it upon the ground that it will be impairing the obligation of a contract to so do." These cases, and many others quoted in the decisions above referred to, make it clear that both the supreme court of the United States and many of the courts of last resort in the several states hold that the passage of a law extending the time of redemption, enacted between the time of the making of the contract embodied in the mortgage and the time of sale under the decree of foreclosure, cannot affect such mortgage. To hold otherwise would be to hold that a law might be passed impairing the obligation of contracts, which is positively forbidden both by the constitution of the United States and the constitution of our own state. The reasons given in these various decisions are abundant and convincing. It is scarcely necessary to rehearse them in the present case. We must hold, therefore, in the case at bar, that the amendment to section 4492 by the act of the legislature of March 5, 1895 (Sess. Laws 1895, p. 34), does not affect sales under foreclosure of mortgages where the mortgage was executed and recorded prior to the passage of the act. The judgment of the district court is affirmed, with costs to the respondent.

SULLIVAN and HUSTON, JJ., concur.

**FIRST NAT. BANK OF WAMEGO, KAN.,  
v. SKINNER et al.**

(Supreme Court of Idaho. Jan. 27, 1896.)

**ACTION ON NOTE—FRAUD—BONA FIDE PURCHASER.**

Evidence examined, and held not to sustain charge of fraud, or that plaintiff was not an innocent purchaser for value.

(Syllabus by the Court.)

Appeal from district court, Bear Lake county; D. W. Standrod, Judge.

Action by the First National Bank of Wamego, Kan., against Hyrum Skinner and Mary Jane Skinner. Judgment for defendants. Plaintiff appeals. Reversed.

Robert S. Spence, for appellant. John A. Bagley and E. E. Chalmers, for respondents.

HUSTON, J. This action is brought to collect the amount claimed to be due upon a

certain promissory note executed by defendants, and the foreclosure of a mortgage given to secure payment of said notes. The case was tried to a jury, and verdict rendered in favor of defendants. Judgment entered thereon. Motion for new trial overruled. This appeal is taken from the order overruling motion for new trial, and from judgment.

The facts, as shown by the record, are substantially as follows: On or about the 11th day of May, 1891, the defendants and certain other parties purchased of one Bennett a certain stallion, for the agreed price of \$2,000, said purchasers giving their notes therefor, among which notes was the one sued upon in this action. Before maturity, the note in suit was sold and transferred to the plaintiff. It is contended by defendants that there was fraud in the inception of the note, and that, such fact being established by the proofs, it was incumbent upon the plaintiff to show that it was an innocent holder of the note, to wit, that it purchased the note for value, before due, without notice of fraud.

If, as is attempted to be shown by defendants, the horse was not as represented, or that they were fraudulently induced to purchase him, and the defendants had repudiated the sale upon such ground, and returned or attempted to return the horse, their contention might have some claim to recognition; but to retain the horse for nearly two years, and then claim fraud in the purchase, is, we think, an unwarranted assumption. We might, perhaps, properly leave the case here; but as it is contended by defendants that plaintiff had notice of the fraud claimed, and as the decision in this case is to be accepted upon this point in other cases, we will proceed to consider the contention of defendants upon this question.

Robert Scott testifies as follows (by deposition): "Q. 1. What is your name, and where do you reside? A. My name is Robert Scott, and I reside at Wamego, Kansas. Q. 2. Where did you reside during the years 1891, 1892, 1893, and 1894? A. In Wamego, Kansas. Q. 3. Are you acquainted with the firm of E. Bennett & Son, of Topeka, Kansas? If so, how long have you known them? A. Yes. I have known them about fifteen years. Q. 4. Did you, as cashier of the First National Bank of Wamego, Kansas, or any of the officers of said bank, at any time during the years 1891, 1892, 1893, and 1894, purchase for a valuable consideration, in the ordinary course of business, and before maturity, from the said E. Bennett & Son, three promissory notes, of which the following are copies? [Here follow copies of the notes admitted by defendants.] A. Yes, in this way: In the year 1891, I, as cashier of the said First National Bank of Wamego, Kansas, and before the maturity of said notes, received said notes as the property of said bank, they and a certain mortgage securing them being then and there indorsed and delivered

by E. Bennett & Son to said bank as collateral security, and in the ordinary course of business. At all times since, the said bank has been the owner and holder of said notes. Q. 5. From whom did you purchase the said notes, and what was the price paid for them? A. From E. Bennett & Son, and the price was as stated in my last preceding answer. Q. 6. Have you ever had any notice, actual or constructive, of any fraud perpetrated by E. Bennett & Son, or their agents, in the inception of the said notes? A. None whatever. Q. 7. Did you, or any officer of your bank, purchase the said notes in good faith, and are you the owners and holders of the said notes at the present time? A. The notes came into the possession of the bank in the manner I have heretofore stated, and since the said time the said bank has been, and still is, the owner and holder of said notes. Q. 8. Has E. Bennett & Son any interest in the said notes at the present time, or have they had any since the date of your purchase? A. None whatever." It is claimed by defendants that this evidence is insufficient to establish the purchase of the note by plaintiff before maturity, for a valuable consideration, without notice of fraud. We cannot agree with this contention. We can scarcely conceive how it could be more complete. The evidence of Mr. Scott was not only undisputed, but no attempt was made to dispute it. He was not even subjected to a cross-examination. Our conclusion, after a careful examination of the record, is that no fraud was shown in the original purchase, and the plaintiff is clearly shown to be an innocent purchaser of the note, for value, without notice. The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

#### JOHNSON v. LINFORD et al.

(Supreme Court of Idaho. Jan. 27, 1896.)

Action by John P. Johnson against Joseph Linford, Jr., and others. Reversed.

**PER CURIAM.** The facts being the same in this case as in the case of *Bank v. Skinner*, 43 Pac. 679, the judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

#### BANK OF TROY, KAN., v. LINFORD et al.

(Supreme Court of Idaho. Jan. 27, 1896.)

Action by the Bank of Troy against Joseph Linford, Jr., and others. Judgment for defendants. Plaintiff appeals. Reversed.

**PER CURIAM.** The only question in this case not involved in *Bank v. Skinner*, 43 Pac. 679, is the claim of defendants that there was no proof of the corporate character of plaintiff. The denial of the corporate character of plaintiff is insufficient in the answer, and we think the corporate character of plaintiff is sufficiently

shown in the record. This question is first raised here. The defendants took no appeal; they took no exception. The judgment of the district court is reversed, and cause remanded for further proceedings in accordance with this opinion.

#### On Rehearing.

**HUSTON, J.** This case was heard together with two others, to wit, *Bank v. Skinner*, 43 Pac. 679, and *Johnson v. Linford*, ubi supra. The cases were heard together. The facts were the same. In this case the point was made for the first time that the corporate character of plaintiff was denied in the answer, and was not proven upon trial. We held that the denial was not made with sufficient directness; that the corporate character of plaintiff sufficiently appeared from the record. We see nothing in the petition to change this view. Even were the contention of counsel correct, it cannot be seriously contended that this matter affects the substantial rights of defendants. See *Rev. St. Idaho*, § 4231. Petition denied.

**MORGAN, O. J., and SULLIVAN, J., concur.**

#### BOULWARE v. PARKE.

(Supreme Court of Idaho. Jan. 30, 1896.)

**WATER RIGHT—ACTION FOR DIVERSION—PARTIES.**

1. Record examined, and held, that complaint states cause of action.

2. In an action concerning water rights, where it does not appear from the complaint that the subject of litigation is within any water district, or that there is any water master in charge of the water in question, a demurrer based upon the nonjoinder of the water master is not well taken.

(Syllabus by the Court.)

Appeal from district court, Cassia county; C. O. Stockslager, Judge.

Action by Sarah Boulware against William H. Parke. From an order, sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

H. S. Hampton, for appellant. Hawley & Puckett, for respondent.

**HUSTON, J.** Plaintiff brought action against defendant for damages alleged to have been sustained by plaintiff by reason of the wrongful violation by defendant of a decree made and entered by the district court of Cassia county in an action in said court concerning certain conflicting claims to water rights, to which action both plaintiff and defendant were parties. The complaint sets forth the decree, the circumstances, and particular acts of defendant in violation thereof, the nature and extent of the damage, and prays judgment. To this complaint defendant filed a general demurrer to each count, and raised the further objection that the water master of the district was not joined as defendant. From an order and judgment of the district court sustaining the demurrer, this appeal is taken. We have carefully examined the complaint, and have no hesitancy in saying that each count or subdivision states a good cause of action. It is true that there is much matter in the com-



plaint that might well have been left out, but objection to this should have been raised in another way. The objection of non-joinder is not well taken. Non constat, from anything in the complaint, that there was either a water master or water district in the precinct or county where the subject of litigation is situated. Counsel, both in their briefs and in their arguments, raise questions which we deem of too much importance to be decided in a case which does not present them in a manner which would give our decision greater weight than mere dicta. The judgment of the district court is reversed, and cause remanded, for further proceedings in accordance with this opinion. Costs to appellant.

MORGAN, C. J., and SULLIVAN, J., concur.

### STEIN v. FOGARTY.

(Supreme Court of Idaho. Jan. 31, 1896.)

#### PAROL EVIDENCE—PROMISSORY NOTE.

In the absence of fraud, accident, or mistake, parol evidence of an oral agreement contemporaneously made with the execution of a promissory note cannot be admitted to show that such note, although made payable in money, was by such agreement to be paid in work and labor.

(Syllabus by the Court.)

Appeal from district court, Ada county; J. H. Richards, Judge.

Action by C. A. Stein against John J. Fogarty. Judgment for defendant. New trial granted, on application of plaintiff, and defendant appeals. Affirmed.

Hawley & Puckett, for appellant. J. R. Wester and O. E. Jackson, for respondent.

SULLIVAN, J. This is an action on a promissory note. The answer admits the execution of the note, but alleges, at the time of the execution of said note, and as a contemporaneous act therewith, the plaintiff and defendant mutually agreed that said note should be paid by the defendant in work and labor as a plumber, at the usual rates, and upon a certain house in Boise City, the property of plaintiff, then being constructed by him. The cause was tried by the court without a jury, and resulted in a judgment for the defendant. Thereupon plaintiff moved for a new trial, which motion was granted, and a new trial ordered. This appeal is from the order granting a new trial. The promissory note sued on is as follows: "\$250. Boise City, Idaho, July 6th, 1893. Four months after date, for value received, I promise to pay to the order of C. A. Stein the sum of two hundred and fifty and no 100ths dollars, at First National Bank of Idaho, in Boise City, Idaho, with interest at one per cent. per month from Oct. 6th, until paid. Should I fail to pay this note promptly at maturity, I further

promise to pay reasonable additional to the amount thereof (principal and interest), as attorney's fee, if suit is instituted hereon. [Signed] John J. Fogarty. Due Nov. 6th, 1893. No. 2,670." The question involved in this case is whether parol evidence of an oral agreement made contemporaneously with a promissory note which contains an absolute promise to pay a specified number of dollars, at a specified time, is admissible to prove that such note was to have been paid in work and labor. It is a well-settled principle, based on public policy, that parol contemporaneous evidence is inadmissible to vary or contradict the terms of a valid written instrument. 1 Greenl. Ev. § 275. In Forsythe v. Kimball, 91 U. S. 291, it was held that, in the absence of fraud, accident, or mistake, the rule is the same in both equity and at law that parol evidence of an oral agreement alleged to have been made contemporaneously with the making of a promissory note cannot be permitted to vary, qualify, or contradict, or to add to or subtract from, the absolute terms of such promissory note. See, also, Brown v. Spofford, 95 U. S. 474; Conner v. Clark, 12 Cal. 168. It was not error to grant a new trial in this case, and the order granting the same is sustained. Costs of this appeal are awarded to respondent.

MORGAN, C. J., and HUSTON, J., concur.

### COLORADO IRON WORKS v. RIEKENBERG.

(Supreme Court of Idaho. Jan. 31, 1896.)

#### SALE—ACTION FOR PRICE—MECHANIC'S LIEN.

1. Findings of court examined, and held to warrant a judgment for plaintiff.

2. When materials are sold under a general sale, without any reference to what use or when they are to be used, held not sufficient to support a mechanic's lien therefor.

(Syllabus by the Court.)

Appeal from district court, Owyhee county; J. H. Richards, Judge.

Action by the Colorado Iron Works against William Riekenberg. From the judgment, plaintiff appeals. Modified.

D. D. Williams, for appellant. Geo. H. Stewart and W. E. Borah, for respondent.

HUSTON, J. The plaintiff is a corporation engaged in the manufacture of iron machinery, etc., at Denver, Colo. The defendant was one of four persons holding a lease upon a certain mine located in Owyhee county, Idaho. On the 3d of April, 1893, defendant addressed the following letter to plaintiff: "De Lamar, Idaho, April 3rd. To Colorado Iron Works, Denver, Colo.—Gentlemen: Will please inform me if you can make the following articles, and at what price? 2 chlorinating barrels, of the following description and sketch: The barrel is of 1/4-inch sheet

iron, 53 inch diameter, and 60 inches long, with 3-inch angle iron, riveted to ends for flanges to fasten the heads to. This hull is to be lined with redwood carefully, and leave 4 heavy pieces, 2 inches heavier than the rest, extend out in the barrels (as shown in sketch one), to act as agitators. The heads is of 3-16 sheet iron, lined with 3-inch wood; the wood recessed, as shown in sketch, to fit the staves of the hull. This must be done carefully as leaks is disastrous to gold chlorinating. The joints can be made tight with rubber gasket, and bolted together. The charging hole in the barrel is 5 inches wide and 12 inches long, covered with a wooden cover, as shown in sketch; and this cover is held in place and tight by a band of  $\frac{3}{4}$  round iron around the barrel, and fastened as shown, in a block of iron 2x4x6, through which two holes are bored through them. The ends of the rods are run and tightened with nut and thread. The barrels will run horizontally, as shown in No. 3, and is carried by axles or shafts, which are keyed into flanges. The flanges are fastened to the heads with bolts. The heads of the bolts must be countersunk in the wood, so we can put sheet rubber or cement on them, as no iron should be exposed to the charge. The shafts or axles are 3 inches diameter, and the two barrels are connected together as shown in No. 3, and will run from 8 to 10 revolutions per minute. I therefore thought to use a cog gear 4 to 1, but this gear will have to be strong; a spur wheel, 36 inches diameter, 4-inch face, 2-inch pitch, with a pinion, 8 inch diameter. The pinion shaft is  $2\frac{1}{2}$  inch diameter, and 4 feet long; pulley 30 inches diameter, with 3-inch crowned face. This shaft should have one collar with it, and 3 or 5 pillar blocks. Will you please inform me if you can make them, how soon, and at what price? We also want 4 wooden tanks; 2 of these is to be used as filter tanks, 7 feet diameter and  $2\frac{1}{2}$  feet high; and 2 tanks, 3 feet diameter and 6 feet high; and at what price can you furnish us 3-16 sheet iron, 3 feet wide and 22 feet long? Of course, the riveting we do here, but the holes should be punched there, joints to be riveted every 8 inches,—that is, rivets to be 8 inches apart; and a smokestack 13 inch diameter and 30 feet high, and one fire front for reverberatory furnace, with 20-inch by 20-inch fire door, and 18-inch ash door; the whole thing would not be over 4 to 6 inches high; and 6 or 8 grate bars, 4 feet long. Answer to the address of William Riekenberg, De Lamar, Owyhee County, Idaho." To which letter plaintiff, under date of April 10, 1893, sent an answer, giving a list of various articles of machinery, with prices, and closing with the words: "We shall be pleased to enter your order for any or all of what you may require of the above list and prices;" letter signed by president of plaintiff corporation. On April 24, 1893, defendant sent to the plaintiff the following

letter: "De Lamar, Idaho, April 24, 1893 Colorado Iron Works, Denver, Colo.—Gentlemen: Yours of the 10th at hand, and make and send me as soon as possible the two chlorinating barrels, as per specification; 2 tanks, 8 feet diameter,  $2\frac{1}{2}$  feet deep; 1 tank, 8 feet diameter, 6 feet deep; 1 3-16 sheet steel, 8 feet wide, 22 feet long; one of the lightest fire fronts as you have marked No. 3; 8 of the lightest grate bars. We will not want no stack, as we have one here. I refer you to the Boise City National Bank, and will issue a check for the amount upon receipt of the shipping bill. Yours truly, William Riekenberg. My future address will be William Riekenberg, Reynolds Creek, Owyhee Co., Idaho. Ship freight to above address, in care of Falk-Bloch Mer. Co., Nampa, Idaho." Under date of April 19, 1893, plaintiff sent the following letter to defendant: "April 19th, 1893. Wm. Riekenberg, Esq., Reynolds Creek, Owyhee Co., Idaho—Dear Sir: Your valued order of the 14th inst. at hand, and entered for immediate attention. We have ordered the wooden tanks from the factory to be shipped direct, and will, no doubt, reach you before the barrels, etc. Thanking you for the order, we remain, Yours very truly, Colorado Iron Works." The goods were in due time received, and the machinery, etc., placed in a mill erected by defendant (but whether with the co-operation of his fellow lessees or not does not appear), upon a tract or piece of government land, adjoining or adjacent to the mine leased as aforesaid to defendant and his colessees. On the 22d day of July, 1893, plaintiff filed a mechanic's lien, under the statutes of Idaho, in the office of the recorder of Owyhee county, Idaho, upon the mill erected by defendant, or by defendant and his colessees, and described in said lien as being "now on that certain lot and parcel of land at or near that certain quartz mining claim known as the 'Last Chance,' situated in the county of Owyhee and state of Idaho, and being located in Rooster Comb Mining district, of said county and state, being about six miles in a westerly direction from Reynolds stage station, in said county and state."

This action was brought to recover of the defendant the amount claimed to be due the plaintiff for said machinery and supplies, and to foreclose said lien. A demurrer was filed to plaintiff's complaint, which was sustained by the district court, which judgment of the district court was on appeal reversed by this court (see *Iron Works v. Riekenberg*, 38 Pac. 651), and the case remanded for trial. Thereafter a trial was had in the district court. A jury was impaneled, as stated by the court in its findings, "for the purpose of finding the value of the property claimed to have been sold by plaintiff to defendant." The jury returned their verdict, fixing the value of said property at the sum of \$535.07. The court finds as facts established by the evidence

"that on the 21st day of June, 1893, the plaintiff sold and delivered to the defendant, at his special instance and request, certain mining machinery, to wit [describing it]; that said sale was made under a special contract, and according to certain plans and specifications, made a part of said contract; that the price agreed to be paid for said articles under said contract was \$535.07; that the purchase price has not been paid." As conclusions of law, the court finds: (1) "That the plaintiff sues to recover the value of certain personality, by reason of its being manufactured according to plans and specifications; and, all evidence of its value based upon its such plans and specifications being stricken out by plaintiff's consent, I find that no value has been proven, and plaintiff is therefore not entitled to recover anything in this action." (2) "I find that even if a value has been proven, that plaintiff was not entitled to a lien for the same, because the sale was a general sale, and no express contract was entered into that the same was furnished for the particular mine, mill, or structure upon which the lien was claimed."

It seems to us there is an irreconcilable inconsistency between the findings of fact by the court and its conclusions of law. The jury impaneled for the sole purpose of finding the value of the property found the same to be \$535.07. This finding or verdict is recognized by the court, and is followed by the further finding by the court "that the purchase price has not been paid." These findings by the court and the jury were presumably predicated upon the evidence in the case. It seems from the record that counsel for respondent made a motion to strike out all evidence in the case with reference to the goods being manufactured in accordance with the plans and specifications, and that the jury be instructed not to consider it; and yet the jury, by their verdict, found the value of the property, and the same was recognized and adopted by the court in its findings of fact. While, perhaps, the complaint is not as correctly or artistically drawn as might be desired, we think it is sufficient to support the verdict of the jury and the findings of the court, and to entitle the plaintiff to a judgment thereon.

As to the second conclusion of law by the district court: It does not appear that, at the time the plaintiff and defendant entered into the agreement of purchase and sale of the machinery, there was anything said or intimated as to where or for what purpose the machinery was to be used. It was a general sale. To entitle the vendor to a lien, "the materials must not only have been used in the construction of a building, but they must have been furnished to be used in that building." 2 Jones, Liens, § 1327, and cases cited in note 2. "Materials must be furnished with special reference to their use in a particular building in order to secure the protection of a mechanic's lien law." 2 Jones, Liens, § 1326; Choteau v. Thompson, 2 Ohio St. 114, 124. These

requirements cannot, we think, be supplied by construction. We think the judgment of the district court should be modified to the extent of allowing a judgment in favor of the plaintiff and against the defendant for the value of the machinery as found by the court and jury, and so much of the judgment of the district court as refuses a lien upon the mill and machinery of defendant is affirmed, with costs to appellant.

MORGAN, C. J., and SULLIVAN, J., concur.

# ATCHISON, T. & S. F. R. CO. v. ROWE.

(Supreme Court of Kansas. Feb. 8, 1896.)

RAILROAD COMPANIES — ACTION FOR INJURIES — MEASURE OF DAMAGES — UNAVOIDABLE ACCIDENT — ASSUMPTION OF RISK.

1. In an action brought by P. to recover damages for injuries claimed to have been sustained by reason of the negligence of an employé of the railroad company, where P. subsequently dies from a disease not the result of such injury, and the action is then revived and prosecuted in the name of his administratrix, and where it is shown that such mortal disease necessarily disabled him from work for a period prior to his death, the jury have no right to include in the damages awarded the administratrix an allowance for loss of wages during the period when his mortal sickness would necessarily have prevented him from working.

2. In such an action the measure of damages after the death of the plaintiff remains the same as before, and the administratrix is entitled to have included in the verdict the same allowance for pain and suffering of the deceased as the original plaintiff would have been entitled to if made in his lifetime.

3. The special findings examined, and held insufficient to authorize a judgment in favor of the defendant notwithstanding the general verdict, and that the injury to the plaintiff is not conclusively shown, either by the evidence or the special findings, to have been the result either of accident or of a risk which the plaintiff assumed.

4. The jury ought to fairly, candidly, and carefully consider every question duly submitted to them in the case; and where it can be said, from the special findings and from the assessment of damages, that they have disregarded the rights of the defendant, and purposely made an excessive allowance in favor of the plaintiff, and have carelessly and inaccurately answered the questions submitted to them, so that it is impossible to ascertain what their findings are on important issues in the case, the verdict should be set aside, and a new trial had.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by Jonathan Pelton, for whom, on his death, was substituted Cella E. Rowe, administratrix, against the Atchison, Topeka & Santa Fé Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

This action was commenced by Jonathan Pelton to recover damages for injuries received while employed by the railroad company as a section man in unloading ties from a box car, and piling them a little way from the track. It appears that four or five men were in the car, taking the ties out, and six

men were on the ground, picking them up, and placing them on the piles. While Pelton was standing with his back towards the car, shoving a tie back on one of the piles, a tie came out of the car door in such manner that it ended over and struck him on the back part of the leg and heel, causing a severe injury. Pelton's injury was received on the 2d day of May, 1888. He died on November 3, 1889, from a disease of the kidneys and bladder, and was at the time of his death about 63 years old. The action was thereafter revived in the name of his administratrix, and afterwards tried to a jury, who rendered a general verdict in favor of the plaintiff for \$4,000. The ground on which the plaintiff based her right to recover was that the tie which struck Pelton was negligently and carelessly thrown out of the car, and permitted to fall on him, without any warning having been given, and without any fault on his part. Seventy-five special questions were submitted to the jury. Among the questions and answers are the following: "Q. 11. When said employé that handled this tie in the car was getting the tie in position to put out of the car door, did said tie slip or bound so as to get out of the door in an unusual manner? A. Yes. Q. 12. Was not the usual way of putting these ties out of the car to extend one end out of the door of the car, and then slide the tie so as to land it on the ground? A. Yes. Q. 18. In trying to get this tie that struck Pelton in a position in the door so that it could be thrown out in the usual way by sliding it down, is it not a fact that the tie fell on the car door in such a manner as to bound or jump over? A. Not on the door, but on the skid. Q. 14. Was one John Brickell the person in the car who was handling the tie that injured said Pelton? A. Yes." "Q. 17. Is it not a fact that said Brickell accidentally lost control of the tie, which prevented the tie from being landed on the ground directly opposite the car door? A. Yes." "Q. 22. From what disease or mortal sickness was Pelton suffering when he died? A. Bladder and kidneys. Q. 23. How long had he been suffering from such disease before his death? A. We don't know. Q. 24. Was said disease chronic, and had he suffered from it for some months before, so as to lay him up from work? A. No. Q. 25. What part of the time from the date of Pelton's injury by the tie to the date of his death was he unable to work because of said disease or sickness other than the injury by the tie? A. No time. Q. 26. How many days was said Pelton kept from work by reason of said injury to his heel? A. About 18 months, or 468 working days. Q. 27. What were his services worth per day during said time? A. Agreed to \$1.20." "Q. 29. If you find a general verdict for the plaintiff, state what part thereof is for the loss of personal services by the deceased. A. \$561.60 (five hundred and sixty-one dollars and sixty cents)." "Q. 33. If you find a general verdict for the plaintiff, state what part thereof

is for pain and suffering. A. \$3,438.40." "Q. 57. During the unloading of said ties prior to said accident, is it not a fact that they landed on the ground in different positions? A. Yes. Q. 58. Was there any particular method followed for alighting the ties out of the car door? A. No." "Q. 60. Did said ties land on the ground in different directions and positions? A. Yes." "Q. 62. In unloading ties from the car, did some end on the ground, and then fall over? A. Yes. Q. 63. Did some of said ties land on the ground endways to the car? A. Yes." "Q. 66. In removing said ties from the car, were some of them dropped on the skid so as to slide or jump out? A. Yes. Q. 67. How did the tie that hit Pelton's heel land on the ground with reference to other ties that had previously been put out of the car? A. About the same way. Q. 68. Is it not a fact that there was no particular place or position that the ties were landed on the ground out of said car door? A. Yes." "Q. 72. Were the men on the ground working within ten or twelve feet of said car door? A. Yes. Q. 73. In the usual and ordinary way of putting out said ties, how close to said door could a person safely stand? A. Eight to twelve feet." The defendant moved for a judgment in its favor on the special findings of the jury, notwithstanding the general verdict, and also moved for a new trial, both of which motions were overruled.

A. A. Hurd and Mills, Smith & Hobbs, for plaintiff in error. J. T. Allensworth and W. L. Bailey, for defendant in error.

ALLEN, J. (after stating the facts). It is insisted that both the evidence offered at the trial and the findings of the jury show that the tie which injured Pelton was thrown out of the car in the usual and ordinary manner, which was known to Pelton, and that the risk of pursuing his employment as the work was being carried on was assumed by him. The special questions submitted to the jury at the request of counsel for the railroad company were very artfully drawn, and some of the answers tend to uphold this contention; but, on a consideration of all the findings and all the evidence on which they are based, we cannot say that the risk was assumed by Pelton. There is evidence tending to show that the tie which struck Pelton came out of the car in quite an unusual manner, and there is also evidence tending to prove that it was incumbent on those who were in the car to look out, to some extent at least, for the safety of the men on the ground. The general verdict in favor of the plaintiff includes a finding in her favor of every fact which there was evidence tending to support necessary to uphold the verdict, and not directly negated by the special findings. Taking all the findings together, we cannot hold that the risk was assumed.

It is strenuously urged that the injury in this case was purely accidental, and that this

is shown by the findings of the jury, especially the seventeenth, in which they say that Brickell accidentally lost control of the tie. In its ordinary use, the word "accidental" does not necessarily negative the idea of negligence. In ordinary conversation, we often speak of a calamity as an accident, without regard to its cause, and without considering whether it was the result of negligence or not. The seventeenth question was not so framed as to fairly challenge the attention of the jury to the question whether Pelton's injury was purely an accident occurring without the fault of any one or not. The fifteenth question was whether Brickell purposely injured Pelton, which the jury answered in the negative. We think it clear, when the general verdict and all the questions and answers are considered together, that the jury regarded Brickell as negligent in permitting the tie to go out as it did, though he did not intend to injure any one with it. The demurrer to the evidence offered by the plaintiff, and the motion for judgment on the special findings, were properly overruled.

A motion for a new trial was made, upon the grounds, among others, that the special findings of the jury were inconsistent with the general verdict and with each other, and that the verdict was excessive, contrary to the evidence, and given under the influence of passion and prejudice. It is also insisted that, although the action for the injury survives, the element of damages for pain and suffering resulting from it does not survive, but is personal to, and dies with, the person injured. The case of *Cregin v. Railroad Co.*, 83 N. Y. 596, is cited in support of this contention. Although the statute of New York under consideration in that case is somewhat different from ours, it must be conceded that the reasoning of the court sustains the contention of the plaintiff in error; but we are not satisfied with the conclusions reached by that court. By our statute, a cause of action for an injury to the person survives. The court of appeals of New York makes a distinction between what it terms pecuniary losses, which diminish the estate which would have gone to the personal representative, and losses personal to the injured party, affecting only his feelings. But Jonathan Pelton had one entire cause of action prior to the day of his death against the railroad company. He had as full and complete a right to recover for the element of pain and suffering as for that of loss of wages. If he had recovered his damages in his lifetime, whatever he did not expend before his death would have been assets belonging to his estate. The dollars awarded for pain and suffering would have differed in no manner from those awarded for loss of wages, and would have been subject to precisely the same rules of distribution. We think the entire cause of action survived, and in this view we are sustained by the supreme court

of Illinois. *Holton v. Daly*, 106 Ill. 131; *Railroad Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263. The argument drawn from decisions as to the nature of the recovery under section 422 of the Code, which gives a cause of action where none existed at common law, has no application to causes of action which are made to survive under section 420, nor those actions already begun which section 421 of the Code declares shall not abate.

We find it extremely difficult to harmonize the various findings of the jury; yet, if there were no other questions, it is possible that in view of the artful manner in which the questions were framed, or the unfairness of many of them, and of the rule that the general verdict is a general finding in favor of the plaintiff on every material fact not directly negatived by the special findings, we might uphold the verdict. But the jury have found that Pelton died from a disease of the kidneys and bladder. The evidence shows that that disease was chronic, and must have continued for a considerable period of time. According to the testimony of one physician, he would have been unable to work for several weeks, months perhaps. In assessing the damages, the jury have allowed full wages for every working day from the date of the injury to the date of his death, without any allowance whatever for loss of time occasioned by the mortal disease of which he died. Although the gross sum allowed for loss of time is not large, the allowance shows a want of that care and discrimination on the part of the jury which they ought to have exercised. The railroad company, clearly, was not liable for loss of time which Pelton would inevitably have sustained from causes other than the injury. If he was rendered unable to work by disease in no manner resulting from it, he could not have been subjected to loss of wages during that time by the injury, for he could not in any event have earned any. The jury allowed \$561.60 for loss of wages. They also allowed \$3,438.40 for pain and suffering. As the injured man lived and suffered only a year and a half, this allowance seems very liberal, being at the rate of more than \$2,200 per year. It is true that no definite measure can possibly exist for damages of this kind. No one can say just how severely another has suffered, nor just how much money would be an equivalent for that suffering. A comparison of the allowances made in other cases with the verdict in this impresses us that it is very liberal; and when taken in connection with the indiscriminating allowance for loss of time, and the somewhat careless and conflicting answers to special questions, we are forced to the conclusion that the jury have failed to give this case that fair and candid consideration it demanded, and that a new trial should be awarded. The judgment is reversed, and a new trial ordered. All the justices concurring.

**IONA SAV. BANK v. BLAIR et al.**  
 (Supreme Court of Kansas. Feb. 8, 1896.)  
**APPEAL—PARTIES—FORECLOSURE SALE—INAD-  
 EQUATE PRICE.**

1. While the judgment debtors are ordinarily necessary parties in this court to a review of the rulings of the district court confirming or setting aside a sale of lands under a decree of foreclosure, where the sale is for a grossly inadequate price, and one of the plaintiffs in error offers to bid many times the amount for which the land was sold, and the sale was made prior to the passage of the act of 1893 known as the "Redemption Law," so that it can be clearly seen that no injury can result to the judgment debtors,—the rulings of the district court may be reviewed without their having been made parties.

2. Where lands are sold at sheriff's sale for a price so grossly inadequate as to be little more than a nominal consideration, a very slight additional circumstance indicative of bad faith on the part of the purchaser, or of a combination among bidders, will be sufficient ground for setting aside the sale.

(Syllabus by the Court.)

Error from district court, Rice county; J. H. Bailey, Judge.

In an action to foreclose a mortgage, after sale and motion for confirmation, the Iona Savings Bank made an increased bid for the property. From an order confirming the sale, the savings bank brings error, making J. A. Blair and others, purchasers, defendants. Reversed.

Rossing, Smith & Dallas and Fuller & Whitcomb, for plaintiff in error. A. L. Berry, Samuel Jones, and Albert Perry, for defendants in error.

ALLEN, J. This is a proceeding to reverse the ruling of the district court of Rice county on motions to confirm and set aside a sale of lands made on April 1, 1891. The purchasers only are made parties defendant in this court. A motion to dismiss is interposed, on the ground that there is a defect of parties, owing to the failure to bring in the original judgment debtors. The sale was of a half section of land, and the price paid for it was \$76. On the hearing of the motion to set aside the sale, the attorney for the plaintiff in error tendered a bid, on behalf of the savings bank, of \$2,088, for the land. It is conceded that the sale carried a full title. Under this state of facts, we think it would be shutting our eyes to the substance, and grasping at a shadow, to hold that the judgment debtors have any possible interest in upholding this sale, made before the passage of the act of 1893 known as the "Redemption Law." Where there is any doubt of the property's bringing a greater price on a resale than the amount for which it was first sold, with the costs of a resale added, the judgment debtors doubtless

are necessary parties, because their interests might be affected adversely by setting aside the sale, and so they doubtless would be where the redemption act applies; but, as the price for which this land sold was less than 25 cents an acre, and one of the plaintiffs in error now offers to bid more than \$2,000 for it, there is no substance in the contention that the original judgment debtors may be injured by a reversal of the orders complained of. On the merits of the case, we have no hesitation in saying that the sale ought to have been set aside; and we reach this conclusion notwithstanding the fact, insisted on by defendants in error, that the record fails to show that all the evidence introduced on the motions is contained in the case. The orders of sale, the sheriff's return, and the testimony of the defendants in error are here. The price at which the property sold is grossly inadequate. We might, perhaps, say that a bid of \$76 on a half section of land in Rice county is merely a nominal consideration, and not a substantial price, especially in view of the offer of the plaintiff in error. Two of the defendants in error are attorneys at law; the other is a banker. All of them testified. Mr. Perry, according to his own testimony, was requested to attend the sale, as the representative of the plaintiff, J. M. Washburn, with instructions to bid the costs only. He testifies that he examined the records in the district clerk's office. He knew that the savings bank had a lien for \$1,500 and interest, and that the sale would carry a full title. Whether he understood he was also representing the savings bank is not so clear from his testimony. It appears, from the testimony of the three defendants in error themselves, that they were the only bidders at the sale, and we think it very clear, from their own testimony, that there was an understanding between them, before the sale, that each of them was in fact bidding in behalf of all, and that the competition was apparent, but not real. The sheriff's return shows a sale of the east half of section 7,—to Samuel Jones, an undivided one-third; to J. A. Blair, an undivided two-thirds,—but does not show the amount for which it was sold. It is only from the testimony contained in the case that we learn the price for which the land sold. The return was not good. The sale should have been set aside. The orders of the district court sustaining the motion to confirm, and overruling the motions to set aside, the sale, will be reversed, and the case remanded, with directions to set aside the sale, on condition, however, that the Iona Savings Bank shall continue its bid of \$2,088 for the land at any sale hereafter made under the judgments in the case. All the justices concurring.

**GOODMAN et al. v. KENDALL.**

(Supreme Court of Kansas. Feb. 8, 1896.)

**ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.**

Where an insolvent debtor executes to two of his creditors chattel mortgages substantially at the same time that he executes a general assignment for the benefit of creditors, so that the execution of all constitutes a single transaction, no preference can be rightfully claimed under the mortgages.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action by C. H. Kendall, as assignee of Bernheimer & Levi, against Morris Goodman and David Carwalho. From the judgment, defendants bring error. Affirmed.

Keeler, Welch & Hite, for plaintiffs in error. Quinton & Quinton, for defendant in error.

**JOHNSTON, J.** This is a controversy in regard to the validity of two chattel mortgages executed by Bernheimer & Levi in favor of two of their creditors at the same time that they executed a general assignment. They were dealers in millinery and fancy dry goods in Topeka, but appeared to have carried on a losing business, and when the mortgages were executed they were actually insolvent. They had previously borrowed money from Morris Goodman and David Carwalho, who, learning of the financial stress of the firm, requested them to execute mortgages upon their stock to secure the payment of the indebtedness. They declined to execute the mortgages unless a deed of general assignment was prepared at the same time and executed on the same day. Accordingly, the mortgages and deed of assignment were prepared together, and before any of them were executed a temporary assignee was selected, and arrangements made with him to at once take possession of the stock. The mortgages were then executed, and within a few minutes afterwards the deed of assignment was also executed. The mortgages were first placed on record, and from 10 to 15 minutes later the deed of assignment was presented for record. The trial court ruled that the execution of the mortgages and deed of assignment constituted a single transaction, and that the mortgagees were not entitled to a preference over the general creditors. The facts in the case justified the view taken by the trial court, and bring it within the rule of *Wyeth Hardware Co. v. Standard Imp. Co.*, 47 Kan. 423, 28 Pac. 171, and *Bank v. Sands*, 47 Kan. 596, 28 Pac. 620. It is clear that all of the conveyances were in contemplation at the same time, the preparation of all commenced and proceeded together, and all were executed and completed substantially at the same time. In such case, the preparation and execution of all must be treated as a simulta-

neous, continuous, and single act, and no preference can be rightfully claimed under the mortgages. Judgment affirmed. All the justices concurring.

**STATE v. COWEN et al.**

(Supreme Court of Kansas. Feb. 8, 1896.)

**CRIMINAL LAW—DECLARATIONS OF ACCUSED—BURGLARY—EVIDENCE—SENTENCE.**

1. On the trial of the defendants under a charge of burglary and larceny, there was no error in the admission of proof of a conversation with them with reference to their doings on the night when the offense is charged to have been committed, although in such conversation they admitted the commission of other larcenies at about the same time, but disconnected from the burglary charged, all of the statements being made in the course of a single conversation, and especially where they afterwards testified, in their own behalf, to the commission of these larcenies.

2. Where petit larceny is committed in connection with burglary, punishment may be imposed by confinement in the penitentiary at hard labor for the larceny in addition to the punishment for burglary.

3. The testimony in the case examined, and held sufficient to uphold a conviction of burglary. (Syllabus by the Court.)

Appeal from district court, Republic county; F. W. Sturgis, Judge.

Jim Cowen and Elmer Barnes were convicted of burglary, and appeal. Affirmed.

B. T. Bullen, for appellants. F. B. Dawes, Atty. Gen., and Jay F. Close, for the State.

**ALLEN, J.** The defendants were charged with burglariously breaking and entering a henhouse, belonging to Jannie Johnson, and stealing therefrom 23 hens and 2 roosters. They pleaded guilty to petit larceny, but not guilty as to burglary. The jury found them guilty of both burglary in the second degree and petit larceny, and they were thereupon sentenced to confinement in the penitentiary for 30 days for the larceny and five years for the burglary.

The principal complaint is of the admission of the testimony of witnesses, narrating a conversation with the defendants, in which they admitted not only the stealing of Johnson's chickens, but of chickens belonging to other persons, and a hatchet, at about the same time. It is claimed that the prosecution sought to convict the defendants of the crime of burglary in this case by proving the commission of other larcenies, and many authorities are cited to the effect that proof of offenses distinct from the one with which the defendants are charged is inadmissible. This is, doubtless, the general rule, though it is subject to some exceptions not necessary to now state. But these conversations were admissible because they were the declarations of the defendants as to what they did on the night of the burglary, and their statements as to the larceny of other chickens were made in the same conversation, and in

such manner that they could not well be disconnected from those with reference to the taking of Johnson's chickens. The proof of the burglary depended to a considerable degree on the identity of the chickens taken, and whether they were taken from the henhouse, or from the trees, as claimed by the defendants. But, even if there had been error in the admission of this testimony, it could not have been regarded as material; for the defendants themselves testified, on the trial, to stealing other chickens and the hatchet, substantially as they had stated in the conversation which they now claim was improperly admitted in evidence.

It is contended that the proof of breaking and entering the henhouse is insufficient. The witness Johnson testified that the chickens were in the henhouse when he went to bed; that he had shut and fastened the door with a hook and staple; that in the morning, when he got up, he found the door shut, but not in the way he shut it; that some of the chickens were gone, and that he found 22 of his hens and 1 of his roosters in the possession of the defendants. He also testified that he put a nail in between the hook on the door and the board, so that if any one opened it the nail would fall down, and that in the morning the nail was lying on the ground, and that the hook wasn't down in the staple. We think the jury had a perfect right to disbelieve the story of the defendants, that they found the chickens in the trees, and to infer from the testimony of Johnson with reference to the fastening of the door and the chickens being in the henhouse at night, and the conceded fact that the defendants got them, that they took them from the henhouse by unfastening the door and entering it, and not from the trees. The argument with reference to the habits of chickens in hot weather was, doubtless, urged on the consideration of the jury, and given due weight by them.

The final objection urged is that the defendants could not be lawfully sentenced to confinement in the penitentiary for petit larceny; but paragraph 2201 of the General Statutes of 1890 provides that, if a person, in committing burglary, also commit larceny, he shall be punished by confinement and hard labor, not exceeding five years, in addition to the punishment for the burglary. The judgment is affirmed. All the justices concurring.

#### TERRITORY v. LEARY.

(Supreme Court of New Mexico. Oct. 18, 1895.)

##### CRIMINAL LAW—CHANGE OF VENUE—LOCAL PREJUDICE.

Under the statute of New Mexico requiring that in a criminal case a defendant's "affidavit" for change of venue shall be supported by the "oath" of two "disinterested" persons that they believe the facts therein stated are true, the court may require defendant to produce in

court persons who have made such an affidavit, to be orally examined under oath.

Appeal from district court, Bernalillo county; before Justice N. C. Collier.

John M. Leary, under indictment charging him with assault with a deadly weapon, moved for a change of venue, on the ground of local prejudice, and appeals from a judgment overruling such motion. Affirmed.

Warren, Fergusson & Gillette, for appellant. Sol. Gen. Victory, for the Territory.

BANTZ, J. The defendant, under indictment charging assault with a deadly weapon, filed his affidavit on the 9th day of November, 1894, for a change of venue, on the ground that he could not secure a fair trial in Bernalillo county, where the case was pending, because the principal witness for the territory had an undue influence over the minds of the inhabitants of the county; that the inhabitants of the county were prejudiced against him; and that, by reason of local prejudice, an impartial jury could not be obtained. This affidavit was supported by the affidavits of two persons, who set forth that they had no interest in the case; that they had read the affidavit of defendant; and that they believed the facts therein stated to be true. The application for a change of venue was resisted upon the ground that the two persons supporting the defendant's affidavit should come into open court, and submit to an oral examination under oath. On the same day, November 9th, the court overruled the application, but at the same time gave the defendant leave to produce in open court two disinterested persons to verify the facts set forth in defendant's affidavit. On the 12th of November, the defendant filed another motion for change of venue, based upon the affidavits already mentioned; and on the same day it was ordered by the court that, "the said defendant not having produced in open court two witnesses to verify the truth of the allegations contained in said motion," the same is overruled. The record fails to disclose that any exception was taken to the action of the court below as to these orders overruling motions for change of venue, but the prosecution and the defense have fully argued the question, and, as it is one of practice and of great importance, we have considered the point without deciding whether it is sufficiently raised on the record. The affidavits of the defendant and of the two persons supporting it fully set forth all that the statute requires; and the question is whether the court below erred in requiring the two witnesses supporting defendant's affidavit to personally appear in open court, and submit to an oral examination.

The statute requires that a defendant's affidavit shall "be supported by the oath of two disinterested persons that they believe the facts therein stated are true." It will be noted that, under this clause, two things



should appear to the court: (1) That two persons must state under oath that they believe the statements in defendant's affidavit to be true; and (2) it must be shown in proof that such persons are disinterested; that proof is not necessarily confined to their testimony alone or at all. It will also be noted that, while the statute directs the defendant to set forth the grounds for the change of venue in an "affidavit," the supporting proofs are to be made under "oath" by disinterested persons. The statute does not say that such oath shall or even may be by affidavit, and in that respect this case is to be distinguished from *Cass v. State*, 2 G. Greene, 353. It would probably be true that, if the affidavits of these persons had been received and considered as proofs, the court would not have been permitted to arbitrarily disregard them. *Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50; *Territory v. Kelly*, 2 N. M. 300. But it is manifest from the orders made on the 9th and 12th of November that the court did not consider the proofs as competent, but required them to be made orally in open court. Even assuming that the bare oral statement under oath by the persons so produced as to their belief in the truth of the defendant's affidavit would have fully satisfied the statute in that particular, still the question as to whether they were disinterested was one upon which they were subject to full and searching examination. The right to use *ex parte* affidavits as proofs in any case is a mere matter of grace and convenience, unless some statute or rule of court provides otherwise in a given case; and the court would have the undoubted right to require the proofs upon a motion to be presented orally in open court. We are not to be understood as holding that proofs upon motions made in the form of affidavits would not be ordinarily sufficient for purposes of review in this court, but we do hold that the license which has grown up in the use of *ex parte* affidavits has not ripened into a right to employ them where the trial court expressly requires the proof to be oral in open court. In requiring this, the court did not deprive the defendant of any rights conferred by statute or common law or rule of court; and it was not in any wise unjust or unreasonable. The legislature, in the very terms of the statute, distinguishes between the "affidavit" of the defendant and the "oath" of the disinterested persons, and we cannot say that the legislature did so inadvertently. No man with a proper regard for the obligation and solemnity of an oath would swear in private to that which he would not swear to in open court, and requiring the oath to be made openly and publicly did not deprive the defendant of any just right. The statute does not say that the proofs in support of defendant's affidavit may be made by the oath of any person, but requires that such persons shall be "disinterested." Who is to determine whether the persons offered are

disinterested? There can be but one answer,—the court alone. If the persons offered as disinterested can by their mere *ex parte* affidavit close the door against their own examination upon that point in open court, notwithstanding the trial court requires it, a thing so extraordinary could only be justified by the clear terms of the statute or rule of court, and there is none. The ease and facility with which change of venue is taken, often to the great delay of causes, the defeat of justice, and the hardship of witnesses, does not require us to construe the change of venue law beyond its plain terms and the full and efficient protection of the defendant in a fair and impartial trial. In *Territory v. Kelly*, *supra*, the defendant attempted to change the venue from Santa Fé county, and also set forth that the same causes existed against San Miguel, and it was urged that the law which made the proofs conclusive against Santa Fé county also made them conclusive against San Miguel; but the court held that, while the statute allowed no discretion in the one instance, it imposed no limitations upon the discretion of the trial court in the other. So here, while law makes the oath of two disinterested persons conclusively sufficient in support of defendant's affidavit, the court is invested with a discretion in ascertaining whether such persons are disinterested. For the purposes of this case, it will be unnecessary to determine whether the legislature used the word "disinterested" in the narrow sense, distinguishing between persons qualified and those disqualified at common law from testifying, or whether it used it in the broader sense, as synonymous with "fair-minded" and "impartial." The statute was passed long after the legislature had swept away the disqualification of witnesses arising from interest, and it may well be that the rule laid down in *Freleigh v. State*, 8 Mo. 607, would not apply, but that, construing the statutory expression in the light of the present condition of the law as to the qualifications of the persons testifying (Suth. St. Const. § 247), we should consider the legislative intent to be that those whose oaths were to inform the court and set in motion judicial action should be indifferent to the cause in the broader sense of being impartial and fair-minded. *Warren v. Baxter*, 48 Me. 194; *Insurance Co. v. Stevens*, 48 Ill. 33. In *Wakefield v. State*, 41 Tex. 553, the statute used the word "credible person," and the court held that the inquiry involved more than a general character for truth, but embraced the means of knowledge, the intelligence, and the relations of such persons with the defendant. This matter does now, however, enter into the decision of this case. It is sufficient to say that the defendant had no right to insist upon the reception of the supporting proofs, and as to the interest of the witnesses by affidavits, where the trial court expressly required them to be made orally, as

already indicated; and it was not error to refuse the change of venue.

The next point for consideration is whether the court below erred in denying the application for a continuance, which set forth that two certain witnesses would swear that the prosecuting witness used vile epithets towards the defendant, and threatened that he would "fix" the defendant, and that this occurred immediately before the assault charged. The application also sets forth that the defendant's attorney relied upon what he termed the hitherto customary and usual manner of granting changes of venue in cases made out on affidavits like the present one, and that, so relying, he did not issue subpoenas for witnesses who were then absent. It is probably true that it has been the customary practice to order the venue changed in cases where the showing has been made on affidavits like those in this case, and we would be strongly disposed to think it error if the refusal to grant the continuance had caused the defendant to suffer any material injury or disadvantage. The record, however, shows that the first application for a change of venue was made and refused on November 9th; that on November 12th the motion was renewed on the same affidavits, and again denied, and on the same day the application for a continuance was made, when the district attorney admitted that the witnesses would, if present, testify to the facts stated in the affidavits, and the court denied the continuance. The trial was begun the next day, the 13th, and one of the witnesses named in the affidavit testified at the trial for the defendant, but as to whether the affidavit as to the other witness was offered in evidence does not appear. Under these circumstances, we do not think error can be assigned on the refusal to grant the continuance. The defendant was deprived of the testimony of only one witness, whose testimony was only cumulative. The trial court necessarily has a discretion to exercise upon such an application, and it has been repeatedly and uniformly held by this court that, unless such discretion has been in some way abused to the injury of the defendant, the denial of a continuance will not be error. We have carefully considered the whole record, and find no error. The judgment will therefore be affirmed.

LAUGHLIN and HAMILTON, JJ., concur.  
The CHIEF JUSTICE was absent at hearing.

#### SILVA v. TERRITORY.<sup>1</sup>

(Supreme Court of New Mexico. Aug. 24, 1892.)

CRIMINAL LAW—APPEAL—RECORD.

On appeal of a criminal case the record did not set out the motion for a new trial or

<sup>1</sup> This case, not having been officially reported, is now published by request.

the grounds on which it was based. There was no bill of exceptions presenting the evidence, and the record did not show that any exceptions were taken to rulings of the court, or from what the appeal was taken. *Held*, that the record presented nothing for the consideration of the supreme court.

Appeal from district court, Lincoln county.

Felipe Silva was convicted of a crime, and appeals. Affirmed.

E. L. Bartlett, for the Territory.

PER CURIAM. The record in this case shows a trial by a jury, and a verdict against the defendant of a fine of five dollars. There was a motion made for a new trial, which was argued, and overruled by the court. The record does not, however, set out the motion or the grounds on which it was made. There is no bill of exceptions presenting the evidence, nor does the record show that any exceptions were taken to the rulings of the court. The record does show that an appeal was properly taken to this court, but from what does not appear. There being nothing properly brought before this court for its consideration, the judgment of the court below will be affirmed.

#### ELSBERG et al. v. FRIETZE et al.<sup>1</sup>

(Supreme Court of New Mexico. Jan. 17, 1867.)

REPLEVIN—PLEADING—TRIAL—FAILURE OF PLAINTIFF TO PROSECUTE SUIT.

1. Though plaintiff in replevin fails to appear, defendant cannot have a trial of issues, having filed no plea.

2. Comp. Laws, p. 244, § 6, providing the mode of disposal of cases in replevin where plaintiff fails to prosecute, must be followed, the language thereof being imperative.

Appeal from district court, Donna Ana county.

Replevin by Gustan Elsberg and another, partners as Elsberg & Amberg, against Daniel Fietze and another, administrators of Augustin Maurin, deceased. Judgment for defendants. Plaintiffs appeal. Reversed.

Stephen B. Elkins, for appellants. R. H. Tompkins, for appellees.

SLOUGH, C. J. This cause is brought from the Third judicial district, Donna Ana county. The appellants, plaintiffs in the court below, brought an action in replevin for the recovery of a portable gristmill, valued at \$500. Maurin, the original defendant, having died, Fietze and Jennerette, his administrators, were subsequently substituted. The record shows no plea to the declaration. At the June term, 1866, of the Donna Ana court, the following action was had, and entry in the record of that court made: "Elsberg and Amberg vs. Daniel Fietze and Jules Jennerette, administrators of the estate of Augustin Mau-

<sup>1</sup> This case, not having been officially reported, is now published by request.

rin. Replevin. And now comes the defendants, by their attorney, Theo. D. Wheaton, Esq., and the plaintiffs, though three times solemnly called at the door of the courthouse, came not, and failed to prosecute said suit; and, a jury being required to assess the value of the property and the damages herein, the following named jurors were tried, sworn, and impaneled as such jury, to wit [twelve names inserted], who, having heard the allegations and proofs in the cause, assessed the damages at fifteen hundred dollars, to wit, 'We, the jury in this cause, find for the defendants, and assess the damages at fifteen hundred dollars.' It is therefore considered and adjudged by the court that the said defendants have and recover of the said plaintiffs the sum of fifteen hundred dollars damages, together with their costs, taxed at —, and that they have execution therefor." The plaintiffs thereupon sue out their writ of error, and the cause is brought to this court.

It is claimed by the appellants, in substance: First, that the court below erred in granting a trial and entering a judgment in favor of the appellees, in the absence of a plea on their part; and, second, that the verdict entered is not a legal verdict, and the judgment thereon is erroneous in both form and substance, and is therefore not a legal judgment.

The action of replevin is a statutory action in this territory. The statutes point out with great particularity the different steps necessary in the action. Sections 6 and 7 of the chapter of the Code of Civil Procedure and Practice on the subject of "Replevin," to be found on page 244 of the Compiled Laws of New Mexico, are as follows:

"Sec. 6. The defendant may plead that he is not guilty of the premises charged against him, and this plea will put in issue, not only the rightful ownership of the property mentioned in the declaration, but also the wrongful taking and detention thereof.

"Sec. 7. In case the plaintiff fails to prosecute his suit with effect, and without delay, judgment shall be given for the defendant, and shall be entered against the plaintiff and his sureties for the value of the property taken, and double damages for the use of the same from the time of delivery, and it shall be in the option of the defendant to take back such property or the assessed value thereof."

The court is not disposed to argue so plain a proposition as that contained in the idea that there cannot be a trial without an issue, or that there cannot be an issue without pleadings on the part of the parties litigant. Such is the plain rule of law, and the universal practice of all the courts of all enlightened nations from time immemorial. The text-books of the profession of law contain no other principle. Our statutes, in section 6, referred to, in substance, only reiterate the principle. A plea was therefore necessary before a trial could be had in the court below and judgment rendered in this cause. Section 7

of the statutes, referred to, provides for the mode of disposal by the courts of cases in replevin where there is a failure to prosecute on the part of the plaintiff. The language of this section directs, imperatively, the manner in which judgments in such cases shall be entered. In this case there appears to be an almost entire failure to comply with the requirements of the law in this respect. It is apparent that the judgment is far short of fulfilling the requirements of this law, and is therefore erroneous. For either of the errors, fatal as both are, it is the duty of this court to reverse the judgment of the court below in this cause, and to remand the same for its further action, which is now unanimously done.

#### IN RE BRYDON.<sup>1</sup>

(Supreme Court of New Mexico. Jan. 23, 1889.)

#### HABEAS CORPUS — RELEASE FROM IMPRISONMENT.

On habeas corpus an order releasing petitioner from unlawful imprisonment cannot be made, there being nothing to contradict the return of the sheriff showing that, at the date of the petition, petitioner was at large, in the enjoyment of his liberty, not having surrendered himself till thereafter.

Petition of James Brydon for writ of habeas corpus.

E. L. Bartlett, for petitioner.

LONG, C. J. On the 17th day of January, 1889, James Brydon filed in the supreme court his petition for writ of habeas corpus; averring therein that at that date he was unlawfully restrained of his liberty by Francisco Chavez, sheriff of Santa Fé county. It is further averred that the cause of such restraint is a commitment issued by a justice of a peace of said county; and it appears by other averments that an affidavit was filed before such justice, upon which a warrant issued, and the petitioner was arrested, on the charge attempted to be made in said affidavit. The petitioner predicates his right to a release from the alleged illegal imprisonment on the ground that the affidavit on which the arrest was made, and the proceeding had before the justice of the peace, does not charge any offense under the law, and that, therefore, the warrant which issued was void, and the proceeding also void. The assistant attorney general appeared in this court on behalf of the territory, and a stipulation appears in the record, between him and the petitioner's counsel, in relation to the evidence which may be considered. The writ, as prayed for, was ordered by this court, and returned on the 21st day of January. The purpose, in part, for which the writ was ordered, was to ascertain whether

<sup>1</sup> This case, not having been officially reported, is now published by request.

the petitioner was in fact restrained of his liberty at all, as alleged in the petition, at the commencement of the proceedings. The return of the sheriff is as follows: "I. Francisco Chavez sheriff, do hereby certify, that James Brydon has been under the custody of the sheriff since the 14th day of January, A. D. 1889, and up to this time he is still under custody of said sheriff, Santa Fé N. M. Jan'y. 21st 1889, he is under actual custody having surrendered this morning." The order for the writ was made the 17th, and the same seems to have been issued the 19th of January. There is some ambiguity about the sheriff's return, but the only reasonable interpretation of it is that there was no actual custody of the petitioner by the sheriff until the 21st day of January. If, prior to that date, he was confined in the county jail as the mittimus contemplates, or was in the actual custody of the sheriff, there would be no necessity for a surrender on the 21st. As we construe the return, it shows the petitioner was at large, within the sheriff's reach, up to the 21st; that on that day, for the first time, the sheriff took him into actual custody. The return is not a compliance with section 2016. The most impressive point in the record is the number of important things that are waived. With an affidavit on file which most lawyers would have moved to quash, the defendant waived examination. With a commitment in his hand, the sheriff seems to have waived the command thereof to securely confine the petitioner in the common jail, possibly for the reason that he deemed the whole proceeding void. The issuing of the writ of habeas corpus is waived, and the return thereto is waived. To invoke the action of this court, there must be a substantial case, and there cannot be with the petitioner at large, in the enjoyment of his liberty, at the date when the petition was filed. As the sheriff's return shows the petitioner did not surrender himself to the sheriff until January 21st, and as there is nothing to contradict this return, we cannot find that imprisonment on that date proves imprisonment on the 17th day of January, and do find and adjudge that the petitioner was not, on the 17th day of January, restrained at all of his liberty, and therefore cannot make any order releasing him from unlawful imprisonment. Costs are adjudged against petitioner. In this opinion the associate justices all concur.

In re HUGHES et al.

(Supreme Court of New Mexico. Dec. 20, 1895.)

CONTEMPT—NEWSPAPER PUBLICATION—PUNISHMENT.

1. A publisher and editor of a newspaper in which an article is printed expressly attributing improper personal and political motives to the court in the institution of a disbarment pro-

ceeding then pending may be summarily punished by the court for contempt, his attention having been called to the nature of the article, though he declared that no contempt was intended.

2. An editor who publishes in his newspaper an article attributing bad motives to the court in the institution of a disbarment proceeding then pending, knowing the nature of the article, but not then knowing or afterwards being able to state who its author was, may properly be punished, in summary proceedings for contempt, by imprisonment. Bantz and Hamilton, JJ., dissenting.

Proceedings against Thomas Hughes and W. T. McCreight for contempt.

The respondent was attached upon an affidavit and information made by W. B. Childers, a member of a committee appointed by this court, to prepare and prosecute charges against Thomas B. Catron and Charles A. Spiess for alleged unprofessional conduct in the trial of the case of the territory of New Mexico against Francisco Gonzales y Borrego et al., for the murder of Francisco Chavez, which was tried in the district court for the county of Santa Fé, in the month of May, 1895. Jacob H. Crist, the district attorney, represented the territory in the trial of that case. At the July, 1895, term of this court, the said Crist, as district attorney, filed his own affidavit and copies of portions of the testimony taken upon the trial of said cause, and also the affidavit of several other persons, in which it was alleged that the said T. B. Catron and Charles A. Spiess had been guilty of efforts to procure false affidavits from the witnesses and otherwise improperly affect the testimony of the witnesses in that case. Upon the filing of said affidavits by the said district attorney, this court appointed John P. Victory, A. A. Jones, W. B. Childers, S. B. Newcomb, and B. S. Rodey, all prominent members of the bar of this territory, to inquire into the alleged offenses, and to prepare and file proper charges against the said Catron and Spiess if, in their judgment, it should be deemed necessary, and present them to this court, and to procure such evidence as they thought proper, and submit the same to the court, in order that there might be a full investigation of the charges so made against the said respondents, Catron and Spiess.

After the committee had filed such charges, and the hearing upon same had been fixed by the court, while they were pending and undisposed of in this court, there was a publication in the Daily Citizen, a newspaper published at Albuquerque, in the county of Bernalillo, of an article nearly three columns in length, entitled "Is it Honesty or Partisanship?" The following are extracts from said article: "Last Sunday evening, Chief Justice Smith, of the supreme court of this territory, wired W. B. Childers that he intended to spend the night with him in this city. It has been reliably ascertained that the object of his visit to Albuquerque, outside of his own district, and

away from Santa Fé, the seat of the supreme court, was to consult with Childers, one of the attorneys designated to 'formulate' charges against T. B. Catron, based on information in the nature of affidavits and copies of a part of the evidence in the 1st judicial district court, in the case for the murder of Chavez, presented by J. H. Crist. Judge Smith, notwithstanding the fact that he is a member of the supreme court, and as such one of the judges to hear and try such charges, has, contrary to all precedent, delicacy, and the ethics pertaining to the judicial action, descended from the high position which he should have commanded, so as to appear in the partisan effort to ruin the character of an attorney whose only crime is that he was, at the last election, selected by a majority of about 3,000 votes to represent New Mexico in congress. In his zeal to cripple the influence of Catron to aid New Mexico and her people, Judge Smith has made this visit to Albuquerque, and at the residence of Childers took up nearly the whole night in discussing the case and its merits. It is well understood that, prior to any action taken in the supreme court in this matter, Judge Smith also met and had a full consultation with Childers, Crist, and other attorneys, who were at enmity with Catron, in regard to the propriety and feasibility of pushing the cause against Catron; that it was there determined that it was necessary to push them for political and personal reasons; that Judge Smith would see that they were referred to a special committee of the bar, composed of a majority who would be hostile to Catron, either politically or personally, or both, but that it should be so done that it should be made to appear to the other members of the supreme court that it was intended to be nonpartisan. \* \* \*

We do not desire or intend to reflect on the supreme court or any member of it, only to state the facts as we have heard them, for the information of the public. We do think, however, the action of Judge Smith was very reprehensible. He had no more occasion to consult with a member of that committee in advance than he had to become the prosecutor in that or any other cause which might come before him in the supreme court or the district court. He sits as a juror. Having taken an active part in advising in regard to the cause,—having manifested his prejudice, if we are correctly informed,—he is no longer qualified in that case. Yet, if appearances and reports are true, he has not demeaned himself as a fair, upright, and manly judge should have done. No judge having any regard for his office or for the esteem for his fellows, since the time of Bacon and Jeffreys, has ever allowed himself to be consulted or to take part in advising the course to be pursued in a given case. The management of causes, and the propriety of the course to be pursued, and

the accusation to be presented in any case, should be left to the legal profession, and, in a case like this, to the Bar Association of New Mexico, of which Catron and Spless are both members, and where such matters properly belong. It can scarcely be considered that Judge Smith has acted fairly and impartially in this cause if the facts as we learn them be true. The other members of that court should see that the judicial ermine is not dragged in the mud of politics and of personal enmity, and should promptly check any partisan zeal or political hostility which may be manifested in that cause if there be any display thereof. \* \* \*

Why does the supreme court assume to take control and ignore the bar association, of which each member of the court is a member? Why is the grievance committee of that association, composed of such men as N. B. Field, George W. Knaebel, S. B. Newcomb, Frank Springer, and A. A. Jones, ignored? Are not these men capable of looking into the truth and reasonableness of the charges? These are men whose integrity, ability, and fairness cannot be questioned, unless it be by those who seek to perpetrate a wrong. It is no partisan committee. Three of its members are Democrats, and two Republicans. Two of them, Newcomb and Jones, have been placed on the committee to formulate these charges. But Field, Knaebel, and Springer have been shoved aside, Field being chairman. Instead of three such men as Field, Knaebel, and Springer, Victory, Childers, and Fiske, persons either politically or personally hostile to T. B. Catron, were placed on the committee. Why was this? Was it fair, or was it that they did not believe in the honesty, integrity, and fairness of Springer, Knaebel, and Field? Or was it, possibly, in order that the advocates of certain peculiar ideas should go upon the committee to besmirch the character of other members of the bar? We hope the latter is not the case. We believe it is not; but, if it be such, then to what low, contemptible, degraded, and insignificant place can the judiciary descend. \* \* \*

The individual who penned or inspired that article, or both, and every one else who knows anything, knows the members of the supreme court individually never read over the alleged charges and annexed papers presented by Crist, nor have they heard them read over, but, without reading or hearing them read, referred them to the representation of some one of the committee, with instructions simply to formulate charges based thereon, but not to examine into the truth of the facts or the probability of their correctness. It is further well known that Catron's attorneys applied to the court on motion, and asked to have the charges investigated by the committee, and their powers enlarged for that purpose, so that they might determine whether there was any reasonable foundation for preferring charges.

The supreme court refused to accede to this motion. That thereafter the committee itself applied to the court, and requested to be informed as to their duties, and most, if not all, of the committee stated that if they were required to examine into the facts of the charges, or do anything except to act ministerially in formulating charges upon the supposed facts before them, that they declined to act upon the committee. They were therefore informed by the court that they were to formulate charges upon the matters presented to them, and stand between the court and wrong. What that meant does not seem to be very clear. These facts, although done in private, with closed doors, none present but four members of the court and the committee, have reached the light of day. How can it be said that the court or any committee has in any manner passed upon the correctness of the charges or the possibility of sustaining them. No investigation has been made by either. Why were not these charges preferred in the district court, where the facts complained of are said to have happened, if at all, and that also before Judge Hamilton? \* \* \* We do not write these facts to influence the supreme court. We expect to be governed solely and entirely by the merits of the case. We do demand, however, that the case shall be tried according to law; that a proper weight should be given, in view of all the facts and surroundings, to the testimony of each witness. We do demand that politics shall be eliminated; that personal hostility and enmity shall be set aside, and nothing but the strictest kind of justice and honesty shall prevail."

The information against said Hughes states that he and one W. T. McCreight are partners, under the name of Hughes & McCreight, and the proprietors of said paper, and has attached to it a copy of said article, alleging that the same was published by the said Hughes & McCreight in said newspaper, which had a general circulation in the territory of New Mexico and in Santa Fé, the capital of said territory, where this court was then in session, and about to proceed to the investigation of the said charges against the said Catron and Spiess. Upon the filing of said information, a writ of attachment was issued for the apprehension of the said Hughes and McCreight. Said McCreight was attached and brought before the court, and to him certain interrogatories were submitted, to which he filed answers; and thereupon the court fined the said McCreight in the sum of \$25 and costs of the proceeding. It appeared from the answers of said McCreight that he had no personal knowledge of the publication of the said article, or that it was to be published until it appeared in said newspaper, and that he was more immediately connected with the local work on said paper than the editorial department.

It appears from the marshal's return and

otherwise that, upon issuance of said attachment, the said respondent Hughes fled from the territory of New Mexico, and was apprehended by the United States marshal at the town of Winslow, in the territory of Arizona, and brought back, and presented before the court in the custody of the marshal. Certain interrogatories were submitted to said Hughes, and answered by him, some of which, together with his answers, are as follows: "Ans. 12. The article was found, as I have stated, upon my office desk. It was typewritten and unsigned. I read it very hurriedly; hung it on the copy hook; and, as I was extremely busy on that day, I sent the article in 'takes' to the printers, and did not read the article until the proof sheets came down; and then, in the hurry of the day, it was placed on the editorial page in making up the forms. I did not read all the proof. W. S. Burke read a portion, and I read a portion; and I never read the entire article until after it was printed in the paper. I had no knowledge or information at that time or since of the authorship of the article. Int. 13. Did not W. S. Burke, who is employed as a writer on the said newspaper, when reading a part of the proof of said article above referred to, state to you, in substance or effect, that said article was 'loaded,' meaning that it was libelous, and that it was calculated to get you or the paper in trouble? Ans. 13. He did, in substance, and he changed one sentence in the article at his suggestion."

Respondent further states on his oath that at the time the United States deputy marshal came to where he was stopping at the hotel in Winslow, Ariz., respondent did not ask for his authority nor demand to see any warrant, but voluntarily went with said marshal to the train, and returned to New Mexico; and that, after arriving within the limits of said territory, said deputy marshal read to respondent the warrant which has been returned into this court. And respondent further states, upon oath, that, in the publication of the article referred to, he had no intention or desire to reflect upon the supreme court of the territory of New Mexico, its chief justice, or any member of said court, nor any intention or desire to impede or obstruct the course of justice in any cause or matter pending before it; and that if respondent had read the article in question with care before it was published, or had been aware of the character of its contents, the same would not have been published in said newspaper; and respondent deeply regrets that, by reason of his haste, such a publication should have appeared in his paper, on October 17, 1895.

After the answer had been filed, and the case heard, and the judgment rendered, but before the sentence of the court had been pronounced, the respondent published in his paper a retraction, which is as follows, to wit: "An article appeared in the Daily Citizen on the 9th day of this month reflecting on Chief Justice Smith, of the territorial su-

preme court. Investigation shows that the article was false in many particulars. The article appeared as an editorial, though it was not written by the editor of this paper. We are now convinced that the objectionable language referred to in the article was fairly and reasonably open to the construction put upon it by the supreme court, though no such construction was intended or thought of by the editor of this paper when the same was published. We fully realize the importance of having the courts of justice unimpaired by newspaper articles or criticism reflecting upon the character of the court or any member thereof. We wish to reiterate our regret that said publication should have appeared, and we desire to give this public assurance that hereafter no such article shall appear in these columns. It appeared and was published through gross carelessness, and without any malicious intent on the part of the editor of this paper; and we desire in this public manner to make apology to Chief Justice Smith and the members of the territorial supreme court of New Mexico. Thos. Hughes, Editor Daily Citizen."

W. B. Childers, A. A. Jones, and John P. Victory, for the Territory. E. L. Bartlett, for respondents.

**LAUGHLIN, J.** The question was argued before the supreme court as to whether the said Hughes should be punished for the publication of said article upon the answers filed by him. A majority of the court held that the answers could not be contradicted, and excluded all testimony offered for the purpose of contradicting the same, partly upon the ground that the practice did not permit the answers of the respondent in such cases to be contradicted, and partly upon the ground that the answers of said Hughes themselves showed guilty knowledge of the contents of said editorial, and that the publication thereof was admitted by him. It will be seen from an examination of said answers that the said Hughes claims that he was entirely ignorant of the authorship of the said article; that he found the same upon his table or desk in his office, and was wholly ignorant of how it came to be there; that he caused same to be set up and published in his paper without making any inquiry whatever into the authorship of the article, or as to the truth of the charges therein made against the chief justice and the other members of this court.

An examination of the extracts quoted above from said article, will show that it was not only a most flagrant attack upon the chief justice, but also other members of the court, and the court as a whole, charging them with dishonest and partisan purposes in the entertainment of the charges against the said Catron and Spless, and the appointment of a committee to prosecute the same. It would be difficult to find in the proceed-

ings of courts for contempt, or in the history of newspaper publications, a more flagrant and outrageous abuse of the liberty of the press. A more flagrant contempt of court probably never was perpetrated by the publication of a newspaper article than in this instance, and the answer of the defendant that he was ignorant of the purpose or effect of the article, and of the authorship of it, instead of mitigating his offense, aggravates it; and it is impossible to escape the conclusion that his flight from New Mexico was in consequence of the issuance of this writ of attachment for his apprehension. No other satisfactory reason has been suggested to the court for such flight.

The judgment of this court in finding the said Thomas Hughes guilty of contempt, and sentencing him to imprisonment in the jail of the county of Bernalillo for 60 days, and one dollar fine and costs, was rendered during the progress of the investigation of the charges against the said Catron and Spless. But, deeming the questions herein involved of such importance to the public that they should be thoroughly understood, we have concluded to state what we believe to be the law concerning contempt of court committed by the publication of articles in newspapers reflecting upon judicial tribunals.

Mr. Cooley, one of the most eminent American jurists and writers on constitutional law, states the law as follows: "It has also been held in many cases that the publication of an article in a newspaper commenting on proceedings in court then pending and undetermined, or upon the court in its relation thereto, made at a time and under circumstances calculated to affect the course of justice in such proceedings, and obviously intended for that purpose, may be punished as a contempt, even though the court was not in session when the publication was made."

In the case of *People v. Wilson*, 64 Ill. 221, the supreme court of the state of Illinois, the opinion being rendered by its chief justice, says: "I merely quote the rules as laid down by Bishop, an American writer, in his work on Criminal Law (page 216). He uses the following language: 'According to the general doctrine, any publication, whether by parties or strangers, which concerns a case pending in court, has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt.' Whether tested by this common-law definition or by the rule laid down by this court in the *Case of Stuart*, already cited, there is no room for doubt that the article in question must be held a contempt of flagrant character. It related to a case in court involving in its final issues a human life. The answers of the respondents state that, at the time of the publication, 'there

was intense excitement in the community, and particularly in the city of Chicago, on account of frequent murders, and the escape of the perpetrators thereof.' This is no doubt true, and this article seems to have been studiously written with a view to direct popular clamor against this court, and compel it either to affirm the judgment sending Rafferty to execution, or incur the imputation of bribery, and the clamor of an angry city to be echoed throughout the state by a portion of the Chicago press. The demand was not that we should calmly examine the record of Rafferty's trial to see whether his conviction had been legal, but that we should give him over to execution, because there was such impunity for crime in the city of Chicago that it was necessary some men should be immediately hung. We have since examined the record of this man's conviction, and reversed the judgment; all the members of the court holding that a plain provision of the statute had been violated on his trial. Let us say here, and so plainly that our position cannot be misrepresented only by malice or gross stupidity, that we do not deprecate, nor should we claim the right to punish, any criticism the press may choose to publish upon our decisions, opinions, or official conduct in regard to cases that have passed from our jurisdiction so long as our action is correctly stated, and our official integrity is not impeached. The respondents are correct in saying in their answers that they have a right to examine the proceedings of any and every department of the government. Far be it from us to deny that right. Such freedom of the press is indispensable to the preservation of the freedom of the people. But certainly neither of these respondents, nor any intelligent person connected with the press, and having a just idea of its responsibilities, as well as its powers, will claim that it may seek to control the administration of justice or influence the decision of pending cases. A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration; but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on the one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude. It may be said that, as long as the court was conscious it had not been frightened from its propriety by the article in question, the wiser course would have been to pass it by in silence. So far as we are

personally concerned, we should have preferred to do so. We desire no controversy with the press. But a majority of the court were of the opinion that this publication could not be disregarded without infidelity to our duty. By our relation to the bar, to the suitors in our court, to the entire judiciary of the state, and to the state itself, we felt constrained to call the persons responsible for this publication to account."

In a note of the learned editor of the *American Decisions* to the case entitled *In Sturce* (97 Am. Dec. 630), the following will be found: "Publications in Newspapers as Contempts. It has long been settled, and is now generally acknowledged, that certain publications in newspapers may amount to contempts of court, and may be summarily punished as such. Publications pending a suit, reflecting on the court, the jury, the parties, the officers of the court, or attorneys with reference to the suit, and having a tendency to influence the action of the tribunal before which the case is pending, are a contempt of that court, which may be summarily punished by attachment if the publication has a tendency to prejudice the public, a part of whom may thereafter be summoned as jurors, with respect to the merits of a case pending in the courts, and to corrupt the administration of justice. Publications scandalizing the court, and intended to unduly influence and overawe its deliberations in causes pending, are contempts, which this court is authorized to punish by attachment; and it is essential to the dignity of character, the utility, and independence of the court, that it should possess and exercise such authority." *People v. Wilson*, 64 Ill. 221. To the same effect: *Hollingsworth v. Duane*, Wall. Sr. 77, Fed. Cas. No. 8,616; *Bronson's Case*, 12 Johns. 460; *State v. Morrill*, 16 Ark. 334; *Respublica v. Passmore*, 3 Yeates, 441, 2 Am. Dec. 388, and note; *Respublica v. Oswald*, 1 Dall. 319; *Stuart v. People*, 3 Scam. 405.

In treating of this subject, Mr. Bishop says: "Again, according to the general doctrine, any publication, whether by parties or strangers, relating to a cause in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice, or reflecting on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt." 2 Bish. Cr. Law, § 259; *In re Cheltenham, etc.*, Ry. Carriage & Wagon Co., L. R. 8 Eq. 580; *Daw v. Eley*, L. R. 7 Eq. 49; *Little v. Thomson*, 2 Beav. 129; *In re Crawford*, 13 Jur. 955; *Reg. v. Onslow*, L. R. 9 Q. B. 219, 12 Cox, Cr. Cas. 358, 5 Eng. Rep. 443; *Reg. v. Skipworth*, L. R. 9 Q. B. 219, 5 Eng. Rep. 456; *Reg. v. O'Dogherty*, 5 Cox, Cr. Cas. 348; *Anon.*, 2 Atk. 469.

In *State v. Morrill*, 16 Ark. 300, the court goes further, and says: "The cases above cited (and many more might be cited if deemed at all necessary) abundantly show



that, by the common law, courts possessed the power to punish, as for contempt, libelous publications of the character of the one under consideration, upon their proceedings pending or past, upon the ground that they tended to degrade the tribunals, destroy the public confidence, and respect for their judgments and decrees, so essentially necessary to the good order and well-being of society, and most effectually obstructed the free course of justice." Applying these principles, the supreme court of appeals of West Virginia, in a late case, held that a publication in a newspaper where the court was sitting, with reference to a case then pending and undetermined, charging three of the four judges of the court with having attended a political caucus more than a year before, and in the caucus advising the action out of which the case arose, and promising the caucus to hold its action legal and proper, and charging the court with having agreed to decide the case before an approaching political convention for political purposes, was a contempt of that court which they should summarily punish. *State v. Frew*, 24 W. Va. 416. So, where a number of the members of the bar unite in a publication falsely charging the judge of the supreme court with having improperly participated in politics, and insinuating that they would favor their fellow partisans in their judicial deliberations, they are guilty of such contempt as justifies their suspension from practice, until they purge themselves of it. *Ex parte Moore*, 63 N. C. 397. *Tenney's Case*, 23 N. H. 162, affords another illustration of this rule.

Among the more recent cases where the publication of such articles in newspapers has been punished as contempt of court is *Burks v. Territory* (decided by the supreme court of Oklahoma, on September 7, 1894) 37 Pac. 829. In that case it was decided that the power to punish for contempt is inherent in courts of record; that the legislature has no power, in the absence of constitutional provisions, to limit or regulate the inherent powers of the courts to punish for contempt; and that the party accused has no right of trial by jury in a contempt proceeding. The court has also decided that the United States statute of March 2, 1831, which is embodied in section 725 of the Revised Statutes of the United States, limiting the power of the courts of the United States to inflict summary punishment for contempt of court, is not applicable to the courts of the territory, these courts not being courts of the United States to which these provisions of the acts of congress are applicable. The court decided in that case that publications made in a daily newspaper, while a matter is pending in the court, as to whether or not a certain report presented by the grand jury shall be received by the court, or returned to the grand jury for further proper action and corrections, to the effect that the action

of the judge seemed to indicate that he intended to withhold the report, and that, if the judge persisted in carrying out such intention by suppressing the report of the grand jury, the act might be characterized as a flagrant violation of the people's rights, and charging by direct implication that the action of the court is "an effort to browbeat the grand jury, and an effort to bend the grand jury to the will of the judge," and "a serious matter," constituted a contempt of court. In the opinion it is said: "Such conduct is often overlooked by the courts, when the acts are serious injury to the public. The diffidence of courts to take up for investigation and punishment matters which are aimed, not only at the court in its public capacity, but also in its individuality, often permits such transgressions as contempts of court to be overlooked and allowed to go unnoticed by the judges of the courts; and the public welfare, the morals, the good behavior, and the proper consideration of a community for governmental functions are thereby greatly injured." The defendant insisted that the statute of Oklahoma provided for the punishment of criminal contempt upon indictment by the grand jury. It says: "The legislature intended that the public itself might also have a right to prosecute these offenses,—not to take away the power which the court already had to punish the offender, but prescribe a means in addition to that already possessed for such punishment." It then proceeds: "The power to punish for contempt of court is inherent in all courts of record." *Ex parte Robinson*, 19 Wall. 505; *In re Millington*, 24 Kan. 214; *People v. Stapleton* (Colo. Sup.) 33 Pac. 167; *Middlebrook v. State*, 48 Conn. 257; *Holman v. State*, 105 Ind. 518, 5 N. E. 556. The court also very well says in its opinion: "We decline in this case to give character to a manufactured sentiment by joining in the too often repeated discussion of a perverted application of our beneficent heritage of freedom of speech and liberty of the press. During these occasions, when crime stalks abroad cloaked in the garb of liberty, and when the assassin of our highest and noblest institutions of civil government would audaciously bid the hand of justice bestow reward for punishment too long deserved, we are reminded of the historic words of Madam Roland: 'Oh, Liberty! How many crimes are committed in thy name!' and resolve that the shield of the innocent shall not be the weapon of the guilty."

In the case of the *Territory v. Murray*, decided by the supreme court of Montana, and reported in 15 Pac. 145, it was decided that the sending and publication of a telegram in a newspaper of general circulation of a dispatch that two persons (real estate agents), on the day of the sending of the telegram, made a wager of \$500 that, owing to the influence of some persons interested in a cause pending before the supreme court

of Montana, the court would reverse their former decision, was a flagrant contempt of court; and this court also held that the acts of congress had no application to the courts of a territory, and that the disclaimer of the defendant in his affidavit of any intention to treat the court with the slightest contempt in publishing the telegram was not binding upon the court, but that it might inquire into the truth of the matter. "The meaning and intent of the defendant in publishing the dispatch must be determined by a fair interpretation of the language used. The construction and tendency of the publication as bearing upon its character as a contempt are matters of law for the court;" *Henry v. Ellis*, 49 Iowa, 205; *People v. Wilson*, 64 Ill. 195; and numerous other authorities.

In the case of *Cooper v. People* (decided by the supreme court of Colorado) 22 Pac. 790, the court quotes from the case of *Watson v. Williams*, 38 Miss. 381, as follows: "The right to punish contempts by summary convictions is a necessary attribute of judicial power, inherent in all courts of justice from the nature of their organization, and essential to their existence and protection and to the due administration of justice. It is a trust given to the courts not for themselves, but for the people whose laws they enforce and whose authority they exercise; and each court has the power for itself finally to adjudicate and punish contempts without interference from any other. The right to punish for contempts extends not only to acts which directly and openly insult or resist the powers of the court or the persons of the judges, but to indirect and constructive attempts which obstruct the progress and degrade the authority of the courts." In this case, the supreme court of Colorado, speaking of the pretended right of trial by jury in contempt proceedings says: "Prior to, and at the time of the adoption of these constitutional provisions, courts had at common law the undoubted authority to punish summarily, without a trial by jury, both constructive and direct contempt. And it is difficult to see how the provisions in reference to jury trials in suits and prosecutions for libel can be so construed as to either extend this right to contempt proceedings, or to support the argument that, as jury trials are not allowed in matters of contempt, therefore the constitution takes away the power to punish as for a contempt for matters spoken, written, or published beyond the immediate view or presence of the court, although presenting no barrier to summary punishment for direct contempts. No court has ever yet held that the right of trial by jury extends to contempt proceedings, and to so decide would defeat the very object of the power. So to hold would place it in the power of a vicious person so to conduct himself as to prevent any kind of a trial. As we have seen, the power to punish summarily for contempt is essential to the

very existence of the court. *Cooley*, Const. Lim. p. 390, note 3." The authority of the courts to punish summarily, as for contempt, parties publishing articles in reference to causes pending, when such publications tend to corrupt or embarrass the administration of justice, has been expressly upheld, notwithstanding the existence of such constitutional provisions. *State v. Morrill*, supra; *Myers v. State* (Ohio Sup.) 22 N. E. 43; *State v. Frew*, supra; *Sturoc's Case*, 48 N. H. 428; 2 Bish. Cr. Law, 259; *State v. Morrill*, supra. The court said: "The counsel for the defense suppose that the power of the courts to punish, as for contempt, the publication of libels upon their proceedings, was cut off by the seventh section of the bill of rights, which is in these words: 'The printing presses shall be free to every person, and no law shall ever be made to restrain the rights thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and think on any subject, being responsible for the abuse of that liberty,' is an answer to the argument of the learned counsel. It is a well-known fact that the bench and bar have been in this and all other countries, where the law has existed as a distinct profession, the ablest and most zealous advocates of liberal institutions, the freedom of conscience, and the liberty of the press; and none have guarded more watchfully the encroachments of power, on one hand, or deprecated more earnestly tendencies to lawless anarchy and licentiousness, on the other. The freedom of the press, therefore, has nothing to fear from the bench in this state. No attempt has ever been made, and we may venture to say never will be made, to interfere with its legitimate province on the part of the judiciary by the exercise of the power to punish contempt."

In the case of *State v. Faulds*, 42 Pac. 285, the supreme court of Montana, in an opinion rendered November 11, 1895, quotes with approval the following from the case of *State v. Morrill*, 16 Ark. 384. The court says: "If an ignorant or impolite man stalks into a courthouse with his hat on, or makes a noise about the door, or disobeys process, all agree that he may be punished for contempt; but if a man has an important case pending in court, and, willing to resort to desperate measures to succeed, publishes, on the eve of the trial, a libel, alleging that the judge has been bribed to charge the jury against him, and that all the witnesses who are to appear on behalf of the opposing party have been corrupted and are unworthy of credit, it is no contempt, and the judge must labor under the embarrassment of sitting in the case, under such circumstances, with his mouth closed. Or if a judgment is rendered against a man, as soon as the judge leaves the bench, he is met at the door, insulted, and assaulted by the party, in consequence

of his decision, and then a publication is made in a newspaper charging him with corruption in rendering the judgment, and calling upon the community to disregard and resist its execution, and yet this is no contempt!" The supreme court of Montana also says: "Such publications are an abuse of the liberty of the press, and tend to sap the very foundation of good order and well-being in society, by obstructing the course of justice. If a judge is really corrupt and unworthy the station which he holds, the constitution has provided an ample remedy by impeachment or address, where he can meet his accuser face to face, and his conduct may undergo a full investigation. The liberty of the press is one thing, and licentious scandal is another. The constitution guaranties to every man the right to acquire and hold property by all lawful means, but this furnishes no justification to a man to rob his neighbor of his lands or goods." This court, in reference to the facts stated that the constitution of Montana limits the power of the two houses of the legislature to punish for contempt, but does not restrict the common-law power of the court, says: "There is a good reason why the framers of the constitution might well have made this distinction. The legislature is a political body. If its proceedings and the conduct and motives of its members are unjustly assailed by libelous publications, they may defend their official conduct, and repel attacks through the press and upon the 'stump'; but it is not the usage of the country, nor would it comport with the dignity of judicial stations, for judges to resort to newspapers or the public forum in defense of the integrity of their decisions, etc., and it should be an unwise policy that would drive them to such a course." *State v. Faulds* (Mont.) 42 Pac. 285.

Parties have a constitutional right to have their causes tried fairly in court, by an impartial tribunal, uninfluenced by newspaper dictation or popular clamor. What would become of this right if the press may use language in reference to a pending cause calculated to intimidate or unduly influence or control judicial action? Days and sometimes weeks are spent in the endeavor to secure an impartial jury for the trial of a case; and, when selected, it is incumbent upon the court to exercise the utmost care in excluding evidence of matters foreign to the issues involved, so that the mind of the juror may not perchance be unduly biased or prejudiced in reference either to the litigants or to the matters upon trial. But if an editor, a litigant, or those in sympathy with him, should be permitted, through the medium of the press, by promises or threats, invective sarcasm, or denunciation, to influence the result of the trial, all the care taken in the selection of the jury, as well as the precaution used to confine their attention at the trial solely to the issues involved, will have been expended in vain.

In the case of *Myers v. State*, it is decided by the supreme court of Ohio (1889): "The furnishing by a correspondent for publication, and procuring to be published, in a newspaper, an article containing statements regarding a judge then engaged in the trial of a cause, imputing to him conduct in respect to the case on trial, which, if true, would render him an unfit person to preside at a trial of the cause, with knowledge on the part of the correspondent that such newspaper has a large circulation in the county where the trial is in progress, and with reasonable grounds to believe that the same will, when published, be circulated in the court room and about the court house during said trial, and there read, and which was afterwards, during the trial, circulated and read therein, is a contempt of court." 22 N. E. 43. It is also decided in this case that, though the libel was in a large part against the presiding judge, that fact did not disqualify him from trying the proceedings for contempt. It was not the libel against the judge which constituted the offense for which the respondent was liable as for contempt of court. The offense consisted in the tendency of his acts to prevent a fair trial of the cause then pending in the court. It is this offense which constitutes the offense, and for which he could be punished summarily; and the fact that, in committing this offense, he also libeled the judge, and may be proceeded against by indictment therefor, is no reason why he may not and should not be punished for the offense against the administration of justice. This is also decided in the case of the *People v. Stapleton*, 33 Pac. 167, by the supreme court of Colorado.

In the case of *Ex parte Barry*, 25 Pac. 256, it is decided by the supreme court of California that a publication made by a newspaper after the judge of the superior court has sustained a demurrer to a petition, with leave to amend, denouncing the judge for his action, is a flagrant abuse of the liberty of the press, and an unlawful interference with the proceedings of the court, punishable by fine and imprisonment as for contempt.

In the case of *State v. Frew* (decided by the supreme court of West Virginia) 24 W. Va. 416, the authorities are also reviewed at great length from nearly every state in the Union, and all to the same effect.

In *Spalding v. People*, 7 Hill, 301, it was said by Nelson, C. J. (afterwards an associate justice of the supreme court of the United States): "The remedy by indictment is oftentimes found too tardy for the exigency of the case; hence the law has always authorized the more summary proceeding by attachment as for a criminal contempt, whereby the offender is arraigned at once upon the charges, and the courts of justice more promptly vindicated and sustained."

But, in our opinion, the judges of this court would have been guilty of a most flagrant

failure to appreciate the dignity of the position which they hold, and their duty to the proper administration of justice, had they shrunk, however unpleasant it might have been to themselves, from meting out to the offender in this case adequate punishment. It may be properly said in this connection that the court was under no obligations to credit the statement of the respondent Hughes that he was ignorant, and could form no opinion, as to who was the author of the article in question. The statement bears the stamp of improbability upon its face. The fact that he has vicariously suffered punishment for the author of the article as well as himself should not have commended him to the sympathy of the court, or in any way induced it to mitigate the sentence which was imposed upon him. The court might feel itself called upon to comment upon the conduct of the author of the article in permitting the publisher of the newspaper to stand between the author and the punishment which justice demands. It is difficult to conceive of a man possessed of so contemptible a spirit as, in the guise of secrecy, to write so flagrant a libel upon the character of a court as this newspaper article was, and when the publishers thereof publish to the world under oath that they were ignorant of the author of the article at the time of its publication, and still are so ignorant, not to come forth and avow its authorship. The retraction published by the respondent Hughes should, in the minds of all honest and fair-minded men, answer at once the proposition that the publication was made by him innocently. How could such a publication be made innocently when he admits that it was false, and that he had no information whatever upon which to base it, and his attention called to its libelous character by his associates before it was printed?

As already stated in this opinion, the answer of the defendant and his subsequent conduct aggravate, instead of mitigate, his offense. It would have been idle, in the opinion of a majority of this court, for the court to have imposed in this instance a mere fine. It might have been possible, and perhaps is probable, that the real author of the article, who escapes punishment, would have come forward and furnished the respondent sufficient money to liquidate the fine had the punishment not been imprisonment.

The court has felt constrained to say this much as the matter was one of duty imposed upon it in the administration of justice and vindication of the law. It is true that the disbarment proceedings seem to have stirred up a great deal of political feeling and prejudice, due to the prominent standing of one, at least, of the respondents; but that fact neither justified the publication of the libel, nor relieved the court from the necessity of discharging an unpleasant

duty. Neither was it in the power of the court, when the charges were preferred against the respondents in the disbarment proceeding, to omit to cause those charges to be investigated. Such an omission would have been a failure to discharge a duty imposed upon the court to the public interest and the proper administration of justice, as well as to the respondents themselves. It is hard to understand how it could be contended for a moment that, in justice to the respondents themselves, there should not have been a full and complete investigation of the charges made against them.

The failure of every well-meaning citizen to dispassionately consider and understand the principles of law that govern the courts in such cases as this, and to sustain the court without regard to the different political complexions of the judges who constituted the court or the citizen himself, is seriously to be deprecated, and argues badly for the prospect of good government in any community or state. Political clamor and prejudice should never be permitted to interfere with the administration of justice and the law, and the judge who yields to it is unfit to fill the position which he holds.

SMITH, C. J., and COLLIER, J., concur.

BANTZ and HAMILTON, JJ. We have filed a separate opinion, and concur in finding respondents guilty of contempt, but dissent from the punishment inflicted, and some of the views expressed herein by a majority of the court.

This is a proceeding in contempt against the publishers of a newspaper in respect to an article reflecting upon the members of this court, published in relation to a cause then pending. It was conceded at the bar by counsel for Mr. Hughes, one of the publishers, that the article was false, wicked, and harmful; and, although our jurisdiction to punish therefor as a contempt was fully conceded, yet we base our jurisdiction upon the distinct ground that the publication was of a nature calculated and intended to exercise an influence upon the decision of a cause then pending, independently of the law or the evidence produced, and thereby sought unlawfully to interfere with and obstruct the administration of justice. The protection of the citizen against that so-called "liberty of the press," in false, reckless, and malignant assaults, is ordinarily to be found in a civil action or indictment. Even though the publication be in respect to a court of justice, we are not prepared to hold, nor is it necessary in this case to hold, that such publication can be the lawful subject of contempt proceedings, however harsh and unjust the criticism; provided it does not impute impure motives, and is confined to decisions or transactions entirely past, and contains no element affecting some cause pending and undetermined. In *People v. Wilson*, 64 Ill.

214, after announcing the general proposition that published criticisms of decisions, opinions, or official conduct of the court or its members, in regard to cases that have passed beyond the court's jurisdiction, will not be punishable as a contempt, and that the judicial and all other departments of the government are open to examination and public discussion, yet the court say that it is not within the liberty of the press "to control the administration of justice or influence the decision of pending causes." And Lawrence, C. J., pertinently observes: "A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven into the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude." In *People v. Stapleton*, 33 Pac. 167, the supreme court of Colorado, in 1893, observed upon this subject: "If the courts of justice may be publicly assaulted by libel and slander, or otherwise threatened or traduced in respect to causes, civil or criminal, pending before them for hearing or trial, then, indeed, no one's rights are any longer safe, and life, liberty, and property are held by a feeble tenure in this commonwealth." Imperfect as judicial examinations may be, both sides have full opportunity to be heard in open court before judgment is rendered; and more danger is to be apprehended from the power of the press over the courts than from the power of the courts over the press. In view of the nature and tendency of the publication set out in this proceeding, and to which we have already called attention, we are entirely satisfied as to our jurisdiction in this case, and of the guilt of the respondent.

The respondent declares under oath that no contempt was, in fact, intended; that, since the publication, he has ascertained the falsity of the charges, and expresses a willingness to publish a full retraction. If, under all the circumstances, the language of the publication, by any fair interpretation, could be harmonized with good faith on the part of the respondent, we might consider ourselves bound by this answer; but the expressions contained in the publication are too direct and full to be overborne by a disclosure now of what were hitherto secret mental reservations. The respondent Thomas Hughes has not therefore purged himself of such contempt; but we do not believe the

punishment of imprisonment by the court is warranted.

SMITH, C. J. I concur in the conclusion that the respondent is guilty of gross licentiousness in the abuse of the liberty of the press, and of wilful contempt of this court, but I dissent from the suggestion that a court is subject to imputation of impurity and partisanship after the determination of a cause. It is public policy that judicial tribunals shall be maintained in their dignity, and, until they have so offended that they are liable to impeachment, it is inherent that they shall protect themselves by the exercise of their official power, especially as they are precluded the privilege of otherwise redressing the wrongs done them in their official capacity. The judgment of the court may be condemned, and its critic may specify its errors and demonstrate its unwisdom, but its motive cannot be assailed. If a high crime or misdemeanor has been committed, let the offender be arraigned before the bar empowered by the constitution to try such crimes.

UNION TRUST CO. OF NEW YORK v. ATCHISON, T. & S. F. R. CO. (POSTAL TELEGRAPH CABLE CO., Intervener).

(Supreme Court of New Mexico. Dec. 20, 1895.)

EQUITY PROCEDURE — INTERVENTION — CORPORATIONS — COLLATERAL ATTACK — TELEGRAPH COMPANIES — BUILDING LINE ON RAILROAD RIGHT OF WAY — EXCLUSIVE FRANCHISE — CONTRACTS IN RESTRAINT OF TRADE.

1. The right of a telegraph company to establish lines along the right of way of a railroad company whose property is in the hands of receivers, pending foreclosure, may be presented and adjudicated by intervention in the foreclosure proceeding.

2. Comp. Laws 1884, §§ 1890-1892, in regard to intervention by persons interested in the litigation, relate only to actions at law.

3. The objection that a foreign corporation has failed to file a copy of its charter, and of the laws of the state or territory granting the same, and has not designated an agent on whom process may be served, as required by statute, before it can do business, can only be raised in a direct proceeding by quo warranto brought for that purpose.

4. Rev. St. U. S. § 5203, authorizing telegraph companies to operate lines of telegraph over any portion of the public domain, along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over navigable streams of the United States, etc., in effect prohibits a railroad company from granting an exclusive franchise along its right of way to any single telegraph company.

5. Such act extends to all military and post roads, whether on the public domain or on private property acquired by a railroad company by purchase or condemnation proceedings.

6. A contract whereby a railroad company grants to a particular telegraph company the exclusive right to establish lines of communication along its right of way is void, as in restraint of trade.

Appeal from First judicial district court; before Justice Edward P. Seeds.

Bill by the Union Trust Company of the State of New York against the Atchison, Topeka & Santa Fé Railroad Company, for foreclosure of a mortgage and the appointment of receivers. The Postal Telegraph Cable Company intervened, and a demurrer to the intervening petition was filed on behalf of the Western Union Telegraph Company. From an order sustaining said demurrer, the intervener appeals. Reversed.

This is an action on an intervening petition in the above cause, brought by the Postal Telegraph Cable Company, for an order on the receivers of the Atchison, Topeka & Santa Fé Railroad Company, requiring them to grant to the intervening petitioner leave to construct a line of telegraph poles, wires, etc., over and along the right of way of said railroad company, and to attach the same to the bridges along said right of way, and for aid and assistance in transporting and distributing its men, materials, supplies, etc., along the same, from the southern boundary line of the state of Colorado, through New Mexico, to the city of Albuquerque, and for such other rights, privileges, and facilities as may be necessary and convenient in the construction, operation, and maintenance of such line of telegraph by the Postal Telegraph Cable Company, and as set out and prayed for in said intervening petition. During January, 1894, the Union Trust Company of the state of New York filed its bill in chancery, in the district court in and for the county of Santa Fé, against the Atchison, Topeka & Santa Fé Railroad Company (which, for brevity, will hereafter be styled the "Santa Fé Company"), for a foreclosure of a mortgage, and for the appointment of receivers to take into custody all the property belonging to the Santa Fé Company, and to operate and manage the same *pendente lite*; and on the same date receivers were appointed by the court, and thereupon assumed and took full control of the operation and management of all the property of the Santa Fé Company. On June 11, 1894, the Postal Telegraph Cable Company (which is, for brevity, hereafter styled the "Postal Company"), filed in said district court an intervening petition in the cause, then pending, of the Union Trust Company against the Santa Fé Company. In the intervening petition, the appellant alleged in substance that it was incorporated under the laws of the state of New York, for the purpose of constructing, operating, and maintaining a general system of telegraph lines between each and every post-office, village, town, and city in the United States; that it had accepted the condition prescribed by section 5263 of the Revised Statutes of the United States, and had thereby acquired the right to construct, maintain, and operate lines of telegraph over the public domain of the United States, and

over and along any of the military and post roads of the United States; and that it had obligated itself to transmit all government telegrams at such rates as might be fixed annually by the postmaster general of the United States, and to transfer its lines to the United States, as provided by law, above cited; that it owns, and has constructed, and now uses and maintains, lines of telegraph in the United States, connecting nearly all the principal cities east of the Rocky Mountains with each other, and has opened and maintains over 3,000 telegraph offices, between all of which offices, when required, it transmits government telegrams at rates annually fixed by the postmaster general, such rates for the current year being far below the general rate to the public for like services; that it is now engaged in constructing a main or trunk telegraph line from La Junta, in the state of Colorado, via Albuquerque, N. M., over and along the line of the Atchison, Topeka & Santa Fé Railroad Company, from the northerly line of the territory to a point near Albuquerque, thence along the right of way of the Atlantic & Pacific Railroad in New Mexico and Arizona, and into the state of California, to Mojave, where it is to connect with the Pacific Postal Telegraph Company's lines; that the Santa Fé Company's system in New Mexico was constructed by the New Mexico & Southern Pacific Railroad Company, the Río Grande, Mexican & Pacific Railroad Company, and the Silver City, Deming & Pacific Railroad Company, all chartered under the laws of this territory, which were, after construction, leased and operated by the said Santa Fé Company, and that all of said railroad companies are land-grant railroads, and have accepted and complied with the terms and provisions of the act of congress approved March 3, 1875, and, as such, are entitled to a right of way, over and through the public domain, of 100 feet on each side from the center of the track, and that all of said right of way has been occupied and used by each, for railroad and station purposes, and was taken substantially from the public lands of the United States; and that said Postal Company proposes to construct its line of telegraph upon and along the right of way in New Mexico, of all three of said railroads; that the said Santa Fé Company and the other railroads named are, by virtue of the laws of the United States, military and post roads, and that it, the Postal Company, is, by virtue of the laws of the United States, entitled to, and has the right to, construct its telegraph line over and along all military and post roads of the United States; that it applied to the receivers of the Santa Fé Company for the right to so construct, maintain, and operate its main and branch lines of telegraph, upon the right of way of the Santa Fé Company's system, and for the usual aid in distributing its poles, materials,

supplies, and water for its men, while so constructing its lines, and offered to pay the usual and customary prices to said receivers for the transportation of the same, and to pay to said receivers a just compensation for any damages or injuries sustained for its use and occupation of the right of way, but that said receivers declined and refused to allow it to construct its telegraph line upon the right of way, and refused and declined to furnish the necessary aid and facilities for the same, alleging as a reason that a contract had previously been entered into between the Santa Fé Company and the Western Union Telegraph Company (which is hereafter called the "Western Union Company"), one clause of which they consider conflicted with the request of the Postal Company, and which the receivers felt bound to respect, until the court should hold to the contrary; otherwise the receivers would be willing to grant the request of the Postal Company, on the payment of a proper compensation; that facilities are granted by the Santa Fé Company to the Western Union Company which are denied to the Postal Company, and that such denial by said receivers is grounded on the clause in said contract now existing between said Santa Fé Company and said Western Union Company, and that said clause in said contract is contrary to law and public policy, and therefore void; with a prayer for the relief sought. The receivers answered, and, among other things, show that they declined and refused to comply with the request of the Postal Company, on the ground that the Western Union Company insists on the validity and binding force of clause 12 in the contract between the Santa Fé Company and the Western Union Company, but, were it not for that clause, the receivers would grant the request of the Postal Company; that the construction of the main and branch lines of telegraph, by the Postal Company proposed, would increase the revenues, and add to the conveniences and facilities, of the property of the Santa Fé Company, in their hands as such receivers; that the receivers are advised and believe that the said twelfth clause in said contract, in so far as it relates to the right of way of the Santa Fé Company, and granting the same to the Postal Company, is void and of no binding force, but, owing to the demand made on them by the Western Union Company, they feel bound to respect it until the court shall have held it void, and submit to the court the question as to the validity of the said twelfth clause, and as to whether or not the Western Union Company was a necessary party to this proceeding. The contract referred to was entered into between the Santa Fé Company and the Western Union Company on the 21st day of November, 1888, and the twelfth clause referred to in that contract reads as follows, to wit:

"Twelfth. The railroad company, so far as it legally may, hereby grants and agrees to assure to the Western Union Telegraph Company the exclusive right of way on, along, and under the line, lands, and bridges of the railroad company, and all extensions and branches thereof, and of railroads owned, leased, operated, or controlled by it, or by corporations owned, leased, operated, or controlled by it, for the construction, maintenance, operation, and use of lines and poles and wires, and underground or other lines, for commercial or public uses or business, with the right to put up or construct, or cause to be put up or constructed, from time to time, in accordance with the provisions of this agreement, such additional wires and such additional lines of poles and wires, and underground or other lines, as the telegraph company may deem expedient; and the railroad company will not, except as legally required, transport men or materials for the construction, maintenance, or operation of a line of poles and wire, or wires, underground or otherwise, in competition with the lines of the telegraph company, party hereto, except at and for the railroad company's regular local rates, nor will it furnish, except as legally required, for any competing line, any facilities or assistance that it may lawfully withhold, nor, except as legally required, stop its trains, nor distribute material therefor, at other than regular stations, providing, always, that, in protecting and defending the exclusive grants conveyed by this contract, the telegraph company may use and proceed in the name of the railroad company, or of any other company owned, leased, operated, or controlled by it, but shall indemnify and save harmless the railroad company and its subordinate companies from any and all damages, costs, charges, and legal expenses incurred therein or thereby." The Western Union Company appeared, and filed a demurrer to the intervening petition of the Postal Company, upon seven special grounds, and, after the hearing on the same, the court sustained the demurrer, and dismissed the intervening petition, from which decision the cause is here on appeal.

Frank J. Loesch and Childers & Dobson, for appellant Postal Telegraph Cable Co. H. L. Waldo, for the receivers. Catron & Spiess and H. D. Estabrook, for appellee Western Union Tel. Co.

LAUGHLIN, J. (after stating the facts). It is contended in this cause, in the brief of the appellee, that the Santa Fé Company filed the demurrer, but it is shown by the record that it was interposed for and on behalf of the Western Union Company, in the name of the Santa Fé Company, under and by virtue of the provisions in clause 12 of the contract, which provided, "Always, that in protecting and defending the exclusive grants conveyed by this contract, the tele-

graph company may use and proceed in the name of the railroad company," etc. The railroad company, by its receivers, through their solicitors, appeared, and answered the intervening petition, and set up, as their defense, that they felt bound to decline the demands made in the said intervening petition, by reason of the covenants contained in the twelfth clause of the contract, until released from the same by the decision of the court holding the covenants therein contrary to public policy and void; and submitted to the court, in their answer, the further question "as to whether or not, under all the facts stated and set forth in this answer, and under the facts stated and set forth in the application, the Western Union Telegraph Company is a necessary party to this proceeding." The demurrer interposed is as follows, to wit: "(1) That said court is without jurisdiction to entertain or grant the prayer of intervenor's petition in the summary manner proposed. (2) For that there is a defect of parties, it appearing, from said intervenor's petition and the answer of the defendant receivers, that the Western Union Telegraph Company has, or claims to have, rights which would be affected by the order sought; furthermore that it appears, from said intervenor's petition and the answer of defendant receivers, that the right of way of the said several railroad companies is, at least in part, over and through private grants, and that an additional burden or servitude placed upon said right of way would entitle the owners of abutting property to a hearing for compensation, and that all of said abutting owners, to be so affected, are necessary parties to the determination of this matter. (3) For that it is beyond the scope of the duties or powers of said receivers to grant, bargain, or sell any portion of the right of way, or to fasten upon the same any additional burden or servitude, all of which appears from the records of this court. (4) For that it is beyond the powers or jurisdiction of this court, by an interlocutory order or other interlocutory or collateral proceeding, to authorize the receivers to sell, bargain, or convey any portion of the right of way of said railroad company, or to encumber the same by any additional burden of servitude, for years or in perpetuity. (5) For that it appears, from the petition of said intervenor and the answer of the receivers, that the Western Union Telegraph Company has paid a consideration to said railroad company for the faithful observance of all the terms of said contract between it, the said Western Union Telegraph Company, and said Atchison, Topeka & Santa Fé Railroad Company, including the covenant and provision complained of, and that there is in said petition or said answer no offer to pay or refund to said Western Union Telegraph Company said consideration, or any part thereof. (6) For there is no allegation in said petition of intervenor that the said Postal Telegraph Cable Company has complied with any of the pro-

visions of the laws of the territory of New Mexico relative to filing in the office of the secretary of the territory a copy of its charter, and the appointment of an agent, or otherwise authorizing it to do business of any kind within said territory, or to have any standing in the courts in said territory. (7) For that the petition of said intervenor does not state facts sufficient to constitute a cause of action." It is insisted by the appellee that the Postal Company can intervene only under sections 1890-1892, Comp. Laws 1884, and that the facts stated do not show that the Postal Company has sufficient interest in the cause pending to permit it to intervene. This contention cannot be maintained, because this is an equitable proceeding, and the sections of the statute referred to relate only to actions at law. In the case at bar, the property involved is in custodia legis, and there is no more proper remedy or procedure than to allow the Postal Company to come in by intervention and litigate its rights, if it have any, and in such causes it is in the necessary and inherent power of a court of chancery to permit parties claiming an interest in the subject-matter in litigation to establish their rights, if they can, and to have them finally adjudicated and determined in the action then pending, and it is the nature of an examination pro interesse suo. *Krippendorf v. Hyde*, 4 Sup. Ct. 27; 2 *Daniell*, Ch. Prac. 1057; *Vault Co. v. McNulta*, 14 Sup. Ct. 915; *Joy v. City of St. Louis*, 11 Sup. Ct. 243. Many other cases might be cited where this practice has been followed. In *Mercantile Trust Co. v. Atlantic & P. R. Co.*, 63 Fed. 513, United States District Judge Ross, in passing on this question concerning the California statute with respect to interventions, said: "The suit was therefore one in equity; and the California statute respecting intervention, relied on in support of the demurrer, does not, I think, have any application to the present proceeding. The property in question being in the hands of the officer of the court, there is no more appropriate way in which to present the alleged rights of the Postal Telegraph Company than by an intervening petition."

The sixth ground relied on in the demurrer is that the Postal Company, being a foreign corporation, has no standing in court, because it has not complied with the laws of the territory, in that it has not filed a copy of its charter in the office of the secretary of the territory, and has not designated an agent upon whom process may be served. This objection is not well taken, because it cannot be raised in a collateral proceeding of this nature. A stranger or third person cannot be heard to object to a foreign corporation doing business within the limits of this territory, on the ground that it has not complied with the statute which requires all corporations chartered under the laws of any other state or territory to file an authenticated copy of its charter, and of the laws of the state or territory granting the same, and a certificate designat-



ing upon whom process may be served, before it can do business in the territory. This objection must come first from the territory, in a direct proceeding in quo warranto brought for that purpose. It cannot be raised in an action between individuals. *High, Extr. Rem.* § 724; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93; *Cowell v. Springs Co.*, 100 U. S. 55; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, and cases there cited; *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1.

The remaining point for consideration is as to the validity and legal force of the covenants in the twelfth clause in the contract entered into between the Santa Fé Company and the Western Union Company, on the 21st day of November, 1888; and it is to continue in force for 25 years from that time. This superseded a similar contract entered into between the same corporations in January, 1872, and, stripped of its legal verbiage, it means that the Santa Fé Company has conveyed to the Western Union Company an exclusive grant and franchise, over, along, and through its right of way, for telegraphic purposes, and agrees not to aid or assist any other person, company, or corporation in the construction, operation, and maintenance of any other telegraphic line along, over, or through its right of way, in so far as it may legally decline to do, and is an effort on the part of these corporations to create and maintain a monopoly of transcontinental telegraphic business in the Western Union Company, and, in so far as this clause has this effect, it is contrary to public policy, and an attempt to cripple trade, in restraint of commerce, and is void. The Postal Company proposes to construct its line over the right of way of the New Mexico & Southern Pacific Railroad, from the north boundary line of New Mexico, at or near Raton, to the city of Albuquerque, which is a part of the Santa Fé Company's system; and it is shown in the answer of the receivers that this right of way was secured over the public domain, in large part, under and by virtue of the act of congress, approved March 3, 1875, granting a right of way to railroad companies over the public domain, of the width of 100 feet on each side from the center of the track. This line of road is a military and post road, having complied with all the requirements of law to make it such, and, by virtue of the laws of the United States, the Postal Company has the right and the authority to construct its line, poles, wires, etc., over, along, and upon the right of way, as proposed by it, so long as it in no way hinders or interferes with the necessary and proper management and operation of the railroad, and pays the railroad company a proper and customary compensation for any and all services performed by it, and pays to it due and proper compensation for any damages it may sustain by reason of the construction and maintenance of the telegraph line by the Postal Company. "Any telegraph com-

pany now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, and over under and across the navigable streams or water of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and water, or interfere with the ordinary travel on such military or post-roads." *Rev. St. U. S.* § 5263. This section has been the source of much discussion by many of the courts of the country, and in each case it has been held that the section quoted is in its nature prohibitive, as to the force and effect of any contract entered into by a railroad company, granting an exclusive privilege and franchise over and along its right of way over and through the public domain to any single telegraph company, where such railroad has acquired its right of way under and by virtue of an act of congress, or which are or may be declared military or post roads by act of congress. In *W. U. Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. 1, in passing on a clause in a contract entered into between the railroad company and the telegraph company, which is similar in its nature and effect to the clause in the contract under consideration, Judge McCrary said: "In our opinion, it is not competent for a railroad company to grant to a single telegraph company the exclusive right of establishing lines of telegraphic communication along its right of way. The purpose of such contracts is very plainly to cripple and prevent competition, and they are therefore void, as being in restraint of trade, and contrary to public policy. They are also in contravention of the act of congress of July 24, 1866, which authorizes telegraph companies to maintain and operate lines of telegraph over and along any of the military and post roads of the United States which have been or may hereafter be declared such by act of congress. We therefore must hold the second subdivision of the contract void." In the case of *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, wherein the state legislature of Florida granted to the Pensacola Telegraph Company an exclusive franchise and privilege, for telegraphic purposes, over a certain portion of the territory of that state, in passing upon the injunction asked to restrain the Western Union from constructing its lines over that territory, Chief Justice Waite, speaking for the court, said: "The state of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. \* \* \* The state, therefore, clearly, has attempted

to regulate commercial intercourse between its citizens and those of other states, and to control the transmission of all telegraphic correspondence within its own jurisdiction. The statute of July 24, 1866 (14 Stat. 221), in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares, in the interest of commerce, and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege." This is just what the Western Union Company is now attempting to do. Its aim and effort is to monopolize all the transcontinental telegraphic business through New Mexico, Arizona, and Southern California, by prohibiting the Postal Company from constructing a competing line for the transmission of telegraphic correspondence across this part of the continent. If a sovereign state, through its chosen representatives, has not the power to grant special privileges of this kind, then a corporation certainly cannot. The general government has power to regulate, over every foot of its territory. It is not limited by state lines, and knows no boundaries, except national. The electric telegraph line is, at this day and time, as much a common carrier and national highway, in the transmission of telegraphic business and intelligence, as the railroads and the steam vessels; and the United States government will not permit its citizens to be compelled to do business with any one single individual or corporation, when other individuals and corporations offer to invest capital and engage as competitor for a share of the public and private business. The government has reserved to itself and to its citizens the right and privilege to share in the convenience and advantages produced by competitors for their patronage and support. In *Mercantile Trust Co. v. Atlantic & P. R. Co.*, 63 Fed. 513, a case exactly similar to the case at bar, United States District Judge Ross, in passing upon the same clause, in the same contract entered into between the Atlantic & Pacific Railroad Company, in a very lucid opinion reviewed the several congressional acts and decisions of courts on that subject, and held the clause here in question contrary to public policy, in restraint of trade and commerce, and void.

But, it is insisted by appellee the Western Union Company that the act of congress in question does not apply, because it is shown by the record that a portion of the right of way of the New Mexico & Southern Pacific

Railroad is over and through, in part, private property, obtained by the railroad company by purchase, or by condemnation proceedings under the statute. In passing on this point, raised in the case of *Pensacola Tel. Co. v. W. U. Tel. Co.*, supra, the supreme court of the United States say: "It is insisted, however, that the statute extends only to said military and post roads as upon the public domain; but this, we think, is not so. The language is, 'through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may be declared such by act of congress, and over or across the navigable streams or water of the United States.' There is nothing to indicate an intention of limiting the effect of the words employed, and they were therefore to be given their natural and ordinary significance." The Santa Fé Company never obligated itself to do more than it has done. It simply sold and conveyed to the Western Union Company a one-half interest in its telegraph lines and telegraph business, for the consideration therein stated, and obligated itself to protect the Western Union Company in its exclusive privileges only in so far as it might legally do, and it has fulfilled its covenants by carrying them out on its part, and submitting the question as to the legality and binding force of these covenants to the courts for their interpretation and construction. Entertaining these views, the court below erred in sustaining the demurrer interposed by the appellee in behalf of the Western Union Telegraph Company. The decision of the court below is therefore reversed, and the cause remanded, with directions to the district court to overrule the demurrer, and proceed in accordance with this opinion.

SMITH, C. J., and HAMILTON, BANTZ, and COLLIER, JJ., concur.

#### ERVIN v. MILNE et al.

(Supreme Court of Montana. Feb. 17, 1896.)

#### SUMMONS—PUBLICATION—SUFFICIENCY OF AFFIDAVIT.

Code Civ. Proc. 1887, § 73, provides that in certain cases, when an affidavit setting up any such case is filed with the clerk, and stating that a cause of action exists against defendant, and that he is a necessary or proper party to the action, the clerk shall cause the service of summons by publication. *Held*, that the affidavit is sufficient if it sets forth, substantially in the language of the statute, enough of the ultimate facts recited in the statute as reasons for the publication of the summons. *Alderson v. Marshall*, 16 Pac. 576, 7 Mont. 288; *Palmer v. McMaster*, 19 Pac. 535, 8 Mont. 136; *Id.*, 33 Pac. 132, 13 Mont. 184, distinguished.

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Action by Arthur K. Ervin against James R. Milne and others, to foreclose a mortgage, in which there was a judgment and de-

cree of foreclosure, and a sale of the property to plaintiff, who afterwards obtained a sheriff's deed. From a judgment denying a motion for a writ of assistance to enable him to obtain possession of the premises purchased, plaintiff appeals. Reversed.

Plaintiff appeals from an order of the district court refusing to issue, at his request, a writ of assistance for the recovery of certain real estate in the possession of one of the defendants, Sarah Milne. It appears from the record that this action was originally commenced by the plaintiff against James R. Milne and Sarah, his wife, and the Miners Lumber Company, a corporation. The action was to foreclose a mortgage upon the real estate owned by said James R. Milne. Sarah Milne and the lumber company defaulted after personal service of summons. The only service obtained upon James R. Milne was by the publication of summons. After judgment, execution was issued, and the sheriff sold the real estate to satisfy the judgment of foreclosure. The time for redemption having expired, the sheriff executed and delivered to the plaintiff herein, who was the purchaser at the sale, a deed of the premises. Afterwards, plaintiff presented this deed to the defendant Sarah Milne, who was in possession, and who refused plaintiff possession. Thereupon plaintiff moved the court for a writ of assistance to enable him to obtain possession of the premises. Upon the hearing of the motion, the plaintiff introduced in evidence the judgment roll in the case. The only appearance made by defendants upon the motion was that of Sarah Milne, by her counsel. He offered in evidence the deed conveying the premises to James R. Milne. He also introduced in evidence an affidavit of Frank E. Shaw, and of Sarah Milne. These affidavits, however, are not considered in the opinion below, and need not be described. The defendant Sarah Milne, by her counsel, also introduced in evidence the affidavit for the publication of summons, and also an order made by the judge for said publication. The affidavit for publication is as follows: "[Title of court and cause.] Affidavit for Publication of Summons. State of Montana, County of Silver Bow—sa.: James M. Self, being duly sworn, says: That he is one of the counsel for the above-named plaintiff. That the complaint in the above-entitled action was duly filed with the clerk of this court on the 7th day of December, 1891, and the summons was duly issued out of this court, and placed in the hands of the sheriff of Silver Bow county, Montana, with directions to serve the same upon said defendant James R. Milne, and the sheriff of said county has returned the same to the clerk of this court, with his return thereon indorsed, to the effect that the said defendant James R. Milne could not, after due and diligent search therefor, be found in the county of Silver Bow, Montana. That the last known place of residence of said

defendant James R. Milne was at No. 407 West Copper street, Butte City, Silver Bow county, state of Montana, but now said defendant James R. Milne has departed from the state, and does not now reside in the state of Montana, but at what particular place deponent does not know, and has not been able after diligent inquiry to ascertain. That there is good cause of action against said defendant J. R. Milne and in favor of said plaintiff, Arthur K. Ervin, as will fully appear by my verified complaint filed herein, to which reference is hereby made, and that said defendant J. R. Milne is a necessary and proper party defendant to this action. Since personal service of said summons cannot be made on said defendant J. R. Milne, I therefore ask that the clerk of this court cause the service of the same to be made by publication. [Duly signed and sworn to by J. M. Self.] Filed Dec. 18, 1891." Plaintiff objected to the consideration of the affidavit and order, for the reason that they constituted no part of the judgment roll. This objection was overruled. Upon this showing, the court denied a writ of assistance. From this order the appeal is taken by plaintiff.

Robinson & Stapleton and Dan'l Yancy, for appellant. Forbis & Forbis, for respondents.

DE WITT, J. (after stating the facts). The statute, in so far as it concerns the affidavit and order for publication which was in force at the time of the publication of this summons, is as follows: "When the person on whom the service of a summons is to be made resides out of the territory or has departed from the territory or cannot, after due diligence, be found within the territory, or conceals himself to avoid the service of the summons, or when the defendant is a foreign corporation, or corporations, having no managing or business agent, cashier, secretary or other officer within the territory, and an affidavit stating any of these facts is filed with the clerk of the court in which the action is brought and such affidavit also states that a cause of action exists against the defendant in respect to whom the service of the summons is to be made and that he or it is a necessary or proper party to the action, the clerk of the court in which the action is commenced shall cause the service of the summons to be made by publication thereof." Code Civ. Proc. 1887, § 73. Upon the hearing it was contended, and was so held by the court, that the affidavit was insufficient. Counsel for defendant Sarah Milne makes the same contention in this court. He urges that the cases of *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576, *Palmer v. McMaster*, 8 Mont. 186, 19 Pac. 585, and *Id.*, 13 Mont. 184, 33 Pac. 132, conclusively sustain his position. If the statute applicable to the present case were the same as that which was passed upon in the above cases cited, those cases, we are of opinion, would be authority for the decision of the district

court in this case. But it is to be observed that in all three of the Montana cases cited the decision was upon the statute of March 1, 1883 (Acts 13th Sess. p. 60). The act of 1883 was similar to that of 1887 quoted above, except that it provided that "the judge of the court in which the action is commenced, or the clerk of said court, in the absence of the judge, shall cause service of summons to be made by publication thereof," whereas the statute of 1887 provides, simply, "the clerk of the court in which the action is commenced shall cause the service of the summons to be made by publication thereof." The change made in 1887 consisted in allowing the publication of summons to be made simply by the clerk, when the facts were shown as described in the early part of the section, whereas under the law of 1883 the publication must be caused by the judge, if he were present. Upon the trials of the three Montana cases cited, judgments were sought to be introduced in evidence, which judgments had been rendered by the publication of summons, which publication was made during the existence of the law of 1883. In the case at bar, plaintiff sought to prove a judgment rendered upon publication of summons made under the law of 1887. It is true that in the case at bar an order for the publication of summons was made by the judge; but this was an act wholly superfluous. *Palmer v. McMaster*, 8 Mont. 193, 19 Pac. 585. If the proper affidavit were made, the clerk could cause the publication, and the intervention of the judge was unnecessary. The proof of the publication of summons was duly made by the affidavit of the foreman of the newspaper in which the summons was published. The questions, therefore, before us are whether the distinction between the law of 1883 and that of 1887 is important, and whether the reasoning of the decisions made upon the law of 1883 is controlling or persuasive in the construction of the law of 1887.

The question of defective affidavits for publication of summons was much discussed in the cases above cited, and many authorities were there reviewed. Where affidavits were held to be insufficient, the reasoning was upon the same line as expressed in *Ricketson v. Richardson*, 26 Cal. 149 in the following language: "An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably, the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts, which must be made to appear, leaving the detail to be supplied by the affidavits from the facts and circumstances of the particular case. Between the statute and the affidavit there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probative facts upon which each ultimate fact depends. These

ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: It is not sufficient to state generally that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the facts constituting due diligence, or the fact that he is a necessary party, should be stated. To hold that a bald repetition of the statute is sufficient is to strip the court or judge to whom the application is made of all judicial functions, and allow the party himself to determine in his own way the existence of jurisdictional facts,—a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge, from the probative facts stated in the affidavit, before the order for publication can be legally entered." In *Forbes v. Hyde*, 31 Cal. 342. *Ricketson v. Richardson* is affirmed in an elaborate opinion by Mr. Justice Sawyer. *Palmer v. McMaster*, 13 Mont. 188, 33 Pac. 182. This same reasoning was applied in all cases which we have examined. See cases cited in the Montana cases above mentioned. It was based upon the fact that the judge was a judicial officer and the court a judicial tribunal, and that the officer or the court must determine judicially whether the facts existed which entitled the plaintiff to the publication of the summons. Therefore the affiant must not simply plead, so to speak, the facts, but must introduce into his affidavit the evidence to support the ultimate facts. He must produce the evidence to support the allegations of his affidavit; that is to say, he must insert that evidence in the affidavit, so that the court or judge may judicially determine the sufficiency of the evidence. Therefore, in former cases decided by this court (cited above) it was held that a statement of the ultimate facts alone, or an insufficient statement of the probative facts, was bad. It may be true, in some of the old cases in this court, the affidavits, as a matter of fact, came before the clerk in the absence of the judge,—as they might under the law of 1883. If this were so, this fact was overlooked; for the decisions do not treat the matter as having been before a clerk,—a ministerial officer,—but proceed upon the ground that the same had been before a judicial officer. Therefore, the question of the affidavit, under the law of 1887, coming before the clerk solely and only, we may discuss as a question not decided by the reasoning of the former cases in this court. Under the law of 1887, it was a ministerial act for the clerk to cause a summons to be served by publication, and in the performance of this act the clerk is a ministerial officer. *Palmer v. McMaster*, 8 Mont. at page 193, 19 Pac. 585. Therefore, does the reasoning which requires the probative

facts to be brought before a judicial officer, that he may judicially determine whether the probative facts establish the ultimate facts, apply to the matter when brought before a ministerial officer for ministerial action? We think not. The reasoning for construing the statute as to publication of summons to the effect that the probative facts must be set forth was based wholly upon the fact that a judicial officer was to pass upon the sufficiency of the probative facts to establish the ultimate facts. This was the reason of the rulings under the law of 1883. But when the judicial officer disappears from the statute and the proceeding, and the ministerial officer takes his place, the reason for requiring the probative facts ceases with the disappearance of the judicial officer. To retain the reasoning of the cases decided under the law of 1883, and apply it to a case to be decided under the law of 1887, we must hold that the probative facts must be set forth, in order that a ministerial officer may judicially pass upon a judicial subject; that is to say, if we hold to the construction of the old cases, we by that construction raise a ministerial officer to the grade of a judicial officer. But ministerial officers have no judicial powers, and we cannot contemplate that the legislature, in the law of 1887, even intended to attempt to give judicial powers to a ministerial officer, viz. the clerk of the court. Therefore, if the clerk is a ministerial officer,—and in this case he is (*Palmer v. McMaster*, 8 Mont. 193, 19 Pac. 585),—would it be reasonable to hold that a matter coming to him for ministerial action must be presented as to a judicial officer? We think not. Or, in other words, if the matter must be presented to the clerk for judicial action, he is a judicial officer, pro hac vice, for determining the sufficiency of the affidavit is a judicial act. *Palmer v. McMaster*, supra. We are satisfied that—the act of the clerk, under the law of 1887, in causing the summons to be published, being a ministerial act—it is necessary only to present the application by affidavit to him as a ministerial officer; and that a judicial question should not be submitted; and that the clerk should not be required to determine from the probative facts whether the ultimate facts exist; and that, as a consequence, the probative facts need not be set forth in the affidavit presented to the clerk, but that the ultimate facts are sufficient; and that the affidavit submitted to the clerk is sufficient, if it sets forth, substantially in the language of the statute, enough of the ultimate facts recited in the statute as reasons for the publication of the summons. It is to be observed that it is not required that all of the causes for publication exist in a particular case. The language of the statute is disjunctive. An examination of the affidavit in this case makes it clear that sufficient of the ultimate facts recited in the statute were substantially set forth.

Another important question which appears in this case, but which it is not necessary to decide, is whether the affidavit for publication of summons is part of the judgment roll, and thus appears in the roll when the judgment is relied upon, or when one seeks to attack it; and furthermore, if the affidavit is not part of the judgment roll, what presumptions the judgment carries. It seems that in the former cases above mentioned it was somewhat taken for granted that the affidavit was part of the judgment roll, and that there was no presumption of service if it did not appear. This ruling is not thoroughly supported by the decided cases in the most respectable courts. But that question is not now before us. The respondent procured the introduction in evidence of the affidavit, over the objection of the appellant. He therefore cannot now complain of a ruling which he obtained upon his own motion. *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333; *State v. Board of Canvassers of Chouteau Co.*, 13 Mont. 34, 31 Pac. 879; *Newell v. Nicholson* (Mont.) 43 Pac. 180; *State v. Second Judicial District Court*, 10 Mont. 460, 28 Pac. 182; *Reed v. Poindexter*, 16 Mont. —, 40 Pac. 506. The order denying the writ of assistance is therefore overruled, and the case is remanded, with instructions to the district court to grant the writ.

PEMBERTON, C. J., and HUNT, J., concur.

#### STATE v. BIGGERSTAFF.

(Supreme Court of Montana. Feb. 17, 1896.)  
CRIMINAL LAW—TRIAL—REMARKS OF COUNSEL—  
APPEAL—REVIEW—HARMLESS ERROR.

1. To enable the appellate court to review improper remarks of the prosecuting attorney in his argument to the jury, it is necessary to request and secure a ruling of the trial court thereon; the taking of an exception to the remarks alone is insufficient.

2. The exclusion of evidence is not ground for reversal if the evidence is subsequently admitted.

3. In a prosecution for murder, exclamations by deceased and witnesses of the homicide as defendant approached the house in which the difficulty accrued, and which he had just left, that "there he comes with a gun," are admissible as *res gestæ*.

4. The prosecuting attorney should not be allowed to state to the jury that, if any wrong is done defendant in his being convicted, he has his redress by appeal to the supreme court.

Appeal from district court, Lewis and Clarke county; Henry N. Blake, Judge.

William Biggerstaff was convicted of murder, and appeals. Affirmed.

C. B. Nolan and Henry C. Smith, for appellant. Henri J. Haskell and R. R. Purcell, for the State.

PEMBERTON, C. J. On the 19th day of October, 1895, the above-named defendant was convicted of murder in the first degree in the district court of Lewis and Clarke county, and on the 26th day of the same month was

sentenced to be hanged. From the judgment and order of court overruling his motion for a new trial, the defendant appeals.

The counsel for the defendant contend that "error of law was committed in the closing argument of said cause by the county attorney, prejudicial to the defendant, to wit, in the use of intemperate language as to the prevalence of crime and the neglect of other juries to do their duty, and the necessity for said jury to act speedily and adversely to defendant, and that, if wrong were done, a rectification thereof could be had in the supreme court; and the failure of the court, by instruction or otherwise, to admonish the jury to disregard such an appeal so made." The language of the county attorney complained of in this assignment is as follows, as shown by the bill of exceptions: "Crimes have been committed in the past in this county, and murderers have been turned loose by reason of the failure of juries to convict and to do their duty, and the community demands a conviction in this case, and the law and public justice demands a conviction. If any wrong or injury is done the defendant in his being convicted, he has his redress by an appeal to the supreme court. The jury should disregard the argument of the counsel except so far as it would assist or guide them in arriving at a right verdict, and I do not want an innocent man convicted. Mr. Nolan, the attorney for the defendant, knows that the defendant ought to be convicted of murder, and is only striving and endeavoring to save his neck, and anything else than the execution of the defendant would be satisfactory to him." Whereupon Mr. Nolan, counsel for the defendant, interrupting the county attorney, said: "I desire to object to the argument of the county attorney in so far as it affects myself and the position I seek to maintain in the defense of the defendant. I do not care to interrupt the county attorney, and would not have done it, but now that I am on my feet, I object to the remarks made by the county attorney in respect to the prevalence of crime," etc. The court then remarked: "In passing upon a matter of this kind, the court is placed in a delicate position. At any rate, Mr. Nolan has stated what his position is in the argument which he made, and you can proceed." Thereupon Mr. Nolan, counsel for the defendant, said: "I would, on behalf of the defendant, preserve an exception." The county attorney, resuming his argument, was about to refer again to the prevalence of crime, when the court, of its own motion, interrupted him, and said: "Mr. Purcell, this matter is objected to by the attorney for the defense, and I would prefer that you would not speak about it." Whereupon the county attorney said to the jury: "I know, and you know, and we all know, and there is no use referring to the matter further." These quotations from the bill of exceptions show, not only the objectionable language used by the county attorney, but

everything that was said and done by counsel for the defendant in the way of objections or exceptions thereto, as well as what effort was made by counsel to secure any action or ruling of the court in relation thereto.

Counsel for the defendant contend that the language used by the county attorney was intemperate, improper, and calculated to injure the defendant. Counsel have referred us to numerous cases and authorities holding such language to be sufficiently prejudicial and erroneous to authorize a reversal of the case. But these were cases for the greater part where the lower court had refused at the time the language was used, on motion of defendant, to strike it out, or direct the jury to disregard it, or, at the request of defendant, to instruct the jury to disregard it, and where the action of the court had been properly preserved in a bill of exceptions. The record in this case shows nothing of this kind. When counsel for the defendant objected to the language of the county attorney, he directed his objection to the county attorney's statement of the position of counsel for the defendant as to defendant's guilt, and, in an apologetic manner, says: "But now that I am on my feet, I object to the remarks made by the county attorney in respect to the prevalence of crime." Nowhere does he request or move the court to direct the jury to disregard this objectionable language. No instruction is asked directing the jury to disregard the language of the county attorney. The court is not requested at any time to make any ruling as to the objectionable language. It is fair to presume that, if the learned judge who tried the case had been requested, he would either have directed the jury to disregard the language at the time it was used, or would have instructed the jury in his charge to do so. It is true, counsel objected to the language used by the county attorney. But there is no exception saved to the refusal of the court to act with respect to this language. In fact, the court was never requested to make any ruling in relation to the objectionable language. If the defendant had requested the court to make the proper ruling in relation to the language objected to, and the court had refused, and this refusal had been properly preserved in an exception, then there would be a case here for this court to act upon. What the court said about the objectionable language was in disapproval of it. There is no objection in the record as to what the county attorney said after the court requested him not to speak of the prevalence of crime. The objection made by counsel to the county attorney's speaking of the prevalence of crime does not cover what he said about an appeal to the supreme court in case the jury erred in finding the defendant guilty. We regard the reference the county attorney made to the right of appeal to the supreme court in the event the jury improperly found the defendant guilty of murder in the first degree as the most objectionable part of the lan-

guage complained of. The statement was incorrect as a matter of law, for, if the jury found the defendant guilty on the evidence, the supreme court would not necessarily have any right to interfere with the verdict. Such statement was calculated to cause the jury to be less cautious in weighing the evidence, and less mindful of their duties as jurors, than they otherwise might have been, for they might have felt that, if they did wrong in the discharge of their duty, the supreme court would correct them, and save the defendant harmless. This statement was calculated to induce the jury to place a lighter estimate on their own solemn duties than they otherwise would, perhaps, have done, by the assurance of the attorney that they could throw the responsibility of the discharge of their duties on the court.

The language complained of was highly improper and reprehensible, and we think the court should, of its own motion, have prevented its use, or directed the jury to wholly disregard it. But we are also of the opinion that this language is not before this court in such manner as to authorize us to treat it. It is not preserved in any exception to any ruling of the court thereon. In *Welsh v. Brown* (Ind. App.) 35 N. E. 921, it is held that an objection and exception by counsel to an objectionable argument "is not a showing of any ruling of the court upon which error can be predicated." The court in that case said: "Unless the court below was given an opportunity to correct the error, no valid exception can be saved. If the court was asked to compel counsel to withdraw his statement, to instruct the jury to disregard it, or to discharge the jury on account of such statement, and refused to do so, to appellant's injury, and the proper exception saved, this court would have some questions to review; but no question is presented by the record, as it comes to us." In *Farmer v. State*, 91 Ga. 720, 18 S. E. 987, in a case like the one at bar, it is said: "The facts of the case touching improper remarks by counsel for the state in his argument to the jury are set forth in the official report. It will be noticed that the cause of complaint as embodied in the motion for a new trial is somewhat mitigated by the explanatory note of the presiding judge. But the impropriety was very great, and the court should have unequivocally rebuked the counsel, and instructed the jury to disregard entirely the improper remarks, even without any request to do so. The omission to deal thus with the matter is attributable only, we think, to inadvertence. The failure of the counsel for the accused either to move to have a mistrial declared or to request any charge to the jury on the subject, and thus to invoke a ruling by the court, is all that prevents this from being cause for a new trial." In *State v. Howard* (Mo. Sup.) 24 S. W. 41, speaking of improper argument of the case, the court says: "The proper course to pursue, if such improper conduct occurred,

was to have called the attention of the court to the matter, and demanded that the proper remedy be applied, and, if it were not, to have saved an exception. This is the only course which, in such circumstances, can be pursued, since matters of exception, which this was, stand on the same footing in criminal as in civil cases, and can only be saved by the like means in the one as in the other." In *Railway Co. v. Cotton*, 140 Ill. 186, 29 N. E. 899, in a case like the one under consideration, the court says: "The bill of exceptions contains quite extended extracts from the addresses to the jury by the plaintiff's counsel, and these extracts embrace various remarks which, we think, were highly improper; but, as to those to which the most serious objection exists, it does not appear that the court was called upon to make or did make any ruling. Several of the most objectionable paragraphs, as they appear in the bill of exceptions, are followed by the memorandum, 'Excepted to by the counsel for the defendant;' but nothing is shown indicating that any objection was interposed, or that the court was called upon to make, or did make, any ruling to which the exception could apply." Thompson, in his work on Trials, says it is the duty of counsel to object, when his adversary exceeds the limits allowed to advocacy, at the time, to answer it by counter argument, or to ask suitable instructions to the jury with reference to the objectionable language; that it is the duty of counsel to secure a ruling of the court; that error cannot be predicated upon the silence of the court, where there is no request for an admonition to the jury not to be influenced by the statement. 1 *Thomp. Trials*, § 957. See, also, *State v. Mack* (La.) 14 South. 141; *Stone v. State* (Ala.) 17 South. 114; *Territory v. Collins*, 6 Dak. 234, 50 N. W. 122; *Learned v. Hall*, 133 Mass. 417; *Miller v. State* (Tex. Cr. App.) 25 S. W. 634; *State v. Sator* (Kan. Sup.) 34 Pac. 1036.

We think the great weight of authority is to the effect that, in order to bring the language complained of before this court for review, it was necessary for the defendant to request and secure a ruling of the court thereon, and properly save an exception to such ruling in a bill of exceptions. The bill of exceptions in the case presents no such record or action of the court as to authorize us to pass upon the language of the county attorney. It was never properly raised and passed upon by the lower court. It cannot be raised here for the first time.

Counsel for the defendant assign as error the action of the court in excluding certain testimony of the witness for defendant, Mrs. Houghton. It appears that the killing took place at a house called the "Mathews House." The defendant went to this house at about 5 o'clock of the morning of the day of the homicide. There he found deceased and others. It was the theory of the prosecution that the defendant went there with the intention to

kill deceased. The defendant sought to prove by the witness Mrs. Houghton that she requested him to go to the Mathews house to see if her daughter was there. The court excluded the evidence. But the record shows that this witness went on the stand as a witness for the state, and testified without objection to the very facts sought to be proved by her by the defendant. The evidence which the defendant sought from this witness was before the jury, given by the witness when she testified for the state. It would make it no stronger to have her repeat it as the defendant's witness.

After the defendant went to the Mathews house, the witness Mrs. Houghton followed him there. At the house a difficulty arose between the defendant and deceased. The defendant left the Mathews house. Witness Houghton followed him out. The state contended that the defendant went out of the Mathews house to get his gun or pistol. Defendant sought to prove by the same witness, Mrs. Houghton, that she followed him out to get him to send for the father of Emma Bowhay; and that defendant went out for that purpose. But the witness did testify to just what defendant wanted to prove by her in this respect. This evidence was given to the jury by the witness on cross-examination. So that, as the evidence of this witness was before the jury, and the defendant got the full benefit of it, we are unable to see how he was injured in the respects specified.

Soon after the defendant left the Mathews house, by the back door, he returned to the front door, with his pistol in his hand. As defendant approached the front door, deceased and others saw him. They exclaimed, "There he comes with a gun!" and immediately shut the door, and deceased and a witness named Smith tried to keep him out by holding the door against him. The counsel for the defendant claim that the exclamations of the deceased and witness, "There he comes with a gun!" are hearsay, and should have been excluded. They were, in our opinion, part of the *res gestæ*, and properly admitted in evidence.

There are no other errors assigned which we deem worthy of special treatment. While all the evidence is not in the record, we think there is sufficient to show that the defendant was the willful and determined aggressor in the difficulty which resulted fatally to the deceased. We are satisfied that the evidence is amply sufficient to support the verdict of the jury to the effect that the killing in this case was done willfully, deliberately, premeditatedly, and with malice aforethought. The judgment and order appealed from are affirmed, and the case remanded to the district court for such further proceedings as are necessary under the law to carry the sentence of the court into execution. *State v. Cadotte* (Mont.) 42 Pac. 857.

DE WITT and HUNT, JJ., concur.

**STATE ex rel. SHING v. LENAHAN, Justice of the Peace.**

(Supreme Court of Montana. Feb. 17, 1896.)  
**APPEALABLE JUDGMENT—CERTIORARI TO REVIEW JUSTICE'S JUDGMENT.**

1. A judgment of the district court quashing a writ of review from a justice court is appealable.

2. Pending a right of appeal from a judgment of the district court quashing a writ of review to a justice's judgment denying a change of venue, certiorari will not lie to the supreme court to review the justice's judgment.

Petition, on relation of John Shing, against J. M. Lenahan, justice of the peace, for writ of certiorari to compel defendant to grant a change of venue. Dismissed.

Hammond & Moore, for relator. R. A. O'Hara, for respondent.

**PER CURIAM.** On the 22d day of January the relator filed in this court his petition for a writ of certiorari against J. M. Lenahan, justice of the peace within and for the county of Ravalli, alleging that, in a case pending before said justice of the peace, wherein the state of Montana was plaintiff, and the relator was defendant, the relator filed with the said justice his affidavit for a change of venue from the said justice of the peace, on the ground that he could not have a fair and impartial trial before the said justice, for the reason that the said justice was biased and prejudiced against the relator; that said justice refused to grant the change of venue. His petition further states that, upon the refusal of the said justice to change the venue of the said cause, the relator applied to the Honorable F. H. Woody, judge of the Fourth judicial district court of the state of Montana, for a writ of review against said justice, alleging the facts as hereinbefore set forth as grounds for the issuance of said writ; but that the said judge of the said district court refused to issue said writ or entertain jurisdiction thereof.

From the return of the said J. M. Lenahan, justice of the peace and respondent, to the writ issued out of this court, requiring the said Lenahan to make return of his proceedings in the case of the state against the relator above referred to, it appears that the judge of the Fourth judicial district court did entertain jurisdiction of said petition for the writ of review, and did hear counsel on both sides argue the case, and, after such argument by counsel, did enter judgment that the said relator was not entitled to said writ. This judgment of the district court, quashing the writ of review, was an appealable judgment. See *State v. Case*, 14 Mont. 520, 37 Pac. 95; *Santa Cruz Gap Turnpike Joint-Stock Co. v. Board of Sup'rs*, 62 Cal. 40; also, section 1941, Code Civ. Proc. 1895. The relator's remedy was by appeal from this judgment of the district court, and the writ must therefore be dismissed. It is so ordered.



O'DONNELL v. GAINAN et al. (VANDERBECK, Intervener).

(Supreme Court of Montana. Feb. 10, 1896.)

DECISION ON APPEAL—CONFESSION OF ERROR—REVERSAL.

When plaintiff demurs to the answer on the ground that it does not state facts constituting a defense, and on appeal from a judgment sustaining the demurrer one of the counsel for respondent confesses error, a reversal will be granted.

Appeal from district court, Madison county; Frank Showers, Judge.

Ejectment by Hugh O'Donnell against E. J. Gainan and another. James H. Vanderbeck intervened, and from a judgment sustaining a demurrer to the answer and the petition in intervention defendants and intervener appeal. Reversed.

Smith & Word and Lew. L. Callaway, for appellants. W. A. Clark and Geo. F. Shelton, for respondent.

**PER CURIAM.** The defendants and the intervener appeal from the judgment rendered against them upon the sustaining of plaintiff's demurrers to the answer and the petition in intervention. The action was ejectment and injunction to stay waste. The complaint set up the acquisition of a mining title by plaintiff, by performance of the acts required for the location of a mining claim. The position of the intervener was that he owned the premises as a mining claim, and had leased the same to the defendants. The answer of the defendants and the petition of the intervener denied specifically all the material allegations of the complaint, and undertook to set forth a title in the defendants and the intervener. The plaintiff demurred to the answer and petition, on the ground that they did not set up facts constituting a defense. The demurrers were sustained, and judgment accordingly entered for the plaintiff. From the judgment, defendants and intervener appeal. One of the counsel for respondent has filed a brief, in which he contends for the correctness of the ruling of the district court. Another of the counsel for the respondent appeared in court upon the oral argument, and stated that in his opinion the ruling of the court below could not be sustained; that is to say, he confessed error. We have no doubt whatever that counsel is correct in this confession. It does not seem to us to be necessary to go further into the case. The judgment is therefore reversed, and the case is remanded, with instructions to the district court to overrule the demurrers. Reversed.

HASSAN v. QUIGLEY.

(Supreme Court of Montana. Feb. 17, 1896.)

Appeal from district court, Lewis and Clarke county; William H. Hunt, Judge.

Action by Eliza Hassan against J. T. Quigley. From a judgment for plaintiff, defendant appeals. Affirmed.

F. N. & S. H. McIntire, for appellant. Leslie & Craven and A. E. Bowe, for respondent.

**PER CURIAM.** In this case judgment was entered in the district court in favor of plaintiff. The case was tried before Associate Justice HUNT, who was at that time district judge of the First district. This fact, under the statute, disqualifies him from participating in the hearing and decision in this court. The case here was argued before Chief Justice PEMBERTON and Associate Justice DE WITT. Upon consultation by the justices who heard the case, it is found that a disagreement exists between them as to whether the judgment should be affirmed or reversed. Owing to this fact, it is ordered that the judgment of the district court be affirmed, without an opinion by this court.

HAMILTON v. GREAT FALLS ST. RY. CO.

(Supreme Court of Montana. Feb. 10, 1896.)

DAMAGES—PLEADING—ACTION FOR INJURIES—INSTRUCTION—APPEAL—CONDITIONAL REVERSAL.

1. In an action by a wife for personal injuries, she may recover damages for any impairment of her capacity to earn money.

2. In an action by a wife for personal injuries, she need not specially plead damages caused by impairment of her capacity to earn money, where the petition shows that she is injured to such an extent as to cause her great pain.

3. In an action by a wife for personal injuries, all the testimony as to future disability consisted of opinions of medical experts. *Held*, that it was not error to charge that damages could be awarded for such consequences as are "reasonably likely" to ensue in the future, and that plaintiff may recover for all pain and suffering which she has sustained, or, "in reasonable probability, will hereafter sustain," etc.

4. Where, in an action for personal injuries, it is impossible, on appeal, to say that the substantial rights of defendant were affected, aside from the amount of the verdict, which is excessive, such court may reverse the case unless plaintiff remits so much of the judgment as the court holds she is not entitled to.

On motion for rehearing. Denied.

For prior report, see 42 Pac. 860.

**PER CURIAM.** 1. Appellant asks for a rehearing. The first point urged is that the court should have decided whether the plaintiff, a married woman, could recover damages "for any impairment of her capacity as a previously healthy woman, if she were such, to earn money." We think she could. Plaintiff's capacity to earn is her own, and she is entitled to recover for any diminution of her capacity to work that is shown to have resulted from the injury. It is unnecessary to decide, in this case, whether the profits or use of that capacity belong to another. The capacity is her own, and for its impairment she can recover. *Jordan v. Railroad Co.*, 138 Mass. 425; 2 Sedg. Dam. § 486.

2. It was not necessary to specially plead damages done to plaintiff by reason of any impairment of such capacity, as, obviously, where a woman is injured to such an extent as to cause her great pain and suffering in and about her womb and back, she will, until her recovery at least, suffer an impairment of her general capacity to earn money. To what extent plaintiff's capacity was impaired

was, therefore, properly submitted to the jury, as part of her general damages. *Railway Co. v. Bowlin* (Tex. Civ. App.) 32 S. W. 918; *Harmon v. Railroad Co.* (Mass.) 42 N. E. 505.

3. The court charged, among other things, that damages could be awarded for "such consequences as are reasonably likely to ensue in the future"; and, again, "plaintiff may recover for all pain and suffering which she has sustained, or, in reasonable probability, will hereafter sustain," etc. The defendant now contends that damages can only be awarded when it is rendered reasonably certain from the evidence that damages will inevitably and necessarily result from the original injury. In this case all testimony as to future disability consisted of expert medical opinions. Certainty of future effects was impossible, and reasonable probabilities were necessarily the bases of the opinions expressed. Therefore, to say that she could recover for suffering which she would in reasonable probability sustain, was practically to say that she might recover for suffering which she was reasonably certain to sustain. The degree of proof would be the same in either case. The instructions complained of are in direct accord with 1 *Suth. Dam. p.* 197; 1 *Sedg. Dam. §* 172; *Swift v. Raleigh*, 54 Ill. App. 44; *Griswold v. Railroad Co.*, 115 N. Y. 61, 21 N. E. 726.

4. The appellant objects to the conditional reversal of the case, and argues that this court has no power to reduce a verdict where errors of law occurred on the trial which were prejudicial to the party against whom the verdict was rendered. The error that counsel has fallen into is in assuming that this court found prejudicial errors. Aside from the amount of the verdict, which was excessive, it was impossible for us to say that the substantial rights of the defendant were affected. In reducing the verdict, we followed the cases of *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, and *Cunningham v. Quirk*, 10 Mont. 462, 26 Pac. 184, and *Kennon v. Gilmer*, 9 Mont. 108, 22 Pac. 448. The other points suggested in the motion for rehearing are sufficiently covered by the views expressed in the original opinion. The motion is denied.

#### MURRAY v. HEINZE.

(Supreme Court of Montana. Feb. 10, 1896.)

##### APPEAL—REVIEW.

Where appellant fails to properly present the question of the giving of an instruction for review because of the absence of an exception and an assignment of error, the supreme court will not review the instruction as a matter of convenience or expediency, to avoid the expense of another trial of the case.

On rehearing. Denied.

For prior report, see 42 Pac. 1057.

PER CURIAM. Counsel for appellant, in the petition for rehearing, urge the court to

pass upon the question as to whether the instructions given in the case were erroneous. In the opinion heretofore delivered in the case, we said, after much reflection, that we could not consider or pass upon this question, for the reason that they were not so presented by the record as to enable us to do so. Counsel now urge us to do so as a matter of convenience or expediency, to avoid the expenses of another trial of the case. They refer us to no authority conferring jurisdiction upon this court to do so in the condition of this record as shown in the opinion of this court delivered in the case. Our own Reports are full of decisions to the effect that we have no jurisdiction to do so. We cannot ignore the uniform course of decisions of this court in order to relieve the litigants of the costs, inconvenience, and hardship of another trial of the cause. The petition for rehearing is denied.

#### CHILDS v. PTOMBEY et al.

(Supreme Court of Montana. Feb. 17, 1896.)

BROKER—ACTION FOR COMMISSION—NONSUIT—ERROR CURED BY VERDICT—EVIDENCE—DOUBLE EMPLOYMENT—AFFIRMATIVE DEFENSE—OPINION EVIDENCE.

1. Where a contract for procuring a sale specifies a fixed price, and in an action on the contract for commissions there is evidence that plaintiff procured a purchaser with whom defendant personally negotiated a sale for a less sum, but none to show that the purchaser was willing to pay the specified price, or why he did not pay it, a nonsuit should be directed.

2. Where a complaint, in an action for commissions, alleged authority to sell at a fixed price, and the evidence showed a sale for a less price than that pleaded in the complaint, the variance was fatal.

3. In an action for commission, it is competent for the purchaser to testify that it was through plaintiff's efforts that he bought.

4. In an action for commission, conversations between plaintiff and the purchaser, relative to the commissions to be received by plaintiff from defendant, are incompetent.

5. In an action for commissions, the defense that plaintiff was employed by both parties, and his double employment not disclosed, must be pleaded.

6. Where a broker's contract to procure a purchaser at a specified price simply requires him to bring his principal and the purchaser together, so that they themselves can make their own contract, he may recover commissions from both parties on separate contracts with each.

7. In an action for commissions, evidence of witnesses as to whether they considered plaintiff defendant's agent is properly excluded.

Appeal from district court, Madison county; Frank Showers, Judge.

Action by Hiram L. Childs against Nelson Ptomey and another for commission due under contract. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Plaintiff sues the defendants to recover the sum of \$3,000, alleged to be due upon a contract for the payment of a commission by the defendants to plaintiff, for the procuring a purchaser and effecting the sale of the

Lucas Mine, owned by the defendants, and situated in Madison county. The complaint alleges that in May, 1893, plaintiff and defendants entered into an agreement whereby the defendants engaged and procured the services of plaintiff to effect a sale of said mine, and to procure a purchaser for said property for the defendants, and that it was then and there agreed that the consideration that should be asked, and the fixed price for the said mine and property should be, and was then and there agreed to be, \$18,000, and the plaintiff was to have and receive \$3,000 for his services, influence, and effort to effect a sale of said mine and property, and for procuring a purchaser for said property. It is further alleged that plaintiff, relying upon the aforesaid contract and agreement, and in pursuance of said employment, did procure a purchaser for the defendants' property, and did bring about, induce, and effect a sale of the Lucas Mine to one Best of Tacoma, and that said Best, in September, 1893, bought said mine for \$10,000 in cash, and that, "only for the unreasonableness of defendants requiring the consideration for the sale of said mine and property to be paid in spot cash, the same could and would have been sold at a sum greatly in advance of the sum mentioned in the deed of conveyance, to wit, \$10,000." Plaintiff further alleges that he duly performed all and singular the terms and conditions of said contract and agreement upon his part that were required to be done or performed, but that he has never been paid his \$3,000, and that the defendants refuse to pay the same, or any part thereof. The complaint contained another count, for the services rendered in making the sale, in payment upon a quantum meruit. Before the trial the defendants made a motion to compel the plaintiff to elect upon which count of his complaint he would proceed, whereupon he abandoned the last count, and elected to try the case on the original contract. A general demurrer was interposed by the defendants to the first count of the plaintiff's complaint. This was overruled. Defendants answered, denying all the allegations of the complaint, except the fact of the purchase of the property by Best for the sum of \$10,000. The trial was had before a jury. The plaintiff recovered a general verdict. The defendants appeal from the order overruling their motion for a new trial, and from the judgment in favor of the plaintiff.

Henry N. Blake, W. A. Clark, and Geo. F. Shelton, for appellants. Smith & Word and J. E. Callaway, for respondent.

HUNT, J. (after stating the facts). The evidence of the plaintiff himself tends to show that, at an interview with Mr. Ptomey, one of the defendants, he asked Ptomey what his price was for the mine, and was told, "\$15,000 cash," whereupon the plaintiff said he would have to ask the parties he brought to look at the mine \$18,000; that he told Mr. Ptomey

that he would bring some parties to him within four or five days, and he could make his own negotiations; that the parties came within a few days, and were introduced to the Ptomeys by the plaintiff; that subsequently, in July, negotiations were had between the defendants and certain persons representing the purchasers of the mine; that in September one J. B. Best, who had been represented by the parties who had been introduced to the Ptomeys by the plaintiff, purchased the mine for \$10,000. The plaintiff was then asked whether he had told the Ptomeys, when they said they asked \$15,000 for the mine, that if he brought purchasers there, or persons through whom a sale was made, he would require \$3,000 for his services. The defendant answered in this way: "Yes, sir; I don't know that I said so in the exact language, but that is what I meant. Yes, sir. The conversation regarding the price was \$15,000. They had decided to ask \$15,000 cash for the mine, and I said I should want \$3,000 as my commission, that I expected parties, and that I would bring them here, and introduce them to them, and they could make their own negotiations,—negotiate direct with the people. They said, with reference to that proposition of mine, they would have to ask \$18,000. They said it was satisfactory—it suited them exactly—to negotiate direct with the people, instead of through me, or words to that effect. Henry Ptomey said that. There was no dissent or objection to the price that I stated at that time by either of the defendants." Plaintiff did not attempt to prove that his clients were ready or willing to pay \$18,000 for the mine, nor did he offer any excuse in his testimony for their not doing so. At the conclusion of plaintiff's testimony, the defendants moved for a nonsuit for the reason that the plaintiff had failed to prove "the substantial allegation of his complaint," and had failed to prove the contract relied upon and set out in the complaint, \* \* \* or that he had sold the mine for the price stipulated and pleaded in the complaint. This motion was overruled. We think this was error. The contract alleged in the complaint contained an express provision to the effect that plaintiff would find a purchaser for the mine for the sum of \$18,000, but the theory upon which the plaintiff actually sought to recover was that he might recover his \$3,000 commission without regard to that part of the agreement pleaded. This variance was not cured throughout the trial. The defendants consistently denied any such agreement. The divergence extended to such an important fact that the cause of action, as proved, was another than that set up in the complaint. No leave to amend was asked. The defendant was therefore entitled to a nonsuit. Pom. Code Rem. § 553; Johnson v. Moss, 45 Cal. 515; Bryan v. Tormey, 84 Cal. 128, 24 Pac. 319; Newell v. Nicholson (Mont.) 48 Pac. 180. The instructions, too, were evidently drawn upon the erroneous theory that

plaintiff's right to recover was not contingent upon his agreement as pleaded; but that he could recover \$3,000 commissions if he found a purchaser for the mine, without regard to the material issue of the price that the customer should pay. Plaintiff recovered a general verdict and contends it is sufficient. But where the pleadings raised materially different law issues from those tried, and defendants saved their rights upon the trial, and no amendments were made, and the jury were instructed without proper regard to the issues of the complaint and answer, a verdict without specifying the amount of the recovery cannot aid the plaintiff in curing such antecedent substantial defects. The judgment must be reversed, and the cause remanded, with leave to the plaintiff to properly amend his complaint.

We will briefly indicate our views upon the more important points raised in the briefs of counsel. Best, the purchaser of the mine, was a witness for plaintiff by deposition. He was asked to state what, if anything, he said to plaintiff, while at Virginia City, in connection with the purchase of said mine, and after he had visited the mine, that it would be a sale, or that he would purchase the mine. Defendant objected, on the ground that the question was incompetent and immaterial, and called for hearsay testimony. The court overruled the objection. The witness answered that plaintiff told him, in the event of the Ptomeys selling to his (witness') syndicate, the plaintiff had a commission coming from the Ptomeys, and witness told plaintiff that he would let him know when to go and get his commission. It was competent for the purchaser to testify to the fact that it was through the instrumentality and efforts of the plaintiff that he bought the mine, but the statements made between the broker and the purchaser in relation to commissions coming to him from defendants were not competent. If defendants relied upon the defense that plaintiff could not recover because he was employed by both parties, unless his double employment was disclosed, it seems that matter should have been pleaded as a distinct affirmative defense. Pom. Code Rem. § 660; Bliss, Code Pl. § 352. Where, however, there is an agreement to pay a middleman for services of value rendered, honestly entered into, it cannot be avoided on the ground that another person, with distinct and independent interests, has agreed, by a separate contract, to pay for the same services. If the broker only undertakes to bring the parties together, so that they may make a contract, if they choose, without his interference in the contract itself, as the agent of either party, he is entitled to compensation from both, on an agreement from each. Rap. Real Est. Brokers, p. 176; Rupp v. Sampson, 16 Gray, 398; Herman v. Martineau, 1 Wis. 151. Certain answers of defendants' witnesses, who said they "never considered plaintiff the agent of the Ptomeys, were stricken out against de-

fendants' objections. The opinion of the witnesses was immaterial and properly excluded. As we think the question whether plaintiff acted as an agent of the plaintiff and defendants ought to have been pleaded before testimony tending to show he did so act was competent, it is unnecessary to further consider objections based upon the theory that such was his attitude. Judgment reversed, and cause remanded, with leave to plaintiff to amend his complaint, and try the case anew. Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

### WETHEY v. KEMPER.

(Supreme Court of Montana. Feb. 10, 1896.)

#### CORPORATIONS—TRUSTEES' LIABILITY—ANNUAL REPORT—COMPLAINT.

1. In an action against the trustees of a corporation, under Comp. St. div. 5, § 460, making the trustees liable for corporate debts unless they file, "in the office of the clerk of the county where the business of the company is carried on," a report, stating the amount of capital, etc. the complaint is bad, if it fails to state in what county the business of the corporation was carried on.

2. Such statute, being penal in its nature, must be strictly construed.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by A. H. Wethey against S. V. Kemper, a trustee of the Constitution Mining, Milling & Prospecting Company, a corporation. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

John A. Shelton, for appellant. F. T. McBride, for respondent.

PEMBERTON, C. J. This action was commenced against the defendant as one of the trustees of the Constitution Mining, Milling & Prospecting Company, a corporation, to recover damages alleged to have been sustained by plaintiff by reason of the alleged failure upon the part of said corporation to comply with the terms of a certain contract of lease of a certain engine and boiler, entered into by said corporation and W. A. Clark on the 15th day of April, 1888, and which contract was afterwards assigned to plaintiff. The corporation is alleged to be insolvent. The complaint alleges, among other things, "that said corporation has wholly failed to publish in any newspaper, or to file in the office of the county clerk and recorder of the county, a report, as required by section 460, c. 25, div. 5, Comp. St. 1887."<sup>1</sup> The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute

<sup>1</sup> Comp. St. 1887, div. 5, § 460, provides that the trustees of a corporation shall be liable for its debts unless, annually, they shall file "in the office of the clerk of the county where the business of the company shall be carried on," a report stating the amount of capital, etc.

a cause of action. The court sustained the demurrer, and, plaintiff declining to amend his complaint, judgment was entered in favor of the defendant for costs. From this judgment plaintiff appeals.

The only question it is necessary to consider is as to whether the complaint contained facts sufficient to constitute a cause of action against the defendant as trustee of the corporation. The complaint nowhere states in what county the business of the corporation was carried on, or that it was engaged in any business in any county in this state. The statute under which this suit is prosecuted against the defendant is penal in its character, and must be strictly construed. *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554; *Anfenger v. Publishing Co.*, 9 Colo. 377, 12 Pac. 400; *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18. In order to recover of the defendant as trustee, it was certainly necessary that the plaintiff should prove that no report was filed by the corporation, or any other person whose duty it was to file the same under the statute, with the clerk and recorder of the county in which said corporation carried on its business. If it was necessary to prove this, it was necessary to allege the failure to file the report with the clerk and recorder of the county in which the business was carried on. We think the complaint, under the authorities, is fatally defective. The judgment appealed from is affirmed.

DE WITT and HUNT, JJ., concur.

CLIFFORD v. PARKER, Judge, et al.  
(Supreme Court of Washington. Jan. 21, 1896.)

PROHIBITION—WHEN LIES—TO COURTS AND JUDICIAL OFFICERS.

Prohibition against proceedings in a lower court will not lie, unless it is affirmatively shown that the supreme court has jurisdiction, and that the lower court is acting or threatening to act without authority.

Petition by M. L. Clifford for a writ of prohibition against Emmet N. Parker, judge of the superior court of Pierce county, and others. Denied.

Claypool, Cushman & Cushman, for petitioner. Colner & Shackelford, for respondents.

HOYT, C. J. The writ of prohibition prayed for in this application could be properly granted only by the announcement of a rule which, if followed to its logical conclusion, would result in tying the hands of many of the superior courts, so that it would be impossible for them to do any business whatever; and it might also result in depriving many of the municipalities in the state of the power to do any official act. Such being the results which might flow from the granting of the peremptory writ, it should not be granted, unless the jurisdiction of this court is clearly

made to appear, and the law applicable to the case upon the merits is beyond reasonable question. The evil to be prevented is so small, compared with the results which might follow such prevention, that the court should refuse to act until satisfied that the petitioner is entitled to the relief prayed for. The granting of writs of this kind rests in the sound discretion of the court; and while it is its duty to interfere in a proper case, it is not its duty so to do when either its own jurisdiction, or the fact that the inferior court is proceeding without authority, is not made to appear beyond reasonable doubt. In our opinion they are not thus made to appear in the case at bar. Hence, the motion of the respondents to quash the writ and dismiss the proceeding must be granted. It is not made clearly to appear that the superior court is about to do anything which this court has the right to prohibit. The order for summoning the jury has already been made, and it does not appear that the superior court, or the judge thereof, is threatening to do any other act connected with the summoning of the jury, or that it is necessary that he should make any further order in connection therewith. This being so, the case, so far as the court or judge is concerned, falls within the rule announced by this court in *State v. Superior Court of Whatcom Co.*, 2 Wash. 9, 25 Pac. 1007, and *Harbor Line Com'rs v. State*, 2 Wash. 530, 27 Pac. 550. None of the other defendants are state officers, and it is at least open to serious question whether this court has any original jurisdiction to grant any relief against them. Besides, that which it is alleged that each of them is about to do is purely ministerial; and for that reason it is at least doubtful whether the writ of prohibition is the proper remedy to prevent the performance of the threatened acts. The peremptory writ will be denied, and the proceeding dismissed.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

WHALLEY v. TONGUE.

(Supreme Court of Oregon. Feb. 17, 1896.)

ATTORNEY—DISBARMENT—MUTILATION OF PUBLIC RECORD.

1. In a proceeding for disbarment it appeared that defendant, being employed to resist the probate of a will, drew up a petition for his client's appointment as administrator, and prepared a typewritten form of journal entry for the clerk, naming therein three persons as appraisers; that defendant then had the petition filed, and sent the same, with the entry, to the county judge, who lived at some distance; that, after filing the petition, defendant learned that a petition for the probate of the will was on file, but did not inform the judge, who approved the petition sent him by defendant, signed the journal entry, and returned the papers to defendant; that the latter then went to the clerk's office with the appraisers named, to have them qualify, but, one of them declining to act, defendant drew his pencil across his name in the entry.

and wrote above it the name of another, the change being made in accordance with a custom of the bar, and in the presence of the three appraisers finally chosen, the clerk, and the attorneys for proponents. *Held*, that there was nothing in defendant's conduct to warrant disbarment.

2. A form of entry, signed by the judge, and intended for entry in the journal of the court, is not a "public record, paper, or writing," the mutilation or changing of which is prohibited by Cr. Code, § 1853.

Proceeding by J. W. Whalley for the disbarment of Thomas H. Tongue. Petition dismissed.

J. W. Whalley, in pro. per. Thos. H. Tongue, in pro. per.

**PER CURIAM.** Thomas H. Tongue, an attorney of this court, is accused by J. W. Whalley, who is likewise an attorney, of unprofessional conduct in counseling and maintaining certain proceedings in the matter of the estate of Edward Constable, deceased, which it is alleged he knew to be illegal and unjust, and in mutilating or changing a public record, paper, or writing, in violation of section 1853, Cr. Code. The acts complained of were done and performed in certain litigation between the Constable heirs over the estate of their father, in which the accused and accuser are counsel for the respective parties. The details of this litigation need not be recited here, as it will be time enough to consider the various legal complications which seem to have arisen therein when the appeal already taken reaches here in regular order. It is sufficient for the purposes of this proceeding to say that we have carefully examined the testimony, and find therefrom that neither of the charges against Mr. Tongue are, in our opinion, sustained by the evidence.

The proceeding in relation to the appointment of Mrs. Shute as administratrix appears to have been taken in the utmost good faith, and to have been prompted solely by a desire to protect her interests under the law as Mr. Tongue understood it; and whether his judgment was at fault in his view of the law is wholly immaterial in this inquiry. The facts in relation to the other charge are that some time prior to August 21, 1895, Judge Hare and Mr. Tongue were retained by Mrs. Elizabeth Shute to resist the probate of what purported to be the last will and testament of one Edward Constable, deceased. In the forenoon of the 21st, Mrs. Shute consulted with Judge Hare about taking some steps looking towards the settlement of the estate, and, having been advised by him to go to Mr. Tongue, and take his advice also, and have him draw the necessary papers, she went to the office of the latter, who drew up a petition for her appointment as administratrix, which petition contained the necessary allegations showing the invalidity of the purported will. At the same time he prepared a typewritten form of journal entry for the clerk, and

named therein J. D. Merryman, J. J. Morgan, and W. D. Smith as appraisers. After having sworn Mrs. Shute to the petition as notary public, Mr. Tongue took it to the courthouse for the purpose of presenting it to the county court; but, not finding the judge there, he had the petition filed, and sent the same, with the journal entry, by Mrs. Shute, to Mr. Hare, who thereupon wrote a letter to the Honorable J. B. Cornelius, county judge, directing his attention to the petition, and asking his approval of the entry, and dispatched a man with it and the petition and entry to the home of the county judge, some eight miles distant. The judge approved the petition, and signed the entry, which were returned to Mr. Tongue. He at once called upon the appraisers named in the entry, and took them to the clerk's office for the purpose of having them qualify and make an early appraisal. Upon reaching the clerk's office, however, Mr. Smith, member of the law firm employed to probate the will, declined to act as appraiser, giving as his reason therefor his adverse employment, and hence the impropriety of his so acting. A discussion then arose as to who should be substituted, and, some one having suggested the name of J. B. Wilkes, Mr. Tongue took his pencil, and drew it across the name of W. D. Smith, and wrote above it the name of J. B. Wilkes, and in this condition handed the petition, with the entry, to the clerk. The change was made in the presence of Mr. Kane, the deputy clerk, the three appraisers finally named, and Messrs. Smith & Bowen, the attorneys for proponents, and without objection from them. Some controversy arose between the attorneys regarding the right of the appraisers to act before the letters of administration were issued, and it was finally concurred in that no appraisal should take place until that was done. Mr. Tongue immediately wrote out a bond, and gave it to Mr. Hare, who forwarded it to the county judge, obtained his approval, and had it filed, and letters of administration issued the next day, August 22, 1893. Just after the petition for administration had been filed, Mr. Tongue's attention was called to the fact that there was a petition on file praying that the will be admitted to probate, signed by Smith & Bowen as attorneys. The judge was not informed of this fact when the petition of Mrs. Shute was presented. Judge Cornelius had, prior to this time, conversed with Judge W. E. Smith, who had drawn the will, and was named as executor therein, about having it admitted to probate, and on the day prior to his starting for the coast told Judge Smith and Mr. Malone, the husband of Mrs. Malone, who subsequently filed the petition for probate of the will, that he was going, and would be gone two or three weeks, and that if they wanted to probate the will they had better do it that day. Malone said in re-

ply: "Oh, I guess I will let it go until you get back. I don't know whether it will be done at all." Judge Hare and Judge Smith had previously consulted with Mr. Malone about the probate of the will, and Judge Hare had talked with other heirs about it, and he says, "I got the impression that none of the heirs here would probate the will." So the matter stood until August 21st, when it developed that the heirs were occupying antagonistic positions, and it then became a race of diligence as to who should obtain control of the estate pending a contest of the will. The evidence disclosed a custom which has prevailed in the county for years, by which the attorneys representing the estate of deceased persons habitually suggested or named the appraisers for appointment, and the judge made the order accordingly, and if it should afterwards, and before the entry went upon the journal and became of record, turn out that one or more of them could not act, the attorney substituted some competent person or persons in his or their stead, which action ultimately received the sanction of the judge; and it was in view of this practice the change was made by Mr. Tongue. The form of entry, signed by the judge, intended for entry in the journal of the court, was not a public record, paper, or writing, within the meaning of section 1853 of the Criminal Code, and hence there was no violation of that section. It amounted to nothing more than a statement by the county judge that he had appointed Mrs. Shute as administratrix, and had approved the selection of appraisers as named by Mr. Tongue, from which the clerk was authorized to make the proper entry to that effect in the probate record. It was from the entry as actually made in the record and approved by the court that the appointment of appraiser obtained its validity. While, as a matter of propriety, it would have been a great deal better if, at the time Mrs. Shute's petition for administration was presented to Judge Cornelius, the fact had been disclosed to him that a petition was on file for the probate of the will, and certainly, as a matter of practice, it ought to have been done, and while we cannot commend the practice prevailing in that county,—and perhaps elsewhere, where the judge does not have his residence at the county seat,—by which attorneys may substitute other appraisers in the stead of those named by the judge, with a view of finally obtaining his sanction to the substitution, as it is calculated to lead to irregularities, and possibly something worse, yet we see nothing culpable in Mr. Tongue's action in the present case. In his zeal to serve his client he deemed it unnecessary, under the circumstances, to notify the judge of the pending proceedings for probate; or perhaps he may not have given it the attention that the occasion demanded; and, as we have seen, he substituted the name of J. B. Wilkes

for W. D. Smith as appraiser under a custom long established, openly, and in the presence of several persons, by the consent—tacit, at least—of opposing counsel, without any attempt at concealment, and without any purpose to obtain undue advantage. In the light of all these circumstances and transactions, there is no unwarranted, ulterior, or designing purpose made manifest on the part of Mr. Tongue to gain an improper or undue advantage, or to violate any public or other duty enjoined upon him as an attorney, or of the proprieties which should at all times be punctiliously observed by such an officer. These considerations lead to the exoneration of the accused. With subsequent transactions we can have nothing to do at this time. As to whether the one party or the other was right in the advocacy of their respective views touching the proper method to be pursued in the contest touching the probate of the will, are matters about which able counsel may honestly differ; and the fact that the matter is coming to this court we must take as evidence only of the fact that they have so differed. A judgment of acquittal must be entered, and it is so ordered.

#### SCHREYER v. TURNER FLOURING MILLS CO.

(Supreme Court of Oregon. Feb. 17, 1896.)

**ASSUMPSIT—MONEY HAD AND RECEIVED—CORPORATIONS—CONTRACTS WITH PROMOTERS—FAILURE TO PRODUCE EVIDENCE—PRESUMPTIONS—EXAMINATION OF WITNESSES.**

1. One who makes a loan, and accepts a note as evidence thereof, may disregard the note, and sue for the money loaned.

2. A corporation will be bound by contracts made on its behalf by its promoters before organization, if, after it is organized, with full knowledge of all the facts, it assumes the contract, and agrees to pay the consideration, or accepts and retains the benefits.

3. If defendant, when notified to produce certain documents on the trial, fails to do so, though in his possession, secondary evidence thereof will be strongly construed against him.

4. In an action against a corporation to recover money loaned to its promoters, it appeared that they subsequently became stockholders and officers of the corporation; that the money was borrowed for the purposes of the corporation; that, after its organization, its secretary sent plaintiff \$100 in part payment of the note given as evidence of the debt; that the secretary, in letters to plaintiff, written on the company's letter heads, stated that he hoped they would have made enough money to pay plaintiff's debt before it became due. *Held* sufficient to go to the jury on the question as to whether the corporation adopted the acts of its promoters.

5. Where a witness was asked, on direct examination, as to the whereabouts of a certain receipt, to show the nonproduction of the same by defendant after it had been notified to produce it, so as to permit secondary evidence of its contents, the witness could not state, on cross-examination, how the receipt came to be given to defendant.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

Action by C. J. Schreyer against the Turner Flouring Mills Company for the recovery

of money. From a judgment for plaintiff, defendant appeals. Affirmed.

Tilmon Ford, for appellant. G. G. Bingham and P. H. D'Arey, for respondent.

**WOLVERTON, J.** This is an action to recover for money loaned the defendant, and the case is here on its appeal. It appears from the complaint that the defendant is a corporation; that its articles of incorporation were executed on the 8th, and filed in the office of the secretary of state on the 11th, day of April, 1893, and that it was on the said 8th day of April, ever since has been, and now is, a corporation, doing business at Turner, Marion county, state of Oregon, in its corporate name, the Turner Flouring Mills Company; that the purpose of the incorporation was to manufacture flour, and all and every kind of breadstuffs and other products of wheat and other cereals, and to do a general flouring-mill business, to buy and sell wheat and other farm products, and to enable it to effect such purpose it was authorized to borrow money, and give its notes, bonds, debentures, and other obligations therefor; that, prior to the incorporation, W. Dunbar, J. C. Robinson, and J. T. Brumfield were the owners of all the property acquired by defendant at its formation, and thereafter were its principal stockholders; that John Hallinan was an incorporator and stockholder, and ever since April 8, 1893, has been, and now is, the managing agent, and said Robinson the secretary, of the defendant, and that Dunbar was then and for a long time subsequent thereto its president; that on said 8th day of April, at the instance of Hallinan, who was acting for and in behalf of defendant, the plaintiff loaned defendant \$1,000, and as evidence thereof Hallinan delivered to plaintiff the promissory note of Dunbar, Robinson, and Brumfield, bearing date April 8, 1893, payable to plaintiff or his order in six months, with interest at 8 per cent.; that no part of said note was paid at maturity, except the accrued interest, but was renewed October 16, 1893; that the sum of \$100 was paid thereon May 3, 1894; that plaintiff has demanded of the defendant the payment of the balance due on account of the money so loaned, but, although defendant has promised to pay the same, it neglects so to do. A demurrer was interposed to the complaint, which being overruled, the action of the court in that regard is assigned as error.

The objection made to the sufficiency of the complaint is that it shows upon its face the money was loaned to the defendant at a time when it could have no corporate or legal existence, as it appears that the articles of incorporation were not filed with the secretary of state until the 11th day of April, 1893, three days after the loan was made. It may be premised that this is not an action upon the note executed as evidence of the indebtedness; but, disregarding the note, plaintiff sued for the money loaned to and received by

the defendant. In this he is supported by settled law. *Black v. Sippy*, 15 Or. 575, 18 Pac. 418, is a case wherein it appeared that goods were sold, delivered, and charged to the husband, who, upon a statement of account, executed and delivered his note for the amount found due, which was assigned to plaintiff, who sued the wife upon the account for family supplies, and the action was maintained. In passing upon the complaint, Lord, C. J., says: "Nothing is better settled than that accepting a note is not payment of an account, nor is accepting one note in renewal of another payment of the old note, unless there is an agreement that the note should be accepted in payment." Conceding that the incorporation of defendant was not accomplished until its articles were duly filed with the secretary of state, and for that reason it had no legal existence on the 8th of April, 1893, is the objection vital to the complaint? In considering this question it must be observed that the defendant answered over, and trial was had under the pleadings and issues thus joined; so that all reasonable inferences must go in support of the judgment. Most certainly it is true that a corporation must have an existence before it can assume to act or carry on business. The statute prescribes how a private corporation like this may be formed and organized, and, prior to its lawful creation, it is idle to think of its entering into contractual relations. After its organization, it may transact such business as it is authorized and empowered to do by the articles of incorporation, which give it individuality and being. Now, the plaintiff alleges that he loaned to the defendant, through its managing agent, acting for and on its behalf, the money which it is sought to recover, and April 8th is named as the date of the transaction. The defendant, while it may not have been in esse at the date fixed by the complaint, yet it could, at any time after its organization, by adoption, make the contract its own. It has been said that the adoption of a former contract is the making of a contract as of the date of the adoption. *McArthur v. Printing Co.*, 48 Minn. 322, 51 N. W. 216. In their primary signification, there is a manifest distinction between "adoption" and "ratification." The one signifies to take and receive, as one's own, that with reference to which there existed no prior relation, either colorable or otherwise; while the other is a confirmation, approval, or sanctioning of a previous act, or an act done, in the name or on behalf of the party ratifying, without sufficient or legal authority,—that is to say, the confirmation of a voidable act. But, as the terms relate to contracts, some lexicographers treat them as synonymous. *Rapalje* thus defines "adoption": "Of contract. To adopt a contract is to accept it as binding, notwithstanding some defect which entitles the party to repudiate it. Thus, when a person affirms a voidable contract, or ratifies a contract made by his agent beyond his authority, he



is said to adopt it." See Rap. & L. Law Dict. 31. See, also, And. Dict. Law, 38. Now, as regards a contract made or an obligation incurred by the promoters of a corporation in the name of, or for and in behalf of, a contemplated corporation it would seem that an adoption or a ratification thereof by the corporation after it had developed into a legal entity would mean one and the same thing, and would be accomplished by one and the same process. True, the promoters cannot be the agents of an unborn corporation; but, where they have assumed to act for it, and to contract in its name, the approval and confirmation of such acts by the corporation, when organization has been duly accomplished, are but the ratification of the acts of an unauthorized agent. And the result is the same, whether we call it "adoption" or "ratification." But it is not very material here to determine whether, as relating to contracts, these terms are synonymous, or are capable of being thus distinguished, as they might be were the statutes of frauds or limitations involved. Suffice it to say, authorities are not wanting which hold them to mean one and the same thing. See 4 Thomp. Corp. § 5321, and *Stanton v. Railroad Co.*, 59 Conn. 285, 22 Atl. 300. The time of entering into the contract is not a necessary ingredient to the maintenance of this action. *Bliss*, Code Pl. § 284. Mr. Thompson, in his excellent and elaborate treatise on the Law of Corporations (volume 4, § 5325), says: "It has been held that, in an action against a corporation upon a contract, it is not necessary for plaintiff to plead that the corporation has ratified the making of the contract in order to introduce evidence of a ratification,"—citing *Collins v. Association*, 3 Mo. App. 586.

Now, to the main question. Although there is some conflict in the authorities, it has been maintained and settled, in some jurisdictions, that while a corporation is not bound by engagements made for and in its behalf, by its promoters, before it has been duly organized, it may, after its organization, make such engagements its own. This it may do in manner and form, and precisely as it may make similar original contracts. A formal action of the board of directors is, however, indispensable in all cases where it would be necessary if the corporation was acting in the first instance. But it is not necessary that such adoption, ratification, or acceptance be expressed, as it may be inferred from acts or acquiescence on the part of the corporation, or by its authorized agents in its behalf, as similar original contracts may be established. *Battelle v. Pavement Co.*, 37 Minn. 89, 33 N. W. 327; *McArthur v. Printing Co.*, supra; *Stanton v. Railroad Co.*, supra; *Buffington v. Bardon*, 80 Wis. 639, 50 N. W. 776; and *Mor. Priv. Corp.* § 548. We adopt this exposition of the rule, as we believe it to be sustained by the weight of authority, as well as founded upon the better reason. It will have to

be conceded that the agreement must be one which the corporation itself could enter into, and one which the usual agents of the company have express or implied authority to make. But where, with full knowledge of all the facts, the corporation assumes the contract, and agrees to pay the consideration, or accepts and retains the benefits, it will be bound thereby. *Buffington v. Bardon*, supra; *Leonard v. Loan Ass'n*, 55 Iowa, 594, 8 N. W. 463; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621, 33 N. W. 271; *Bridge Co. v. Rollins*, 13 Colo. 4, 21 Pac. 897. It is alleged here, not only that the contract was made for and in behalf of the corporation, but that it had promised to pay the balance sued for; and it sufficiently appears that the parties contracting in its behalf were its promoters and organizers. It further appears, by the testimony, that it is highly probable the defendant received, accepted, and used the money to recover which this action was instituted. Under such circumstances, the objection to the action of the court in overruling the demurrer cannot be sustained.

When the plaintiff had rested his case, the defendant moved for a nonsuit, which the court denied; and this is assigned and relied upon here as error. This involves to some extent a review of the testimony offered and admitted in support of the action. The answer puts in issue many of the material allegations of the complaint, but we take it that this much is admitted: First, that Robinson, Brumfield, and Dunbar were the principal stockholders of the corporation; second, that Robinson was at all times its secretary; third, that John Hallinan may have been its managing agent on the 8th day of April, 1893, and much, if not most, of the time since; and, fourth, that defendant had a corporate existence at some time since April 11, 1893. Before the trial, and in due time, defendant was notified in writing, by plaintiff, to produce, for his use as evidence at the trial, a receipt given by plaintiff to defendant for \$100 about May 3, 1893, the surrendered note, the records of the meetings of defendant, its books of account, in which were kept the transactions of defendant, especially with plaintiff, and a letter written to Dunbar April 4, 1893, by plaintiff. Answering this, the defendant stated that it had "nothing in its possession or under its control, mentioned in said notice, except its books of account with the plaintiff," which it proffered to produce. John Hallinan testified, among other things, that he was president, manager, and bookkeeper of the defendant company. When asked for the surrendered note, he answered, "I have not got it." Then, as he was interrogated, he responded as follows, which we shall have occasion to refer to later on: "Q. I ask you, as an officer of the defendant corporation, to produce that note. A. The original note I sent to Portland immediately. Q. To whom? A. To Mr. Robinson. Q.

Who is Robinson? A. Secretary of the company. Q. Then the receipt for \$100, payment made by you, as agent of the company, to the plaintiff, on or about the 3d day of May. A. I have not got it. I destroyed it. Q. Then the minute book of the company. A. I have not got that. They are in Portland. I don't keep any of the accounts in Portland. Q. What books of your own have you got? A. My ledger. Q. Is there another kept in Portland? A. They keep books in Portland. I have nothing to do with them. Q. You were asked to produce the books of account, in which the account with this plaintiff are kept. A. I have got it. Q. With reference to this note? A. There is nothing about the note in it. I never made any entry of these things in my books at all. Q. They are made in Portland? A. Yes, sir." Nor was the witness able to produce the letter to Dunbar of April 4, 1893. The defendant's failure or refusal to produce the documents called for by the notice cannot be considered as evidence of the truth of what plaintiff claims he would be able to prove by them; that is, that to a greater or less extent they would have a tendency to prove his case. It did, however, open wide the doors for the introduction of secondary evidence; and if any such were introduced, from which the truth of such claims could reasonably be inferred, the nonproduction of the primary evidence, unless attended with some sufficient or reasonable excuse therefor, would strengthen the inference. As the introduction of inferior evidence, when higher or primary evidence is at hand, would create a presumption that the higher or primary would be adverse if produced, so, if a party, when legally called upon to produce the best evidence, if within his power to do so, fails to comply with the demand, and allows his adversary to proceed with the introduction of secondary evidence, the presumption will obtain that the higher evidence would be more hurtful to him than the secondary, and thus strengthen the inference to be drawn therefrom. See Hill's Ann. Laws Or. § 776, subds. 5, 6, and *Connell v. McLoughlin* (Or.) 42 Pac. 220.

The testimony further shows that plaintiff became acquainted with Hallinan in September, 1891, and with Dunbar some time before the money was loaned; the latter having sent him up from Portland to take charge of the mill. He had not seen either Robinson or Brumfield until after the company had been formed. His first conversation with Hallinan in regard to the money in controversy took place on April 4, 1893. Hallinan told him that Dunbar, Robinson, and Brumfield had bought the Oregon Flouring Company's stock,—that is, the Turner flouring mills,—and that, to enable them to start up and run the mill, they needed the \$1,000 which he had in the bank, and wanted him to loan it to them, to which plaintiff consented, and, at Hallinan's request, wrote a

letter to Dunbar, offering to loan them the money. To this letter Dunbar replied: "I am very much obliged to you for your kindly wishes, and for your financial assistance and offer of \$1,000 to assist us in getting the mill started again. I gladly accept of your offer, and will send you up note, made and signed by all of my partners here." Upon Hallinan's advice, plaintiff went to Salem on April 6th or 7th, and made out a check for the money upon the First National Bank, payable to John Hallinan or order. After returning, on Saturday, the 8th, in the morning, plaintiff, at Hallinan's request, went from his house over to the mill, and handed him the check, when he (Hallinan) laid down the note for plaintiff, signed by Dunbar, Robinson, and Brumfield, which plaintiff took home with him. At the same time Hallinan gave plaintiff the key, and turned the mill over to him, to take charge of it in his absence, and then went to Portland on the 1 o'clock train, taking the check with him. On his return the following Tuesday, he told plaintiff that "he was just come up from Portland, and arrived in time when the persons were assembled to form the company, and the deeds were signed, and the company met the same afternoon, and my check was handed in to the company, and they would be able to start the mill up in a few days." On October 12th Hallinan paid the interest on the note, and on the 16th a new note was given, it having been sent from Portland by Robinson. The old one was then taken up by Hallinan. Plaintiff wrote several letters to the company, and others to the secretary and Mr. Dunbar, regarding the note, demanding payment in some of them. On the 4th day of May, 1894, Robinson sent up \$100 from Portland, and Hallinan paid it to plaintiff upon the note. For this money plaintiff gave a receipt, running in the name of Turner Flouring Mills Company, which Hallinan accepted. Plaintiff testified that, in writing to Dunbar, he proposed to lend the money to the Turner Flouring Mills Company, and that, in accord with the proposal, did lend to the company. Several other letters were introduced, some from Robinson, and some from Dunbar. Those from Robinson were written upon the letter heads of the company, whereon was printed "W. Dunbar, President; J. C. Robinson, Secretary." In one bearing date December 6, 1893, Mr. Robinson, after commenting somewhat upon Dunbar's unfortunate litigation, growing out of the smuggling cases, says: "Under any circumstances, the rest of the trial will not have any effect on the position of the company. At the worst, even if Mr. Dunbar could not go on with the business, the other partners hold a majority of the stock, and can carry on just the same, and Mr. Dunbar's stock cannot be touched by any one. I don't think you need have the least fear as to the result. You know how poor a season there has been ever since we started; yet, in spite of that, we

have been able to pay off Balfour, Guthrie & Co. for all the fixtures, stores, and book debts of the old company, so that everything is now our own. We have also paid the \$800 which Mr. Crocker lent us, and now we owe no one except yourself and the bank, and the bank, of course, is well covered. I think, if we have been able to do so well in poor times, our prospects ought to be very good in ordinarily fair seasons. The fact is, our expenses here are very small, and all that Mr. Dunbar and myself take out of the business is \$50 a month each. It is not enough to live on, but we are determined to leave every dollar we can in the business until times are better. \* \* \* I hope that, long before your note is due, we will have made enough money to pay it with ease. We could do it now if our flour was sold, for we should have a nice surplus. I hope this explanation will satisfy you. You know I manage everything relating to the finances, and neither Mr. Dunbar nor any one else can draw a dollar without me, and my endeavor all the time is that every one who does business with us shall have full confidence in us. \* \* \* The money you lent us has been very helpful to us, and you may depend on my doing everything to safeguard your interest. If everything goes well, I will have some money of my own to spare in a day or two." On March 2, 1894, Robinson writes: "I can see no way in which we can take up your note this month. \* \* \* I hope that, by the end of the month, we may get orders that will justify us in running the mill, and so be able to pay you at least part of the note." On April 6th he writes: "We told you we considered the note due on the earlier date, and would so enter it on our books. We continue to press our collections, but we depend on our remittances from China to pay your note." Dunbar writes, April 27, 1894: "Had I known what was before me, I would have left the milling business alone; but, as it now is, my friends are in it, and I will do all I can to work it out. That will take time. I have got nothing out of it since November last, and before that \$50 a month; so all that the mill has earned has been paid in wages at Turner." On April 30th Robinson writes again: "I am going to send down to Mr. Hallinan to-morrow, for you, \$100. I cannot get it to-day, but am confident about it to-morrow. I was in hopes to have done better for you, but the taxes must be paid, and it takes all I can get hold of. We have got orders that will keep the mill going for a little time, and the price is a little better; so I hope, if business keeps up, to send you money regularly." Miss Bertha Schreyer, the sister of plaintiff, testified that Hallinan told her, on April 4, 1893, that they had bought the mill, and were starting a new company, and that Robinson and Brumfield were connected with it. Afterwards, Hallinan told her that, at first, Dunbar was president, but that later he became the president;

and he told Watson that Dunbar, Robinson, Brumfield, and himself were the company. The note was offered in evidence, to be surrendered to defendant. This evidence would seem to indicate that Hallinan borrowed this money for the defendant corporation; that it has had the benefit thereof, having used the same in its business; that it has adopted or ratified the acts of its officers, in borrowing for its use and benefit, and thereby undertook to repay the same. Hence, the motion for nonsuit was properly overruled. As supporting this conclusion see *Mining Co. v. Quintrell*, 91 Tenn. 693, 20 S. W. 248; *Paxton Cattle Co. v. First Nat. Bank*, supra; and *Whitney v. Wymap*, 101 U. S. 392.

It is next claimed that the court erred in refusing to allow Hallinan, upon cross-examination, to answer the following question, viz.: "Now, you were asked about some receipts for some money which you paid, the attorney said, to the plaintiff, Schreyer. Now, you may state how you came to pay that money, and get that receipt for it." By referring back to Hallinan's testimony, it will be seen that he was merely asked in chief concerning the whereabouts of the \$100 receipt, and he answered: "I have not got it. I destroyed it." Nothing was asked him concerning the payment of the money. The sole purpose of the inquiry in chief was to show the nonproduction of the receipt, on the part of defendant, after it had been notified to produce it, so as to permit the introduction of secondary evidence of its contents. In this view, there was no error in sustaining the objection. The witness was further asked, upon cross-examination, the following questions, viz.: "I will ask you, if, in taking up that old note, which the attorney called your attention to, which you say you forwarded to Robinson in Portland, if you did so as the agent of Robinson, Brumfield, and Dunbar, and not as the agent of the Turner Flouring Mills Company?" "Did you act in the capacity as agent or president of the Turner Flouring Mills Company, the defendant in this action, in the matters pertaining to this Schreyer note, sued upon?" To which an objection was made, as not proper cross-examination, and sustained by the court; and such ruling is assigned as error. The same answer is applicable here as to the preceding assignment. The witness was only asked in chief to produce the old note. He was not interrogated as to the consideration, or as to how, or for what purpose, it was executed. So, the objection to these questions was also properly sustained.

Another error is assigned which is predicated upon the court's admission in evidence of several exhibits, consisting of letters written to plaintiff, from time to time, by Dunbar and Robinson, concerning the money which is the subject of the action. Some of these letters were written upon the letter heads of the Turner Flouring Mills Company, but the contents of all were more or less con-

cerned with the money transaction about which the controversy arose; and we think, for this reason, if for no other, the exhibits were admissible. This disposes of all the objections maintained here, and the judgment of the court below will be affirmed.

In re CATRON et al.

(Supreme Court of New Mexico. Dec. 20, 1895.)

DISBARMENT OF ATTORNEY—EVIDENCE—SUFFICIENCY.

1. In a proceeding to disbar an attorney, a witness testified that, while he was confined in the penitentiary, said attorney endeavored to induce him, on an approaching murder trial, to change or suppress the evidence he had given for the territory on the preliminary examination. Said attorney, who was retained for the defense on said murder trial, testified without contradiction that said witness had made a different statement to that given on the preliminary examination, and that he visited said witness to ascertain which statement was true, and denied that he tried to influence said witness. *Held*, that the evidence was insufficient to sustain a charge of unprofessional conduct, so as to warrant a disbarment.

2. In support of a second charge in said disbarment proceedings, another witness testified that she was also a witness on said murder trial; that she was brought from another city to the house of a certain person at the place of trial, and told as to what she should testify to on the preliminary hearing, and that she gave such testimony; that afterwards, and at the time of the trial, she was brought to the offices of said attorney, where she slept and had her meals brought to her; that she was brought to the courthouse, and testified, and was then taken back to said offices, and remained there until the arrival of the train on which she returned home; that, before the conclusion of the trial, she was brought back, at the instance of the prosecution, and admitted that the testimony she had given was false. Other witnesses testified that said witness was regularly subpoenaed, and one stated that he brought her to said offices, where she remained over night and took her meals. Said attorney also stated that, while he sent for said witness, he did not know she was at his offices until the next morning; that she repeated to him the testimony she had given on the preliminary hearing; and that she was allowed to go home after her examination, because he declined to be further responsible for her fees,—but denied that he endeavored to influence her testimony. *Held*, that the second charge was not sustained by the evidence.

3. On a third charge of improperly influencing the testimony of another witness on the murder trial, said witness testified that said attorney had procured for him a railroad pass, but denied that said attorney attempted to have him suppress or change his testimony. Said attorney stated, without contradiction, that he obtained the pass on condition that the witness would transact some business for him. *Held*, that the third charge was not sustained by the evidence.

4. In support of a fourth charge, a witness testified that said attorney called her into his office, and after some conversation in relation to her pension papers, for his services in connection with which he declined to receive any compensation, he offered her money if she would induce her sons not to testify against defendants on said murder trial. Said attorney denied that her statements in that respect were true. No other person was present at the interview. There was testimony that said witness was unworthy of credit. *Held*, that the evidence

was not sufficient to sustain the fourth charge.

5. In the same proceeding to disbar another attorney, a witness, as to whom there was evidence that she was a public prostitute, testified that she was visited by said attorney, who offered her money and held out other inducements if she would not testify against defendants on said murder trial. A person who was present at said interview, and said attorney, denied that any such conversation occurred. *Held*, that a charge of attempting to influence the testimony of said witness was not sustained.

6. On another charge a witness testified that he was induced by a person whom he met on the street to go to the offices of said attorney; that said attorney offered him money if he would swear that a certain person tendered him money to give false testimony against said defendants. Other persons testified that they would not believe said witness under oath, and his statements were denied by said attorney. *Held*, that the evidence was not sufficient to sustain the charge.

Laughlin, J., dissenting.

Disbarment proceedings. In the matter of the charges and specifications against Thomas B. Catron and Charles A. Spiess. Dismissed.

W. B. Childers, A. A. Jones, B. S. Rody, S. B. Newcomb, and John P. Victory, Sol. Gen., for the Territory. N. B. Field, F. W. Clancy, Frank Springer, and A. B. Fall, for respondents.

HAMILTON, J. This is a proceeding upon charges and specifications for the disbarment of Thomas B. Catron and Charles A. Spiess, who are members of the bar of this court. The testimony has all been taken on each side, and the matter is now submitted to the court for a determination. The ability and high professional standing of at least one of the respondents, the vast importance of this proceeding in its results, both to them and to the bench and bar of the territory, the great public interest manifested by this investigation, and the anxiety felt in its final determination, have rendered it proper that we should give the reasons which, we think, furnish a sufficient justification for the conclusion at which we have arrived.

The facts and circumstances out of which this investigation arose had their origin in, and are the outgrowth of, a great criminal trial which occurred in Santa Fé county in the months of April and May, in the year 1895. On the 29th day of May, 1892, Francisco Chavez, an ex official and prominent citizen of Santa Fé county, was assassinated. The prominence of the deceased, and the cowardly manner of the murder, aroused that intense public feeling and indignation which usually follow crimes of this character. Investigation led to the detection and arrest of Francisco Gonzales y Borrego and three others, all of whom were charged with the commission of the crime. A preliminary examination of these parties was had before the then district judge of the First judicial district in Santa Fé county, at which a large amount of testimony

was taken and a large number of witnesses examined. At the regular term of the district court following, the defendants in that preliminary proceeding were indicted for this crime, and were subsequently, as above stated, tried and convicted, and are now under sentence of death, awaiting the final determination of the case in the supreme court, to which it has been appealed.

The respondents in this proceeding were counsel retained for the defendants in that criminal trial. They appeared and conducted the case at the preliminary investigation, and also defended them on their final trial in the district court, under the indictment; and it is claimed that, while acting as attorneys for defendants in that case, the respondents were guilty of unprofessional conduct, for which they should be disbarred and removed from practice as attorneys and officers of this court. At the first session of this court in August, 1895, Jacob H. Crist, the district attorney for the First district, who conducted the prosecution in the criminal trial above referred to, appeared in this court, and filed a number of affidavits, charging the defendants with unprofessional conduct, and accompanied them with a petition, calling the attention of the court to the same, and asking the court to take such action in the premises as it should deem best. This court, upon an investigation of the affidavits, deemed the charges of sufficient gravity to call for a full investigation. The court therefore entered an order appointing a committee, consisting of four of the leading members of the bar of the territory, who, in conjunction with the solicitor general, were directed to take charge of the matter, and prepare and file in this court such charges therein as they, in their judgment, might deem proper, and to take charge of such investigation and offer such testimony in support thereof as, in their judgment, the public interests might require. Under this order the committee prepared and filed charges and specifications against each of the said respondents, to which each of them answered, denying all of the charges, and demanding an immediate hearing thereon. The committee to whom had been intrusted the unpleasant duty of filing these charges and conducting this investigation have discharged that duty with zeal and ability which commends itself to the favorable commendation of both the court and the bar.

The charges filed contain five separate and distinct specifications, charging the respondents with five separate and distinct unprofessional acts. Testimony has been offered which, if accepted as credible, tends to the establishment of these charges. The respondents have each taken the stand, and have positively, specifically, and in detail denied all of the material allegations set forth in these several charges. The matter is therefore presented to us with a mass

of conflicting testimony, upon which we are called upon to sit in judgment, much in the same way as a jury would sit in passing upon the rights of one of its citizens in a different tribunal. It is our duty to try this issue upon the evidence produced and admitted upon this hearing, and to bring to its consideration that calm, deliberate, and unbiased judgment which should ever characterize judicial investigation, and by which a just, correct, and proper conclusion alone can be reached. The respondents have a right to invoke in their behalf, at the hands of the court, that same presumption which should be accorded to the humblest citizen, when placed on trial for the most trivial offense. The prosecution has a right to expect that full, fair, and just credit to all of its testimony which it would demand at the hands of a jury in another and different court. Both parties have a right to demand that, in our consideration and determination, we will be guided by these rules of presumption and the principles of evidence which have become established as a result of the combined wisdom and experience of ages. Guided by these principles, let us come to the consideration of all the testimony offered by either side in this proceeding, and give to each the full measure of credit to which it is entitled. Let us arrive, if we can, at what is a just and correct conclusion.

The first specification against the respondent Catron charges him with unprofessional conduct, in substance, that he (the said Catron) procured an interview with one Ike Nowell, who was a material witness for the said prosecution in said Borrego trial, and who testified on the preliminary examination, and endeavored to get the said Nowell to give entirely different testimony from that which he (the said witness) had given, and tried to get the said witness to avoid testifying in the said cause. The testimony admitted by both sides shows that Nowell was a material witness for the prosecution in that trial, and testified on preliminary examination to material facts, seriously damaging to the defendants; that, after that examination, he was tried and convicted in the district court of Santa Fé county of the crime of adultery, and sent to the penitentiary, and was in the penitentiary at the time of the beginning of the trial of the Borregos for murder; but the prosecution, desiring to use him as a witness in that trial, has secured for him a pardon during the progress of that trial; but the respondent Catron, having been present at the preliminary examination, and having learned that the witness would be pardoned and would again be introduced as a witness on behalf of the prosecution, went out to the penitentiary, and had an interview with the witness Nowell, a few days before he was released and placed on the stand. The testimony of the respondent, uncontradicted, is that the witness Nowell had made two state-

ments, one under oath at the preliminary hearing, and the other and different statement to his partner, Mr. Spiess, the other respondent herein, which statements were entirely opposite to each other, one favorable to his client, and the other favorable to the territory. The respondent, as he says, visited the witness to learn from him which of these statements was true, and which he (the witness) would testify to when again placed on the stand. If the respondent, as he says, honestly believed that the witness had made two statements in relation to the case in which he was a witness, which statements were diametrically opposite to each other, one favorable to his client and the other unfavorable, then the respondent had a right to use all legitimate and proper means to ascertain which statement was correct, and had a right to talk to the witness himself and learn from him which statement was correct, provided he did not use any improper means, by word or act, to induce the witness to conceal, change, or in any way give improper testimony. Attorneys engaged in the defense of important criminal trials have the right to ascertain by proper and legitimate means the nature, strength and credibility of the testimony to be offered in the case, so long as they do not by word or act attempt in any manner to influence a witness to conceal, modify, or change his testimony from that which is absolutely true. We know of no rule of morals or professional ethics which is opposed to this view. If this is not allowed, then you break down the barrier which the law and the courts have erected as a shield to protect the lives and liberty of the citizens from what might prove an unjust and designing prosecution. We do not wish to be understood as in the slightest degree countenancing any conduct on the part of any attorney in attempting in any manner to influence a witness to conceal, change, or in any manner give improper testimony under any circumstances. Such an act, when established, should meet with condemnation by the bar, and should be visited with disbarment by the court. We discover, however, no unprofessional conduct in the respondent in his simply visiting the witness to honestly ascertain what would be his testimony, so long as he did not in any way attempt to influence him to conceal, falsely change, or modify his testimony.

But it is contended by the prosecution that the respondent Catron visited the witness Nowell for an improper and illegal purpose; that he endeavored to induce the witness not to testify on the trial, or, if he did, to change his testimony, or refuse to testify on the ground that he (the witness) would criminate himself. If we were to credit the whole of the testimony of the witness Nowell, then this part of the charge is established, as Nowell states that the respondent Catron came to the penitentiary, and had a talk with him, in which the re-

spondent Catron told him (the witness), in substance, that he (Catron) did not want him (the witness) to testify, as he had done before, about seeing the Borregos on the night of the killing of Chavez, and that when the witness asked the respondent how he could "get out of it," and if they would not "get him into trouble for perjury," the respondent told him (the witness) that he could refuse to testify on the ground that the answers "would criminate him" (the witness); that the respondent told him (the witness) that he (the respondent) would be there at the court, and would defend him (the witness) if he got into any trouble. The respondent denies this statement positively and unequivocally. The respondent states that he visited the witness, and had the interview with him, for the purpose solely of learning what his testimony would be upon the trial; that having been advised that the witness had made two statements in relation to the matter, one to Spiess, and one on the preliminary examination, each different from the other, he (the respondent) desired to know which was the truth; that the respondent visited the witness honestly for the purpose of learning from the witness which statement was true. One statement made by the witness was favorable to the clients of the respondents, and one was against them, and favorable to the prosecution; and the respondent, in the interest of his clients, with a desire to learn the true facts, had the interview with the witness. The respondent denies positively that he attempted in any way or manner to influence the witness, or attempted in any way to induce him to change or modify his testimony, save to tell the truth. Respondent testifies that, in his interview, he (the witness) admitted to respondent that the testimony given by him (the witness) on the preliminary examination for the prosecution was false, but the other statement made to Spiess, favorable to the defendants, was true; that he was induced to give his testimony on the preliminary examination because he (the witness) thought it would help him on his trial on the indictment then against him. The testimony of the respondent is a clear and positive denial of the testimony of the witness Nowell that he (the respondent) made any attempt whatever, in any manner, to induce the witness Nowell to swear falsely or change or modify his testimony in any way to conflict with the truth. No one was present when this interview was had, save the witness Nowell and the respondent Catron.

Upon the testimony of these two witnesses, standing in direct opposition upon this part of the charge, neither being supported by corroborating facts, we are asked to reach a conclusion as to whether the first charge is sustained. If this were but a civil suit to recover a debt, instituted by Nowell against the respondent in any of the inferior

courts, and the only testimony was the affirmation of one as to the debt, and a positive denial by the other, assuming both to be of the same credibility, could the court pronounce a judgment upon the testimony of Nowell? Under the evidence offered before the court and contained in this record, these two witnesses do not stand before the court possessing equal credibility. The uncontradicted record shows Nowell to have been a penitentiary convict, indicted, tried, and convicted of a felony, and sentenced to imprisonment. He abandoned his home, deserted his family, disavowed his marriage, dishonored his children, and became the companion of disreputable characters, until he is pronounced, by some of his neighbors, at least, as unworthy of credit. Take the testimony of this witness, weigh it in the scales of impartial justice, as against the testimony of the respondent, test it by those rules which should guide conscientious judicial action, and can we, upon it, pronounce a judgment which will result in the disbarment of the respondent? We do not believe that such a conclusion could be sanctioned or sustained, either by reason or judicial authority. We therefore are irresistibly led to the conclusion that this charge is not sustained by the evidence.

The ground of the second charge of unprofessional conduct against the respondent Catron is, in substance, that one Porfilia Martinez de Strong was a witness who testified for and on behalf of the defendants in the trial of the Borregos, both at the preliminary hearing and at the final trial, and that such testimony was material, and that it was false, and that she was induced to give such false testimony by the improper conduct of the respondent. Her testimony shows that parties came to her house at Lamy at night and brought her, under what she supposed was a warrant, to Santa Fé; that she was taken to the house of Charles Conklin, and he told her what she was brought for, and what she must testify to; that she went upon the stand at the preliminary hearing, and gave this testimony; that, upon the final trial, she was again brought to Santa Fé, and taken to a room in the office of the respondent Catron, and slept there; her meals were brought to her; that she was brought to the courthouse, and testified, and was then taken back to this room, and remained there until the train went out, and then returned home. She was brought back a few days after, was placed again on the stand by the district attorney, and was cross-examined. In this latter examination she testified that all her former testimony given for the defendants, both in court and on the preliminary hearing, was false and untrue; that she was induced to give this false testimony because she was afraid to tell the truth. Her testimony in this regard is clearly contradicted by other witnesses in the case. The testimony of these

witnesses is that they went down to Lamy, and brought her up here upon a subpoena; and of the respondent, I think, that he had a subpoena issued, and that he gave it to the witness Thayer. Thayer went for this woman, and brought her up. She was brought here at the expense of the defendants. The money was paid, I think, part by the respondent himself,—an amount which would be her legitimate fees, which she could have claimed, and which she would have been entitled to. She was brought to the office of the respondent Catron, and placed in a room there by Thayer. She remained there all night; took her meals there during the next day. She returned to that room after she testified in the courtroom on the trial; was kept there until the train went out; and was then put on the train, and sent home. The respondent Catron states that he had heard that she was a material witness, and that he asked that she be sent for and brought here in order that he might see her; that she was subpoenaed as stated, and brought here; that he did not know that she was in his office until the next morning, when he found her there, and he asked her what she was doing in the office; that she said she had been brought up there by this man Thayer, who had brought her from Lamy; he then asked her what would be her testimony; that she said in reply that her testimony would be the same as it was on the preliminary trial. Respondent states that he said to her: "I don't remember what that was. Will you repeat it to me again?" She then sat down, and repeated to him her testimony substantially as she had given it upon the preliminary examination. He then left her, and went off, and engaged in other business connected with the trial of the case, and she was afterwards brought upon the stand and testified. After her testimony in chief was through, the prosecution announced that it desired time to get out the transcript of her evidence on the preliminary examination, before they could be ready to conduct the cross-examination of this witness. The respondent then announced that he would not be responsible further for her fees. This witness then went home, and in a few days came back, and went upon the stand, and denied positively the truth of the statement which she made upon two previous occasions, when put upon the stand as a witness. The respondent denies that any threat of any kind or character or any influence was used or attempted to be used upon this witness. I find that the testimony of this witness stands before us, denied in part by the witness Conklin, denied in part by the witness Spiess, denied in part by the witness Thayer, denied in part by the witness Domingues, and denied, in so far as any criminality is shown, by the respondent Catron himself. We therefore must say there is only one conclusion to which the court can come in examining this testimony with reference to the sec-

ond charge or specifications,—that it is not sustained by the evidence.

The third charge is in reference to, and charges, that the respondent Catron had attempted to influence or control improperly the testimony of the witness Max Knodt, who was a witness for the prosecution on the preliminary trial of the Borregos, and that he obtained for him a pass to Wingate, as a means of inducing him to give improper testimony. This charge, I must say, is sustained in no part, except in the fact that respondent did obtain for the witness Knodt a pass to Wingate. The witness Knodt himself comes upon the stand, and testifies that he wanted to go to Wingate. He asked some person whether he could obtain a pass. He was directed to Mr. Spless. Mr. Spless directed him to Mr. Catron. Mr. Catron, after a conversation with the witness, applied for a pass for him to Wingate. The witness says that Mr. Catron told him that he must be there at the Borrego trial; that the court would fine him \$25 if he did not come. In this statement of the witness, he denies positively that Mr. Catron discussed his testimony in the Borrego case with him, or attempted in any way or manner to induce him, or to influence him, to conceal any part of his testimony, or modify or change it in any manner whatsoever. The respondent testified that he obtained the pass; that the witness Knodt applied to him for a pass to go to Wingate to see a lady out there, whom he desired to visit, who used to be a servant in Mr. Catron's house. Mr. Catron told him that he could not, probably, get him a pass upon that ground, but, if he could transact some business for him (Catron), that he might be able to obtain the pass for him. This statement of the respondent Catron we must prefer to the other, because it is not denied. No attempt or effort has been made to show that the statement of the respondent as to the reasons why he obtained the pass in behalf of Knodt is untrue. Therefore we must accept the statement of the respondent as true with reference to this fact, and I say that, in view of the condition of the testimony, the third charge in reference to the witness Knodt is not sustained in any particular.

The fourth charge is based upon the testimony of Mrs. Baca, who is the mother of Luis and Mauricio Gonzales. Luis Gonzales and Mauricio Gonzales were two material witnesses for the prosecution in the trial of the Borregos. Luis Gonzales had testified upon the preliminary examination, and also was brought and kept as a witness to be used on the final trial. It is claimed in this charge that the respondent Catron sought, by the use of money, to induce this woman, who is the mother of these boys, to get them away from the court, or to get them to modify their testimony or change it, or, rather, not to testify against the Borregos. She states in her testimony that she was going

by the office of Mr. Catron, and he knocked on the window, raised it, and called her up to the office. She came up to the office, and in her conversation with Catron something was said with reference to her pension papers. She talked about the papers, and offered to pay Mr. Catron for his services in her behalf connected with the papers. Mr. Catron stated that he did not want any pay for the services he had rendered. According to her statement, all he wanted was for her to do something to aid and assist the Borregos. She said that he then offered to pay her money, give her assistance, be her friend, and give her help, if she would induce her sons to testify in behalf of the Borregos, or not to testify against them. This is the statement made by her. This conversation occurred in the presence of the respondent and this woman alone. Nobody else was present. Respondent goes upon the stand, and positively, without hesitation, and without qualification, denies wholly and absolutely this statement. So we have, so far as this charge is concerned, the testimony of the woman Mrs. Baca, on the one side, and the testimony of the respondent, on the other. Under our views of the weight which should be attached to testimony, and the amount of evidence which should be required to establish and sustain a charge of this kind, we conclude that under this testimony, taking these two witnesses as they stand before us, assuming them to be of equal credibility, the prosecution in this charge have wholly failed to sustain the allegations made.

Now, as to the fifth and last charge, that the respondent attempted, by the use of money and other means, to influence the witness Mauricio Gonzales to testify falsely or improperly in the trial of the Borregos: The respondent Catron denies absolutely that anything of this kind was done; denies that he offered any money, that he agreed to pay any money, or that he offered any kind of inducement to this witness to testify falsely or untruthfully in any way in this cause. The testimony upon this point is not corroborated by any other facts or any other circumstances. Therefore we say that, under this testimony, even if the witnesses were of equal standing, this charge is not to be sustained. It may be proper, however, in order to see and understand the weight which should be attached to the testimony which is offered by the prosecution in this case, to look at it for a moment. The testimony is that the woman Mrs. Baca, upon whom the fourth charge is based, was a woman whose character was such as to render her unworthy of credit. The testimony shows, too, that the witness Luis Gonzales and the witness Mauricio Gonzales were witnesses of such character as to render them unworthy of belief. Prominent citizens of this community, officials in high standing, prominent members of the bar,



reputable business men in large numbers, have come upon the stand, and have testified, without qualification, that they would not believe these witnesses under oath, in consequence of their character, their reputation, and their standing in this community. The witness Porfilla Martinez de Strong,—her testimony itself has furnished facts sufficient to mete out its own condemnation. She twice testified to one thing. She came upon the stand subsequently, and testified directly in the opposite way. Here we have a witness of this character coming upon the stand, testifying in directly opposed directions in the same case. Besides, the testimony which has been introduced with reference to character applies to her as well. The testimony of Mauricio Gonzales shows that he has been willing to make affidavit on both sides of the case. He testified in one way, and then made an affidavit in another way. So that, having taken this testimony, and applied to it those rules which the court ought to apply in weighing testimony, giving to it that credit to which it is entitled, we must conclude that these charges are not sustained. It may be proper, also, to remark that these charges are five in number. Each stands by itself, a separate and distinct charge as to a separate and distinct act, alleged to have been done at separate and distinct times, with separate and distinct individuals. It is proper to say that the testimony in no one of these charges tends in any way to establish the truth of any of the others. Therefore, we must dispose of these charges separately, upon the testimony which has been offered applicable to that particular charge. Viewing it from that standpoint, and applying the rules above given to this testimony, we must conclude that this evidence is not of a character that commends itself to credit, and is not testimony such as we ought to disbar respondent upon.

As to the respondent Spiess, it is charged that he made a trip to Las Vegas, to see the witness Domingo Apodaca, who had been examined upon the preliminary trial of the Borregos, and that he endeavored to induce her to swear falsely in the Borrego trial. It was stated by the district attorney, in the opening of the Borrego trial, that he expected to prove a confession made by Francisco Gonzales y Borrego to this Domingo Apodaca; that the respondent went to Las Vegas with a knowledge of that fact, and had an interview with this witness, and in that interview he offered her money, offered her support, offered his protection as a lawyer, and the protection of his firm, if she would not testify against the Borregos. This is her testimony. In this respect the testimony of the witness Domingo Apodaca is denied by Mr. Ortiz, who says he was present at the entire interview which was held between the respondent Spiess and the witness Domingo Apodaca in Las Vegas,

and that no such conversation occurred. The respondent also denied the statement. So we have the testimony of these two witnesses against the testimony of the witness Domingo Apodaca. The other evidence with reference to her shows that she is a public prostitute. Her testimony, as I think, is of such a character as to cause the court to, at least, concede to it only a limited amount of credit; but against her testimony alone, uncorroborated, denied as it is by the testimony of the other two witnesses, which stands uncorroborated, we think that this charge with reference to the respondent Spiess is not sustained.

It is charged that the respondent Spiess offered money to Luis Gonzales; that he was in front of the post office; that he was met there by Gus O'Brien, and Gus O'Brien asked him if he did not want a job, if he did not want work. He said that he did, and went with Gus to the office of the respondents, Catron and Spiess. He went to the office, and Mr. Spiess was absent. Gus O'Brien telephoned to the Palace Hotel, and in a few minutes Mr. Spiess came in. Mr. Spiess spoke to him, and he spoke to Mr. Spiess. He says that he asked Mr. Spiess what he wanted. Mr. Spiess said that he wanted him to do something for him; that he wanted him to help him in the Borrego case; that he wanted him to make an affidavit that Gov. Thornton had offered him (the witness) money to swear as a witness in the Borrego case; that he would give him \$10 if he would do so. Spiess sent Gus O'Brien into the other room to get the check book; instructed Gus O'Brien to draw him a check for \$10 for Gonzales, and offered it to him, to influence the witness in that case. The respondent's testimony is that this is not true. He denies positively that he offered him anything, that he drew or had any check drawn, and denies that he wanted him to help him in the Borrego trial. The testimony upon this subject is the testimony of these two witnesses, the witness Gonzales, upon one hand, and Spiess, the respondent, upon the other. In the light in which we view the testimony of Luis Gonzales, and the credit which, in our judgment, it is entitled to receive, it is not such as to warrant us in finding the defendant guilty of this charge.

It may be contended that this conduct of the respondents in going to these witnesses, and talking to them, was of itself improper. It may also be contended that the sending for and the bringing of a witness here, in the manner in which they (the respondents) did with reference to the witness Porfilla Martinez de Strong, is improper and unprofessional conduct. If the record in this case contained testimony which could in any way establish the fact that the respondents brought these witnesses to their offices, or visited them with the view of in any way influencing their testimony, or if there was credible tes-

timony showing that they attempted to tamper with any of the witnesses, then it would be our duty to find the respondents guilty. We cannot, however, find from this evidence that such was the case. The vast importance of the trial in which the respondents were engaged, the intense public interest that was manifested and centered in its result, the bitter feeling of hostility which was engendered between the prosecution and the defense, led the respondents, as they say, to distrust the officers in serving their process for their witnesses, and caused them to have subpoenas issued in the case, and have them served by others outside of the regular officers, and caused them to bring some of their witnesses to their offices for consultation. We cannot discover in their conduct anything which will warrant us in adjudging the respondents guilty.

The position of an attorney and counselor at law is that of an officer of the court. His relation to the court, the bar, and the public is one of trust and confidence. To his integrity and ability are not infrequently intrusted the lives, the liberty, and property of the citizen. Years of time, arduous labor, and constant application are required to elevate him to that professional standing which enables him to discharge with fidelity the responsible duties intrusted to his care. If dishonest practices and unprofessional conduct have caused him to forget his obligations, and lead him to a violation of this sacred trust, his name should be stricken from the roll, and he should be removed from a place in the ranks of the profession which he is found unworthy to fill. But a result so humiliating in its effect and so disastrous in its consequences to him should not be reached upon circumstances that appear merely suspicious, but only upon that credible and convincing testimony which will lead with reasonable certainty to the establishment of his guilt. By the laws of the country and the sanction of the courts, he has been admitted to that profession to which the energies of his life may be devoted. His zeal and ability may have gained for him a position of eminence and distinction in his calling, and he has thereby acquired a right of property in the privilege of engaging in its practice. This right and privilege should not be destroyed or taken from him, and he be deprived of its benefits, and driven in humiliation and disgrace from the profession, unless upon reliable proof,—such proof as would be sufficient to satisfy the mind of the court in determining questions involving the liberty and property of the citizen.

Giving full consideration to all the testimony offered in this investigation, considering the credibility of the evidence, and the character, standing, and reputation of the witnesses presented in support of these charges, each charge being supported by an uncorroborated witness, whose credibility is impeached, both by his own evidence and by in-

dependent proofs,—place this upon the one side, give to each portion of it that full weight and consideration which, in the most favorable light, it should receive, place against this the open, frank, positive, and unqualified denial by the respondents of each criminalizing fact contained in the charges, apply to this conflicting evidence the test of those well-established rules by which its character and weight should alone be determined, weigh each part of it in that just and impartial scale which should ever measure and control judicial decisions, and we are led irresistibly to the conclusion that none of the charges and specifications against the respondents are sustained by the evidence, and they should be dismissed.

BANTZ and COLLIER, JJ., concur in the conclusion reached, but file separate opinions herein.

COLLIER, J. In concurring in the conclusion of a majority of the court in this case, I cannot assent to all that is said in the opinion of the court. It was announced at the time the judgment of the court dismissing the charges was rendered that some observations on certain practices indulged in by respondents would form a part of the opinion of the court. Many matters expected by myself to be adverted to are not contained in the opinion, or referred to either directly or indirectly. As to these I will not submit any views, because, as they in no way appear on the face of the record, I will not impart them for the mere purpose of giving an individual opinion.

The opinion does, however, contain some things I must express my dissent from. I do not believe that an attorney having a high sense of professional decorum and ethics would have permitted himself to visit the witness Nowell, upon the plea that he honestly desired to ascertain what the witness would testify to, because he had stated to another in conversation a different state of facts from what he had already testified to. He could rest upon the presumption that the witness would repeat his former testimony, and it was not the office or business of the attorney against whose client that testimony militated to give that witness any warning or advice as to the pains of perjury. The fact that witness had testified in a certain way, and is told by the attorney of the client against whom that testimony bore that it would be shown that he made contradictory statements, is itself a threat tending to the suppression of testimony. The attorney should have relied upon his right to impeach the credibility of such witness according to the rules of evidence, and the practice of the courts, and I cannot agree that I "discover no unprofessional conduct" in the respondent's visiting and talking with the witness Nowell. While I think his act was

blameworthy, I do not think it such reprehensible conduct as deserves disbarment.

Other matters I do not care to advert to, except to say that I believe counsel should so bear themselves towards witnesses who are subpoenaed for the side to which they are opposed as not to give rise to the suspicion of improper influences being exerted; and I think that, so far as the witnesses Max Knodt, Domingo Apodaca, and Luis Gonzales are concerned, the respondents do not appear to have so conducted themselves as to ward off suspicion. If the two latter witnesses were of such unsavory character as the testimony of the respondents shows, and which the court takes as established, it were better for counsel to have kept aloof, instead of seeking one and being visited by the other, as is the case so far as respondent Spies is concerned, it not being denied that Spies visited Domingo Apodaca, nor that Gonzales came to his office upon the request of his employé.

I have thought it my duty to say this much as to the concurrence I give to the court's opinion, because these matters appear on the face of that opinion.

BANTZ, J. (concurring). It is a sufficient statement of reason for the conclusion reached in this case to say that whatever testimony there may be tending to sustain the substance of the charges comes from those who do not commend themselves to confidence, and such testimony cannot outweigh that of men of respectable reputation.

LAUGHLIN, J. This is an action brought on information filed in this court by Jacob H. Crist, as district attorney for the counties of Santa Fé, Rio Arriba, and San Juan, for the disbarment of the respondents, and to exclude them from the office, rights, and privileges accorded them as attorneys and counselors at law of this court.

In recording my dissent from the opinion filed by a majority of the court, and a dismissal of the charges filed herein against the respondents, it is done through a sense and an appreciation of the official responsibilities of the position and the obligations of my oath, and out of the respect and reverence I have for it, and the duty, respect, and confidence possessed in me for the public and for the public interests involved and shown in this matter. Were my personal feelings and inclinations permitted to control over what seems to me to be an official duty which I owe to the position, and from which I am unable to see any avenue through which to escape, there would certainly be no dissenting opinion recorded by me in this particular and important case. To concur in an opinion by a majority of my brothers upon the bench, for all and in all of whom I have but the profoundest respect and confidence, is both an easy and a pleasant duty, and one to which there is always a certain degree of

pride and honor attached; but to dissent on the facts in a case of this nature and importance, and to justify that dissent, is a duty unpleasant in the extreme.

This case arose immediately out of a criminal prosecution in the district court of Santa Fé county, wherein Francisco Gonzales y Borrego, Antonio Gonzales y Borrego, Lauriano Alarid, and Patricio Valencia were indicted, tried and convicted for the murder of ex-Sheriff Francisco Chavez; and in making this statement it is proper and necessary, in order to understand fully all the facts and circumstances, to resort to records now in that court, which are not part of this record, but which are public and notorious facts throughout the territory. During the nighttime of May 29, 1892, said Chavez was assassinated in Santa Fé by parties lying in wait, four bullets having penetrated his body. For some time thereafter it was not known who the assassins were. During the latter part of the year 1895, W. P. Cunningham, then sheriff of Santa Fé county, obtained information from one Luis Gonzales, which led him to the discovery of the murderers of said Chavez; and in November or December of that year one Francisco Rivera made an affidavit before Judge Seeds, judge of the district court, sitting as committing magistrate, that said Francisco Gonzales y Borrego, Antonio Gonzales y Borrego, Lauriano Alarid, and Patricio Valencia and Hipolito Vigil were the guilty parties, and thereupon a warrant was issued, and placed in the hands of the sheriff, for their arrest, and all were immediately arrested, except Vigil, who resisted, and was shot and killed by the sheriff's posse. During January following, Judge Seeds, sitting as committing magistrate, heard the preliminary examination, which lasted some three weeks, and at the close held the four defendants, and committed them without bail; and at the sitting of the succeeding grand jury they were all indicted for murder in the first degree; and during May and June, 1895, they were placed on trial on the indictment, which continued about 40 days, resulting in a verdict of "Guilty as charged." Motions were made for a new trial and in arrest of judgment, and after an exhaustive argument in behalf of the motions they were both denied, and thereupon sentence of death was pronounced on the defendants, and error was sued out in their behalf, and the case is now pending in this court. Since the trial and conviction and the passing of death sentence by the court, two of the accused, to wit, Lauriano Alarid and Patricio Valencia, have confessed that all four of the defendants and the said Hipolito Vigil did commit the murder in the manner charged, and that the testimony given on the trial by the prosecution was substantially true. These confessions were in writing, signed and sworn to by two parties making them, and in the presence of a brother of one of them, and have been printed in

the public press of the country, and have become a part of the public history of New Mexico. Chavez, by reason of his personal presence, his goodness of heart, and his kind and generous disposition, had attached many followers, not only of his political faith, but of the opposite faith as well, so that at the time of his assassination, and for a number of years prior, he was the acknowledged leader of his party, and much the strongest man politically in the county, and it was well known that he could elect or defeat any man he desired in local politics; and the testimony given at the preliminary hearing and on the trial on the indictment tended strongly to show that the primary motive for his assassination was political jealousy, a fear of his popularity and power, and an inordinate desire to remove him from the road of political preferment. I was of counsel for the prosecution at the preliminary hearing before Judge Seeds, and was therefore disqualified; and by agreement of all parties Judge H. B. Hamilton, of the Fifth district, came to Santa Fé, and gave his most patient, painstaking, and laborious attention to the long, tedious trial, and pronounced the death sentence on the four convicted defendants.

The information in the nature of charges upon which this action is based were filed by Jacob H. Crist, as district attorney, and who as such prosecuted for the territory in the case for the murder of said Chavez, out of which trial this case directly grew, and the firm of Catron & Spiess appeared for the defense. Said information was filed at a former day of this term of the court, and the court took the same under advisement, and, after due consideration, referred the same to a committee of highly respectable members of the bar, to wit, J. P. Victory, of Santa Fé, as solicitor general of the territory; A. A. Jones, of Las Vegas; E. S. Rodey and W. B. Childers, of Albuquerque; and S. B. Newcomb, of Las Cruces,—with power and authority to investigate and inquire into the information so filed, and to prepare and file such charges and specifications, if any such should be required, as in their judgment might seem proper, and to prosecute the same before the court. At a subsequent day the committee filed charges and specifications, which are, in substance, as follows, to wit: (1) That the respondent Catron was guilty of unprofessional conduct in connection with said trial in this: That one Ike Nowell was an important witness to very material facts for the prosecution in said trial, and that he had testified as such witness at the preliminary examination of said defendants, in January, 1894, and that before he had given his testimony he had been tried and convicted of adultery under the laws of the United States, and that after he testified at said preliminary hearing he was sentenced to three years in the New Mexico penitentiary; and that while he was so confined, and during the progress of the trial of said de-

fendants on the indictment, said respondent, believing that said Nowell would be introduced and examined at said trial as a witness on behalf of the territory, went to the said penitentiary, sought and had an interview with said Nowell, and in said interview endeavored to persuade him to give different testimony, when he should be introduced as such witness, from that which he had given on said preliminary examination, and suggested to said Nowell that he might avoid testifying to the facts which he had testified to at said preliminary examination by declining to answer upon the ground that the answer might criminate him; knowing that the witness then and there claimed that the testimony given by him, said Nowell, on said preliminary examination, was true. (2) That the said respondent was guilty of unprofessional conduct in connection with said trial in this: That one Porfilla Martinez de Strong was examined as a witness on behalf of said defendants at said preliminary hearing, having then testified to material and important facts, and that she was so induced to testify by means of intimidation and fear, caused by threats and false pretenses exercised over her by certain agents of said respondent, who claimed and represented to her that they were sent by said respondent to bring her as a witness, as officers of the law, when in fact they were not such; and that she was again introduced as a witness at the trial on the indictment, and testified on her examination in chief to material facts in behalf of the said defendants; and that she was so induced to appear and testify by reason of fear and intimidation exercised over her by said respondent and his agents; that one Fred Thayer was sent to Lamy to bring her to Santa Fé, and that said Thayer represented to her that he was a deputy sheriff, and arrested and took her into custody and brought her to respondent's law office in the nighttime, and kept and retained her in his private office the remainder of the night, and took her from there direct to the courthouse, and on the conclusion of her examination in chief (the district attorney declining at that time to cross-examine her until he could have her former testimony written out) took her directly back to said office, and retained her there until 10 o'clock that night, and then sent her home,—all of which conduct on the part of the respondent and his said agents tended to intimidate said witness; that she returned a day or two thereafter, and on her cross-examination testified that the facts which she had testified to at the said preliminary examination and on her examination in chief on said trial were false and untrue, and so given because of fear and intimidation as aforesaid, she being an ignorant and friendless woman. (3) That said respondent was guilty of unprofessional conduct at said trial in this: That one Max Knodt, a witness, testified to important and material facts on behalf of

the prosecution at said preliminary examination, and was offered as a witness to prove the same facts at the trial on the indictment, but on said trial said witness testified differently, and in such manner as to render his testimony valueless to the prosecution on said trial; that said Knodt admitted on said trial as such witness that respondent Catron had promised to procure for him a railroad pass from Santa Fé to Ft. Wingate and return at any time said Knodt should desire one, and did so procure a pass for said Knodt; that the procuring and giving said Knodt said pass was for the purpose and had the effect of inducing him, said witness, to change his testimony from that given on the preliminary hearing, and to render it valueless to the prosecution. (4) That said respondent Catron was guilty of unprofessional conduct in connection with said trial in this: that subsequent to the preliminary examination, and prior to said trial on the indictment, said respondent offered money and other inducements to one Rosa Gonzales y Baca, mother of Luis and Mauricio Gonzales, two important and material witnesses in behalf of the prosecution, and by said offer endeavored to procure her to induce her said two sons to testify falsely on said trial on the indictment. (5) That said respondent was guilty of unprofessional conduct in connection with said trial in this: that he, subsequent to the said preliminary examination, and prior to the trial on the indictment, offered said Mauricio Gonzales money, and attempted otherwise to induce said Gonzales to make a false affidavit as to his information with reference to material facts about the killing of said Chavez by said defendants.

The witness Nowell, during the January, 1894, term of the United States court, held at Santa Fé, and at the same time the preliminary hearing in the case of the territory against the said Francisco Gonzales y Borrego, Antonio Gonzales y Borrego, Lauriano Alarid, and Patricio Valencia, which will hereafter be styled the "Borrego Case," was being had for the murder of said Chavez, was indicted, tried, and convicted of the crime of adultery, in which respondent Spless appeared as his attorney, and after conviction, but before sentence was pronounced, he was offered as a witness by the prosecution in the Borrego case, and gave material and damaging testimony against the defendants, and afterwards the court passed sentence, and fixed his punishment at three years in the New Mexico penitentiary. During the trial of the Borregos on the indictment, knowing the importance of Nowell's testimony, and that he had served nearly half of his time, I joined the governor, who had previously written fully all the facts, in a telegram to the department of justice, requesting a pardon for Nowell, that he might again give his testimony on the trial; and immediately upon the receipt of the telegram the president granted the pardon, and so notified the superintend-

ent of the penitentiary; and the testimony shows that during the next day after the superintendent received the notice of the pardon the respondent took a buggy and an employé in his office, and drove, not by the usual way, but by a circuitous route, to the penitentiary, and there sought and obtained a private interview with Nowell, in which Nowell told respondent that he had been notified by the superintendent of his pardon, and that he was then a free man, and that the superintendent had requested him to remain until his clothes could be prepared, but that he did not know by whose influence the pardon had been secured; and the substance of that interview is here given as taken from the witness' mouth by the official stenographer, on his examination in chief: "Q. How came Mr. Catron to see you? State it to the court, if you will. A. He came out there, and sent for me to come into the private office. I went up, and sat down on one side of the table, and he says—asked me how I was getting along; and he says, 'I don't want to— It is my business out here, that I don't want you to testify in this case,—the Borregos killing Chavez.' And I told him I didn't see how I could get round it. I says, 'I gave my evidence in the preliminary examination,' and I says to refuse to testify they would get me for perjury; and he says, 'No; they won't.' He says, 'I will tell you now what to do.' He says, 'You, when they ask you if you know the Borregos, you can tell them, "Yes,"' and he says: 'If they ask you if you know of how Chavez was killed, you refuse to answer the question. Just say it would incriminate you.' And I sat there for a while, and he says to me,—and I didn't pay much attention to it,—he asked me what I thought about it. 'Well,' I says, 'I don't know.' I says, 'I have had enough of this trouble, and I don't want any more trouble about it;' and he says: 'I will defend you. I will protect you. Do just as I tell you, and I will defend you.' Q. State whether he said anything about bringing an action against them for keeping you in the penitentiary at that time? A. He said I could bring an action against them. Q. How long had you been there in custody after you supposed you were entitled to be discharged? A. Just the evening before. That was on Saturday, I believe, and on the 6th day of May, and I was turned out on the 7th. Q. Did you know you were to testify before Mr. Catron came out to the penitentiary to see you? A. I was satisfied what I had been pardoned out for. Q. Well, when Mr. Catron called on you at the penitentiary, did he say his business relations with you were as your attorney in the adultery case? A. I believe he did. Q. What, if anything, did he have to say, when he called on you at the penitentiary? A. He asked me not to make any remark about his being out there. He says, 'If you are asked the question, you can tell them I was your attorney in this adultery case;' that I would make that statement. Q. What did you say

about it to him? A. I don't remember what answer I did make." On his cross-examination he testified in part, and pertinent to the issue, as follows, viz.: "Q. Did you not testify, in your direct examination, that your understanding was that you were pardoned out of the penitentiary to be a witness in the Borrego case, here, this morning? A. I said I supposed it was that. Q. Didn't you understand that that was the price of your testimony? A. I had no such promise. Q. Now, is it not true that when Mr. Catron came out to see you at the penitentiary, that he said to you that you ought not to testify to falsehoods against the Borregos, or words to that effect; that you had told Charlie Spless that your testimony against the Borregos was false, and that you ought not to testify again against them? A. I don't think he ever said that. I never told Mr. Spless so at all. Q. Did he say anything of like substance? A. He said something to that effect. I told him I didn't testify to nothing that was untrue. Q. Didn't you then say to Mr. Catron that Mr. Spless was your attorney at the time you made this statement to him, and that Mr. Spless ought not to use it, and that it would get you into more trouble? A. I don't remember any such conversation. Q. Didn't you say that the use of this matter, that you told Mr. Spless when he was your attorney, had the effect to get a more severe sentence on you in your adultery case? A. I don't think I did. Q. Didn't Mr. Catron then insist that you should tell the truth in the Borrego case, as he understood it; and didn't you say that if you did they would get you for perjury? Didn't you ask Mr. Catron, in the course of that conversation, that if you gave testimony upon the second trial different from that you gave in the first trial, if they could not get you for perjury? A. I did. Q. And didn't he tell you that they could? A. He told me that they could not, if I did what he told me to do. Q. Didn't he say that they could not if you testified that it would criminate you if you testified? Did he not put that distinctly on the ground that your testimony on the first trial was false? A. He tried to make it appear that way. Q. Wasn't that the way he talked to you all the way through? A. No, sir. Q. That your testimony on the first trial was false? A. He did not. Q. Did he at any time intimate to you that he believed the testimony you gave on the first trial was true? A. He intimated that it was not true. Q. Didn't he insist that your testimony on the first trial was false, and that you knew it was false? A. He didn't say that I knew it was false. Q. Didn't he say to you, when you asked him if you gave testimony on the second trial that was different from that you gave on the first trial, that they could not get you for perjury? Didn't he say that they could, unless you testified that your testimony would tend to criminate you? A. I asked him if I was going to make different evidence, if I did as he

wanted me to do. I said, 'If I did that, could they get me for perjury?' Q. What did he say? A. He says, 'Answer the questions as I told you, and decline to answer the others.' Q. That is, to decline on the ground that it would incriminate you, or tend to criminate you? A. Yes, sir. Q. He then said to you that if upon that trial you did decline to answer, upon the ground that your testimony would tend to criminate you, that he would protect you? A. Yes, sir. Q. He made no suggestion to you upon that occasion that you should give any sort of testimony on the Borrego trial, did he? A. That I should give none; that I should give no evidence in the case. Q. And he put that distinctly upon the ground that if you did testify to the truth, as he understood it, that you would lay yourself open to an indictment for perjury? A. I don't recollect that he did. Q. Do you recollect that he did not? A. The way he said was, 'Now, if you go and testify in this case, you will be indicted for perjury, because these Borregos are liable to come clear, and then they will get you for perjury.' Q. Didn't you ask him, Mr. Nowell, and have you not said that you did ask him, that if you gave different testimony on the second trial from what you gave on the first trial, could they not get you for perjury? A. I did. Q. Didn't he tell you then to decline to answer, upon the ground that your answer would tend to criminate you? A. I don't recollect that he asked me that way. Q. Did he say anything like that? A. He told me if I answered these questions different from what I did before, they would get me perjury. He says, 'You do as I tell you, and you will not be indicted for perjury,'—just about them words. Q. Didn't you ask Mr. Catron the question on that occasion, that if you gave different testimony on the second trial, if they could not use your testimony on the second trial, one against the other, for the purpose of indicting you for perjury? A. I did not."

In explanation of his visit to the penitentiary, and his version of the interview with the witness Nowell, respondent testified as a witness in his own behalf, on his direct and cross examination, as follows, to wit:

"A. I heard Ike Nowell's testimony on the preliminary examination, and I heard the cross-examination of him by Mr. Spless; and Mr. Spless also informed me that, in a conversation with Ike Nowell, Ike had told him he knew nothing,—nothing tending to connect the boys, the Gonzales boys, in that case, with the killing of Francisco Chavez. Subsequently his testimony was the same as what he testified here this morning himself. I said there was a possibility that Ike Nowell was to get a pardon, so that he might be brought on the stand to testify in that trial. I went to the penitentiary to see him and find out what his testimony would be; the circumstances being different, under which he was to testify here, to those under which he testified in

the preliminary examination. At the time he testified in the preliminary examination he had been convicted of the crime of adultery. His sentence was suspended in order that he might testify in that case, and he testified under the influences existing then as to the punishment that might be imposed upon him, as I understood it. Then I went to see what would be his attitude with reference to the two statements he had made,—the one to Mr. Spiess, as Mr. Spiess has represented, and the one in his testimony, they being diametrically opposed. I went to the penitentiary, and requested to see him. He was brought into the room, and I spoke to him, and he said that he understood that I wanted to see him. I informed him that I had come to see him with reference to his testimony, in case he should be called as a witness in the Gonzales y Borrego case. I said to him that he had made, as I understood it, two different statements,—one on the stand as a witness in the preliminary hearing, and the other to Mr. Spiess, in regard to the connection of the Gonzales y Borrego boys with that killing,—and that they were contrary to each other, or conflicting with each other; that to Mr. Spiess he had said that he knew nothing to connect them with it, and in the other he stated facts which would tend to connect them. I asked him which of these two statements were true. He said the one he had made to Mr. Spiess was true. And then I said to him, 'If you are called on the stand, which are you going to testify to,—the one that is true or the one that is not true?' He said that when he gave his testimony before the preliminary examination that he was in a 'close place' or 'tight place'; that he gave the testimony the way he did because he hoped it might influence the amount of punishment which would be placed on him, and help him in that regard; and Mr. Spiess having cross-examined him on that matter, and shown a different statement, he thought that the use of it in cross-examination had rather injured him, and caused a heavier punishment to be put on him. I said to him: 'Which are you going to testify to now, the truth or the untruth?' He remarked this way: 'I don't wish to do anybody any harm. I have had enough of this affair.' He said: 'If I go on the stand, and testify to what I told Spiess,' he says, 'can't they use it against me in a prosecution against me for perjury?' I remarked to him: 'Certainly, if you testify differently from what you did before. One lot of your testimony can be used against the other,—or words to that effect. 'But if you go on the stand you ought to tell the truth if you testify at all.' Then he says, 'How can I get out of telling what I said before if I tell the truth?' I said: 'You must not, if you go on the stand, tell anything but the truth. If the truth will help to convict you of perjury, why, there is only one way I

see how you can get out of telling it; that is, that your answers will tend to criminate you. I must insist that if you go on the stand, that you tell the truth, if you testify to anything.' He said something, I think, about seeing me again, or something of that kind. I believe that is substantially what took place. I don't pretend it is literally the words. Q. State whether or not during that interview with Nowell you endeavored to persuade him to change his testimony on the approaching trial, in any other manner than what you have now described. A. I did not."

Cross-examination: "Q. When you went to the penitentiary to see Ike Nowell, how did you go, Mr. Catron? A. I went in a buggy. Q. Who went with you? A. Gus O'Brien. Q. What direction did you go? A. We went up this street that goes in front of the Cathedral, turned down, and went across what is called the 'San Miguel Bridge,' there in front of the San Miguel College, and took a cross street. Q. That is not the usual route to the penitentiary, is it? A. I don't know that it is the usual one. It is the one I took on that occasion. Q. You knew as a matter of fact, before you went, that Ike Nowell had already been pardoned? A. No, I didn't know. Q. Hadn't you understood that the pardon had actually been granted? A. No. Q. Didn't you state to him while you were there that he had been pardoned? A. I may have stated that Col. Bergmann had informed me that he had received a telegram that he had been pardoned. Q. The conversation was entirely private? A. Yes, sir. Q. You had cross-examined Ike Nowell on the witness stand on the preliminary examination,—he had testified, hadn't he? A. I had examined him partly in regard to that matter. I think I examined him in part, but not with reference to his connection with the Borrego matter. Q. But it was taken down in shorthand, and written out for the purpose of being used on the Borrego trial? A. I understand it was. Q. You had read it, hadn't you? A. I don't know whether I had or not. I was present when the cross-examination took place. Q. You talked with Mr. Spiess fully as to what Mr. Spiess claimed had been that conversation between him and Nowell prior to the preliminary examination? A. Yes, sir. Q. Pointed and direct questions had been directed to Nowell on that preliminary examination? A. I think so. Q. And he answered positively that he had no such conversation with Mr. Spiess? A. My recollection is, in a general way, that he denied substantially that he had any such conversation with Mr. Spiess. As to whether he denied specifically, I don't know. Q. Had Mr. Spiess taken the witness stand and contradicted Mr. Nowell on the preliminary examination? A. If he did, I don't know. I wasn't there. Q. When you went to the penitentiary you knew that,

didn't you? A. If Mr. Spless testified, he testified when I was not there. Q. You knew that Mr. Spless claimed Nowell had been put on to testify, and was asked about the conversation with Spless? A. Yes, I knew that. Q. You knew that, from Mr. Spless himself, that he would take the witness stand, and contradict the testimony of Ike Nowell, if he testified in the main trial? A. Before, in the preliminary examination, I supposed he would. Q. As a matter of fact he did take the witness stand on the main trial, and contradicted Nowell? A. I think he did, but I am not positive about that."

A careful comparison of the testimony of respondent with that of Nowell will disclose a substantial variance in two or three important particulars only. Respondent testified: "I said to him that he had made, as I understood it, two different statements,—one on the stand as a witness in the preliminary hearing, and the other to Mr. Spless, in regard to the connection of the Gonzales y Borrego boys with that killing,—and that they were contrary to each other, or conflicting with each other; that to Mr. Spless he had said that he knew nothing to connect them with it, and in the other he stated facts which would tend to connect them. I asked him which of these two statements was true. He said the one he had made to Mr. Spless was true. And then I said to him, 'If you are called on the stand, which are you going to testify to, the one that is true or the one that is not true?' " Then he gives his version of Nowell's reply, and again repeats to the witness, "Which are you going to testify to now, the truth or the untruth?" These are the only substantial contradictions of Nowell. In answer to the last question on his examination in chief, "Did you endeavor to persuade him to change his testimony on the approaching trial in any other manner than you have now described?" he said, "I did not." Nowell, in answer to the question, "He made no suggestion to you upon that occasion that you should give any sort of testimony, on the Borrego trial, did he?" says, "That I should give none; that I should give no evidence in the case." Nowell is, it appears, corroborated in many important particulars by the respondent's own statements, and he stands uncontradicted in the following answers, to wit: In answer to the question, "What did he [respondent] say?" Answer: "He said, 'Answer the questions as I have told you, and decline to answer the others.'" And then, after the question if that was not put distinctly on the ground that if he testified to the truth, as respondent understood it, that witness would lay himself open to an indictment for perjury, witness said: "I don't recollect that he did. \* \* \* The way he said it was, 'Now, if you go and testify in this case, you will be indicted for

perjury, because these Borregos are liable to come clear, and then they will get you for perjury.'" And again, to the question, "Didn't he tell you then to decline to answer, upon the ground that your answer would tend to criminate you?" This answer is: "He told me, if I answered these questions different from what I did before, they would get me for perjury. He says, 'You do as I tell you, and you will not be indicted for perjury,'—just about them words." And to the question, "What, if anything, did he have to say, when he called on you at the penitentiary?" This answer is: "He asked me not to make any remarks about his being out there. He says, 'If you are asked the question, you can tell them I was your attorney in this adultery case;' that I should make that statement." These are material parts of the testimony, and stand as true, if the witness is worthy of belief.

But there is still another phase in this witness' testimony. It was well known that his evidence was considered very damaging to respondent's case, and much interest and anxiety was displayed concerning him and his whereabouts. The hearing of these charges was set the first time for the 7th day of October last, and it was a notorious fact that Nowell had left the territory, and gone to Trinidad, Colo. The committee secured a subpoena for his appearance and that of other witnesses then at Trinidad on the day set for the hearing, and directed it to be served by the United States marshal for that state; and about the 1st of October one Page B. Otero, who, up to a few days prior to that time, had been one of the most efficient and active officers of the county in securing testimony against the Borregos as one of Sheriff Cunningham's deputies, and one of the posse which was compelled to kill Vigil while resisting the arrest, secured a loan of \$50 from the respondent, boarded the train the same day and went to Trinidad, and there had an interview with Nowell and the other witnesses about this case, and advised Nowell to disobey the subpoena, and offered to give him sufficient money to pay his railroad expenses to Texas, and offered to secure legal advice in Trinidad to convince him that he need not come on the subpoena issued by this court, and said to witness: "I understand you are subpoenaed in the case of Catron and Spless, and you need not answer that subpoena. I saw the lawyer, and also a telegram from the old man,"—who the witness supposed to mean the respondent; and said to the witness, "If you don't want to answer this subpoena, just keep out of the way until Cunningham leaves town." Witness further says: "His business up there was to see me. He says, 'We don't want you to appear;' " "that if he [witness] did come, he would get the worst of it;" and that "we have all the other witnesses fixed;" and that he (Otero) asked witness to write a letter to



District Attorney Crist, and explain that he (witness) was drunk when he testified, and to give him (Otero) a copy of the letter, etc. Otero contradicts substantially all this conversation, but Nowell's statement bears the stamp of truthfulness more than does Otero's contradictory statements; and Otero returned to Santa Fé on the same train with Nowell and other witnesses for the prosecution. The telegram referred to by Otero is in evidence, and is as follows, to wit: "Trinidad, Colo., Oct. 4th, '95. T. B. Catron, Santa Fé, N. M.: Has clerk of our supreme court power to issue subpoena in proceedings against you for witness residing in Colorado? If so, how must service be made? Wire full instructions. [Signed] P. B. Otero." To this telegram the following reply was sent: "Santa Fé, Oct. 4th, 1895. P. B. Otero, Trinidad, Colo.: Clerk of the supreme court has no right to issue subpoena to run into Colorado. No one is authorized to serve such; and it is void. [Signed] T. B. Catron. Ch. T. B. C." These telegrams are sufficient to support, in substance, Nowell's testimony as to the conversation he had with Otero in Trinidad, if he needed any support, as against Otero. The respondent testifies positively that he had no previous understanding with Otero in reference to his mission to Trinidad, and did not know at that time that Nowell was there, and that he made Otero the loan as a mere matter of business accommodation, and that he did not know that the witness referred to in the telegram meant Nowell. The proof also shows that other friends of the respondent approached Nowell on the streets and in saloons, after his return to Santa Fé, and warned him not to testify against respondent, but there is nothing to show that respondent authorized or knew anything about his friends approaching the witness.

The second specification refers to the witness Porfilla Martinez de Strong. This witness gave testimony in the Borrego case, on the preliminary examination, which would, if true, have impeached and completely destroyed that given by Luis Gonzales, a very material witness for the prosecution; and at the trial on the indictment, she again gave, in her examination in chief, substantially the same, but was not then cross-examined by the prosecution, but returned in a day or so afterwards,—as she testifies, of her own volition,—took the witness stand, and stated that all she had previously sworn to at the preliminary hearing and on her examination in chief at the trial a day or so before was false, and that she had been so induced to give false testimony through fear and intimidation. Was the testimony of this witness alone to be weighed in the balance as against that of the respondent, it would be an idle use of time to consider it; but there are circumstances connected with and surrounding this part of the case which cannot in justice to the subject be passed over unnoticed. When the time came for her appearance in

the trial, one Fred Thayer, whose occupation has not been clearly defined, went to the witness' home, in the nighttime, some 18 miles from Santa Fé, and read to her what she seems to have understood as a warrant for her arrest, but which in reality appears to have been a subpoena, put her on the train, brought her to Santa Fé about 12 o'clock at night, and, instead of taking her to the home of a friend or to a public hotel, lodged her in the private office of the respondent, and furnished her a bed, where she passed the remainder of the night, and where said Thayer furnished her with her meals, and where she remained all the time, except while at the courthouse as a witness. But respondent says, in his testimony, that this was done without his knowledge or consent, and I do not think there is anything to show to the contrary. I do believe, however, that she was induced to give false testimony, and that she gave it through fear and intimidation, but not through the advice, knowledge, or consent of respondent, but through the aiders and abettors of the said four defendants.

But, during the pendency of these charges, the testimony shows, the respondent drew up a long typewritten affidavit, stating, in substance, that all that this witness had testified to at the preliminary hearing and in her testimony in chief on the trial was true, and that what she had testified to on her cross-examination on the trial was false, and that she had been so induced to testify falsely through intimidation and fear; and gave the same to one Roman Garcia, a friend to his clients, and sufficient money for his proper expenses, and told him to have her sign and swear to it, and then return it to him, the respondent. Afterwards this affidavit fell into the hands of the prosecution. That witness (Garcia) testifies as follows, to wit: "I went to the office, and he [respondent] was there, and he took me into another room, where he and I were alone; and he asked me if I could go to Lamy and speak to Porfilla [the witness], and I told him I could. He said, 'Don't go to-day, because I am afraid Cunningham is around there; and when you do go, be careful of Pedro Carriaga. Come to my office about 4 o'clock in the afternoon.' I went, about 5 o'clock. My father was there with me. He asked me again if I wanted to go. I told him I did. Then he took me into another room, where Bob Gortner was, and he commenced to prepare that paper [the unsigned affidavit]. He then said, 'Here is this paper; translate it into Spanish, and bring me the English.' Then he said to me that I was in danger of being put in the penitentiary. He gave me the paper, but didn't say anything more to me. I left the office, and afterwards returned and asked him when I should go. He told me to go about 9 or 10 o'clock, to his house. The following day (Sunday) I went to his house, and found him. He pulled out five dollars, and gave them to me,

and told me to go and endeavor to get Porfilla to sign that paper. That is all that occurred that day." "Q. Did Mr. Catron give you any instructions as to what efforts you should make to obtain the signature of Porfilla Martinez de Strong? A. That is all he told me,—to try and get Porfilla to sign the paper. Q. State whether or not, when Mr. Catron gave you this paper which I showed you a while ago, he gave you instructions as to the length of time you should remain down there in the getting of this affidavit, if necessary. A. All he said to me was that I could stay two, or three, or four days." It appears that Garcia did not go to Lamy, or take any steps to procure the signature of the witness to the affidavit, and that on a subsequent day he was called to the office of respondent; and he says, "Mr. Catron asked me where the paper [affidavit] was. I told him that Messrs. Cunningham and Crist had it. Then he asked me if I had promised to state anything in court. I told him I had not." Two or three days before the witness testified, he says he was again sent for, and went to the office of respondent, and learned that he was at the hospital at dinner; and an employé in the office took him there, and that respondent "said to me, what was I going to testify in the court? If I wasn't going to state that I had promised the affidavit of Porfilla; if I didn't state to him that I would go and see Porfilla and get her to sign that? I told him yes. Then he said, 'You be careful of what you are stating before Gus.'" "Q. What did Mr. Catron say to you when he first came into the parlor? A. I am not sure what he said to me first; but he said, 'Is it not true that you promised me Porfilla's affidavit or oath? That is what he said,—and if I was going to testify to that? And I told him yes. Q. State whether or not it was true that you had promised Mr. Catron Porfilla's affidavit. A. Never. Q. State why you made the statement which you have just made, to Mr. Catron. A. In order not to delay any longer there. \* \* \*

Q. State whether or not, prior to the time that you went into Mr. Catron's office, when you went to get that affidavit, and since the trial of the Borrego case, you had any conversation with Porfilla Martinez de Strong in regard to her testimony. A. No, sir. Q. State whether or not you had had any conversation with Mr. Catron, in regard to the testimony of Porfilla Martinez de Strong, prior to the time he called you into his office and wanted you to get Porfilla to sign that affidavit. A. I have had no more conversation than what I have stated." This witness seems to be a young man of excellent reputation, and his testimony is uncontradicted in every particular, except by the respondent, and he testified that he and his father are close personal and political friends of the respondent. In reply and explanation to this testimony, the respondent

testifies as follows, to wit: "The father of Roman Garcia and some other gentleman—I don't remember now who—came to me, and informed me that this woman had been induced, as they understood, to change her testimony, by a promise to release her from jail, and stated that she had been brought back at the time she came back and was cross-examined,—that she had been brought back on a warrant for a violation of a city ordinance, and that she had been released from jail on a promise that if she would give testimony they would not enforce that warrant against her, and that she was willing, as they said, to make an affidavit to that effect, and also to a contrary effect of what she had testified to before the examination, wherein it differed from the other examinations. They suggested to me that if I prepared an affidavit to that effect they could send it down and have it signed. I prepared an affidavit to that effect, a copy of which, the original of which I dictated to Mr. Gortner. I saw it in the newspaper. I don't know whether it has been offered in evidence yet or not. I prepared that. Then Mr. Garcia said his son would go down and get it signed, as he was acquainted with her. I told him to come with his son to receive the copy of the affidavit. He came there in person, and I delivered the affidavit to his son, in his presence, stating to the son to explain this affidavit to this woman,—translate it into Spanish (he said he understood English well enough to do so),—so that she could thoroughly understand it. If she said it was true, to have her sign it. If she said it was not true, 'don't get it signed, but bring it back to me.' He said he had no means of paying expenses, and that the woman might be away from Cerrillos, and I gave him five dollars to pay his expenses while he was gone to get that affidavit. I expressly said to him that he must not offer her any inducement in the world, nor make any promises to her, and that the affidavit must be entirely voluntarily given, and what she said must be true, and that no influence, no efforts, and no promises must be used to get her to make the affidavit."

The third specification relates to the testimony of one Max Knott, who gave very positive and important testimony against the defendants in the Borrego case, on the preliminary hearing, before Judge Seeds. On this hearing, this witness gave strong and damaging evidence, which tended directly to connect the defendants with the killing of said Chavez,—that he had seen and recognized some of the defendants going in the direction of the place of the homicide, only about half an hour or so before the time it occurred; and he was consequently regarded as a most important witness for the prosecution, especially as he appeared, in the preliminary examination, to be an honest and disinterested witness. Just prior to the trial on the indictment, he suddenly

became very reticent, and talked with much reluctance to the prosecuting attorney about the facts he had previously testified to, and on the witness stand at the trial his memory finally slipped from under him, and his testimony became valueless to the prosecution. It was then discovered that the respondent had procured a pass for him over the railroad from Santa Fé to Gallup and return, and the following letter, after many efforts by the prosecution to obtain it, was offered to sustain the charges by the prosecution: "Santa Fé, New Mexico, May 10, 1895. Hon. C. N. Sterry—Dear Sir: I am compelled to either go or send an agent out to Gallup, on some business of my own. I am tied up at present in the trial of the alleged Francisco Chavez murder case and cannot get off, while the business I have out there is urgent, and I must send an agent to represent me. Will you kindly do me the favor to send me a pass for Max Knodt from Albuquerque to Gallup and return, good for 30 days? I will deem this a favor, which I will be glad at some time to reciprocate. Very truly, &c., T. B. Catron, Atty. for S. P. R. R. Co. Hon. C. N. Sterry, Genl. Counsel, Albuquerque, N. M." The respondent gives the following explanation of his connection with this matter, to wit: "Q. State whether or not the procurement of the pass for him has any reference to the trial of the Borregos. A. None in the world. Mr. Knodt came to me, and stated that he wanted to go to Fort Wingate to see a girl who had formerly been in my employ, with whom he had got acquainted while she was living in my house (she was cooking for me), and asked me if I could not procure him a pass. I informed him that for such a purpose as that I did not think I could secure him any, and I said, 'I have some business which will call me to Gallup, and if you can possibly attend to it,—it is to get some papers from a party in Gallup to whom I had been writing,—and if you will go on and attend to that for me, I can represent that you are going on business for me, as I will have to go myself otherwise; I can't get it on that ground for you.' He said he would be willing to go on and attend to it, so I wrote a letter to Capt. Sterry asking a pass for him stating that I wanted him to go to Gallup and attend to some business for me. I didn't hear from that letter at all. That letter was written some time in May,—I think the 10th of May. I didn't hear from the letter until some time in June, when I received a letter from Mr. Sterry stating that he had been absent from Albuquerque when my letter came, and asking me whether I still desired him to send the pass, and I answered the letter which has been given in evidence, I think dated June 4th, and after that the pass was sent to me, and turned over to Max Knodt. There was only one pass obtained." This is indeed a most remarkable coincident,—that this man's memory should

remain so perfect and retentive at the preliminary hearing, which occurred nearly two years after the homicide, and then in a little more than a year after that hearing, and after it had been refreshed by a rigid cross-examination under oath, it should fail him, and that, too, at just about the time when respondent says witness applied to him for his influence to assist him in securing the pass, and who was one of the attorneys who cross-examined him in the preliminary hearing. That this witness was "tampered" with there cannot be a shadow of a doubt. But it is not here contended that respondent did it, because he swears positively that he did not, but as to whether it was done with his advice, knowledge, or consent the record does not disclose. But the idea that respondent constituted Max Knodt, at that particular time and under the peculiar circumstances, his authorized agent to go to Gallup and "get some papers from a party" there, which he said he had been unable to obtain through correspondence (but which it appears he did obtain in that manner), is a subterfuge of the most transparent character; and it is but due respondent to say that he has too much respect for this court to expect it to give one minute's serious consideration to such a statement; else why did he fail to show authority in Knodt to receive "the papers," why did he fail to give the name of "the party at Gallup"? These matters could have been shown, if the statement was true about the agency. He was simply driven, for an explanation of the "pass transaction," to the old maxim that "necessity is the mother of invention."

The fourth specification charges, in effect, that the respondent offered one Rosalia Gonzales y Baca money, and otherwise tried to induce her to secure of her two sons Luis and Mauricio Gonzales affidavits which, in effect, would destroy their testimony in the then approaching trial of the Borrego case, on the indictment; both said Luis and Mauricio being very important and material witnesses for the prosecution in that case, and the said Luis having testified at the preliminary hearing, and said Mauricio being subpoenaed, but not called as a witness. That part of the testimony of this woman pertinent is as follows, to wit: "Q. Just tell what happened. A. I was going to church, when he [respondent] knocked at the window, and motioned this way, and told me to come upstairs. I went upstairs, where he was, and he inquired of me what I was doing with reference to the record or pension of my husband. I told him I was making an effort to get the reward, and would pay him the money when that came. He said no, that all he wanted was that Luis and Mauricio should come and make a declaration in favor of the Gonzales y Borregos. I told him that I didn't command my children. I told him that I would not meddle in my sons' affairs; that I didn't

command them. Then he told me not to say anything to Luis or Mauricio. Then he said to me that he could give me money if I desired; that he could aid me whenever I was in need, if I so desired. That is what he said to me." The respondent's testimony on that point is as follows, to wit: "Q. If you had any interview with her in your office in connection with any other business, state the particulars of it. A. I had an interview in my office with her, two of them. She came up to my office with her son Catalino, and represented that her husband had been a soldier during the war, and she had made application for a pension. Mr. Read, she said, was her agent and attorney, and would like for me to aid her so far as I could, as delegate to congress. I interrogated her as to her husband's being connected with the army. I knew her husband, had known him during his lifetime, and as far as I could get from her the character of pension she had applied for, judging from what she said, it was under the dependent pension act. I said to her, 'I will write a letter to the commissioner of pensions.' She said the application had been made a long time, and was being delayed, and that she could not hear from him, but she would like for me to write and hurry it up as soon as possible." And says he did not in any way attempt to induce her to secure the affidavits of her two sons Luis and Mauricio in favor of the Borregos.

The fifth and last specification is to the effect that the respondent offered said Mauricio Gonzales money, and otherwise attempted to induce him to make an affidavit that he was not at or near the place of the killing of said Chavez, during the night that the homicide occurred. To sustain this charge, the said Mauricio was offered as a witness, and he first testified, in substance, to the effect that he was called to the office of respondent, and there offered money and otherwise induced to make such an affidavit, as alleged, but that he had declined to do so. The respondent then offered in evidence, for the purpose of contradiction, and to destroy the testimony of the witnesses, the following affidavit, to wit: "Territory of New Mexico, County of Santa Fé. Mauricio Gonzales, being first duly sworn, upon his oath says that he is twenty-three years of age; that he is a resident of Santa Fé county, and has been all his life; that he is a brother of Luis Gonzales, also a resident of said county of Santa Fé, and that he remembers the night on which the late Francisco Chavez was shot and killed, at or near the Guadalupe bridge, said Francisco Chavez being the same man who had formerly been sheriff of Santa Fé county; that on that night he came from his house to the plaza of Santa Fé, about six o'clock, when he returned to his home, being a house of the same Francisco Chavez, on the north side of the Santa Fé river, near the house of Mr. Schormeyer, and in the

same square or block with the house of Mr. Schormeyer, and remained there the whole of the night, and did not further go out. He further states that at no time on the night when Francisco Chavez was killed did he cross the Guadalupe bridge with his brother Luis; that he was not on the Guadalupe bridge during the whole of that night, or nearer to it than two hundred yards or more; that he did not hear any shots fired, nor was he where he could see, nor did he see, any persons at or near the south end of the Guadalupe bridge, armed or otherwise, nor did he go by such place, any time during the night, with his brother Luis; that if his said brother Luis has stated that he was with him on that night at any time, or that he crossed that bridge with him, or that they saw any men standing near the south end of the bridge, or that any shots were fired in the presence or hearing of affiant, at or near said bridge, he is entirely mistaken, as affiant was nowhere near that place at any time during that night; nor was he at any time during that night in company with his brother Luis; and that he never at any time saw any of the defendants, Francisco Gonzales y Borrego, Antonio Gonzales y Borrego, Patricio Valencia, or Lauriano Alarid, at or near the south end of said bridge, standing there, either on a level with the bridge, or down on either side of it; that he never at any time heard any shots fired at or near said bridge, and never at any time crossed said bridge with his brother in the nighttime; that he knows nothing whatever about the killing of Francisco Chavez, or who was connected with the killing; nor does he know of any fact which casts suspicion upon anyone as to who killed said Francisco Chavez, or as to what the facts of his killing were. Affiant further states that he makes this affidavit freely and voluntarily, and without any threats or compulsion whatever, and without any reward or offer of reward or hope of reward for the same; that he does it without any consideration whatever, and uninfluenced by anything except a desire to

tell the truth. Mauricio <sup>his</sup> X Gonzales. Sub-  
mark

scribed and sworn to before me, this 1st day of October, A. D. 1895. William E. Griffin, Notary Public. [Seal.] Witnesses to signature: Clarence Key, R. G. Gortner." The witness in the afternoon returned into court, and asked leave to again go upon the stand for the purpose of correcting his testimony given by him in the forenoon, and was then permitted to so do; and stated that he so returned of his own volition, and without advice from anyone, and on being shown the affidavit admitted that he did sign and swear to it. He then stated that, when he was called to the office of respondent, the respondent directed his clerk to prepare a paper of some kind, as he understood him to say, and to have witness sign and swear to it; that the respondent then left the office, and

witness remained until the same was prepared and presented to him; that he signed it, but that it was not read to him in Spanish, and that he (witness) understood very little or no English, and that he did not understand the purport and contents of the same. Respondent replied to this as follows, to wit: "I had been absent from Santa Fé, just prior to the 1st day of October, some days, and I came to the office on the morning of the 1st of October, and Gus O'Brien, who is the office boy for me, informed me that this Mauricio Gonzales had been at the office two or three times, stating that he wanted to make an affidavit that Luis Gonzales' testimony was false, as he gave it on the preliminary examination. I said to him, 'If he wants to make it, all right,' and he said that Mauricio wanted to see me to get me to draw it up. I told him if he saw him to tell him to come up, and I would talk with him about it. A short time afterwards, during the day, he came up with O'Brien, and O'Brien said, 'There is Mauricio,' and that he wanted to talk with me about the testimony of Luis Gonzales. I asked him what he wanted to say, and asked him several questions, and he gave me the facts as set out in that affidavit, and he stated that he wanted to make an affidavit as to those facts, and asked me to write it out for him. I wrote it in pencil, and handed it over to Mr. Gortner, my stenographer, and asked him to have it typewritten, and I said, 'When you have it written, have Mr. Key to translate it to him in Spanish, and get some one to swear him to it, if he says it is true, and wants to swear to it.' I was not there when he swore to it, and was not there when it was translated to him. That is all that occurred while I was there. I went out of the office, and when I came back into the office they told me it had been translated to him, and that he had sworn to it, and showed it to me."

This woman Rosalia Gonzales y Baca, it appears from the record, had three sons, Catalino, Luis, and Mauricio, all of whom were subpoenaed as witnesses for the prosecution at the preliminary examination, and at which Catalino and Luis testified to very damaging facts against the defendants, but to a different state of facts which occurred at different times and places, but Mauricio was not called, because it appeared in this proceeding that he, at the time of the preliminary examination, was going on, was arrested by the city marshal, brother of one of the defendants, charged with having a deadly weapon on his person, and was confined in the city jail, was fined, appealed to the district court, where he was again found guilty, and sentenced to serve his sentence in the jail, and was so confined and serving out his sentence when the Borrego case was tried on the indictment. To show the importance of the testimony of said Luis, the following is taken from the testimony of respondent, on cross-examination in this case, to wit: "Q. Mr. Catron, on

the trial of this Borrego case, this man Luis Gonzales was the most important witness for the territory, wasn't he? A. I think not. Q. Wasn't he the only witness introduced by the territory on the trial of the case who testified that he saw these defendants near the place,—near the bridge where the shots were fired,—and that he heard the shots? A. No. Q. What other witness so testified? A. Francisco Rivera, in my opinion, was a much more important witness for the territory. Francisco Rivera didn't say he saw the shots, but that he saw the defendants at that place. He testified that he saw the defendants there about half an hour before he heard the shots, something like that. This man Luis Gonzales testified on both trials that he was within comparatively a short distance from the bridge, when the shots were fired, and heard them. Q. Was there any other witness on that case that gave direct, positive evidence, so as to prove their presence, and identify them with the shots? A. I think Rivera gave better testimony than he did, as to identifying the parties. There were other people that testified as to the shots, fully as well as Luis Gonzales. There was no witness that testified as to both facts. Q. Luis Gonzales testified as to both facts, didn't he? A. Yes. Q. And he put the defendants closer, in point of time, to the shots, to the place where the shots were fired, than any other witness? A. I don't know that I understand you. He put himself closer, in point of time of firing the shots, than Francisco Rivera did, but there was some other witnesses that saw the shots fired, and were fully as close as he was. I think a man named Hogle was one. Q. This witness didn't see the defendants? A. No, he didn't pretend to. Q. The testimony of Luis Gonzales was that they (Luis and his brother Mauricio) saw the defendants, and passed on some five or six hundred feet, and saw the shots? A. Something of that kind. Q. And that he spoke to one of the defendants, Hipolito Vigil, the one that was killed, one of the accused, at the end of the bridge, as he came across? A. He said he spoke to Hipolito at a little acequia. Q. Close to the place? A. A short distance from them. Q. The evidence on the part of the territory tended to show that the shots were actually fired by the two Borregos and Hipolito Vigil? A. There was some testimony to that effect. There was no evidence that I remember, on the part of the territory, that limited it in that way. The evidence, so far as I remember, tended to show that the parties who were standing near the end of the bridge, the two Borregos, Hipolito Vigil, Chino Alarid, and Patricio Valencia. It was in evidence that Chino Alarid had gone down town at the time the shots were fired. The evidence of these men that pretended they saw him there was some evidence that he had gone down town. The testimony as to his presence there was that he had seen him there about half an hour before,

—the testimony of Luis Gonzales that he had seen him there. My recollection is that he said,—the testimony was, I think, he said,—he saw about five of them there. I don't pretend to remember all that testimony minutely. That is all. Q. Is it not a fact that Patricio Valencia wanted to get a severance,—to have a separate trial? A. Yes, his father stated he did. Q. Didn't you oppose that? Hadn't he already employed Ben Read to defend him? A. I don't know. Q. Didn't you object to Mr. Read's being associated with you in the trial? A. Mr. Read suggested that some of these defendants wanted to employ him, but I suggested that if they had any money they had better give it to me. Q. Did you defend the defendants without compensation? A. Yes, I have a promise of compensation; but I defended them without any." It will be seen from this that the influence of this woman, the mother of three important witnesses, who either had given or was known to be in possession of material and damaging testimony against the accused, was a matter of vital and important consideration to the defendants and their counsel; and it may be construed as strong corroborative circumstances to strengthen the testimony of the woman Rosalia Gonzales y Baca.

The court hearing this case sat as a jury, saw the witnesses, heard them testify, and observed their manner and conduct while upon the stand, and, as a jury, passed upon and considered all the facts and circumstances as they developed before the court. And in recording this dissenting opinion, as the dissent must largely rest upon the facts, I have endeavored faithfully to extract and incorporate into this opinion only such parts of the testimony as will give a fair and impartial understanding of the case, and of all the surrounding facts and circumstances influencing it, in so far as it is thought proper, without becoming too unreasonably prolix, and to show, in so far as possible, in a calm and dispassionate manner, reasons for refusing to concur with the majority of the court. It is admitted in the majority opinion of the court "that if we are to credit the whole of the testimony of the witness Nowell, then this part of the charge is established, as Nowell states that the respondent, Catron, came to the penitentiary and had a talk with him, in which the respondent, Catron, told him, the witness, in substance, that he, Catron, did not want him, the witness, to testify as he had done before. \* \* \*" It is true that the respondent testified that he went there for the purpose of ascertaining from the witness which of the statements were true,—the one his partner, Spless, told him the witness had made, or the one he swore to on the preliminary examination; but do his own statements sustain this position, or his purpose? I think not. Nowell swears that respondent told him, "Answer the questions as I told you, and decline to answer the others," and,

"Now if you go on and testify in this case, you will be indicted for perjury, because these Borregos are liable to come clear, and then they will get you for perjury;" and again he testified that respondent "told me if I answered these questions different from what I did before they would get me for perjury. He says, 'You do as I tell you, and you will not be indicted for perjury.'" Neither of these statements are in terms denied by the respondent. He bases his denial entirely on the ground that the testimony previously given was false, "as he understood it,"—and this, too, after the witness says he told respondent that he had told the truth. Respondent offered to defend witness if he got into trouble, and this is not denied, and the whole burden of the examination of respondent's counsel was to the effect that witness should on the approaching trial testify to the truth as he (respondent) "understood it." The only real and substantial and pointed contradiction is that witness says he told respondent that he had testified to nothing but the truth, while respondent swears that witness told him just the contrary. There are many other facts and circumstances corroborating Nowell, which will hereafter be discussed.

The testimony shows that the witness Porfilia Martinez de Strong, or what she would swear to, was first brought to the attention of respondent by Charles M. Conklin, who was, at the time of the killing, and for some time thereafter, the sheriff of the county, and that he caused the witness to be brought to Santa Fé for the preliminary hearing, and took her to his private house, and there kept her, and, she swears, told her what she must swear to at that examination. Then she was brought again to Santa Fé, in the nighttime, under arrest, as she states, by one Thayer, taken directly to a private office of respondent, kept there the remainder of the night, all the next day, except while being examined in chief, and until nighttime, and her meals brought to her by said Thayer, when she was put into a carriage and sent to the train, and sent back to her home at Lamy,—and all at the cost and expense of respondent; that a day or two thereafter she voluntarily returned, sought the district attorney, and requested to be recalled that she might retract her testimony given at the preliminary hearing and at the trial; that, pending these charges, respondent prepared a long affidavit contradicting all she had said on her cross-examination, employed the son of a close personal and political friend of his, gave him the necessary funds, and directed him to go to her house at Lamy and secure her signature to it; that this witness is very ignorant, understands little or no English, can neither read nor write her own language, a widow, the mother of children, very poor, friendless, and possessed of a bad moral reputation. With reference to the testimony of Rosalia

Gonzales y Baca, it is corroborated only to this extent; that it is shown that her three sons were all very important witnesses for the prosecution; and while her testimony alone could not stand as against that of the respondent, yet it is shown that respondent did procure the affidavit of her son Mauricio, and that, too, to the exact purpose and effect that his mother swears that she was asked to do; and in one of the charges against the respondent Spiess, tried as a part of this case, the said Luis testified positively that respondent Spiess had him called to the office, and wrote out a bank check for \$10, and offered it to him if he would make an affidavit similar to that made by Mauricio, and that the whole transaction was in the presence of Gus O'Brien. Mr. Spiess positively contradicts this by his testimony, but he failed to put O'Brien on the stand to corroborate his testimony and contradict that of Luis, which would have been an easy matter, and a very strong and proper thing to have done.

In order to understand more clearly the important facts these witnesses testified to on the preliminary hearing, I will state them briefly. Nowell testified that he saw the two Borregos about 600 feet from, and going in the direction of, the place of the killing, about three-quarters of an hour before the killing occurred, and that he again saw them going in a direction from the place, about a quarter of a mile distant from the place, about half an hour after the killing, and that he saw and recognized them. Max Knodt testified that he saw and recognized the said Francisco, with two others, filling completely the description of said Antonio and said Alarid, about 300 yards from, and going in the direction of, the place, about three-quarters of an hour before the killing occurred. Luis Gonzales testified that he and his brother, Mauricio Gonzales, crossed the said bridge a few minutes before the killing occurred, and just beyond it, a few steps, saw, recognized, and spoke to said Hipolito Vigil, and saw with him another man, and that he and his brother passed on about 200 yards further south, stopped, and heard the fatal shots fired, and saw the flash from the guns. The witness Porfilla Martinez de Strong testified that Luis Gonzales lived, at that time, in the same house with her and her husband, who was then alive, and that, at the very time of the killing, the said Luis was in bed in an adjoining room to her, and that a man came and rapped on the door, and that she saw said Luis get up and answer the call, in his night clothes, and heard the man on the outside tell him that "Chavez had been killed on the bridge." The testimony of the witnesses Nowell, Knodt, and Luis and Mauricio Gonzales completely destroyed the alibi, as set up by the defendants; and if this evidence was untrue, or if the jury had disbelieved them, and believed the testimony offered to impeach their moral

characters and their standing for truth and veracity, then the alibi would have been sustained, and the defendants acquitted, because these were the only witnesses who testified that they saw the defendants within the locality of the place of the killing at any time within three hours of the time it took place, except Francisco Rivera. But his testimony, standing alone, would hardly have warranted a verdict of guilty, because it was shown that he was, to some extent, an accessory before the fact to the conspiracy to commit the crime. It is but natural, then, that the defendants and their counsel would be very much interested in these witnesses and their testimony; and it clearly shows the motives for obtaining affidavits from all of them that it was possible, and for the efforts used to break down and destroy the others by impeachment and otherwise.

But it is contended by counsel for the respondent that all these witnesses are of bad moral character, and that their standing for truth and veracity is bad, and that they are unworthy of belief; and the majority of the court has sustained that view of the case. To sustain this contention, respondent offered a number of witnesses, who testified that Nowell was a man of bad moral character, because he had been indicted and convicted of adultery, and that his standing for truth and veracity was bad, and that they would not believe him on oath. Almost to a man, these witnesses were strong partisans, and favor seekers of the respondent, and were unable to show that Nowell had ever been charged with a violation of the law, though a resident of this county for a number of years, except in the adultery "incident," and that because he was a hack driver, and sometimes drank too much whiskey; and the only reason they could give why he was unworthy of belief was because they would not believe him. The prosecution offered about the same number of equally respectable witnesses, who testified that they had known him for a number of years, and never heard of his violating the law, except in the adultery "incident," that his standing for truth and veracity was good, and that they would believe him on oath. Respondent offered a number of witnesses who testified that the woman, Porfilla Martinez de Strong, and the old woman, Rosalia Gonzales y Baca, were women of bad moral character, unworthy of belief, and that they would not believe them under oath, and that the old woman, Rosalia Gonzales y Baca, was generally a very bad woman, and a "procuress," whatever that term may imply. Respondent also offered witnesses who testified that Luis Gonzales and his brother Mauricio were of bad moral character, and that their standing in the community for truth and veracity was bad, and that the witnesses would not believe them on oath.

If these witnesses were all ex-convicts, petty thieves, liars, prostitutes, and "procuresses," and unworthy of belief, why was respondent so solicitous about their testimony? Why did he go to the penitentiary, and seek the private interview with the convict, and say to him: "Now, if you go, and testify in this case, you will be indicted for perjury, because these Borrego's are liable to come clear, and then they will get you for perjury. \* \* \* I will defend you. I will protect you." Why did he advise Otero by wire that the service of subpoena in Colorado was void? Why did his confidential agents and friends make a trip to Colorado for the purpose of suppressing Nowell's testimony, by attempting to spirit him out of the jurisdiction of the court? Why did he secure the affidavit of Mauricio Gonzales, for the purpose of destroying his testimony on the trial? Why did he have his agent bring one of these prostitutes to his private office in the nighttime, furnish her bed and meals, and keep her there in his private office 24 hours, all with his knowledge and consent, and where, she swears, Thayer kept her locked in and guarded her all the time, and all at his expense? Why did he make such efforts to secure her affidavit, through Ramon Garcia, and that, too, pending this investigation? If these people were so unworthy of belief, as his witnesses swore they were, what had he to fear from such characters? What use had he for their testimony, if he regarded them as so untruthful? One of the strongest tests of innocence is open, frank, and fearless conduct of an accused, and his willingness to meet any and all of his accusers face to face. It is true the respondent urged a speedy hearing of this case, and, when the time was fixed for the hearing, he loaned a new-made friend \$50 as "a business accommodation," who immediately proceeded to Colorado, sought an interview with the ex-convict, persuaded him not to obey the process of the court, urged him to go to Texas, and told him he would "get the worst of it" if he came,—that they had "all the other witnesses fixed." The moral characters of these witnesses may be, and no doubt are, not what they should be, and they may be unworthy of belief. But, are the facts they testified to unworthy of belief in this case? Judge Seeds believed them on the preliminary examination, and held defendants without bail. A jury believed these witnesses when they made a statement of the same facts, and that, too, as against the testimony of this respondent, respondent Spless, and a number of other highly respectable citizens, who swore that they would not believe them under oath. A judge sustained the jury in the finding of the verdict, and pronounced sentence of death on the defendants. And, from all the evidence taken together, with all the surrounding circumstances in this case, I

believe they told substantially the truth. A witness may be guilty of all the most heinous crimes known, and he may be indicted, go into court, confess his crime, with the promise of immunity from punishment, and become a witness against his co-criminals; and on his testimony, corroborated by circumstantial evidence only, a verdict of conviction be sustained. Any witness may testify to the truth in any particular case, but all witnesses do not testify to the truth in all cases. Then, the question is, did these witnesses testify to the truth, substantially, in this particular case?

I understand the rule to be that, where a witness knowingly and willfully testifies falsely to material facts, his testimony may be disregarded in toto, unless corroborated by other legal evidence, and that this rule applies whether the witness has a good moral character, and stands well for truth and veracity, or not. I believe that a court, sitting as a jury, is guided and controlled, in considering and passing on the facts brought out by the evidence, by the same rules of law which a court gives for the guidance of the jury in a similar case, when similar facts are shown before the jury; and I think that that rule is general, and should have been applied in this case, in the same manner that it was applied to the same witnesses to like facts in the Borrego case and other similar cases, and in accordance with the practice prevailing in this jurisdiction. Respectable people do not become witnesses to assassinations by lying in wait; nor do the assassins, as a rule, associate thereafter with respectable people, but they usually associate and converse with just the class of people that these witnesses do, and they find out, expose, and bring to light these crimes, and on their evidence guilty parties are convicted, as in the Borrego case. People whose moral character and standing for truth and veracity are unimpeachable do not, as a rule, frequent the haunts of the prostitute, "procuress," and petty thief, the very homes and comforters of crime; and if criminals shall go unwhipped of justice until reputable citizens can be found by whose testimony they may be convicted, then the law of the vigilante must be invoked, and the laws established by the wisdom and experience of the past for the protection of life, liberty, and the pursuit of happiness must be abandoned.

It is not contended that all of these witnesses possessed good moral characters, nor is it contended that the standing in the community of all of them for truth and veracity is unimpeachable. Were such the facts, in all probability they would never have been witnesses in the Borrego case, and therefore not in this case. Let us see who they are, and what are their vocations in life, as shown by this record. Nowell is a very poor man, with very little educa-



tion, and what is known in this country as a "frontiersman," all his life, and a hackman by occupation; but there is not a word or intimation in the record here, or in the Borrego case, that he is a dishonest man, or that he has ever been guilty of a dishonorable or dishonest act in his life, except in reference to the adultery case. Knott is a poor man and a foreigner, with little education, speaks very little English, very poor Spanish, and very bad German (as shown by the difficulty the interpreter had in rendering his German into English), and a butcher by trade. Porfilia Martinez de Strong is very poor, a widow, the mother of several children, unable to read or write even in her own language, and speaks very little English, of a questionable reputation, an outcast on the world, and absolutely friendless. Rosalia Gonzales y Baca is a very old, ignorant woman, in the extreme straits of poverty and distress, and denominated by some of the impeaching witnesses a "procuress." Luis and Mauricio Gonzales are both ignorant, possessed of a certain degree of cunning, but of idle and dissolute characters, without any designated occupation. Every person at all acquainted with the history of crime knows that this is just the class of people who become cognizant of the commission of crime, and expose and furnish testimony for its detection and punishment. Upon such people's testimony, the better and law-abiding classes, the courts, juries, and the administrators of the law, must rely for the enforcement of the laws, and the suppression of crime. Without the testimony of this class of people, the law would fail of vindication, and the majority of criminals would go unpunished. And it is equally as well known, too, that this class of people are sought out as proper subjects for subornation of perjury. It is unreasonable to suppose that reputable people who happen to be witnesses are approachable by the opposing side of a case; and the presumption indulged in by the court in this case, that because good citizens testify that witnesses are unworthy of belief generally, that therefore their testimony is false, is erroneous, unless it is shown by circumstantial evidence, or by disinterested witnesses, that the facts testified to by them were improbable. But such is not the fact here.

It is shown that the interviews between respondent and the witnesses Rosalia Gonzales y Baca, Mauricio Gonzales, Porfilia Martinez de Strong, and Ramon Garcia were all had in the presence of other people; but they were not introduced to support and corroborate respondent, and no reason was shown why they were not. It is also admitted, in the opinion of the court, that "testimony has been offered which, if accepted as credible, tends to the establishment of these charges," and the dismissal is based alone on the denial by the respondent,

and because other witnesses testified that they would not believe the witnesses who gave the "testimony tending to the establishment of the charges." But it is not contended that any evidence was offered, except that of the respondent, which in any manner tended to contradict any facts testified to by these witnesses in this case. There are, however, pointed contradictions to many important facts, as between the prosecuting witnesses and the respondent. The motive to suppress and destroy the testimony of these witnesses, in the Borrego case and in this case, is clearly shown; and the interest of the respondent in the result of this case was great, and important to him, while it does not appear that they had any interest whatever in the result of this case; and, according to the elementary rules of the law of evidence, every legal intendment and presumption is in favor of the truthfulness of the testimony of these witnesses. The jury are required to pass on the truth or falsity of the facts testified to before them, and not on the personel of the witnesses. The matters of moral character, and the standing for truth and veracity of the witnesses, are only incidental matters for the jury to consider. These five or six witnesses testified, each, to separate and disconnected facts, which, it is alleged, occurred at different and distinct times and places. No motive, reason, or conspiracy is either alleged or shown, as an inducement why they should have so testified, either at the preliminary hearing, or on the final trial, or at this investigation. They each separately testified to substantially the same state of facts on each particular occasion, covering a period of some 18 months. It is not contended that one single cause usually assigned as a reason for the giving of false testimony by witnesses was shown or existed in this case; and it was perfectly apparent to the court, from observation of these witnesses, their conduct upon the stand, and their manner while testifying, that they are wholly incompetent, from want of education, natural ability, and experience, to fabricate the facts so testified to by them. Nor is it shown or contended that any malice or ill-will, on the part of any of them, existed towards the respondent; but, on the contrary, it is shown that at least one of them, who testified to very damaging facts, was a very warm personal and political friend of respondent. Nor is it contended or shown that any illegal or improper influences were brought to bear on any of them by the prosecution, or by any one else, as a reason for their so testifying; while, on the contrary, it is shown that many efforts were made, by and on behalf of respondent and his friends, to intimidate and suppress the testimony of at least some of them, and their testimony stands uncontradicted by that of any disinterested witnesses. There-

fore, the presumption is that these witnesses testified, in substance, to the truth, and to presume that they testified falsely, under such circumstances, it seems to me, is a clear disregard of the most elementary rules of evidence, established by reason and experience for the guidance of courts and juries in the administration of justice from time immemorial, and is contrary to the deduction of the truth by the process of ascertaining one fact from the existence of another. That is, in this case respondent did obtain one affidavit, and did attempt to obtain another, for the purpose of suppressing or destroying the testimony of these witnesses, and did render valuable assistance to the witness Knodt, and did interview other witnesses; and the jury would be presumed to reason that, it being shown, beyond a reasonable doubt, that respondent did attempt to suppress or destroy the testimony of two or three of the witnesses, and did interview the others, therefore the testimony of such witnesses is true, unless controverted by other disinterested testimony, and nothing of that nature appears in this record. To hold that such testimony, under such circumstances, is unworthy of belief, simply because the moral characters and standing for truth and veracity of some of the witnesses are impeachable, is to destroy the most fruitful source of testimony for the detection and suppression of crime, and to break away the barriers, and open wide the gates to the criminal classes, and to subject the lives, liberties, and property of the weak and law-abiding to the will of the strong and vicious.

It is held, in the opinion of the court, "that these charges are five in number. Each stands for itself, a separate and distinct charge, as a separate and distinct act, alleged to have been done at separate and distinct times, with separate and distinct individuals." The charge is, in substance, that respondent was guilty of unprofessional conduct as a lawyer in the defense of the Borrego case; and it is one, and only one, charge, with five separate and distinct specifications. These specifications set out in detail the manner in which the unprofessional conduct is alleged to have occurred, and the testimony offered should be directed and applied to the gist of the charge, which is unprofessional conduct during the progress of the Borrego trial; and testimony offered in support of any one or more of the specifications goes to support the charge, and not to establish a separate and distinct offense, as stated in each separate specification. It can hardly be presumed that the committee would have attempted to establish so serious a charge on the testimony of any one witness to any one of the specifications; nor should it be presumed that this court would have spent its time hearing a charge against a lawyer based simply on the testimony of any one of these witnesses. Such a course would subject both

the committee and the court to the criticism of frivolity. The same rule that applies in other cases should apply in this, and that is, that all the evidence, both direct and circumstantial, must be taken and considered together. It is an elementary principle that a trial court must instruct the jury to take and consider together all the evidence before them, and render a verdict accordingly. The rule attempted to be established by the court is unfair to the respondent, because it might be held that the proof was sufficient to establish the allegations in one of the specifications, yet if the allegations in the remaining four specifications were satisfactorily explained away, the court would hardly be warranted in entering an order of disbarment, on the principle, "*De minimis non curat lex*." The principle that the testimony of any one of the witnesses might have been insufficient to sustain the charge, but when all the testimony of all the witnesses, with all the circumstantial evidence offered, is taken together, is sufficient, is well illustrated by the old fable that a bundle of sticks is stronger than any single stick, and this was the principle pursued by respondent; that is, that while his testimony alone was not strong enough to overcome the combined strength of all the testimony for the prosecution, he therefore offered other witnesses to destroy and break the strength of the prosecution's evidence.

The opinion also states: "Prominent citizens of this community, officials in high standing, prominent members of the bar, reputable business men, in large numbers, have come upon the stand, and have testified, without qualifications, that they would not believe these witnesses under oath, in consequence of their character, their reputation, and their standing in this community." If I believed this statement from the evidence in this case, and if I had the power, I would grant those four defendants a new trial, just as soon as I could sign my name to the order, I believe the law protects, with its mantle of mercy, alike, the rich and the poor, the high and the low; and those four men now awaiting in solemn solitude, under the pall of the death sentence, pronounced by the same learned and honored judge who uttered the above strong and cutting sentences, are just as much entitled to their lives as the respondent is to practice law at this bar. Their lives and their liberties are just as sweet, dear, and valuable, to them and their loved ones, as the honor, profits, and emoluments are to the respondent as a lawyer. If this testimony against them in that case was found sufficient, to the exclusion of all reasonable doubt, to convince a jury of 12 good and lawful citizens of the guilt of the accused, and the judge concurred in that view, why is it not sufficient to sustain these charges? Without their testimony, the verdict certainly would not stand.

It was contended by respondent, as an ex-

cuse for sending out for his witnesses, friends of the defendants, that he could not trust the officers of the court to subpoena them in the regular way, and it seems to be the view of the court also; but there is not a word (except in the testimony of the respondent) in the record to show that the officers were not as faithful in their duties to defendants as to the prosecution. The committee offered in open court to connect respondent with the authorship of an article in a newspaper containing severe strictures on this court with regard to the conduct of this case; but respondent's counsel vehemently opposed its introduction, and the court ruled it out. Why was this done, if respondent was innocent, and courted a fair, full, and honest investigation? The respondent stands before the court, not as an ordinary person. He is learned in the law, and is far in advance of the ordinary lawyer in the practice of the profession; and in such matters he well knows that "his conduct is attributable to his supposed knowledge that the truth would militate against him." The suppression or fabrication of evidence always raises a presumption against the accused, in matters of fact before a jury, and the rule, "*Omnia præsumentur contra spoliatores*," applies here with great force. 1 Greenl. Ev. 37.

The opinion of the court states that "the uncontradicted record shows Nowell to have been a penitentiary convict, indicted, tried, and convicted of a felony, and sentenced to imprisonment. He abandoned his family, disavowed his marriage." That he was tried, convicted, and sent to prison is not denied; but that he was tried and convicted of a felony is denied. He was convicted of the crime of adultery, under what is known as the "Edmunds-Tucker Act" of congress. But that is not a felony under the law, because that act does not declare the crime of adultery a felony; and it is not a felony at common law, because it is by the act of congress a purely statutory offense, and not even bigamy or incest are by that act declared felonies. Supp. Rev. St. U. S. p. 568; U. S. v. Vigil (N. M.) 34 Pac. 530; Rev. St. U. S. § 819; U. S. v. Coppersmith, 4 Fed. 198; U. S. v. Yates, 6 Fed. 861; U. S. v. Daubner, 17 Fed. 793; U. S. v. Baugh, 1 Fed. 784. And many other authorities might be cited. And there is not a line or a word in this record, in the record of the Borrego case, or in the adultery case, to sustain the statement that Nowell "disavowed his marriage"; and the only hint at such a thing was suggested by respondent's counsel, on mere idle rumor, that Nowell had told the respondent Sless that he had never been married. That was all there was of it, and nothing else whatever even tended to show that Nowell had ever at any time "disavowed his marriage."

There were some questions which arose during the progress of the trial which I deem of sufficient importance, in the due administra-

tion of justice to notice here, and from which I dissented from the views of the majority of the court at the time; but, owing to the necessity for a speedy hearing, the members of the court could not then express their views in writing. I was of the opinion then, and am still of the opinion, that all evidence offered tending to show complicity of respondent in any way to intimidate or influence witnesses on the hearing, or in the publication of a newspaper article or articles reflecting upon the court, or any member of it, in connection with this hearing then pending before it, should have been admitted. The committee charged with the prosecution stated that they expected to connect the respondent with those acts. The evidence was admissible upon the plainest and most fundamental principles of evidence; that is, that all acts done for the fabrication or suppression of evidence, for the intimidation of witnesses, jurors, or courts, are acts evincing a consciousness of guilt, and therefore admissible. Innocence trusts to truth, and relies on legal methods to have the truth shown, and the judgment of the court rendered according to the demands of justice. Nothing was shown which should have changed the rule on this hearing. All the facts should have been permitted to see the light of day. The rules of evidence are not intended for the suppression of facts, if these facts tend to aid in the determination of the issues involved; and so should they have been applied. It is not necessary to cite authorities to establish the principle for the admissibility of this evidence. I know of nothing whatever which would justify its exclusion.

I do not believe that an attorney is authorized to visit and talk to witnesses who are expected to testify on the opposite side of the case, and learn from them what they know, and are expected to swear to in that case; and I am sure they should not do so under any circumstances, after the witness has once testified in the case. This principle is strongly illustrated, in the Borrego trial, in the case of the witness Max Knodt, whose testimony on the preliminary hearing was very damaging to the clients of respondent; but, as soon as he received the pass, through the influence of the respondent, his memory failed him, and his testimony became valueless to the prosecution, and, in so far as the testimony of that witness was pertinent, the due administration of justice was defeated. I know of no code of moral or legal ethics which would warrant any attorney in such conduct, and I think the attorney who permits himself to do so steps clear beyond the bounds of his duties and responsibilities in the legal profession, and becomes guilty of a "moral delinquency," at least, and subjects himself to disbarment. The legal profession needs no code of rules for its guidance. It is composed of too many honorable and illustrious men to require any such restraints. The profession is composed of lawmakers, as well as adminis-

trators of the law; and the only rule that I know of for their guidance in their profession is a clear and distinct knowledge of the scope of their professional duties, and a conscientious belief in the right, frankness, and honesty of their acts. The late Mr. Associate Justice Miller, in language as clear and pure as the sunbeams, has said: "The lawyer in this country is one of the administrators of justice. The judge who presides in the court is another, with more authority of position, and, perhaps, in some respects a more burdensome one. But the court, and the clerk, and the marshal, the sheriff, the jury, the lawyer, all constitute ministers of justice; and a lawyer who consciously undertakes to thwart justice is unfit for the position, as much as the judge who accepts a bribe, or knowingly decides a case against the law and the right, and it should be understood that they are subjected to the same responsibilities. They have a duty, undoubtedly, to their clients; but that is not the first duty, as is generally supposed. Their first duty is the administration of justice, and their duty to their clients is subordinate to that." In re Thomas, 36 Fed. 242. The methods resorted to in securing the affidavit of the witness Mauricio Gonzales, and in attempting to secure that of the witness Porfilla Martinez de Strong, are not such as to command favorable consideration from the court. In speaking of the preparation of affidavits for clients and witnesses to sign by an attorney, Judge Sharswood, in his work on Legal Ethics (page 111) says: "The client will be often required, in the course of a cause, to make affidavits of various kinds. There is no part of his business with his client in which a lawyer should be more cautious, or even punctilious, than this. He should be careful lest he incur the moral guilt of subornation of perjury, if not the legal offense. An attorney may have communications with his client in such a way, in instructing him as to what the law requires him to state under oath or affirmation, in order to accomplish any particular object in view, as to offer an almost irresistible temptation and persuasion to stretch the conscience of the affiant up to the required point. Instead of drawing affidavits, and permitting them to be sworn to, as a matter of course, as it is to be feared is too often the case, counsel should on all occasions take care to treat an oath with great solemnity, as a transaction to be very scrupulously watched, because involving great moral peril, as well as liability to public disgrace and infamy. It lies especially in the way of the profession to give a high tone to public sentiment upon this all-important subject, the sacredness of an oath. It is always the wisest and best course, to have an interview with the client, and draw from him, by questions, whether he knows the facts which you know he is required to state, so that you may judge whether, as a conscientious man, he ought to make such affidavit." The assistance rendered

Otero, in his efforts to spirit away the witness Nowell for the purpose of suppressing his testimony on this hearing, and the favors granted the witness Knodt, and his consequent obligations to the respondent, followed by his loss of memory at the Borrego trial, do not shine with any degree of credit on the side of the respondent, and do not comport with the duties and responsibilities of the profession; and an attorney who permits himself to engage in such practices lays himself open to the charge of "tampering" with witnesses, and shows either an utter forgetfulness of the high responsibilities of his position, or a gross disregard for an honest administration of justice. If such acts are to be passed over unnoticed by the courts, then the profession will be reduced, from that high and honorable place to which it belongs, to the level of the trickster and charlatan; and while the lawyer who engages in such practices may become distinguished among a class of people who indulge in such methods in the conduct of their own affairs, yet he can never expect to achieve the fame of a Marshall or a Webster, but he will sooner or later find himself at the very bottom of the ladder.

After a careful observation of the witnesses, the manner of their testifying while upon the stand, their interest or noninterest in the results, and a conscientious consideration of all the testimony evolved on the hearing, I am irresistibly driven to the conclusion, however unpleasant it may be, that the legal evidence contained in the record sufficiently sustains the charge of unprofessional conduct on the part of the respondent during the progress of the trial of the said Borrego case, and I so find. The charge against respondent Spleas consists of four specifications; and, as the greater part of the facts are set out in the opinion of the court, it is sufficient for me to say that I cannot concur in the conclusions therein reached, for the reasons hereinbefore stated.

#### PEOPLE v. THOMPSON. (Cr. 72.)<sup>1</sup>

(Supreme Court of California. Feb. 10, 1896.)

INDICTMENT—CHARGING OFFENSES CONJUNCTIVELY  
—SUFFICIENCY.

Under Pen. Code, § 218 (St. 1891, p. 283), making it felony for any person to throw out a switch, etc., with intent to derail any train, or board any train with intent to rob it, etc., an indictment charging defendant with throwing a switch with intent to derail a passenger train, "and" boarding a passenger train with intent to rob the same, and not specifically showing that the two acts were directed against the same train, was not bad for duplicity, it being inferable from the indictment that they were directed against the same train, and the case having been tried on that assumption. Beatty, C. J., and Temple and Henshaw, JJ., dissenting.

In bank. Appeal from superior court, Los Angeles county.

W. H. Thompson was convicted of train wrecking, and appeals. Affirmed.

<sup>1</sup> Rehearing denied.

Ben. Goodrich, D. K. Trask, and Wm. A. Harris, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. A few years past, the legislature enacted what is popularly known as the "Trainwrecking Act." It is entitled, "An act to add a new section to the Penal Code of the state of California," "to be known as section 218, relating to train wrecking and the punishment thereof"; and the act provides: "Every person who shall unlawfully throw out a switch, remove a rail or place any obstruction on any railroad in the state of California, with the intention of derailing any passenger, freight or other train; or who shall unlawfully board any passenger train with the intention of robbing the same; or who shall unlawfully place any dynamite or other explosive material, or any other obstruction, on the track of any railroad in the state of California with the intention of blowing up or derailing any passenger, freight or other train; or who shall unlawfully set fire to any railroad bridge or trestle, over which any passenger, freight or other train must pass, with the intent of wrecking said train, upon conviction shall be adjudged guilty of felony and shall be punished with death or imprisonment in the state prison for life, at the option of the jury trying the case." St. 1891, p. 283. Defendant Thompson was charged and convicted of violating certain provisions of this act, and sentenced to be hanged. He now brings this appeal from the judgment rendered against him. A demurrer to the information was overruled, and the reversal or affirmance of this judgment is dependent upon the legal soundness of the action of the trial court in that behalf. The material part of the information charged: "The said Kid Thompson, on the 15th day of February, A. D. 1894, at the county and state aforesaid, did willfully, unlawfully, and feloniously throw out a switch, at Roscoe station, on the railroad known as the Southern Pacific Railroad, with intent then and there to derail a passenger train; and did then and there willfully, unlawfully and feloniously board a passenger train on said railroad, at said station, with intent then and there to rob said passenger train." It is now insisted that the information charges two offenses, and that such duplicity compels a reversal of the judgment. The question presented for solution is not an easy one, and we will at the outset enter into a somewhat detailed analysis of the act here involved. The act is not well drawn. Upon the contrary, it is crude,—entirely too crude to leave the hands of a state legislature, especially when we consider the importance of the legislation with which that body was then dealing. We cite a single instance in illustration of these remarks, and then leave the act with the present Code commission, as furnishing ample material for substantial re-

construction. One clause provides that any person is guilty "who shall unlawfully board any passenger train with the intention of robbing the same." The meaning of the phrase "unlawfully board any passenger train," by reason of its indefiniteness and uncertainty, but serves the purpose of giving work to the lawyers and worry to the courts; but the last part of the clause, to wit, "with the intention of robbing the same" (passenger train), is worse than the first. As to what is meant by robbing a passenger train, we will not now indulge in surmise.

This act arose from the necessity of the times, and was created for the purpose of stopping train wrecking and punishing train wreckers. The act so declares its purpose in terms, and, aside from one clause thereof, such purpose is patent upon the most casual inspection of its provisions. It covers four distinct and separate branches of the subject, to wit: (1) Every person who shall unlawfully throw out a switch, remove a rail, or place any obstruction on any railroad in the state of California, with the intention of derailing any passenger, freight, or other train; (2) who shall unlawfully board any passenger train with the intention of robbing the same; (3) who shall unlawfully place any dynamite or other explosive material, or other obstruction, on the track of any railroad in the state of California, with the intention of blowing up or derailing any passenger, freight, or other train; (4) who shall unlawfully set fire to any railroad bridge or trestle over which any passenger, freight, or other train must pass, with the intent of wrecking said train. The whole tenor and purpose of the act is directed against train wrecking, and this is true as to subdivision 2 equally with all other subdivisions. At first glance, that clause would seem to be directed towards the suppression of the crime of robbery, but the offense of robbery is only incidentally involved, and the prevention of the wrecking of the train, and the consequent and natural results following, of injury and death to the passengers, is its prime purpose. Whatever else the clause means, it imports acts of violence upon the train. It imports, to a more or less degree, the subjection of the employes to the robbers, the menace and duress of the employes, a loss of control of the train by them, fright upon their part, and even death. These things being so, the probabilities of destruction to the train and passengers follow merely as necessarily as such probabilities would follow from the misplacing of a switch or the removal of a rail. Hence we say that every part and clause of the act is directed towards the suppression of train wrecking.

Does the information charge two offenses? In other words, may the prosecution charge the defendant with the four distinct acts, to wit, throwing out a switch, with the intention of derailing a passenger train; unlaw-

fully boarding the said passenger train, with the intention of robbing the same; placing dynamite upon the track, with the intention of blowing up the said train; and setting fire to a bridge over which said train must pass, with the intent of wrecking said train. In the present case, the defendant is charged with but two of these acts, and it naturally and ordinarily follows, in statutes similar to this one, that if more than one of the acts may be charged, all or any number less than all may be charged. We think this information is not susceptible to the charge of duplicity, and base our conclusion upon the general principle declared in Bishop's New Criminal Procedure (section 436): "A statute often makes punishable the doing of one thing, or another, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore, the indictment on such a statute may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or,' and it will not be double, and it will be established at the trial by proof of any one of them." This principle of law is universally recognized as sound, and the application of it to the facts of this case presents the only point of difficulty. If persons, for the purpose of wrecking a certain passenger train, should (1) throw out a switch, (2) place dynamite upon the track, (3) burn a bridge over which the train must pass, it would not be an open question but that those acts could be properly charged in one information, and the proof of any of them support a judgment of conviction; and the reasons why the legal soundness of such a pleading is so apparent would be because the three acts charged were forbidden by the same provision of law, because they were all directed towards one certain passenger train, and because all were done for the purpose of wrecking that train, and thus done as part of one and the same transaction. But when we come to consider clause No. 2, as to boarding a passenger train with the intention of robbing the same, we meet with more difficulty; for there the intention with which the act of boarding is done is to rob, and not to wreck. Yet, as we have already said, the intention of robbery carries with it the probable result of wrecking, and it was the wrecking and not the robbing that the act was primarily aimed to prevent. If the act had said boarding the train with the intention of wrecking it, instead of boarding it with the intention of robbing it, the entire act would have been in perfect harmony, and clearly the four specific acts could have been joined in the one charge as one offense. And we think that the mere fact that the boarding of the train is done with the specific intent of robbery, a different intent from that

accompanying the other acts specified, is not sufficient to take it out of the rule we have quoted from Mr. Bishop. We hold it is not necessary that the acts coupled together should all be required by the statute to be done with the same intent, before they may be joined as one offense. This act is essentially one to prevent train wrecking. The lawmaking power concluded that certain acts, done with certain intents, would result in the wrecking of trains. That body, in effect, created a new crime, known as "train wrecking," and declared it a felony. While in terms it did not give such name to these acts, yet the statute taken altogether fully supports that construction; and if such be its construction, we think but one result can follow, and that is the validity of the information here involved. If the lawmaking power should declare that every person who unlawfully removes a rail from a railroad track, or burns a railroad bridge, or places dynamite upon the track, or turns a switch, or forces the employees of the train to leave their posts of duty, or kills the engineer, or gags and blinds the conductor of the train, shall be guilty of a felony known as "train wrecking," we are clear that one or two, or all of these acts, if directed towards the same train and in the same transaction, could be, and if the facts shown justified it, should be, charged in one information as one offense. It should be so charged, for such form of information would thus limit the rascal's opportunity of escape from the clutches of the law to the smallest possible compass. In this illustration we have a series of acts prohibited, without mention by the statute of any specific intent in the doing of any of them; yet, if committed, they would constitute a felony. It is thus observable, from what we have said, that a series of prohibited acts may be joined together and charged as one offense, where the statute fixes the same specific intent in the doing of all of them; and, further, that they may be joined when the statute specifies no specific intent for the doing of any of them. And there is no reason in principle why the rule should be different when some of the acts prohibited by the statute must be done with a certain specific intent, and the others with no specific intent; or where some of the acts must be done with a certain specific intent, and others with a different specific intent. The question of intent with which the prohibited acts are done does not furnish the test by which the charge of duplicity in pleading is determined. We think that the boarding of the train, if done with a different intent than the act of burning the bridge or removing a rail, does not prevent the application of the principle laid down by Mr. Bishop. The specific intent or intention mentioned in the statute is an essential and material part of the felony. It is but a part of the description of the offense. It is just as essential to make out the felony as the doing of the abstract act, and the act and intention

must be joined or there is no offense. Hence, it follows that the acts of themselves may be perfectly harmless, or they may constitute other offenses, but they are only enjoined by this statute when coupled with certain specific intents. As illustrative of this matter of intention: In *Angel v. Com.*, 2 Va. Cas. 231, defendant was charged under a statute with unlawfully shooting, "with the intention to maim, disfigure, disable and kill," and a conviction was sustained.

As supporting generally the information here under consideration, against the charge of duplicity, we cite *Hinkle v. Com.*, 4 Dana, 518. Defendant was there charged under a statute with having "set up and kept a gaming table, and induced others to bet at it." The court said: "Although the setting up of a gaming table may alone be an indictable offense, the keeping of such table and the inducing of any person to bet upon it, another, when each shall have been committed by different persons or at different times, nevertheless, as they are co-operative acts, constituting altogether one offense when committed by the same person at the same time, an indictment for that combined act in violation of law may properly charge the whole in one count, and but one punishment can be inflicted, as for one offense." In *Com. v. Miller*, 107 Pa. St. 276, an indictment was sustained charging a forcible entry and detainer. In *State v. Murphy*, 47 Mo. 274, an indictment was sustained charging "the keeping open a tipping shop and grocery, and selling to divers persons intoxicating liquors on the first day of the week." The court said: "When a statute in one clause forbids several things, or creates several offenses in the alternative, which are not repugnant in their nature or penalty, the clause is treated in pleadings as though it created but one offense; and they may all be united conjunctively in one count, and the count is sustained by proof of one of the offenses charged." In *State v. Cooster*, 10 Iowa, 454, an indictment was sustained charging the defendant with keeping a gambling house and permitting other persons in a place under the control of defendant to play for money and other things. The court said: "The objection has its origin in the idea that there is such a difference in the essential qualities of these two acts as to make them separate offenses. But is this true? They are found in the disjunctive clause of the same section of the Code, visited with the same penalty, and it is the better opinion that in their essence they are one and the same offense, the guilt of which may be incurred in one or other of these methods." In *State v. Nelson*, 29 Me. 329, an indictment was sustained charging defendant "with buying, receiving, and aiding in concealing stolen goods, knowing the same to have been stolen." To the same effect is *Stevens v. Com.*, 6 Metc. (Mass.) 241, where the court said: "There is but one count in which the defendant is charged, and there is

but one offense with which he is charged. It is made but one offense by the statute, although, according to the language used, it may be committed in one of three modes,—that is, by buying, receiving, or aiding in the concealment of stolen goods. Whether charged to be done in one, two, or all three of the modes mentioned, it is still but one offense, and the general finding of the jury is that the offense was committed as charged." In *Wingard v. State*, 13 Ga. 396, an indictment was sustained charging that certain defendants "did play and bet with cards for money at a game of poker, whilst, faro, seven-up, three-up, and other games played with cards." It will be noticed that in the cases we have cited the various acts are charged in one and the same count of the indictment. The authorities of our own state go to the full length of those cited from sister states. In *People v. De La Guerra*, 81 Cal. 459, a case involving a statute which declared it a felony for certain county officers to issue, have in their possession with intent to circulate, or put in circulation, certain licenses, it was charged that the defendant had in his possession, with intent to circulate, and did actually put in circulation, one of these licenses. The court upheld the indictment against the charge of duplicity, and reversed the judgment. Here one of the acts was done with a certain specific intent, and the other was done without any specific intent whatever. Various violations of the gaming statute may be charged in one indictment. *People v. Gosset*, 93 Cal. 641, 29 Pac. 246. It is conceded that under the act declaring who are vagrants, and prescribing the punishment therefor, the entire series of acts there laid down may be charged in one complaint. *Ex parte McCarthy*, 72 Cal. 384, 14 Pac. 96. This is so though the act mentions no such offense as vagrancy, and it might be suggested that in nearly all of the statutes from which we have quoted like the case at bar the offense is given no technical name. In *People v. Frank*, 28 Cal. 513, the defendant was charged with falsely making a draft, and also with passing the draft knowing it to be forged, and the indictment was sustained. Such an indictment would be good, even though the false making was done upon one day and the passing was done months subsequent thereto, and even though the false making was done with intent to defraud A., and the passing was done with intent to defraud B. *People v. Harrold*, 84 Cal. 567, 24 Pac. 106.

The information in this case is clumsily drawn in this: that it is not directly and specifically shown that it was the same passenger train towards which the two unlawful acts charged against defendant were directed. But we think such fact fairly inferable from the pleading, and the entire record indicates the case to have been tried upon such assumption. Indeed, appellant's counsel make no point that the information is de-

fective in this respect. The further point is made that there can be no such thing as robbing a passenger train, and that the statute in that regard is meaningless. "Robbing a store," "robbing a safe," and "robbing a train" are every-day, ordinary, and common expressions. Very possibly it is in this sense that the legislature used the verb "rob," and not in connection with the technical meaning of the offense of robbery. But, aside from this, the trial court told the jury what constituted robbing a train, and no complaint is here made that such instruction as to the law was not sound. For the foregoing reasons, the judgment is affirmed.

We concur: MCFARLAND, J.; VAN FLEET, J.; HARRISON, J.

TEMPLE, J. I dissent from the conclusion reached by the court in this case. The charging part of the information is that defendant "did willfully, unlawfully, and feloniously throw out a switch at Roscoe station \* \* \* with intent then and there to derail a passenger train, and did then and there willfully, unlawfully, and feloniously board a passenger train on said railroad at said station, with intent then and there to rob said passenger train." Defendant demurred on several grounds, one of which was that the information charges more than one offense, to wit, (1) throwing out a switch with intent to derail a passenger train, and (2) boarding a passenger train with intent to rob the same. Both these acts are charged in the information, and, except by the use of the words "then and there," it is not shown that the two acts have any reference to each other. It does not appear that any train was derailed, or that if so it was derailed that defendant might board it, nor that he boarded it that he might derail it; nor is it charged that the acts were in pursuance of a common intent, as to wreck the train. In fact, it does not appear that he boarded the same train that he attempted to derail. In no way is it shown that the acts charged were a part of the same transaction. To derail a train may be one mode of wrecking a train, but to board a train for the purpose of robbing it cannot, in the nature of things, be either a mode or the means of wrecking it. Besides, the allegations of an information must be such that, if true, the guilt of the defendant inevitably follows. It must negative the possibility of innocence. That the defendant is guilty of any act which would tend to the wrecking of a train is not shown, for he is charged to have boarded the train for the purpose of robbing it while it was standing at a station, or sidetracked waiting for its right of way, and when no engine was attached to it. If it was intended to charge an act which was liable to cause the wrecking of the train, all such possibilities should be negated. As long ago as 1865 this court considered the question as to what charges may be joined in an indictment.

In *People v. Shotwell*, 27 Cal. 394, it was said, quoting from Wharton: "Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the offense, it has in many cases been ruled that they may be coupled in one count." It has been held that where an offense consists of various acts which may be said to constitute different phases or ingredients of an offense, or, as is said in the above quotation, different stages in its commission, the legislature may provide that the commission of any one of these acts shall constitute the offense. In such case they may be joined, and proof of any one act will justify a verdict of guilty. Further than this, in my opinion, the rule relied upon to uphold this information has never been carried in any well-considered case. In considering authorities from other states, it must be borne in mind that our statute expressly provides that the indictment or information shall charge but one offense (Pen. Code, § 954), while elsewhere different offenses may be joined, provided they are charged in different counts and they are of the same general character and the mode of trial the same. Whart. Cr. Pl. § 285. The only authorities from other states, therefore, which will be of value here, are those referring to the joinder of different offenses in the same count. One point made on this appeal by the defendant is that robbing a train means nothing, and therefore the charge is not of an offense. In the leading opinion it is said: "As to what is meant by robbing a passenger train we will not now indulge in surmise." Yet the defendant has been convicted of robbing a passenger train, and sentenced to be hanged. He appeals to this court, as was his right, and makes the point that it is not a public offense. The court below instructed the jury that, "If they believed from the evidence that defendant boarded an express car in a passenger train on the Southern Pacific Railroad at Roscoe station in said county, and by force and violence, or by putting in fear of some injury to the person of the messenger in charge of said car, did rob, steal, and carry away any money of any value then in custody or in the control of said messenger, then the jury should find the defendant guilty." How can this court affirm the judgment on such an appeal, without determining what robbing a passenger train means, and that it means just what the trial court said it did?

HENSHAW, J. I concur in the dissenting opinion of Mr. Justice TEMPLE. To what he has said it may be added that there is involved in this dissent no doubt of the power of the legislature to pass the statute under review, nor any doubt of the validity of the statute as a penal law. The legislature might by a single enactment provide, for example, that every person who commits a murder, every person who commits treason



against the state, every person who bears false witness against another by means of which that other loses his life, upon conviction shall be adjudged guilty of felony, and shall be punished with death. Such a law would violate no rule applicable to the enactment or interpretation of penal statutes. These offenses are all now punishable by death; yet would any one assert that under a system of criminal pleading such as ours, which commands that the indictment shall charge but one offense, these acts or any two of them might be charged in one indictment? With deference to the reasoning of the prevailing opinion, I think, until it became the law of the state, he would have been deemed a rash advocate who would have dared so to argue. And the reason is not far to seek. Such a law, though cast in one enactment, declares against several separate and distinct crimes. Is it less plain that the act under consideration does the same thing? Where a statute makes penal a single act done with one of several unlawful intents,—as the derailing of a train for the purpose of injuring property, or for the purpose of larceny, or for the purpose of killing or maiming its passengers (*People v. Milne*, 60 Cal. 71),—or where it enumerates a series of acts done with a single unlawful purpose, either of which acts separately, or all of which together constitute but the one offense, as making, altering, uttering, passing, or attempting to pass a forged and counterfeit instrument (*People v. Ah Wo*, 28 Cal. 205), an indictment charging the single act with the multifarious purposes, or the several acts with the single purpose, is not objectionable. This is as far as the rule goes; and from the illustrations which Mr. Bishop gives to support his text, it is as far as the learned author ever meant to be understood as carrying it. He says, in explanation of his statement quoted in the prevailing opinion: "Thus, where the statute forbids the unlicensed sale of, for example, rum, brandy, whisky, or gin, the interpretation is that the offense may be committed by selling any one or two of the specified liquors, or all of them; and, whichever is done, in one transaction, there is but one crime. So it is not ill to charge in one count that the defendant did offer to sell and suffer to be sold intoxicating liquor. Under a statute the words of which are 'shall willfully destroy, deface, or injure,' etc., one may be charged with 'destroying, defacing, and injuring' a register. Under a statute to punish one who 'utters or passes, or tenders in payment as true,' any counterfeit money, it may be charged that the defendant 'did utter and pass as true,' etc. A statute made punishable anyone who 'shall sell or offer for sale' any lottery ticket, and it was adjudged not double to charge that the defendant did 'unlawfully offer for sale and did unlawfully sell' a lottery ticket." After having given these examples, the author is careful to point out

that "the nature of the offense and of the act should be considered in determining whether or not a charge is double." 1 Bish. New Cr. Proc., § 437, and notes. It is no answer to the contention that boarding a train for the purpose of robbery is a distinct offense from derailing it to say that the unlawful boarding may tend to derail it. Even a man accused of crime is only chargeable with the natural consequences of his act, and the legislature itself may not declare that to be a natural consequence which in fact is not. But, indeed, in this case it is not the legislature, but this court, which has done so. The legislature has said only that for his attempted robbery he is guilty of a felony; this decision in effect says that he must be presumed to have intended that his robbery should result in train wrecking. Yet the defendant might have entered the train for purposes of secret theft. He might have entered undetected, and have escaped in like manner. It might have been furthest from his thoughts to disturb any person upon the train. It might have been his earnest wish and active endeavor to prevent the train from being wrecked or derailed while he was on it, since in that event he must share the common peril of the others. Still, for doing what he did he would have violated this law, and his conviction under it would be justified. Yet, can it be said that his act was "train wrecking," or had anything in common with the other acts and offenses enumerated in the statute? His acts do not import violence. And it is a part of common reading that when acts of violence are committed by robbers who are themselves upon a train, in consideration of their own safety they first bring it to a standstill that it may not be wrecked. Nor can I perceive that it would have relieved the embarrassment which seems to have been felt in interpreting this statute if the legislature had in fact designated the acts as "train wrecking." Plenary are the powers of that body. Its ipse dixit may create a crime, but there is no such magic in a name as will enable even the legislature to make robbery or rape or perjury "train wrecking," merely because it calls them that. If, in the instance above cited, the legislature had said that every person who commits murder, treason, or perjury which costs another his life shall be guilty of the unpardonable crime, and on conviction shall suffer death, a common name would thus have been conferred upon three distinct offenses. Could they for that reason have been charged in one indictment? The suggestion of Mr. Justice TEMPLE that it is incumbent upon this court to define what is meant by "robbing a train" is subsequently treated in the last paragraph of the opinion. But even by it the phrase is given no interpretation. It is suggested merely that "very possibly" the legislature intended to use the word "rob," not as it used it in creating and defining the crime of

robbery, but as a mere colloquialism; and it is said that "robbing a store" and "robbing a safe" are every-day, ordinary, and common expressions. But would an indictment charging a man with robbing a store be upheld? And, if so, what is the definition of the offense? This is the precise question which the defendant in this case puts when he argues that there is no such crime known to the law as robbing a train; and if there be, he asks this court to define it and say whether it means burglary or larceny of goods in a train, or the robbery of some person upon the train. It would seem that a defendant situated as is this one, under a sentence of death, and appealing to this court, as is his right, for an interpretation of the law under which he is to be hanged, sentenced under a law which now for the first time is before the court for construction, is entitled to a forthright answer rather than to a mere conjecture as to what may or may not have been in the legislative mind. Nor is it an answer to say that he is foreclosed because he took no exception to the trial court's instruction upon the question. He is here within his right in asking the court of last resort to define the law, and it seems hardly to fill the measure of his just demand to tell him that he did not object in another forum to a definition given by somebody else. Moreover, it was not incumbent upon the defendant to take any formal objection and exception to the instructions. His rights in that regard are fully preserved by section 1178 of the Penal Code, which provides: "When written charges have been presented, given or refused, or when the charges have been taken down by the reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges of the report, with the indorsement showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." And when a defendant urges upon this court that the offense with which he is charged is not one known to the law, how can it be said that he is not objecting to instructions which purport to define the offense? The prevailing opinion may be taken, as deciding, against defendant's contention, that there is such a crime as "robbing a train," but whether that crime be the one defined by the instructions, or some other, appellant is not told.

To the further defect in the indictment which Mr. Justice TEMPLE points out, namely, that it does not even appear that the attempt to rob and attempt to wreck were directed against the same train, it is answered, not that the pleading does so show, but that it is fairly inferable therefrom, and that the record discloses that the case was tried upon that theory. But this defendant is demurring to the indictment,

and an absence of necessary averment is conceded. Is its absence to be supplied by an inference? Then it is not necessary, even against demurrer, to charge that a defendant committed a crime; it is sufficient to plead circumstances from which it may be inferred that he committed a crime. This hearing is on demurrer only. What difference can it make to a logical decision of the question to say that the case was tried upon one or another theory? When the defendant's demurrer was overruled, there was nothing for him to do but to submit to a trial upon any theory which met the views of the prosecution and judge. But if the prevailing opinion looks for support to the trial of the cause, there can be no objection to scanning the record. The state of things there disclosed shows what the trial court believed to be the scope of the indictment, proves that the defendant was in fact tried upon two (if not three or four) distinct and separate offenses, and demonstrates the vice of the ruling which upholds this pleading. With the instructions, as declarations of principles of law, no fault need be found; but as dealing with a single crime they are anomalous in the history of the criminal jurisprudence of this state. The jury is instructed (1) that if defendant threw out a switch with intent to derail a passenger train, he is guilty; (2) if he unlawfully boarded a passenger train with intent to rob said passenger train, he is guilty (it is not charged to be the same train as that he attempted to derail); (3) if he boarded an express train at Roscoe station, and by force and violence, or by putting in fear the messenger, robbed and stole money in his custody, he is guilty; (4) if defendant abetted one Johnson in derailing a train, whereby one Masters was killed, then he is guilty. Here there are instructions touching train wrecking, and an attempt at train wrecking, boarding a train with intent to rob it, robbery of a messenger upon the train, and murder. The indictment, double as it is, charges no more than the throwing of a switch with intent to derail a passenger train, and the unlawful boarding of a passenger train at a station with intent to rob it. These instructions are addressed to evidence admitted under the indictment. But can it be said that they are applicable to a single crime, or to a series of acts having in view a single purpose? I am convinced that it can not.

I concur: BEATTY, C. J.

In re HATHAWAY'S ESTATE. (S. F. 376.)  
(Supreme Court of California. Feb. 18, 1896.)

APPEALABLE JUDGMENTS—REVOKING APPOINTMENT OF GUARDIAN AD LITEM—DISMISSAL OF PETITION FOR REVOCATION OF PROBATE OF WILL.

1. Code Civ. Proc. § 963, subd. 3, authorizing an appeal from a judgment or order revoking "letters" of guardianship, refers to the guard-

ianship of the person or estate of a minor, or of an insane or incompetent person, for which provision is made in part 3, tit. 11, c. 14, and does not apply to an order appointing a guardian ad litem under section 372.

2. Though Code Civ. Proc. § 963, subd. 3, authorizes an appeal from an order revoking the probate of a will, it does not authorize an appeal from an order denying such revocation, or dismissing a petition for such revocation.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Petition by Charles W. Barrow, guardian ad litem of Harriet Coleman Barrow, an incompetent person, for the revocation of the probate of the will of Anna M. Hathaway, deceased. From a judgment granting a motion to vacate and set aside the order appointing such guardian ad litem, and to strike out and dismiss such petition, the guardian ad litem appeals. Dismissed.

Wm. T. Baggett and Walter H. Linforth, for appellant. El. J. Pringle, for respondent.

**PER CURIAM.** Motion to dismiss the appeal. The last will and testament of Anna M. Hathaway was admitted to probate in the superior court of the city and county of San Francisco in January, 1895, and thereafter, viz., June 21, 1895, upon his application therefor, Charles W. Barrow was appointed by one of the judges of said court guardian ad litem of Harriet Coleman Barrow, an incompetent person, claiming to be the heir at law of the deceased, and on the same day a petition was filed in said court in her name by her said guardian for the revocation of the probate of said will. Upon notice therefor to said guardian ad litem, a motion was made to said court to vacate and set aside the order appointing him as said guardian ad litem, and to strike out and dismiss the petition filed by him for a revocation of the probate of said will. This motion was heard upon affidavits filed on behalf of the respective parties, and on the 7th of September the court made an order granting the motion. From this order the guardian ad litem appealed to this court, and a motion is now made on behalf of the executor to dismiss the appeal upon the ground that the order is not appealable. The provision in section 963, subd. 3, Code Civ. Proc., authorizing an appeal "from a judgment or order \* \* \* revoking letters of guardianship," refers to the guardianship of the person or estate of a minor, or of an insane or incompetent person, for which provision is made in chapter 14, tit. 11, pt. 3, Code Civ. Proc., and does not include an order appointing a guardian ad litem to represent the infant or incompetent person, authorized by section 372. No letters of guardianship are issued to a guardian ad litem, but his authority is evidenced by the entry in the minutes of the court appointing him. He is appointed by the court in which the action is pending in each case, and his removal, as well as his appointment, is under the control of

the court in which the case is pending. If an appeal could be taken from the order removing him, it could with equal reason be taken from the order appointing him, and the very purpose of the appointment would be frustrated. Neither is that portion of the order striking out and dismissing the petition for the revocation of the probate the subject of an appeal. This court has appellate jurisdiction in such probate matters only as may be provided by law; and while section 963, subd. 3, Code Civ. Proc., authorizes an appeal from an order revoking the probate of a will, it does not authorize an appeal from an order denying the revocation of the probate of a will, or from an order dismissing a petition therefor. Estate of Sbarboro, 70 Cal. 147, 11 Pac. 563. See, also, Estate of Montgomery, 55 Cal. 210; Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174; Estate of Ohm, 82 Cal. 160, 22 Pac. 927. The motion to dismiss the appeal is granted.

#### YOUNGLOVE v. CUNNINGHAM. (S. F. 264.)

(Supreme Court of California. Feb. 18, 1896.)  
ACTION ON NOTE—COMPLAINT—FRIVOLOUS APPEAL—DAMAGES.

1. In an action on a note the complaint need not specially aver a consideration.

2. Where an appeal appears to be frivolous, a mere oral assurance in argument, that it was taken in good faith, is insufficient to avoid the imposition of damages, but such assurance must find some support in the record.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by Dwight Younglove against James F. Cunningham on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

Spalsbury & Burke, for appellant. Z. N. Goldsby, for respondent.

**PER CURIAM.** Action upon a promissory note. Judgment went for plaintiff, and defendant appeals therefrom upon the judgment roll. The single point made in support of the appeal is that the lower court erred in overruling a general demurrer to the complaint, the contention being that there is no averment in the complaint of a consideration for the execution of the note, and that hence there is a failure to state a cause of action. There is nothing whatsoever of merit in the point. It is not essential to the statement of a cause of action founded upon a contract in writing to specially aver a consideration. The writing imports a consideration (Civ. Code, § 1614), and the presumption thus arising is one of law, which is not required to be averred (Henke v. Association, 100 Cal. 429, 34 Pac. 1089). Appellant in fact conceded at the oral argument that his contention was untenable, but, in response to the demand made by respondent for damages as for a frivolous appeal, urged

that when the appeal was taken it was taken in good faith, and in the honest conviction that the point involved error. This assurance should come from the record, or at least find some semblance of support therein, which the record before us entirely fails to furnish. A party cannot be permitted to avoid the consequences of a wholly groundless appeal by indulging himself in a mere unsubstantial belief that there is merit in his case, when the slightest investigation would have assured him to the contrary. Such excuse, if held good, would require us to recall every penalty ever imposed in a like case. The judgment is affirmed, with \$100 damages, to be recovered by respondent as a part of his costs of the appeal.

**HUNTER v. HUNTER.** (No. 19,555.)  
(Supreme Court of California. Feb. 15, 1896.)  
DIVORCE—SUMMONS BY PUBLICATION—EX PARTE  
PROCEEDING—DECREE—AFFIDAVIT—ESTOP-  
PEL—PRESUMPTION—ALIMONY.

1. A woman was twice married, and, having heard that her first husband was living, began proceedings to obtain a divorce from him. The proceedings were ex parte, defendant having been served with summons by publication, and a decree was entered as prayed. *Held*, that the proceedings were strictly in rem, and determined only that plaintiff was no longer the wife of defendant, and did not determine that defendant was then living, and that she was his wife at the time of entering the decree.

2. The affidavit of plaintiff in such case, that she was the wife of defendant at the time of her subsequent marriage to another, does not estop her from denying such fact in an action by her second husband to annul the second marriage.

3. In divorce by the second husband it will be presumed that the first husband was dead at the time of the wife's second marriage, under Code Civ. Proc. § 1863, presuming a person innocent of crime or wrong, and the burden of proof is on the party asserting the negative.

4. The allowance of alimony is an incident to an action for divorce, and the determination as to its allowance is not the trial of an issue in the case.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinleys, Judge.

Action by Jesse Hunter against Jane Elizabeth Hunter or Milam to annul a marriage between the parties. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Knight, Simpson & Harpham, for appellant. S. A. W. Carver, for respondent.

TEMPLE, J. The action was brought to annul a marriage between the parties, entered into on the 3d day of July, 1862, upon the ground that defendant had another husband, to wit, Joseph Milam. It is now conceded that defendant was married to Joseph Milam in February, 1858, when defendant was but 15 years of age; that she lived with Milam as his wife for 10 days, when she was taken away by her parents, and went to Salt Lake. It does not appear how long she was absent from San Bernar-

dino, but it could not have been a very long time, for she testified that she lived at San Bernardino, after her marriage to Milam, about 4½ years, when she married plaintiff. Only about that period elapsed between her first and second marriages. She testified that Milam left a few days after her marriage to him, and she had heard nothing of him since. Plaintiff and defendant lived together as husband and wife at Los Angeles for about 22 years, when, as defendant testified, she was told by her nephew, who lived in Arizona, that he had met a brother of Joseph Milam, who said Joseph Milam was living at Walla Walla. This is all she has ever heard in regard to Milam since he left San Bernardino. She then commenced an action against Joseph Milam to secure a divorce. In her verified complaint, filed December 21, 1883, she describes herself as Jane Elizabeth Milam, and states that plaintiff and defendant were married in February, 1858, and ever since have been, and now are, husband and wife, and that defendant resides out of the state of California. On the same day she made and presented to the court her affidavit to procure the publication of summons, in which she stated that defendant resides out of the state, that his last residence within the state was in Pajaro, in Santa Cruz county; that through knowledge derived from his brother she believes he resides at Walla Walla, in Washington territory. Such proceedings were had in the action that on the 29th day of March, 1894, a decree was entered dissolving the marriage between Joseph Milam and the defendant, plaintiff in that action. Certain findings were also filed, and purport to constitute part of the judgment roll, but, as there were no issues to try, and judgment was entered on default, express findings were unauthorized, and add nothing to the necessary adjudication. Subsequently defendant commenced an action against the plaintiff to have her marriage with him declared void on the same ground on which plaintiff now seeks relief, to wit, that at the time of her marriage with him her first husband, Joseph Milam, was living, and she had not been divorced from him. The complaint in that suit was also verified. The action was finally dismissed by her before it came to judgment. Two of plaintiff's brothers testified that at the time the parties to this action were married they heard travelers say the man defendant married was still living there (San Bernardino). It is, however, pretty certain that he was not then living at San Bernardino. This is all the evidence contained in the record upon this subject.

It is contended, first, that the judgment in the divorce suit is conclusive upon defendant that she was divorced from Milam; that is, that Milam was then alive, and that until the decree was entered she was his wife. But this adjudication as such did not bind Milam. He was not served with

summons, and was without the state, and the action was therefore strictly in rem. "No sovereignty," says Story, Conf. Laws, § 539, "can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions." The res before the court was the status of the plaintiff in the divorce suit. No service of summons being had, it was not an action inter partes, but a proceeding affecting only the status of the wife. "It did not establish, but recognized and presupposed, the relation of husband and wife as previously existing." *Burien v. Shannon*, 3 Gray, 387. It was conclusive against all the world that the plaintiff in that suit was no longer the wife of Joseph Milam, and it was an adjudication of nothing else. No one would claim that Milam would be estopped by the decree to deny that he had ever been married to defendant, or, had he remarried and had children, that the decree would be evidence of their bastardy. Milam may have been previously divorced, and in such case there would be two valid decrees, which, on the theory that they constituted an adjudication of marriage at the time of the divorce, conclusive against the world, would contradict each other, and yet both be binding on all the world. See, on this point, *Gill v. Read*, 5 R. I. 343; *Gouraud v. Gouraud*, 3 Redf. Sur. 262; *Freem. Judgm.* 154. But since the court had jurisdiction to declare the status of Mrs. Milam as affected by an assumed marriage with Joseph Milam, and did adjudge that she was no longer the wife of Joseph Milam, it would follow that he could no longer be her husband. He was thus affected by the judgment as he would have been by the death of his wife, and this resulted simply from the fact that the status of his wife was changed. So far, and no further, the judgment bound him and all the world. That being so, it must follow that as an adjudication it bound her no further. Had she borne children to Hunter, the judgment would have estopped neither such children nor her to deny that she was the wife of Milam when she married Hunter.

It is further contended that her affidavits are conclusive evidence against her. Three times she stated under oath that she was the wife of Milam when she was married to Hunter. This is very strong testimony against her, but is only strong evidence. It is not an estoppel. She went upon the stand as a witness for herself, and explained that she made those affidavits upon the strength of a rumor she heard. This was all she had heard. The court found in her favor, and must have believed her statement. The statements made by plaintiff's brother do not show that Milam had been heard from, and if defendant's testimony was true, such statements must have been unfounded. The court could well find that there was no authentic information to the effect that Milam was alive.

But it is said the marriage of the parties to this suit took place only about 4½ years after the marriage to Milam, and it will be presumed that Milam was alive, in the absence of proof to the contrary. There was no proof tending to show that Milam was dead, or that his chance for life was below the average; therefore it is contended the court should have found that he was alive. This presumption of the continuation of life is, however, overcome by another. It is presumed that a person is innocent of crime or wrong. Code Civ. Proc. § 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years; or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative,—that the first marriage had not ended before the second marriage. A few cases will best illustrate the rule. *Rex v. Inhabitants of Twynning*, 2 Barn. & Ald. 386, was a question as to a settlement, which depended upon the validity of a second marriage of Mary Burns. She was a pauper, and married about 12 months after her husband had enlisted as a soldier in foreign service. The second marriage was held good. The court said: "The law presumes the continuation of life, but it also presumes against the commission of crimes, and that even in civil cases, until the contrary is proved." This was the question in *Rex v. Inhabitants of Harborne*, 2 Adol. & E. 540. It was said that there was no absolute presumption, but that it was a question for the jury to determine under the circumstances of the case, and a verdict convicting a defendant of bigamy was upheld on proof that the husband was alive 25 days before the second marriage. See, also, *Reg. v. Lumley*, L. R. 1 C. C. 196. *Murray v. Murray*, 6 Or. 1, involved the legitimacy of the children of a second marriage. It was held that the presumption of innocence should be preferred, but the presumption was not absolute, and the question would depend upon the special circumstances of the case. In *Lockhart v. White*, 18 Tex. 102, Mrs. Waggoner had been separated from her husband about five years. One witness had heard of him since the separation. The court said: "There is no evidence that Waggoner had been heard of within twelve months (though that exact time is not necessary to raise a favorable presumption) prior to the marriage with Allsbrooks, and under the rule established in the above case the continuance of the

life of Waggoner will not be presumed. The second marriage was consequently lawful and valid." It was also said that the presumption of the continuance of life was weaker, and must yield to the presumption of innocence. *Sharp v. Johnson*, 22 Ark. 79, was a case involving a question of heirship depending upon legitimacy. This depended upon the validity of a marriage. The court refused an instruction to the effect that the former wife, if alive within five years before the last marriage, was presumed to be still alive. The ruling was affirmed, and the court quoted from Mathews on Presumptive Evidence: "A charge of an act of immorality, or of disobedience of a positive law, will not be received unless supported by direct evidence. Circumstances showing probability merely are not enough; the fact averred must be conclusively proved." *Klein v. Laudman*, 29 Mo. 259, was an action of slander, and a similar ruling was made. *Spears v. Burton*, 31 Miss. 547, involved the question of legitimacy, and it was held that the presumption of continuance of life would not establish a crime, even in a civil case. To the same effect is *Town of Greensborough v. Town of Underhill*, 12 Vt. 604. The question in that case was as to settlement. *Schmisser v. Beatrice*, 147 Ill. 210, 35 N. E. 525, was a case involving the question of legitimacy. It was proven that an absent husband was alive at the time of the marriage, and the court held that in favor of this second marriage it would presume that the absent party had obtained a divorce, and that the burden of proving that such divorce had not been obtained was on the party alleging the invalidity of the second. It is said that a contrary doctrine is established in *People v. Stokes*, 71 Cal. 263, 12 Pac. 71. This precise point was not there discussed, although it was raised. The court contented itself with asserting the general proposition, which no one disputes, that the presumption of life continues for seven years. The fact that there were conflicting presumptions must have escaped the attention of the court, otherwise the case is in conflict with all the cases upon the subject and with all the text-books. We cannot hold that this long line of decisions, in which there is no break, has been overruled by a case in which the point was not discussed.

The court found for the defendant upon all points, notwithstanding the fact that owing to her former statements under oath her testimony was justly subject to grave suspicion. If her explanation of the former affidavits was true, I think it sufficient. We cannot reverse the judgment for insufficiency of the evidence.

As the appeal from the judgment was taken too late, we cannot consider the objections to the allowance of alimony. A new trial is a re-examination of an issue of fact

in the same court after a trial. The allowance of alimony is an incident to an action for a divorce, and, although the determination as to its allowance may involve a controversy as to facts, such determination is not the trial of an issue in the case. It may be before or after trial. The appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.; HARRISON, J.; GAROUTTE, J.; HENSHAW, J.

#### COURTNEY v. STAUDENMAYER et al. (Supreme Court of Kansas. Feb. 8, 1896.)

##### PRESUMPTION OF PAYMENT—LAPSE OF TIME.

Where, 27 years after the maturity of a series of promissory notes and the last indorsement of interest paid thereon, an action was brought upon the notes, and to foreclose a mortgage given to secure them, *held* that, although the statute of limitations was not a bar, because of the nonresidence and absence of the defendants, yet the lapse of time raised a presumption of payment, which was not overcome by the facts found and the evidence received or offered.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by R. B. Drury and others against L. R. Staudenmayer and others for partition. Maria L. Courtney, executrix, filed a cross petition. From a judgment for Staudenmayer and others, Courtney brings error. Affirmed.

On July 17, 1858, L. R. Staudenmayer, Sr., a single man, and a resident of Atchison, Kan., executed and delivered to William C. Courtney a mortgage on S. E.  $\frac{1}{4}$  of section 23, township 5, range 20, in Atchison county, to secure four promissory notes for \$500 each payable to the order of said William C. Courtney at the Bank of Charleston, in Charleston, S. C.; the last of the same being due October 1, 1859. On November 16, 1858, said L. R. Staudenmayer, Sr., married Elizabeth L. Conner of Charleston, S. C., a daughter of Henry W. Conner, and a niece of said William C. Courtney. Staudenmayer returned with his wife to Atchison, where they remained until January, 1860, when they left for the South and never afterwards returned. While they were residing at Atchison, and on July 29, 1859, Staudenmayer conveyed the mortgaged land to his wife. L. R. Staudenmayer, Jr., was the only child of said marriage. Henry W. Conner died in 1861, and W. C. Courtney, James Conner, and H. W. Conner, Jr., were executors of his estate; James Conner also being trustee of the share left to Elizabeth L. Staudenmayer. During his temporary absence, William C. Courtney acted for him, and paid to Mrs. Staudenmayer money from time to time from said trust estate. In the fall of 1883 Mrs. Staudenmayer died, leaving as her heirs her husband and her son, and William C. Courtney was administrator of her estate

until his death in December, 1886; Maria L. Courtney, his widow, being his executrix, and sole devisee and legatee, but she never filed an inventory of the assets of his estate. After the Civil War, and until the time of his death, W. C. Courtney was in straitened circumstances financially. He paid to L. R. Staudenmayer, Sr., \$59.25 on his share of the estate of Mrs. Staudenmayer. After Staudenmayer and wife left Atchison for the South, A. G. Otis became the agent of Mr. Staudenmayer as to the collection of rents and payment of taxes on the property (the rents being small in amount; the land being mostly unimproved), and said A. G. Otis accounted to Mr. Staudenmayer therefor. On April 27, 1887, L. R. Staudenmayer, Sr., then residing in North Carolina, executed to R. B. Drury a deed for said land, and also for some town lots in Atchison, the deed by mistake purporting to convey the whole title, instead of an undivided half of the land. On May 31, 1887, R. B. Drury and his wife conveyed to Charles J. Drury and Robert McCrie, each, an undivided one-third of the undivided one-half of said quarter section. On July 8, 1887, said R. B. Drury, Charles J. Drury, and Robert McCrie commenced their action for the partition of said land, making L. R. Staudenmayer, Sr., L. R. Staudenmayer, Jr., and three tenants on the land defendants. On November 9, 1887, by leave of court, said Maria L. Courtney, as executrix of the estate of William C. Courtney, deceased, was made a party defendant; and she filed her cross petition, asking judgment upon said promissory notes, with interest from one year after the dates of their maturity (credits appearing thereon for interest up to such dates and one year thereafter), and for the foreclosure of said mortgage. L. R. Staudenmayer, Sr., answered said cross petition, and alleged, in substance, that by an arrangement between himself and William C. Courtney the indebtedness was paid by the conveyance of the land to Mrs. Staudenmayer, and was accounted for in the dealings of said William C. Courtney with the trust estate left to Mrs. Staudenmayer by her father on his death; but the answer is quite vague and indefinite in this respect. L. R. Staudenmayer, Jr., replied to the cross petition of Maria L. Courtney, alleging, among other things, that the notes had been fully paid and satisfied. On March 27, 1890, the cause came on for trial between the plaintiffs and the defendants; but it had not proceeded far when the plaintiffs asked leave to file a supplemental petition, which was granted, and the case, as between the plaintiffs and the defendants, was continued for the term, but the trial was allowed to proceed, as between Maria L. Courtney, executrix, and her codefendants, L. R. Staudenmayer, Sr., and L. R. Staudenmayer, Jr. Some of the facts were agreed to, and evidence was offered as to others, and Maria L. Courtney, executrix, rested her case, when the Staudenmayers announced that they had no testimony

to offer, but would rely entirely upon a presumption of payment arising from lapse of time. Said Maria L. Courtney then offered in evidence the report of the case of *Richbourg v. Richbourg*, Harp. Eq. (S. C.) 139, for the purpose of showing that, by the law of that state, it was improper and illegal for a trustee or administrator to set off, against a balance due by him, as such, to a distributee of the estate, a debt due him individually from such distributee, and also the transcript of the record of a case commenced in the court of common pleas of the county of Charleston, S. C., October 19, 1883, wherein L. R. Staudenmayer, Jr., was plaintiff, and William C. Courtney and Henry W. Conner, surviving executors of H. W. Conner, deceased, and Mrs. Sallie E. Conner, executrix of James Conner, deceased, were defendants, for the purpose of showing full settlement of the trust estate of Elizabeth L. Staudenmayer derived from her father, and all payments made therefrom, and for what purpose and to whom made, and to show that no payment of the mortgage was made therefrom; but this testimony was excluded, and the court found that the presumption of payment had arisen from lapse of time, and rendered judgment against said Maria L. Courtney, and decreed that said notes and mortgage had been fully paid, discharged, and satisfied, and that the mortgage constituted no lien upon said land. Maria L. Courtney brought the judgment to this court for review, since which time L. R. Staudenmayer, Sr., died, and the action has been revived against his administrator, B. C. Wood.

Thomas J. White, for plaintiff in error.  
Waggener, Horton & Orr, C. D. Walker, and W. W. & W. F. Guthrie, for defendants in error.

MARTIN, C. J. (after stating the facts). A period of 27 years elapsed from the maturity of the last note, and the indorsement of interest paid thereon, before any attempt was made to recover upon the indebtedness, or to foreclose the mortgage. Yet the action was not barred by our Kansas statute of limitations, because of the nonresidence and absence of the defendants (Civ. Code, § 21), and the South Carolina statute was not pleaded. At the common law a presumption of payment arises after the lapse of 20 years, and the principal question in this case is whether such presumption obtains in this state, notwithstanding the statute of limitations. It is claimed by the plaintiff in error that the common law is adopted in this state only in aid of the general statutes, and as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people (Gen. St. 1889, par. 7281), and that the doctrine of the presumption of payment from the lapse of time is inconsistent with our statutes of limitation, and therefore cannot be recognized. In England, however, this pre-

sumption arises, and is given effect, in the courts both of law and equity, notwithstanding the limitation acts. In the case of *Smith v. Clay*, decided in 1767, a report of which may be found in 3 Brown, Ch. 640, Lord Camden said: "A court of equity \* \* \* has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. \* \* \* Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." And in *Hovenden v. Lord Annesley*, 2 Schoales & L. 607, 636, Lord Redesdale said "that every new right of action in equity that accrues to the party, whatever it may be, must be acted upon at the utmost within 20 years." The federal courts have declared the same doctrine, from an early day, down to the present time, refusing, independently of the statute of limitations, to entertain and enforce stale demands. *Platt v. Vattier*, 9 Pet. 405, 416, 417; *McKnight v. Taylor*, 1 How. 161; *Bowman v. Wathen*, Id. 189, 193; *Speldel v. Henrici*, 120 U. S. 377, 387, 7 Sup. Ct. 610, and cases cited. The state courts very generally hold the same doctrine. Several of the decisions are cited in the foregoing cases from the supreme court of the United States, and we will refer to a few others as follows: *Cheever v. Perley*, 11 Allen, 584; *Kellogg v. Dickinson*, 147 Mass. 432, 437, 18 N. E. 223, and cases cited; *Bean v. Tonnele*, 94 N. Y. 381, 385, and cases cited; *In re Neilley*, 95 N. Y. 382, 390; *Lash v. Von Neida*, 109 Pa. St. 207; *Gregory v. Com.*, 121 Pa. St. 611, 15 Atl. 452; *Shubrick v. Adams*, 20 S. O. 49, 53; *Wright v. Mars*, 22 S. O. 585; *Dickson v. Gourdin*, 26 S. O. 391, 2 S. E. 303; *Stimls v. Stimls* (N. J. Ch.) 33 Atl. 468. The presumption of payment from lapse of time differs essentially from a statute of limitations. The presumption may be rebutted by sufficient evidence, no matter how long the time may be; but a statute of limitations cuts off the right of action, although it may be admitted that no payment has ever been made. The presumption of payment is based upon the experience of mankind that vouchers, acquittances, and evidences of payment are not usually preserved from one generation to another; that creditors usually desire their own, without waiting a score of years upon their debtors; and that, where there has been no recognition of the claim by the debtor, and the creditor has borne to assert a right for so long a time, it is most probable that his claim has been in some way satisfied. The cross petition for foreclosure in this case was in the usual form. No explanation or excuse was given for the long delay in the assertion of any right, and this seems to be necessary under several of the authorities cited. But, if this defect of pleading had been remedied, yet the facts found, and the evidence received and rejected, were insufficient to establish nonpayment; and therefore the presumption of pay-

ment from lapse of time was properly held by the court below to be effective as a bar to the action, and the judgment must be affirmed. All the justices concurring.

### WOOD v. STAUDENMAYER et al.

(Supreme Court of Kansas. Feb. 8, 1896.)

ERROR—PARTIES—LAND CONTRACT—RESCISSION—FRAUD.

1. In a proceeding in error, a case made for the supreme court was served upon one of the defendants, who executed a written waiver of summons, and an entry of appearance in the supreme court, which were delivered to the plaintiff in error, but in some unaccountable way were afterwards lost. *Held*, that the defendant was a party to the proceeding in error.

2. A person who is not a party to an action in the trial court is not a necessary party to a review of the case in an appellate court, even if the trial court, in rendering a judgment, may have awarded affirmative relief to such person.

3. A rescission of the contract for the purchase of land, and the cancellation of the conveyances, on the ground that the representations of the vendor were false and fraudulent, is an extraordinary power of equity, and should not be exercised unless it is clearly established that the representations were false or fraudulent, and that they were relied on by the purchaser; and the right to disaffirm the contract must be exercised promptly after the discovery of the fraud.

4. The testimony examined, and, in respect to the contract in question, it is *held* that the testimony fails to sustain the finding that the contract of purchase was induced by the false and fraudulent representations of the vendor, and, further, that it is insufficient to support the judgment that was rendered.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by R. B. Drury and others against L. R. Staudenmayer, Sr., and others, to rescind a contract for the purchase of land. There was a judgment for plaintiffs and defendant Staudenmayer brought error. On his death, B. C. Wood, administrator, was substituted. Reversed.

This is a part of the litigation which was before the court in *Courtney v. Staudenmayer*, and the facts out of which it arose are largely set forth in that case, to which reference is made. 43 Pac. 758. It was originally an action of partition between R. B. Drury, Charles J. Drury, and Robert McCrie, as plaintiffs, and L. R. Staudenmayer, Sr., L. R. Staudenmayer, Jr., and three tenants, as defendants, and was instituted on July 8, 1887. The plaintiffs claimed to be the owners of an undivided one-half of the land, and that the Staudenmayers owned the other undivided one-half of the same. Maria L. Courtney became a party to the action, and set up a mortgage executed by L. R. Staudenmayer, Sr., to William C. Courtney on July 17, 1858, and asked for a foreclosure of the same. The plaintiffs, as well as L. R. Staudenmayer, Sr., averred, in appropriate pleadings, that the mortgage debt had been paid, and that the mortgage was



not a lien upon the land. On March 27, 1890, a trial of the cause was begun; but it had not proceeded far before the plaintiffs asked and obtained leave to file an amended and supplemental petition, which caused a continuance of that branch of the case until the following term. A trial of the issue with respect to the validity and payment of the mortgage was allowed to proceed as between Maria L. Courtney, executrix, and her codefendants, the Staudenmayers; and the court found and adjudged that the mortgage debt had been fully paid and discharged, and that the mortgage constituted no lien upon the land. Upon a review that judgment has been affirmed. Courtney v. Staudenmayer, supra. The amended and supplemental petition filed by the plaintiffs alleged the purchase of the land from L. R. Staudenmayer, Sr.; the existence of the mortgage thereon, executed by L. R. Staudenmayer, Sr., to William C. Courtney, on July 17, 1858; and that L. R. Staudenmayer, Sr., at the time of the sale of the land to Drury, represented that the Courtney mortgage had been fully paid and satisfied, and should have been so entered of record, but from oversight it had not been done. It was further averred that R. B. Drury, believing the representations to be true, purchased the interest of L. R. Staudenmayer, Sr., in the property, for \$15,300, and made a payment of \$2,500 upon the same. For the unpaid purchase money, R. B. Drury and his wife executed promissory notes, secured by a mortgage upon the same property; and subsequently R. B. Drury conveyed to C. J. Drury and Robert McCrie, each, an undivided one-third interest in the real estate purchased from L. R. Staudenmayer, Sr., and each in turn assumed one-third of the mortgage indebtedness due from R. B. Drury and wife to L. R. Staudenmayer, Sr. It was alleged that C. J. Drury and Robert McCrie purchased the land, relying upon the representation that the Courtney mortgage debt had been paid and discharged; and the plaintiffs alleged that they had purchased an interest in the property with a view of subdividing it into small parcels and selling the same for a profit. They further averred that they had promptly instituted the proceeding in partition, but that it had been delayed by the claim upon the Courtney mortgage, which appeared to be in full force and effect as a lien upon the land. They alleged that they had made a demand upon L. R. Staudenmayer, Sr., that he should satisfy the claim, or cancel the contract of sale and the accompanying papers, but that he still persisted in claiming that the mortgage had not been for many years a lien or incumbrance upon his interest in the land conveyed by him to R. B. Drury, and he promised to speedily have the controversy relating thereto settled and determined. They averred that he had failed to take any steps to settle the controversy, that it had become further involved by a claim of an attorney's lien thereon, and the

property had been greatly depreciated in value during the delay, so that the land was not available for the purpose for which it was purchased, and, therefore, that they were entitled to rescind the contract. To that end they tendered deeds, duly executed, releasing their interest in the real estate, and asked the court to decree the contract of purchase canceled and annulled, and the notes and mortgage executed by R. B. Drury and wife to be adjudged null and void, and surrendered into court; and, further, they asked to recover a judgment against L. R. Staudenmayer, Sr., for the sum of \$2,600, with interest thereon. L. R. Staudenmayer, Sr., answered, setting forth the notes and mortgage executed by R. B. Drury and wife, asking for a personal judgment against them in the sum of \$12,800, and for a judgment against Charles J. Drury and Robert McCrie, each, for one-third of the mortgage debt, it being alleged that each had assumed the payment of one-third of the same, and for a decree of foreclosure. He also asked that Anna M. Drury should be made a party to the action, in order that his rights might be made complete. In a supplemental answer, filed by L. R. Staudenmayer, Sr., on June 24, 1891, he alleged that, on November 29, 1890, it had been duly determined in that court that the Courtney mortgage had been fully paid, satisfied, and discharged, and that the judgment was then in full force and effect. Replies were filed, and the issues closed. A trial was had before the court without a jury. Conclusions of fact and of law were filed on July 11, 1891, in which the court found that the Courtney mortgage was duly executed and recorded, and was still unsatisfied on the record, that no payment upon the notes secured thereby had ever been made, except three small interest payments, made in 1860, which were indorsed on the notes. It was also found that, at the time of the purchase, L. R. Staudenmayer, Sr., represented to R. B. Drury that the Courtney mortgage had been paid, that he had paid it, and that he had a receipt or something to show payment among his papers. It was further found that, by reason of the misrepresentations and misconduct of L. R. Staudenmayer, Sr., the contract of purchase should be rescinded, and it was so adjudged. The plaintiffs were required to convey the property to L. R. Staudenmayer, Sr., and the notes and mortgage executed by R. B. Drury and Anna M. Drury were annulled and canceled; and the court further gave judgment to the plaintiffs, against both of the Staudenmayers, for the sum of \$2,965.79, that being the amount of the payment made by R. B. Drury to L. R. Staudenmayer, Sr., together with the interest thereon. Staudenmayer complained of these rulings, and, after having brought the case to this court for review, he died; and since that time the proceedings have been revived in the name of B. C. Wood, administrator of the estate of the deceased.

Waggener, Horton & Orr, C. D. Walker, and J. L. Berry, for plaintiff in error. W. W. & W. F. Guthrie, for defendants in error.

JOHNSTON, J. (after stating the facts). A question of jurisdiction has been presented, based on what is alleged to be the absence of necessary parties. It is contended that the presence of L. B. Staudenmayer, Jr., and Anna M. Drury are necessary to a review of the case, and that their absence compels a dismissal. Although no personal judgment was sought against L. B. Staudenmayer, Jr., the court for some reason rendered a joint judgment against him and his father, who is designated as "Dr. Staudenmayer," for \$2,966.79, and it is therefore clear that he is a necessary party to the proceeding. He was not served with summons, nor was a formal entry of appearance made in his behalf until more than a year after the final judgment was rendered. It appears, however, that the case made was served upon him as the law requires, and that in good time his attorneys executed a written waiver of summons, and delivered the same to the attorney of plaintiffs in error, who forwarded the same to the clerk of the supreme court. If it was ever received, it cannot be found among the records of the court. Under these circumstances, we think he was a party to the proceeding from the beginning. Anna M. Drury was a party to the notes and mortgage decreed to be canceled; and, although Dr. Staudenmayer sought to recover a judgment against her upon the notes, the judgment of the court was that she be discharged from all liability on both notes and mortgage. If she was a party in the district court, her presence here is undoubtedly necessary to a review. She was not mentioned as a party in the title to any of the pleadings in the case, nor was there any order of the court obtained expressly directing or allowing her to become a party. When Dr. Staudenmayer set up the Drury notes and mortgage, he asked that she be made a party, and in the reply which was filed a few days later there is the following language: "Further replying herein, these plaintiffs, and said Anna M. Drury, joining herein, and as the wife of said R. B. Drury, having no other interest in the subject-matter thereof, say," etc. The counsel signed this pleading as "Plaintiffs' Attorneys." In the judgment, the court adjudges the annulment of "the three several notes executed by the plaintiffs R. B. Drury and Anna M. Drury," which were secured by a mortgage; "that the said notes, and each thereof, and the said mortgage, each as the obligation of the said defendants R. B. Drury and Anna M. Drury, as also any liability on account thereof of the other defendants, O. J. Drury and Robert McCrie, be canceled." The majority of the court are of the opinion that, as no leave was obtained from the court to make her a party, and as she did not sign any of the pleadings as plaintiff or defendant, and no attorney ex-

pressly signed for her, she cannot be regarded as a party in the trial court, and therefore her presence is not necessary here. It is the view of the writer that, when she was joined in the reply with plaintiffs, she became a party plaintiff, and that the attorneys who signed the reply signed for her as well as the others. From that time the parties appear to have proceeded upon the theory that she was a party, and certainly she was regarded to be a party by the court when he relieved her from any liability upon the notes and mortgage, and canceled them. It follows, from the holding of the majority of the court, that the motion to dismiss the proceeding cannot be sustained.

This brings us to the merits of the case, and we are all united in the opinion that the testimony does not sustain the findings and judgment of the court. The rescission was sought on the ground of the representations of Dr. Staudenmayer that the Courtney debt had been paid, and that the mortgage given to secure the same was no longer a lien upon the property. It appears that the representations were not in fact false, and we fail to see that an actual fraud was practiced upon the purchasers. The transaction was had at a time when there was an active demand for real estate, and during what is characterized by the parties as the "Atchison Boom." While it lasted, prices of land and lots in and about Atchison were greatly inflated, and the purchasers desired to obtain the land in question to subdivide and sell the same out in small parcels for profit. R. B. Drury went to North Carolina, and found Dr. Staudenmayer, and purchased his interest in the property for \$15,300. The history of the transaction shows that they were eager to obtain the land, and gave the price asked by the doctor, with little hesitation. L. R. Staudenmayer, Jr., who owned the remaining interest in the property, was in South Carolina, and it is said that the doctor encouraged Drury to believe that his son would sell the remaining interest to him. Before the transfer was made, however, Drury visited the son in South Carolina, who told Drury that he would not sell his interest to him, and that his father was mentally incapable of making a contract or transfer of his interest. Notwithstanding this denial and protest, Drury purchased the land, paying \$2,500 in cash, and for the balance of the purchase money gave three separate notes of \$4,266.66 $\frac{2}{3}$  each, signed by himself and his wife, and secured by a mortgage on the real estate purchased. According to the testimony, when Drury purchased the property, the mortgage stood as an incumbrance on the record title, and, besides, he had actual knowledge of that fact. He concedes that he called the attention of Dr. Staudenmayer to the incumbrance during the first negotiations, but the doctor told him it had been paid, and should have been discharged. The doctor insisted then, as he has since that time, both in and out of court, that the debt had been paid, and

that no lien actually existed against the land. With full knowledge of the unsatisfied mortgage, Drury purchased the property, and it is difficult to see, from the testimony in this record, that the purchase was induced by deception or fraud. The representation, said to have been made by the doctor, that he would induce the son to sell his interest, cannot weigh much in this controversy, for the reason that the plaintiffs were well advised, before the transfer, that the son would not sell his interest, nor consent to a sale of the interest held by the father. The first negotiation for the land was on April 27, 1887, and the purchase money was not paid, nor the deeds and mortgages exchanged, until May 6, 1887, when R. B. Drury went to North Carolina and personally attended to the transfer. It does not appear that, when the transfers were made, Drury demanded or asked for a written receipt of the payment of the money, nor did he demand the production of a written discharge of the incumbrance. About two months afterwards the purchasers began their action for partition of the property. Soon after the commencement of that proceeding, Maria L. Courtney came into the case, and set up the mortgage of 1858, claiming that it was an incumbrance upon the property, and asking for a foreclosure of the same. The mortgage was resisted alike by Dr. Staudenmayer as well as the purchasers, each alleging that it had been paid and satisfied. Notwithstanding this claim, and the open manner in which it was made, no charge of fraud was made against Dr. Staudenmayer, nor was rescission asked for by the purchasers until March 27, 1890, when the amended and supplemental petition was filed. Although the controversy in the litigation had continued for nearly three years, and although the purchasers appear to have possessed full knowledge of the situation, no complaint had been previously made that the purchase was induced by misrepresentations. The facts that partition was delayed, and the litigation concerning the same protracted, afford no grounds for rescission. The rule is that the right to disaffirm a contract for fraud must be exercised promptly after its discovery. *Bell v. Keepers*, 39 Kan. 105, 17 Pac. 785.

We are inclined to the view that the testimony fails to show that the purchasers were misled or induced to purchase by reason of the false representation of any material fact. A rescission of the contract and the cancellation of the conveyances is an extraordinary power of equity, and should not be exercised unless it is clearly established that the representations were false or fraudulent and that they were relied on by the purchasers. It appears that the statements of Dr. Staudenmayer with respect to the payment and satisfaction of the Courtney mortgage were in fact true. He asserted it to the purchasers, alleged it in his pleadings, and it has been established by a judgment of the trial court which has just been affirmed in this court.

48 Pac. 758. The findings of the court respecting the Courtney debt and mortgage are strangely inconsistent, and are another reason why the judgment should be set aside. Special findings of fact and of law were made in the trial of the issue respecting the Courtney debt and mortgage, and they are embraced in the record of this proceeding. In the first, the court held that the debt was paid, and the lien discharged; while, in the second set of findings, upon another issue in the same case, and substantially upon the same testimony, the court, in effect, found that the mortgage debt had not been paid. This was one of the controlling considerations in the judgment of rescission. It may be remarked here that the court found that, on July 8, 1887, R. B. Drury received one-half of an award of damages allowed for the establishment of a highway over the land in the sum of \$75, and on April 12, 1888, he received one-half of an award of \$50 for the establishment of another highway over the same land. Taking the testimony of the admitted knowledge of the parties with respect to the incumbrance, their conduct in the negotiations and the litigation, and the long delay in asserting that the purchase was induced by misrepresentation and fraud, we think the testimony fails to show any grounds for rescission, and that the findings and judgment are unsupported by the testimony. The judgment will be reversed, and the cause remanded for further proceedings. All the justices concurring.

#### WOOD v. DRURY et al.

(Supreme Court of Kansas. Feb. 8, 1896.)

#### JUDICIAL SALE—VALIDITY.

Where interested parties attack the title of property offered at a judicial sale, in such a way as to deter bidders and depress values, and where the price paid for the property is greatly inadequate, the sale should be set aside.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Executions issued, on the application of R. B. Drury and others, against L. R. Staudenmayer, Sr., and another. To a judgment confirming a sale thereunder, B. C. Wood, administrator of defendant Staudenmayer, since deceased, brings error. Reversed.

C. D. Walker, J. L. Berry, and Waggener, Horton & Orr, for plaintiff in error. W. W. & W. F. Guthrie, for defendants in error.

JOHNSTON, J. This proceeding is brought to review the ruling of the district court of Atchison county confirming a sale of real estate. Executions were issued upon a judgment rendered against L. R. Staudenmayer, Sr., and L. R. Staudenmayer, Jr., and in favor of R. B. Drury, O. J. Drury, and Robert McCrie, which judgment has just been reversed and set aside. *Wood v. Staudenmay-*

er, 43 Pac. 760. The executions were levied upon a quarter section of land adjoining the city of Atchison and upon three lots in that city. The land was sold for \$3,200. According to most of the testimony offered on the motion to confirm, it was worth more than double that amount. And the city lots only brought a small part of their actual value. The plaintiffs below, who were the judgment creditors, attended the sale; and it appears that two of them openly stated to those in attendance that there was a mortgage for a large sum upon the property, and in that way to some extent discredited the title to the property offered. This conduct was irregular, and may have affected the price paid for the property. It had then been adjudged that the mortgage to which they referred had been paid and discharged; and, while there was some competition at the sale, the attack upon the title probably chilled the sale, and conduced to the inadequacy of the prices offered. On account of this action, which would naturally deter bidders and depress values, together with the great inadequacy of the prices paid for the property, we think the sale should have been vacated. The rule is that great inadequacy of price is a circumstance which courts will always regard with suspicion, and in such cases slight additional circumstances only are required to authorize the setting aside of the sale. The orders of the court refusing to set the sale aside and in confirming the same will be reversed, and the cause remanded for further proceedings. All the justices concurring.

ZIMMERMAN et al. v. BARNES (two cases).  
(Supreme Court of Kansas. Feb. 8, 1896.)

WRITS—SERVICE BY PUBLICATION.

It is irregular and erroneous to join claims only personal in their nature with others where-in constructive service is allowable, and then proceed to obtain such service as to the several incongruous claims; and, where a motion to set aside such service is seasonably made, it should be sustained. Johnston, J., dissenting.

(Syllabus by the Court.)

Error from district court, Shawnee county;  
Z. T. Hazen, Judge.

Action by Thomas B. Barnes against William Zimmerman and Mary M. Zimmerman. Judgment for plaintiff. Defendants bring error. Reversed.

On January 12, 1891, the defendant in error commenced an action against the plaintiffs in error, and at the same time filed an affidavit for service by publication, the body of the same being as follows, to wit: "Now comes Thomas B. Barnes, who, after being duly sworn, upon his oath deposes and says: That he is the plaintiff in the above-entitled action. That the defendants therein, William Zimmerman and Mary M. Zimmerman, are nonresidents of the state of Kansas. That the plaintiff, with due diligence, is unable to make service of summons upon the

defendants, or either of them, within said state of Kansas. That said action relates to real estate in said county of Shawnee. That the relief, among other things, demanded in said action, is to establish and acquire the legal title, and to recover the possession, with five hundred dollars damages for rents and profits, and for the withholding of the possession of, and to exclude the defendants from, any title or interest in or to the undivided one-half of the following described real estate, situated, lying, and being in said county of Shawnee and state of Kansas, to wit: The northwest quarter and the southeast quarter of section seven (7), township thirteen (13), range seventeen (17); and to recover judgment against said defendants for \$1,218.66, with interest at 10 per cent. from December 17, 1887, as balance due on certain mortgage; and to declare and enforce the same as a first lien on the moiety of said real estate owned by said defendants. And if, for any sufficient reason, the title cannot be compelled or enforced, then plaintiff asks judgment for five thousand dollars in that behalf, and for other judgments, orders, and decrees as prayed for in the plaintiff's petition filed therein, reference to which is hereby had." The affidavit substantially followed the prayer of the petition as to the relief demanded, and the published newspaper notice was in general accord with the affidavit. On April 21, 1891, a motion was filed in behalf of the defendants below, as follows: "Come now the defendants, and, denying the jurisdiction of this court over the persons of the defendants, appear specially for the purposes of this motion, and not otherwise, and move the court to set aside the pretended publication notice for constructive service on these defendants, upon the grounds: (1) That no sufficient affidavit was made or filed herein authorizing or supporting the publication notice made by plaintiff, and filed herein on 2d March, 1891. (2) That the supposed publication notice filed herein on 2d March, 1891, was not authorized by any affidavit filed under the provisions of sections 72 and 73 of the Code of Civil Procedure, or of any other statute of this state. (3) Said supposed publication notice was not published in the manner required by law. (4) The court had no jurisdiction over the persons of these defendants." On May 9, 1891, said motion was overruled, the defendants excepting; and on June 8, 1891, judgment was rendered in favor of the plaintiff below, against the defendants below, as upon default, and the case was brought to this court for review August 6, 1891. On March 1, 1895, the defendants below, appearing specially, filed a motion to vacate and set aside said judgment, and asking that they be let in to answer and defend; but on September 16, 1895, said motion was overruled, and this decision of the court is complained of in the second petition in error filed in this court on October 16, 1895.

W. O. Webb, for plaintiffs in error. Jetmore & Jetmore, for defendant in error.

MARTIN, C. J. (after stating the facts). It is unnecessary to consider whether the service by publication was or was not void, for it was attacked directly by motion in good season, and therefore we have the question before us whether the proceeding was regular or erroneous. It is well settled that, with some exceptions, not including this controversy, the jurisdiction of a court does not extend beyond the boundaries of the state, so as to personally bind by its adjudication those outside of such boundaries. No personal judgment against a nonresident can be obtained, unless he shall enter his appearance or be served with process within the state, although any property which he may have within the jurisdiction may be subjected to any just demand against him, and any right, title, lien, or interest that any other person may claim in such property may also be the subject of adjudication. In cases of the latter class, service may be made by publication. Civ. Code, § 72. It would be an abuse of process to compel a nonresident owner of property located here to subject himself to the jurisdiction of the courts of this state upon a mere personal claim, as a condition of his right to litigate as to the title or status of such property. As to personal claims against him, a nonresident has a right to defend against the same in his own courts as long as he chooses to remain there, without going into another jurisdiction. The plaintiff below had a right to service by publication for the purpose of establishing an interest in the lands described, but, on failure in that respect, he could not recover a personal judgment for damages for the value of such interest.

In the case of a creditor proceeding by publication, the fact that he is seeking to subject property of the defendant within the jurisdiction must affirmatively appear. *Repine v. McPherson*, 2 Kan. 340, 346. In a suit against a foreign corporation, where its treasurer, found within the state, is garnished, but he has no funds of the corporation in his hands here, the court obtains no jurisdiction over the corporation or its property in another state on service against it by publication (*Wheat v. Railroad Co.*, 4 Kan. 370); and, where the affidavit for publication does not state directly, inferentially, or in any other way that the action brought is one of those mentioned in section 72 of the Civil Code, it is fatally defective, and service by publication cannot be obtained thereon (*Harris v. Claffin*, 36 Kan. 543, 13 Pac. 830). In *Neal v. Reynolds*, 38 Kan. 432, 435, 16 Pac. 785, a party sought to rescind a contract for the exchange of real estate by an action properly brought in the county where part of it was situated, against residents of another county, where they were summoned. After appearance of the defendants, the

plaintiff, obtaining leave to amend, added another cause of action for damages for breach of warranty as to some of the exchanged lands, thus blending a local with a transitory cause of action; and it was held that the added cause was properly struck out on motion of the defendants; that the plaintiff should be confined to the cause of action which authorized service of summons in another county, and to allow him to do more was to violate the statute relating to service, take an undue advantage of the defendants, and impose upon the court. It may be difficult to reconcile this case with *Beebe v. Carter*, 54 Kan. 261, 38 Pac. 278; but the latter case is distinguishable from the one now under consideration, for in that the amendment was allowed after a general appearance had been entered by the defendant constructively served, and one of the defendants had been personally served. In the present case, demands only personal in their nature were united with those wherein constructive service is allowable, and then such service was attempted as to the several incongruous claims; but, the validity of the service having been attacked by motion, we cannot disregard the former as mere surplusage, because, on appearance of the defendants below, they could not answer to a part of the petition only, but must respond to everything contained therein; and thus they would be forced to litigate personal claims as a penalty for appearing in this jurisdiction for the purpose of settling rights to property situated here. The judgment of the court below overruling the motion to set aside service will therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

It was unnecessary to bring the second case here, as everything essential to a consideration of the question involved was presented in the first case, and the second will therefore be dismissed.

ALLEN, J., concurring.

JOHNSTON, J. (dissenting). Two proceedings in error were submitted for a review of rulings made in the case in the district court; the first attacking the service as absolutely void, and the second attacking the validity of the judgment rendered. As the principal relief demanded in the action was the recovery of real estate, and to exclude others from any interest in it, service by publication was authorized, and therefore cannot be said to be void. The affidavit and notice embraced all that is required for constructive service under section 72 of the Civil Code, and it will hardly do to say that the service was destroyed on account of redundancy in either the affidavit or publication. If the service was irregular by reason of surplusage, it was cured by a subsequent general appearance of the defendant in the case, when he came in and asked affirmative action of the trial court. More than that,

when a party appears after constructive service, and his appearance is not induced by fraud of the plaintiff, he is in court for all purposes and for every step that may be taken in the case. If causes of action are improperly joined in the petition, the Code requires that a party must raise the objection by demurrer or answer; and, if he does not do so by either method, he is deemed to waive the defect. Of course, if default is made upon service by publication only, no relief can be had except such as is provided in section 72 of the Civil Code. When he does appear, however, he is, in my opinion, entitled to the same rights and the same protection in conducting his share of the litigation as a resident of the state, and no more. When he comes in, he is permitted to set up a defense of an affirmative and transitory character, and why should the resident plaintiff be barred from the same privileges? Why should he be precluded from amending the petition, and joining with his local action one of a transitory nature, which grew out of the same transaction, and which the Code expressly provides may be united in a single proceeding? The policy of our Code is against the splitting of a transaction into several lawsuits, and is in favor of uniting all consistent causes growing out of the same transaction, and disposing of them in a single case. There may be some lack of harmony in the decisions upon this question; but, after a careful consideration of the same, it was held, in *Beebe v. Carter*, 54 Kan. 261, 88 Pac. 278, that, where service by publication is made upon a person who afterwards makes a general appearance and files a pleading, it is competent for the court thereafter to allow the original petition to be amended so as to charge him personally, and to warrant the recovery of a personal judgment against him. In the case of *Neal v. Reynolds*, 88 Kan. 432, 16 Pac. 785, the amended pleading which was before the court was a substantial change of the claim or action of the plaintiff, and hence the court properly sustained the objection made against it. Some of the language of the commissioner who prepared the opinion tends to sustain the view of the plaintiffs in error in these cases; but that decision, as well as the language of the commissioner, was urged upon the attention of the court in *Beebe v. Carter*, supra, and we then held that, when a party is legally brought into a case by constructive service, he is subject to the same rules as one upon whom personal service has been had.

#### CHEROKEE & P. COAL & MINING CO. v. STOOP.

(Supreme Court of Kansas. Feb. 8, 1896.)

##### NEW TRIAL—SUFFICIENCY OF EVIDENCE.

The fact that the jury are the exclusive judges of all questions of fact submitted to them

does not justify the judge of the trial court in declining to examine the sufficiency of the evidence upon which the verdict rests, when it is challenged by a motion for a new trial; and whenever it is manifest that the jury have found against the clear weight of the evidence, and that the party asking for a new trial has not in all probability had a fair trial, nor received substantial justice, it is his imperative duty to set the verdict aside and grant a new trial.

(Syllabus by the Court.)

Error from district court, Crawford county; Stephen H. Allen, Judge.

Action by Samuel K. Stoop, administrator of George W. Croxton, against the Cherokee & Pittsburg Coal & Mining Company. Judgment for defendant, and from an order granting a new trial it brings error. Affirmed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. J. F. McDonald, J. D. Hill, and J. D. McCleverty, for defendant in error.

JOHNSTON, J. This was an action brought by Samuel K. Stoop, as administrator of the estate of George W. Croxton, deceased, against the Cherokee & Pittsburg Coal & Mining Company, to recover damages sustained by the widow and next of kin of George W. Croxton, deceased, for pecuniary loss alleged to have been sustained by them by reason of his death, and which it is alleged was caused by the negligence of the company. The company owned and operated a coal mine at Frontenac, and the deceased was an employé working in the mine as a coal miner, and it is alleged that the company negligently permitted the accumulation of combustible and inflammable dust in the mine, which, being communicated with by a blast of powder, caused a general explosion, and, among other casualties, caused the death of George W. Croxton. There is an averment in the petition that the company knew or should have known that the presence and accumulation of dust was a dangerous element in the mine, but, notwithstanding this, they failed to sprinkle the mine, or take other reasonable precautions against danger from this cause. The answer was—First, a general denial; and, second, that the deceased came to his death by reason of his own carelessness. The trial resulted in a verdict in favor of the company, and the plaintiff below asked for and obtained a new trial, and one of the grounds for his motion was that the verdict was not sustained by sufficient evidence, and was contrary to law.

It is contended by the company that the action of the court in setting aside the verdict and granting a new trial was an abuse of discretion on the part of the trial court. The testimony of the plaintiff below was to the effect that the company negligently permitted large quantities of coal dust, impregnated with sulphur, to accumulate in the mine, and that such coal dust was combustible and explosive, and, coming in contact

with a blown-out shot, caused a general explosion, which destroyed the life of Croxton. On the other hand, the testimony offered in behalf of the company was that the coal dust was not explosive, and that the explosion in question was occasioned by the careless act of the employes in igniting the powder used by the miners in mining coal.

In view of the fact that the testimony was so conflicting and contradictory, there is little left for our determination. "The granting of a new trial is so much in the discretion of the trial court that the supreme court will not reverse the order of the trial court granting a new trial unless error is clearly established with respect to some pure, simple, and unmixed question of law." *Sanders v. Wakefield*, 41 Kan. 11, 20 Pac. 518; *City of Sedan v. Church*, 29 Kan. 190.

It is conceded that there is a conflict in the testimony, but it is urged that this conflict was settled by the jury, who are the exclusive judges of the facts, and that it was clearly an abuse of discretion in the trial court to set aside the verdict. A trial court will be reluctant to set aside a verdict where a doubtful question of fact exists, simply because its judgment inclines the other way; but the mere fact that there is a conflict in the testimony does not relieve the court from examining the sufficiency of the evidence, nor make the verdict of the jury conclusive. "While the case is before the jury for their consideration, the jury are the exclusive judges of all questions of fact; but, when the matter comes before the court upon a motion for a new trial, it then becomes the duty of the trial judge to determine whether the verdict is erroneous." *Railroad Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108. In the same case it was said that "it has been the unvarying decision of this court to permit no verdict to stand unless both the jury and the court trying the cause could, within the rules prescribed, approve the same." Whenever a trial court determines that the verdict is clearly against the weight or preponderance of the evidence, it should not hesitate to set it aside, and grant a new trial; and, in arriving at this determination, the judge of the trial court must be controlled by his own judgment, and not by that of the jury. *Williams v. Townsend*, 15 Kan. 563; *Railway Co. v. Diehl*, 33 Kan. 422, 6 Pac. 566. In *Railway Co. v. Kunkel*, 17 Kan. 172, it was held that the judge had the same opportunities as the jury for forming a just estimate of the credence to be placed on the various witnesses; and, if it appears that the jury have found against the weight of the evidence, it is the imperative duty of the judge to set the verdict aside. If the evidence is nearly balanced, so that different minds might fairly come to different conclusions, the finding of the jury should stand as against any mere doubts of the judge concerning its correctness; but when his judgment tells him that the jury, from

some cause, have found against the fair preponderance of the evidence, no duty is more imperative than that of setting aside the verdict and remanding the case to another jury. And so, in *City of Sedan v. Church*, supra, it was said that "new trials ought to be granted whenever, in the opinion of the trial court, the party asking for a new trial has not in all probability had a reasonably fair trial, and has not, in all probability, obtained or received substantial justice."

The trial judge, under whose eye and within whose hearing the evidence was presented, did not approve the verdict. Manifestly, he determined that the jury had mistaken or failed to properly weigh the testimony in the case. Having in mind the superior opportunities which the trial judge has for comprehending the force of the evidence and the discretion with which he is vested in the granting or refusal of a new trial, we cannot say that there has been an abuse of discretion in setting the verdict aside. Judgment affirmed. All the justices concurring.

#### ATCHISON, T. & S. F. R. CO. v. BUTLER.

(Supreme Court of Kansas. Feb. 8, 1896.)

#### RAILROAD COMPANIES—ACTION FOR DEATH—NEGLECT—INSTRUCTIONS.

1. The petition *held* to be sufficient to charge negligence in the management of the engine and cars.

2. Common prudence would dictate that cars should not be "cornered" in railroad yards, and, before a train is set upon a track, those in the management of it should use reasonable diligence to see that it will clear the car or cars on another track; and a failure to do so may be negligence as towards employes working on the colliding cars.

3. A party has a right to request answers to particular questions of fact pertinent to the issues, and which can be answered fairly upon the evidence; and the court has no discretion to refuse to submit them to the jury, but it should refuse all questions propounded in a negative or leading form, or unfair in substance, as those assuming as true matters that are false or disputed.

4. The instructions of the court *held* not erroneous in any material respect.

(Syllabus by the Court.)

Error from circuit court, Ford county; A. J. Abbott, Judge.

Action by Alice E. Butler against the Atchison, Topeka & Santa Fé Railroad Company. There was a judgment for plaintiff, and defendant brings the case up on a case made. Affirmed.

On November 28, 1890, Alice E. Butler commenced the original action to recover damages for the death of her husband, Elmer E. Butler, a switchman in the defendant's yards, at Dodge City, on August 5, 1890. It was charged, in substance, in the petition that, about 8 o'clock a. m. of said day, the defendant, while operating one of its engines and exchanging some of its cars from one track to another, and shunting, kicking, or switching

said cars, by its agents and servants other than said Butler, managed said engine and cars carelessly and negligently, and then and there, without his fault, and by reason of such carelessness and negligence, struck with great violence the car on which he was then at work under charge and direction of the defendant, and thereby shook and threw him off said car, and onto the railroad track, and ran over and killed him. The answer was a general denial. The evidence shows that Butler was one of a switching crew, consisting of an engineer and fireman on the engine, a foreman, named Bleaker, a switchman, named Martin, and himself. The general course of the railroad where they were working was east and west, and there were two side tracks or switches south of the main track, the first one, branching from Bridge street east, being called the "river track," and the other, branching from it east of Bridge street, being called the "house track," extending to the freight warehouse. The switch east of Bridge street could be so adjusted as to throw cars from the main track either onto the river track or the house track. On the occasion of the casualty, the engine was attached to the west end of the way car, which had five or six cars attached to the east of it on the river track, which were to be pulled out upon the main track, and the car furthest east thrown onto the house track to be coupled to some cars standing near the warehouse, after which the others were to be thrown back onto the river track. The evidence (with the exception of that of one witness, who must have been mistaken) shows that Butler was on the car that was to be thrown onto the house track, and it was kicked eastward by the engine and other cars, Bleaker pulling the pin, and Martin turning the switch, and, after the car passed him, turning it back again, so as to throw the other cars upon the river track, Bleaker again pulling the pin which coupled the way car to the rest of the train, which was kicked back upon the river track; and these overtook the one on which Butler was riding on the house track before it had gone far enough to clear it from those following on the river track, and the car furthest east struck the northwest corner of the one upon which Butler was riding with a force which knocked him off, and he was run over and killed. The evidence is quite conflicting as to Butler's position on the car at the time of the collision, some of the witnesses claiming that he was on the top of the car, and fell therefrom, while others say that he was clinging to the east end of the car, and that his hold gave way causing him to fall by reason of the shock. Some evidence was given tending to show that he had been at the brake at the east end, and that he had turned the brake wheel, and let it off again; and it was claimed by the defendant below that this retarded the motion of the car, by reason of which it was overtaken by those coming on the river track. There was a clearing post a

few inches high set up between the river track and the house track, at a point far enough east to indicate where cars upon the two tracks would clear each other. The cause was tried at May term, 1891, a verdict being returned for the plaintiff in the sum of \$9,450, together with answers to numerous particular questions of fact. The defendant moved for judgment in its favor on the findings, and also for a new trial; but these were overruled, and the defendant below brings the case here for review upon a case made.

A. A. Hurd, C. N. Sterry, and Stambaugh & Hurd, for plaintiff in error. Overmeyer & Mulvane, Sullivan & Sullivan, and J. H. Coppenheffer, for defendant in error.

MARTIN, C. J. (after stating the facts). 1. In the parlance of railroad switch yards, when a car running or standing on one track is struck by a car or cars in motion on another before the two tracks have sufficiently diverged to admit of the cars clearing each other, they are said to "corner"; and it was a collision of this nature, between cars running in the same direction, upon different tracks, that caused the death of Elmer E. Butler. Such an occurrence can hardly take place without the fault of one person or more. It is claimed by the railroad company that the petition is insufficient to charge the foreman or switchman with negligence, and instructions were asked to that effect. The petition was not well drawn; yet we think that, by a liberal interpretation, it may be said to charge negligence and carelessness in the management of the cars, as well as that of the engine; and, as no motion was made with a view to its correction, we must hold it to be sufficient.

2. Before Butler's car got far enough on the house track to clear, it was struck by the train on the river track. Had his car run a little faster or the train on the river track a little slower, the collision would not have occurred; and the real question was whether the fault was that of Butler or of the men in the management of the train that was set upon the river track. The jury have found, in substance, that those in the management of the train were in fault, and that Butler was not; and we think the evidence sufficient to justify their verdict. It tended to show that the train was kicked down upon the river track with great force before Butler's car had time to get out of the way. It is possible that Butler may have turned the brake wheel without setting the brake, and this sooner than he should have done, but common prudence would dictate and the rules of the company required that cars should not be "cornered"; and, before a train is set upon a track, those in the management of it should use reasonable diligence to see that it will clear the car or cars on another track. Reliance is placed by the railroad company upon the fact that those in the management of the train after Butler's



car had been cut off thought it had sufficient momentum to take it beyond the clearing post, and we doubt not that they were correct. But they did not give it time. It was still running when it was struck, and perhaps in two or three more seconds it would have been out of the way, but the other cars were hurled down upon it on the other track; and we cannot say that this was not negligence. The evidence tends to show that Butler was upon the top of the car at or near the brake, and looking towards the east, where it was his duty to couple to others at or near the warehouse. In this position he probably did not see the clearing post, nor know the exact location of his car with reference to it; and, after the train was uncoupled from the way car, it was not in the power of any of the crew to check it, and, if Butler noticed it, no signal from him would have been of any avail.

3. Many particular questions of fact were submitted to the jury on behalf of the defendant below, and complaint is made that some of the answers were indefinite, and the court refused to require the jury to reconsider them. We think, however, that the court should have refused to submit some of them in the first instance. We will quote only one question and answer, namely: "(38) Is it not a fact that Butler, when on top of the car, could, by remaining there, have seen whether the car he was riding had passed east of the clearing post or not before it stopped? A. Depends upon circumstances." This question is negative in form, and leading. Besides, it assumes that the car stopped before the collision; and this is not only unsupported by the evidence, but contrary thereto. Several questions of a similar character were asked, apparently for the purpose of entrapping the jury. It is true that a party has a right to request answers to particular questions of fact pertinent to the issues, and which can be answered fairly upon the evidence, as held in *Bent v. Philbrick*, 16 Kan. 190, and other cases; and the court has no discretion to refuse to submit such questions to the jury, but this court has often animadverted upon the abuse of this valuable right. *City of Wyandotte v. White*, 13 Kan. 191, 196; *Railway Co. v. Holley*, 30 Kan. 465, 472, 1 Pac. 130, 554; *Railroad Co. v. Ayers*, 56 Kan. —, 42 Pac. 722, 723. The cross-examination and badgering of a jury should not be tolerated, and the court should draw heavy black lines across all such questions.

4. Some legitimate criticisms are made upon the instructions. The court stated to the jury that it was the duty of all employes associated in the service of the railroad company—"First, to exercise care and diligence for the safety and life of other employes, and, second, to exercise care and diligence for the protection of the property and interest of the employer." The second clause should not have been given, for, while it may be correct as an abstract proposition, it is

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not applicable to this case. But we do not think that the jury could have been misled by it, and this remark is applicable to other parts of the instructions complained of. Upon the whole, there was no material error in the case, and the judgment must be affirmed. All the justices concurring.

#### MAIN STREET HOTEL CO. OF HORTON et al. v. HORTON HARDWARE CO.

(Supreme Court of Kansas. Feb. 8, 1896.)

MECHANICS' LIENS—ENFORCEMENT—LOSS—ABANDONMENT OF CONTRACT—RIGHTS OF SUBCONTRACTOR—SURETIES.

1. Where subcontractors performed labor and furnished material in 1888 and 1889, so as to be entitled to mechanics' liens under the act of 1872, they had a right to file their lien statements, give notice thereof, and commence their actions thereon under the act of 1889, which repealed the former act.

2. Where, after the act of 1889 took effect, the contractor abandoned the work with the knowledge of the owner, which was withheld from the subcontractors, whose contracts were incomplete, the latter had the right to file their lien statements within 60 days after the abandonment or doing the last work or furnishing the last item of material before notice of such abandonment.

3. A surety on a contractor's bond cannot be held liable thereon when the failure of performance of the contract is caused by the default of the obligee.

4. Subcontractors cannot obtain liens in excess of the amount which the owner has agreed to pay the original contractor.

5. The giving of a bond under section 13, c. 168, Acts 1889, does not operate to divest a lien the right to which accrued under the act of 1872.

(Syllabus by the Court.)

Error from district court, Brown county; J. F. Thompson, Trial Judge.

Action by the Horton Hardware Company and others against the Main Street Hotel Company of Horton and others to enforce a mechanic's lien. To the judgment rendered, the parties bring error and cross error. Modified.

On June 15, 1888, E. S. Malone contracted with the Main Street Hotel Company, a corporation, to furnish all material for and construct and complete a three-story brick hotel building, with stone basement, on lots 39, 40, and 41 in block 10 in the original town of Horton, according to certain plans and specifications prepared by Eckel & Mann, architects, for the sum of \$17,585.80, one-fourth of said amount to be paid when the basement walls were completed, one-fourth on completion of the roof, one-fourth when the plastering was done, and the remainder when the building was fully completed and accepted by said architects; and it was further agreed that Malone and his bondsmen should not be liable for any delays caused by the failure of the hotel company to make said payments. On the same day, Malone, as principal, and Hugh Caughey, as surety, entered into a bond to the hotel company in the sum of \$5,000 for the performance of Malone's part of

the contract. The basement walls were completed by August 27, 1888, when the first payment was made, amounting to \$4,396.45. The roof was completed November 1, 1888; but the second payment was not fully made, for want of funds on the part of the hotel company, but partial payments were made, and the work was carried on with a limited number of men. On January 5, 1889, the plastering was completed with the exception of the halls, which could not be properly plastered until the stairs were completed, and some necessary patching, which could not be done until the building was nearly finished. The third payment was not made, for lack of funds. The work was prosecuted with a small force, when the weather was suitable, until June 15, 1889; the president of the hotel company having personally guaranteed the wages of the workmen, who had refused to work unless the payment of their wages every Saturday night was guaranteed. At that time he notified Malone, in the presence of the workmen, that he would not be responsible for the payment of the men thereafter; and thereupon Malone abandoned the work, and went to Denver, where he remained some months. Malone did not tell the men to stop work; but on Monday, June 17th, upon the personal guaranty of the managers of the hotel company, three carpenters who had been working for Malone on the building continued the work, one of them acting as foreman, and in that capacity signing Malone's name to orders for wages at the request of the hotel company, and the wages were paid by the company without authority from Malone. On August 28th, the hotel company called on Hugh Caughey, and notified him that they looked to him to complete the contract. But he refused to have anything further to do with it, and the company proceeded to complete the building at an expense of \$2,286.54, which was as low as it could reasonably be done at that time; but, if money had been furnished to Malone before he abandoned the contract, he could have completed it for \$1,500 in addition to what he had expended. The building was completed in December, 1889. Under subcontract with Malone, several parties performed work and furnished material for said building. The Horton Hardware Company, a partnership, commenced furnishing materials July 6, 1888, and continued to do so until June 20, 1889, before they learned of the abandonment of the work by Malone; but the items furnished from June 15th to June 20th, inclusive, were insignificant in amount; and on August 12, 1889, the company filed a mechanic's lien, and gave notice thereof. Hugh Caughey furnished material from July 12, 1888, until June 13, 1889, amounting to \$5,820.28; and on August 7, 1889, he filed a mechanic's lien, and gave notice thereof. Besides the foregoing, he advanced to Malone for material, labor, etc., \$5,108.70, and was reimbursed out of the first payment to the

amount of \$3,406.84; leaving a balance of \$1,701.86, for which Malone gave him an order on the hotel company November 17, 1889, and the hotel company was then owing Malone more than that amount. The order was never returned nor paid by the hotel company. The Ambrose Manufacturing Company contracted for the iron work at \$947, and all of the same, except \$124 in value, was furnished between August 10, 1888, and September 29, 1888, which Malone partially paid, leaving a balance due on the part furnished of \$643.63. The manufacturing company was ready to complete the furnishing of the materials according to contract when called upon by Malone according to their arrangements; but the remaining material was not called for, and on August 3, 1889, the company filed a lien, and gave notice thereof. John Collins contracted to do the painting and furnish the material for \$470. He worked 40 days, his wages being reasonably worth \$2.50 per day, and furnished material worth \$60; but work was done and material furnished amounting in value to \$20 in August, 1889, before he knew of the abandonment by Malone, the last work being done August 20, 1889; and he filed a lien and gave notice thereof October 16, 1889. Malone furnished extra material and work of the value of \$315.15. The hotel company paid to him and on his orders \$11,046.03, and the total cost of the building up to its abandonment by Malone was \$21,090.83, and \$2,286.54 thereafter for its completion, as hereinbefore stated. The labor and material were in substantial conformity to the contract. On September 14, 1890, the Horton Hardware Company commenced this action to enforce its mechanic's lien, and the several lien claimants were thereafter brought into court, where they set up their respective claims. On September 27th, the hotel company caused to be executed, approved, and filed a bond, as authorized by section 13, c. 168, Laws 1889. The case was referred to Hon. Abijah Wells, as referee, who made a full report, from which the foregoing statement is taken, the facts found being supported by the evidence in all material respects. The referee allowed the respective amounts found to be due for work and material entering into the building, and found that all the claimants except one (who makes no complaint, and is not a party in this court) were entitled to liens, to be prorated according to the contract price and the actual cost, but held that the lien claimants could not have relief against the real property, and must be remitted to their actions on the bond approved and filed September 27, 1889. The report was confirmed by the court, and judgment rendered in accordance therewith. The hotel company prosecutes error as to the allowance of these several claims for liens, and the lienors have filed cross petitions in error complaining of the cutting down of their liens, and of the relieving of the real estate from the burden thereof.

James Falloon and Johnson, Rusk & Stringfellow, for plaintiff in error. J. M. Johnson, R. F. Buckles, Means & Smith, S. L. Ryan, James A. Clark, and W. J. Stewart, for defendants in error.

MARTIN, C. J. (after stating the facts). 1. The first point suggested is whether the parties that performed labor and furnished material in the construction of this building under subcontracts while the law of 1872 was in force could, after the repeal of that law, proceed, either thereunder or under the act of 1889, to perfect mechanics' liens upon the property. It is provided in chapter 104, par. 6687, Gen. St. 1889, which took effect October 31, 1868, that "the repeal of a statute does not \* \* \* affect any right which accrued, \* \* \* nor any proceeding commenced under or by virtue of the statute repealed"; and, again, "the provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment." A right accrued to these subcontractors under the act of 1872 by performing work and furnishing materials in the erection of the building. *Weaver v. Sells*, 10 Kan. 458; *Brown v. School Dist.*, 48 Kan. 709, 711, 29 Pac. 1069; *Nixon v. Cydon Lodge*, 56 Kan. —, 43 Pac. 236. Under the act of 1872, a subcontractor was required to file his lien statement within 60 days after the completion of the building; but under that of 1889 he must file it within 60 days after furnishing the last item of his account. And by the rulings of this court upon the act of 1872, where the work was abandoned either by the fault of the contractor, the owner, or both, the subcontractor might treat the building as completed for the purpose of filing a mechanic's lien. *Shaw v. Stewart*, 43 Kan. 572, 577, 23 Pac. 616; *Lumber Co. v. Savings Bank*, 52 Kan. 410, 414, 34 Pac. 1045. The right to the liens accrued under the act of 1872, but the procedure for enforcing them, which included the filing of the lien statements, the giving notice thereof, and the commencement of action thereon, is governed by the act of 1889. *Nixon v. Cydon Lodge*, supra. By the act of 1872, the time limited for the commencement of the action to enforce the lien was one year after the completion of the building; but, under the act of 1889, the suit must be brought within one year after the filing of the lien statement, and therefore these statements were not filed too soon, nor the action prematurely commenced.

2. The Ambrose Manufacturing Company did not file its lien until nearly 10 months after the furnishing of the last item of its account, but it stood ready to furnish the remaining materials, amounting to \$124 in value, as soon as they should be needed, and in accordance with its agreement with the contractor; and, clearly, it had a right to file its lien state-

ment within 60 days after the abandonment of the contract by Malone, as it could not be expected to furnish the remainder of the materials after that time under its subcontract. The Horton Hardware Company furnished items insignificant in amount from June 15 to June 20, 1889, before it had any knowledge of the abandonment by Malone; but as the hotel company failed to notify the hardware company of the abandonment, and received the benefit of the goods furnished, we think it has no right to complain; and the same remarks apply to the claim of John Collins for painting, a small part of which was done after the abandonment by Malone, but without notice thereof, by reason of the hotel company withholding the information.

3. We think the evidence justified the referee in finding that the hotel company failed to make its payments according to the terms of its contract with Malone, and that this was the principal cause of the abandonment; and, as it was provided in the contract that Malone and his bondsmen should not be liable for any delays caused by the failure of the hotel company to make its payments, Hugh Caughey, as surety, was properly relieved from any liability upon the bond, especially as it is found by the referee that the building could have been completed at the contract price by Malone, if payments had been promptly made and the work pushed with a large force; and we see no error in allowing judgment in favor of Hugh Caughey against the hotel company for the pro rata amount of the order for \$1,701.86.

4. The lien claimants, in their several cross petitions in error, complain because they were not allowed the full amount of their claims, but were compelled to prorate, as mentioned in the statement. But subcontractors are bound to take notice of the original contract, and they cannot obtain liens in excess of the amount which the owner has agreed to pay the original contractor. *Nixon v. Cydon Lodge*, supra. Section 2, c. 141, acts 1872; section 3, c. 168, Acts 1889.

5. The claimants also complain of the ruling of the referee and the court relieving the real estate from the burden and remitting them to their several actions on the bond given in pursuance of section 13 of said act of 1889, and their position must be sustained in accordance with the reasoning contained in this opinion. The right to a lien upon the real estate, which accrued under the act of 1872 by performing labor and furnishing materials, was not divested by the giving of a bond as authorized by said section 13 of the subsequent act. *Weaver v. Sells*, supra.

The court below will be directed to so modify its judgment as to allow the pro rata amount of the several claims as liens upon the real property. In all other respects the judgment will be affirmed. All the justices concurring.

**RICHOLSON, Sheriff, v. FREEMAN.**

(Supreme Court of Kansas. Feb. 8, 1896.)

**NEW TRIAL—INSUFFICIENCY OF EVIDENCE—FRAUDULENT CONVEYANCE—EVIDENCE—BURDEN OF PROOF.**

1. If the verdict does not meet with the approval of the trial court, it should be set aside, and a new trial granted, although there were three prior disagreements.

2. Where a sale of a stock of goods is alleged to have been fraudulent as to creditors, the purchaser may be asked, and allowed to answer, as a witness in his own behalf, whether he had any knowledge or notice that his vendor was selling the goods with intent to hinder, delay, and defraud his creditors. *Gentry v. Kelley*, 30 Pac. 186, 49 Kan. 82, followed.

3. The instructions examined, and some of them held erroneous.

(Syllabus by the Court.)

Error from district court, Elk county; M. G. Troup, Judge.

Action by L. A. Freeman against Oley Richolson, sheriff. Verdict for plaintiff. From an order refusing a new trial, defendant brings error. Reversed.

C. W. Canoose, being the owner of a stock of goods at Longton, Kan., on April 2, 1889, made a bill of sale thereof to L. A. Freeman, the defendant in error. Canoose was indebted in a considerable sum on said goods, and on April 4, 1889, several suits were commenced against him on the claims, and orders of attachment were levied on the stock by Oley Richolson, as sheriff of Elk county. On April 12th Freeman replevied the goods from the sheriff, who gave a redelivery bond, and the property was returned to him, and afterwards sold as upon execution by order of the court. This action of replevin was tried four times before a verdict was reached, and this was in favor of Freeman, at May term, 1891, for the sum of \$2,850. The sheriff filed his motion for a new trial, which the court overruled, stating the reasons therefor at great length, the following being some of his remarks thereon, namely: "I am willing to concede, now, that, in my opinion, there never can be but one final outcome to this case. That has always been my opinion of the case. I have always been of the opinion that the defendant must prevail in this case, finally. I have always been of that opinion, and I am of that opinion now. \* \* \* They [the jury] say, and have said, that the circumstances that surrounded Freeman, at the time when he bought these goods, were not such as to have induced a man of ordinary prudence to inquire into his financial condition. I think they were, and I don't agree with the jury as to the manner in which they have answered that question. \* \* \* This case has been tried here by four juries of this county, fairly, and each time it was tried I have been of the same opinion that I am now, namely, that the plaintiff never can finally recover in this case, under the law and the facts. But three juries have disagreed. Part of the jury heretofore have thought with the court, and part have thought otherwise. \* \* \* If I

should do my duty here, probably, strictly and literally, under the law as announced by our supreme court, \* \* \* I would set this verdict aside. \* \* \* I may have committed error in saying it frankly, in the instructions to the jury, that, in the opinion of the court, C. W. Canoose made that sale with intent to hinder, delay, and defraud his creditors. I don't think there is any doubt about that. The very minute he got his money he skipped out. Of course, he sold to defraud his creditors. I think the jury ought to have said so. \* \* \* I think he sold these goods with intent to defraud his creditors. I am inclined to think that Mr. Freeman had notice of such facts to have put him on inquiry at that time." Error in the admission of testimony and in giving instructions is also alleged.

J. B. Ziegler and W. E. Ziegler, for plaintiff in error. L. Scott, for defendant in error.

**MARTIN, C. J. (after stating the facts).**

1. It is evident, from the remarks of the trial judge, that the verdict did not meet with the approval of the court, and it should have been set aside, and a new trial granted, although there had been three prior disagreements. *Railroad Co. v. Ryan*, 49 Kan. 1, 3, 4, 12, 13, 30 Pac. 108, and cases cited.

2. Upon Freeman's examination in chief as a witness in his own behalf, he was asked the following question: "Had you any knowledge or notice that Mr. Canoose was selling this stock of goods with intent to hinder, delay, and defraud his creditors?" And he answered: "No, sir." This is alleged as error, but the question was competent under the authority of *Gentry v. Kelley*, 49 Kan. 82, 88, 30 Pac. 186.

3. Complaint is made of instructions given, and the court seems to have erred both to the prejudice of the plaintiff and the defendant. At the request of the defendant below, the court gave the following instruction: "(2) If you are satisfied, from the evidence, that C. W. Canoose sold and transferred to the plaintiff the goods in controversy, with the intent to defraud, or to hinder and delay, his creditors, then the burden falls upon the plaintiff; and before he can recover he must satisfy your minds, by the preponderance of the evidence, that he made the purchase without knowledge or notice of such fraudulent intent on the part of the said C. W. Canoose, and that all the facts, circumstances, and transactions attending and surrounding such sale and transfer were not of that kind and character as should have led him, as a prudent man, to make inquiry into the intent of his vendor." This was error to the prejudice of the plaintiff below. A prima facie case was made out in favor of the plaintiff by showing possession of the stock of goods under a bill of sale from Canoose, who was conceded to be the owner. It then devolved upon the defendant to show that the sale was

made by Canoose for the purpose of hindering, delaying, or defrauding his creditors, and that Freeman knew or had reason to believe that Canoose was acting in bad faith towards his creditors in making the sale. The burden of proof did not shift by the showing of the fraudulent intent of Canoose. *Baughman v. Penn*, 33 Kan. 504, 508, 6 Pac. 890; *Bank v. Beard*, 55 Kan. 773, 42 Pac. 320, 321. Where confidential relations exist between the vendor and the vendee, it may sometimes devolve upon the latter to show that the transfer was for a valuable consideration and in good faith; but that principle is not applicable to this case. The court also charged the jury in instruction No. 1, requested by the defendant below, that the plaintiff was charged with knowledge of all facts that he might have ascertained by examination and inspection of the books and papers he received along with, and as a part of, his purchase. This is going too far. The plaintiff may not have examined the books and papers, and, had he done so, might have been unable to understand everything that was contained in them. The contents of such books and papers, as to any showing of indebtedness, were competent evidence against the plaintiff below, and constituted legitimate subjects of argument to the jury that the plaintiff made the purchase either in haste, without regard to the rights of the creditors of Canoose, or that he closed his eyes to facts which would have been otherwise obvious; but it was erroneous to declare, as a matter of law, that he was chargeable with a knowledge of all the facts which an inspection of the books and papers might disclose.

At the request of the plaintiff below, the court gave the following instruction: "(1) The jury are instructed, as a matter of law, that it is not sufficient, to vitiate a sale of personal property, that it was made by the vendor to hinder, delay, or defraud his creditors. In order to vitiate such sale, as against the purchaser, he must have had knowledge or notice of such intent on the part of the seller." And the same principle was substantially declared in instruction 3. This was error prejudicial to the defendant below. The jury may have understood therefrom that, in order to vitiate the sale as to Freeman, he must have had knowledge or notice of the fraudulent intent of Canoose. It is not necessary, however, to show actual knowledge or notice of the fraudulent intent of the vendor. A knowledge of facts sufficient to put one upon inquiry, which, if duly prosecuted, would have disclosed such fraudulent intent, is equivalent to actual knowledge of the same. *Bush v. Collins*, 35 Kan. 535, 541, 11 Pac. 425, and cases cited. This principle seems to have been recognized in the instructions given by the court upon its own motion, but we cannot harmonize these general instructions with those we have criticised, and which were requested by the parties. There is little to

criticise in the general instructions given by the court to the jury on its own motion. But the province of the jury was invaded by the statement that they ought to have no particular difficulty in finding a fraudulent purpose on the part of Canoose, although there was little, if any, room to doubt that fact, and the judgment would not be reversed on this ground alone. It is best, however, under our practice, to leave all facts not admitted to the determination of the jury, without any intimation of the opinion of the trial judge. The judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

PRAIRIE LUMBER CO. v. KORSMEYER  
et al.

(Supreme Court of Kansas. Feb. 8, 1896.)

APPEAL—REVIEW—ACCEPTING PROCEEDS OF JUDGMENT.

A party who has received his portion of the proceeds of property sold on the foreclosure of mechanics' liens, as distributed by the court, cannot have the decree reviewed on appeal.

Error from district court, Finney county; A. J. Abbott, Judge.

Action by the Prairie Lumber Company against F. A. Korsmeyer & Co. and others to foreclose mechanics' liens. From an order distributing the proceeds of the sale of the property the lienholders bring error.

Milton Brown, for plaintiffs in error. M. A. Calhoun, for defendants in error.

PER CURIAM. In an action to recover money for building material and to foreclose mechanics' liens judgment was rendered adjusting the priorities, and decreeing a sale of the property. The property was sold in pursuance of the decree, and with the consent of all the parties the sale was confirmed. Afterwards, upon a motion for the distribution of the proceeds of the sale, an order was made providing for distribution, as follows: First, the costs of the proceeding and sale; second, the sum of \$1,001.12, the amount necessary to redeem the property from the tax liens and tax certificates held by Fred. Finnup, and the balance was to be prorated among the lien claimants. The principal objection made to this distribution is the direction for the redemption of the property from tax sale. It is contended that paragraph 6902 of the General Statutes of 1889 does not authorize payment out of the proceeds of a judicial sale for lands already sold at tax sale, but only includes unpaid and delinquent taxes previous to sale, and which have not already been collected from any source. The questions discussed by counsel are new and interesting, but we cannot determine them in this proceeding. From the admissions of the parties it seems

that they have accepted the shares allotted to each, and that the plaintiffs in error have received the share apportioned to them. It is true, they objected to the distribution, but they cannot be heard to complain of a judgment when they have accepted a substantial part of the benefits of the same. In a recent case it was held that "a party who accepts the principal benefits of a litigation cannot escape from its burdens or disadvantages by a review in a higher court." *Bank v. Butler*, 56 Kan. —, 43 Pac. 229.

**FIRST NAT. BANK OF CONCORDIA v. MARSHALL, Sheriff.**

(Supreme Court of Kansas. Feb. 8, 1896.)

**DEPOSITION IN ANOTHER ACTION—ADMISSIBILITY—EVIDENCE—MOTIVE—SUBSEQUENT CONDUCT—FRAUDULENT CONVEYANCES.**

1. The deposition of the president of a bank, taken in another action, offered in evidence by the defendant, is inadmissible on the trial of an action brought by the bank where he is present in court, so that his oral testimony can be given; but where he, on the witness stand, testifies, without objection, after hearing the deposition read, that it is correct and is his testimony, and where he is examined at length with reference not only to matters mentioned in the deposition, but also with reference to other material facts, and where there is no claim made by the bank that any statement contained in the deposition is untrue or is contradictory of the statements made by him on the witness stand, the error in the admission of the deposition becomes unimportant, and does not warrant a reversal of the judgment. *Martin, C. J.*, dissenting.

2. In a controversy between a bank, claiming a stock of merchandise under chattel mortgages, and a sheriff, claiming possession by virtue of divers writs of attachment, where it is claimed by the defendant that the mortgages were made and received to defraud creditors of the mortgagor, letters written by the president of the bank to creditors while the rights of the parties remain undetermined, calculated to influence their action with reference to the collection of their claims, as well as telegrams sent by such creditors to the bank with reference thereto, are admissible in evidence, though written and sent after the execution of the mortgages, and after the levy of the attachments.

3. A mortgage taken for the purpose of defrauding creditors of the mortgagor is not merely voidable as to such creditors, but is void.

(Syllabus by the Court.)

Error from district court, Cloud county; *F. W. Sturgis, Judge.*

Action by the First National Bank of Concordia against Edward Marshall, sheriff. There was a judgment for defendant, and plaintiff brings error. Affirmed.

This action was brought by the First National Bank of Concordia against Edward Marshall, sheriff of Cloud county, to recover a stock of merchandise, consisting of farm implements, plumbing goods, harnesses, bugles, wagons, barbed wire, windmills, etc., which had been seized by the sheriff under divers writs of attachment issued against *L. A. Bartlett*. The plaintiff claimed the prop-

erty under two chattel mortgages executed by Bartlett on the 4th day of June, 1889, one to the bank to secure the payment of three promissory notes, aggregating \$2,304.87, the other to secure a note to Laing and Wrong for \$1,500. The answer of the defendant was a general denial. The jury rendered the following verdict: "We, the jury, impaneled and sworn in the above-entitled case, do upon our oaths find for the defendant, and that at the commencement of this action he was entitled to all the property sought to be recovered in the same; that that taken from him by the coroner under the writs herein is described therein, and was at the commencement of this action of the value of \$8,782.26." The court thereupon rendered a judgment in favor of the defendant for a return of the property, or for the value as fixed by the jury in case a return could not be had.

Theo. Laing, for plaintiff in error. *J. W. Sheafor* and *A. H. Ellis*, for defendant in error.

**ALLEN, J.** (after stating the facts). The first specification of error discussed in the brief of counsel for plaintiff in error is in the admission of the deposition of *F. J. Atwood*, taken in the case of the *Parlin & Orendorff Co. v. Bartlett*, in June, 1889. Atwood was the president and general manager of the plaintiff bank, not only at the time the deposition was taken and of the trial of this action, but at and for a considerable period of time before the chattel mortgages under which the plaintiff claimed were taken. The defense of the sheriff was that the transaction was fraudulent; that, for some time prior to the execution of the mortgages, Bartlett had been buying great quantities of goods on the recommendations of Atwood as to his financial standing made to the wholesale dealers; that Atwood, as the manager of the bank, conspired with Bartlett, and assisted him to get these goods on credit, for the purpose of defrauding the sellers, and of securing payment of a large indebtedness to the bank by a mortgage on the goods so purchased. The first attachment against Bartlett was issued in a suit brought by the *Parlin & Orendorff Co.*, and levied on the same day that the chattel mortgages were executed, but after they were filed in the office of the register of deeds. Soon afterwards they took the deposition of Atwood in that case, before a notary public. On the trial of this action he attended as a witness, and testified on behalf of the plaintiff. On cross-examination he was asked some questions with reference to this deposition. In the course of the introduction of testimony on behalf of the defendant, this deposition was offered in evidence, and objected to on the ground of incompetency, and because *Mr. Atwood* was

present. The defendant thereupon called Atwood, and exhibited to him the deposition. He admitted that the deposition was taken and subscribed by him; that he had read it over before signing it; that he was president of the plaintiff bank at the time it was taken, and was still its president and managing officer. The court thereupon overruled the objection, and the plaintiff excepted. The deposition, which is very long and very important, was thereupon read to the jury. It contained Atwood's testimony as to the dealings between Bartlett and the bank, and with reference to various other matters connected with the case. It was error to allow the introduction of the deposition. Although Atwood was the president and managing officer of the bank, he could not bind it by a mere admission, not made in connection with the discharge of any duty, nor the transaction of any business for the bank. *Dodge v. Childs*, 38 Kan. 526, 16 Pac. 815; *Tennis v. Railroad Co.*, 45 Kan. 503, 25 Pac. 876; *Coal & Mining Co. v. Dickson*, 55 Kan. 62, 39 Pac. 691. Was this error prejudicial to the rights of the plaintiff? After concluding the reading of the deposition, Atwood was again called to the witness stand, and testified, without objection or exception, that he had recently read the deposition, and that he had been present in court while it was read to the jury. He was then asked whether there was any statement contained in the deposition as read which he desired to correct. He made one slight correction, and, as to the rest, said that, if he were allowed to revise the matter, he would change the wording in several cases, but not the sense of it, and that with the correction he then made the deposition was correct; that it would be his testimony if he were giving it now; that it was his testimony. On rebuttal, Atwood was again called as a witness for the bank, and testified at length. No material contradiction between his testimony in the deposition and on the witness stand is apparent. Atwood, as president, had authority to represent the bank in this litigation. *Bank v. Berry*, 53 Kan. 696, 37 Pac. 131. He and the attorney appearing for the bank could bind it by admissions made in the progress of the trial. On the witness stand, Atwood not only admitted that the deposition had been taken and subscribed by him, but swore that it contained his testimony, and that it was true. This he stated without objection from his counsel, and we think, in view of the full opportunity offered for correcting any misstatement, and also for giving any further testimony desired, that the error in admitting the deposition was cured. Although the practice followed is not to be commended the plaintiff in error has not pointed out any particular in which it was injured by the manner of getting Atwood's testimony before the jury. The bank nowhere challenges Atwood's truthfulness, but maintains it; nor is any attempt made to point out material

error in the testimony contained in the deposition. Where the plaintiff in error asserts the truth of every statement which it contains, we cannot hold that material error was committed in its admission. *Railroad Co. v. Prouty*, 55 Kan. 503, 40 Pac. 909.

Error is also alleged in the admission of a letter written by Atwood to the Abbott Buggy Company on June 7, 1889, and a telegram by the buggy company to the bank, sent from Chicago on the 8th. It is contended that these were transactions after the attachments were made, and after the occurrence of the events to which they referred, and that they were objectionable for similar reasons to those urged against Atwood's deposition. The letter and telegram were admissible on other grounds. Although the chattel mortgages had been executed and attachments had been levied on the goods, the rights of the parties had not been determined. The bank was still seeking to hold the property as against creditors, and its communications with them, through its president, with reference to litigation pending or prospective, and with reference to the action they might or ought to take for the protection of their interests, and with reference to the claims of the bank, were all properly admissible in evidence, because in these matters Atwood spoke for the bank, and represented its interests.

Error is claimed in the admission of the appraisal in the case of *Parlin & Orendorff Co. v. The Bank*; but we think it was properly admitted. A part of it had been offered in evidence by the plaintiff, and Mr. Bellale, a competent witness, who was one of the appraisers, was called, and testified that the value of the goods was correctly set down in the inventory.

We find nothing substantial in the objection to the testimony of Day with reference to his having written a letter to his house which was not read in evidence.

Complaint is made of the following portion of the instructions: "Of course, if any material false representations were made by Atwood, and were known by him to be false at the time, and were made for the purpose of concealing Bartlett's true condition, and to enable him to purchase goods when he otherwise could not have done so, then such acts on the part of Atwood would amount to a fraud as to Bartlett's creditors whose claims were thus created, and the bank would have no right to take a mortgage on goods thus obtained; and, if it did take such mortgage under such circumstances, it would be void absolutely." It is contended that a mortgage taken under such circumstances would be voidable only, while the court charged that it would be void. We think the court correctly declared the law as applicable to this case. This was a contention between the bank claiming under the mortgages and the sheriff who represented attaching creditors. As to such creditors,

the mortgage was either valid or void. There was no question of voidability as to them; nor do their rights to rescind the sales of goods made to Bartlett on the ground of fraud on the part of the purchaser, and to recover the goods so sold, affect the question in any manner of the validity or invalidity of the plaintiff's mortgages. The plaintiff cannot maintain a cause of action based on a mortgage taken for the purpose of perpetrating a fraud on Bartlett's creditors. *Wafer v. Bank*, 46 Kan. 597, 28 Pac. 1032.

Complaint is made of the form of the verdict and of the judgment rendered thereon, but we find them sufficient. We have carefully examined the voluminous record brought to this court, and find in it abundant evidence to uphold the verdict and judgment. It is therefore affirmed.

JOHNSTON, J., concurring.

MARTIN, C. J. (dissenting). I am constrained to dissent from the first point of the syllabus and the corresponding part of the opinion. We all agree that it was error to permit the reading of the deposition of Atwood taken in another case, and he being not only in the county, but present in the court room, and that "the practice followed is not to be commended." I think it should be condemned by granting a new trial. The error was not cured, but aggravated and confessed, by calling Atwood again to the witness stand, to make him admit a second time that he had given the evidence contained in the deposition. It was but a repetition of a flagrant violation of the rules of evidence established by the Code of Civil Procedure. It would have been idle, and perhaps prejudicial to the plaintiff, to have made further objection. The point was already saved by objection and exception. The courts should not permit the law to be broken with impunity by its ministers in the halls devoted to its administration.

#### UNION PAC. RY. CO. v. URE et al.

(Supreme Court of Kansas. Feb. 8, 1896.)

#### RAILROAD COMPANIES — TRESPASSER ON TRACK — NEGLIGENCE OF ENGINEER.

In a suit for an injury resulting in the death of a child two years old, the jury found that the engineer saw the child, in dangerous proximity to the track, in time to have stopped the train, and prevented the injury, if he had immediately used all the appliances provided on his engine for that purpose, but that he did not exercise proper care, and failed to do so. *Held*, that said facts are sufficient to uphold a verdict against the railway company, and it is immaterial whether the court erred, or not, in its instructions, making a distinction as to the point of time when duty of the company arises towards a conscious and an unconscious trespasser upon its track. Johnston, J., dissenting.

(Syllabus by the Court.)

Error from district court, Sheridan county; Charles W. Smith, Judge.

Action by William D. Ure and another against the Union Pacific Railway Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

A. L. Williams, N. H. Loomis, and R. W. Blair, for plaintiff in error. E. A. McMath, for defendants in error.

MARTIN, C. J. The original action was commenced, December 20, 1890, by the parents of George D. Ure, a child two years and one week old, to recover damages for injuries resulting in his death on April 1, 1889. A trial at June term, 1891, resulted in a verdict and judgment in favor of the plaintiffs for \$3,000, and the defendant prosecutes its petition in error in this court for a review of said judgment. The material facts, either undisputed or found by the jury in answer to questions propounded, may be summarized as follows: The child was killed at Grainfield by a passenger train of the defendant, running east, which struck him on the track. The home of the child was a little north of the railroad, and he was first seen, by some of the witnesses, in the slight depression or ditch north of the track, and creeping towards the rails, about 620 to 650 feet west of the depot, and 336 feet east of the switch. The engine was west of the switch, and 500 to 600 feet from the child, when the engineer first saw him near the track, and creeping towards the rails. He was not at any public street or crossing. The engineer discovered the presence of the child, in a dangerous situation near the track, in time to stop the train, and avoid the injury, if he had immediately used all the appliances provided on his engine for that purpose, and the train could have been stopped within 450 to 500 feet; but the engineer did not use proper care to stop his engine, and did not immediately use the appliances available for that purpose. The plaintiffs were in the exercise of ordinary care and prudence as to the child at the time, and his mother did not negligently permit him to wander upon the track. The general verdict is supported by the findings; but the plaintiff in error claims that these are not justified by the evidence, and that the answers favorable to a recovery may have been influenced by erroneous instructions of the court. It contends that there is no distinction, in principle, between the time when duty arises towards a conscious and an unconscious trespasser upon its track; whereas, the court below stated to the jury that such a distinction did exist in law, and that, as to a child so young as not to be chargeable with contributory negligence, the duty of the railroad company was not limited to the time after it was actually discovered to be in a place of danger, as in the case of a conscious trespasser, but that it was the duty of the railway company to keep a reasonable lookout, and if the unconscious trespasser could have thereby been seen in time to avoid the casualty, by stopping the train, and it failed



to do so, then it was liable in damages for the injury. The authorities on this point are quite conflicting. The defendant in error claims that the evidence established the facts—First, that the engineer, by the exercise of reasonable care and watchfulness in the running of his train, could and should have discovered this child in a dangerous position, near the track, in time to have stopped the train, and prevented the injury; and, secondly, that the engineer actually did see the child, in dangerous proximity to the track, in time to have stopped his train, and prevented the injury, if he had at once used the appliances provided on his engine for that purpose, but that he failed to do so. The second contention of the defendants in error is established by the findings of the jury, and we cannot say that there is no evidence to support them. We have great doubt of the correctness of the answer of the jury that the engineer saw the child 500 or 600 feet away, and we think the weight of the evidence is that it was not seen before the engine reached the switch. Yet the evidence of the engineer is not entirely satisfactory, and probably the jury disregarded it, as they had a right to do, if the evidence of other witnesses on this point was more credible.

We deem it unnecessary to decide whether the court was correct, or not, in making a distinction as to the point of time when duty of the railroad company arises towards a conscious and an unconscious trespasser upon its track. No question was propounded to the jury as to the distance at which the child might have been seen if the engineer had been keeping a proper lookout, and these most material questions in the case were directly propounded to the jury in the plainest of terms: "How many feet was George D. Ure east of the engine when Engineer Trow first discovered him?" And, "What was the distance ahead of the engine when the engineer first saw the child near the track?" The answer to each question was, "From 500 to 600 feet." It does not seem reasonable that the jury understood either of these questions as seeking an answer as to what distance ahead of the engine the child was when he could have been seen by the engineer, if he had been looking ahead on the track; and, in this view, it is immaterial whether the instructions of the court on this point were correct, or not, and we deem it unnecessary to consider them. Some complaint is made upon the admission of testimony, but we think there was no material error in that respect. The judgment of the court below will be affirmed.

ALLEN, J., concurring.

JOHNSTON, J. (dissenting). In my view, the testimony does not sustain the finding that the engineer discovered that George D. Ure was in a dangerous situation, near the track, in time to have stopped the train and

avoided the injury. It was probably the result of the erroneous charge given to the jury, in holding that the engineer must anticipate the presence of trespassers upon the track, and that, if he could have seen the boy in time to have stopped the train, and by the exercise of proper care have avoided striking him, the company is liable. It is well settled that the duty of the company towards the trespasser is to avoid injury to him after his peril is actually discovered. While the boy could not have been guilty of contributory negligence, no duty arose towards him until those in charge of the train discovered that he was in a place of danger. After he was seen, a higher degree of care was required of the trainmen than if he had been an adult; and, if they then ran the train upon him without doing all they reasonably could to prevent the injury, the company would be responsible. As the duty towards him did not commence until his presence was discovered, and as there can be no negligence without a breach of duty, the instruction of the court upon this question was erroneous and misleading.

#### ATCHISON, T. & S. F. R. CO. v. WINSTON.

(Supreme Court of Kansas. Feb. 8, 1896.)

#### MASTER AND SERVANT — ACTION FOR INJURIES — INSTRUCTIONS.

1. A recovery was sought for an injury alleged to have been caused by the negligence of the defendant. Although there was no testimony tending to show that the injury was willfully or wantonly inflicted, or that the defendant was guilty of gross negligence, the court instructed the jury as to the liability of the defendant in case they found that the injury was the result of the gross negligence of the defendant. *Held*, under the facts of the case, to be misleading and erroneous.

2. A railroad company is not an insurer of the safety of its employes, but is liable for injuries resulting to an employe from its failure to exercise reasonable and ordinary care towards him, unless he has been guilty of contributory negligence upon his part.

(Syllabus by the Court.)

Error from district court, Osage county; William Thompson, Judge.

Action by Lucius Winston, administrator, against the Atchison, Topeka & Santa Fe Railroad Company, to recover damages for death by wrongful act. There was judgment for plaintiff, and defendant brings error. Reversed.

A. A. Hurd and C. N. Sterry, for plaintiff in error. Waters & Waters, for defendant in error.

JOHNSTON, J. On April 6, 1891, Albert A. Ayers was engaged as a switchman in the yards of the Atchison, Topeka & Santa Fe Railroad Company at Nickerson, Kan., and had been acting in that capacity for about three months prior to that time. Two crews of men were engaged in the yards, each consisting of three men, viz. a yard master and two switchmen. Ayers belong-

ed to the night crew, of which Frank Low was yard master; Logan Lawson pulled the pins between the cars and between the engine and the cars; while Ayers generally caught cars which were cut off from others, and moved to different parts of the yards, but occasionally he was required to uncouple cars and to pull pins. On the night of April 8, 1891, which was dark and windy, the crew were engaged in making up a train, and it became necessary to set 18 cars which were upon one track over upon another. The switch engine was backed down to connect with them, and Lawson, whose duty it was to pull pins and direct the movements of the engine, stood on the running board attached to the tender. That end of the engine was attached to what is called a "Mexican car," which had a pin in the drawhead that could not be taken entirely out. There was a slot in the pin, through which a rivet passed, and the pin was so made that, when it was drawn up as far as the rivet would permit it to go, the head of it dropped back, and the slot would catch in the drawbar, and hold the pin in position. Quite a number of cars with such couplings were used on that railroad system, but the pins so placed would not always stay up. Occasionally, when passing over a switch or anything which would cause a jolt, they would fall back again. The cars were pulled out from one track, and were being backed in upon another, at a rate of from three to five miles an hour, and Low and Ayers had climbed upon the other end of the train with a view of setting the brakes and stopping the cars when they reached a certain point. When they had proceeded a short distance, and it was desired to cut the engine off, Lawson, standing on the footboard of the tender, with his lantern in one hand, pulled the pin of the Mexican car, and set it back, and at once turned to catch the handhold of the tender with one hand, and signal the engineer with his lantern with the other to stop the engine. Upon this signal, the engineer stopped the engine; but the pin had fallen back, and recoupled the engine to the Mexican car, which caused a jerk throughout the entire train of 18 cars. Just before this occurred, Ayers had climbed upon the train, and was over near the end of the eighteenth car, while Low had climbed on the seventeenth car, but had not reached the top. When Low felt the jerk, he looked back, and saw Ayers' lantern falling, but he was unable to see whether Ayers had fallen, or what had become of him. Low at once set the brakes, and stopped the cars, and, after a search, Ayers was found in the middle of the track, with one foot cut off, and his body badly bruised. In a short time he died, and his widow brought this action to recover for the loss suffered by his death. The jury found in her favor, and awarded damages in the sum of \$7,987.

The sufficiency of the evidence is attacked, and, while it is weak and unsatisfactory in some respects, the court is of opinion that it was sufficient to take the case to the jury. Whatever may be said of the testimony as to the negligence of the company, it is certain that there was none offered tending to show a wanton and willful injury, nor anything which approached gross negligence. The court, however, in its charge, and over the objection of the company, stated at length the definition of gross negligence, and instructed that, if the jury believed the injury and death of Ayers was caused by the gross negligence of the railroad company, they should find for the plaintiff, unless the deceased was guilty of contributory negligence. In view of the testimony, this instruction was misleading and erroneous. The casualty is attributed to want of care on the part of Lawson, the pin puller, but we fail to find anything which warranted the giving of these instructions. It is conceded that the falling of the pin, which caused the jerk, was accidental. Pins fastened as this one was, occasionally fall when the car is jolted, and the one upon this car had fallen once before on the same night. Lawson pulled and set the pin as the car approached the switch, and probably the jolt resulting from passing over the switch caused the pin to fall. While Lawson knew that Ayers was on the other end of the train, he could not see him when he was upon the footboard, uncoupling the engine from the cars, and there is nothing to show that Lawson believed that Ayers was in danger. Jerks of the kind which probably caused the fall of Ayers are not uncommon in the yard, and Lawson states that he had no idea that the jerk was sufficient to throw a man from the train. More than that, the jury found that, in pulling the pin and signaling the engineer, Lawson acted in the usual and ordinary way of doing such things in that yard. It is further found that Low, the other switchman, did not know that Ayers was thrown from the car until he had climbed on the top, and looked over the sides and end; and, further, that, after the jerk, he could not have done anything to prevent the casualty. Under this state of facts, an instruction directing the attention of the jury to the rule which obtains where the negligence is malicious or willfully and wantonly reckless was prejudicial error. *Railway Co. v. Peavey*, 29 Kan. 169; *Railroad Co. v. O'Connell*, 46 Kan. 581, 26 Pac. 947; *Railroad Co. v. Wells*, 56 Kan. —, 42 Pac. 699.

Some of the instructions appear to have been given upon the theory that there was testimony that Lawson believed, or had reason to believe, that the deceased had been jerked from the train, and was liable to be run over; and the jury were therefore advised that, unless he then used all the means within his power to prevent injury to Ayers,

he was guilty of culpable negligence. In one of them, it is said that in such case it was Lawson's duty, "if in his power, to take such precautionary measures as would insure the safety of the deceased; and if he failed to do so, and the deceased was not at fault, the defendant would be liable for the injuries thus occasioned." Nothing in the testimony tends to show that Lawson knew or had reason to apprehend that Ayers had been jerked from the train; and, in any event, the railroad company is not required to insure the safety of its employes, and can only be held liable for the failure to exercise ordinary care. The twenty-third, twenty-fourth, and twenty-fifth instructions are objectionable in this respect, and should not have been given.

For the errors mentioned, the judgment will be reversed, and the cause remanded for another trial. All the justices concurring.

#### HAMPTON v. ALLEE.

(Supreme Court of Kansas. Feb. 8, 1896.)  
MINOR CHILDREN—SUPPORT BY DIVORCED WIFE—  
LIABILITY OF HUSBAND.

An action brought by a divorced wife against her former husband to recover compensation for the support of their minor children, which bases the right of recovery on the judgment rendered in the divorce case, cannot be maintained where the judgment imposes no liability on the husband for such support.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by Edith J. Hampton against James F. Allee. There was a judgment sustaining a demurrer to the petition, and plaintiff brings error. Affirmed.

The plaintiff in error, as plaintiff below, filed an amended petition, which reads as follows: "That for a number of years prior to November 19, 1884, the plaintiff and defendant were husband and wife. That on said date this plaintiff was divorced from said defendant, and the custody, control, and management of plaintiff's and defendant's minor children, Hattie May Allee, then about 8 years of age, and William F. Allee, then aged about 10 years, was given to this plaintiff by the judgment and decree of divorce rendered in the district court of Shawnee county, Kansas, in an action therefor between plaintiff and defendant. That a copy of said decree of divorce is hereto attached, marked 'Exhibit A,' and made a part hereof; and plaintiff alleges that said defendant is indebted to her, under and by reason of said decree, in the sum of twenty-one hundred dollars (\$2,100.00) for maintaining and supporting said minor children from said 19th of November, 1884, to November 19, 1891. That by the terms of said decree defendant was and is bound to support and maintain said minor children till they shall

have reached their majority. That an itemized statement of said indebtedness, as near as plaintiff can make same, is hereto attached, marked 'Exhibit B,' and made a part hereof. Wherefore plaintiff asks judgment against said defendant for said sum of \$2,100 and interest and costs of suit." The copy of the decree of divorce attached to the petition shows that the judgment was rendered on service by publication, and that the defendant did not appear. It awards the custody of the minor children to the plaintiff, and contains only this in regard to their maintenance: "That provision for the maintenance and support of said minor children shall be made by the court as from time to time may be deemed necessary." In Exhibit B there are seven items, each of which is a charge of \$300 for boarding, lodging, educating, and clothing their two minor children for one year. A general demurrer to the petition was sustained.

B. F. Hudson and P. Hayes, for plaintiff in error. C. D. Walker, for defendant in error.

ALLEN, J. (after stating the facts). The ruling of the court sustaining the demurrer to the plaintiff's amended petition was right. The decree of divorce rendered by the district court of Shawnee county contains no provision imposing a liability on the defendant for the support of the minor children, and it has been held that no such liability exists independent of the decree *Harris v. Harris*, 5 Kan. 46. The petition and Exhibit B, thereto attached, make no claim for unpaid alimony, but recovery is sought for the support of the children only. The judgment is affirmed. All the justices concurring.

#### RODGERS et al. v. RODGERS et al.

(Supreme Court of Kansas. Feb. 8, 1896.)  
INSANITY — PRESUMPTION OF CONTINUANCE — DIVORCE IN SISTER STATE — EFFECT — RIGHTS OF CHILDREN.

1. The presumption of continued insanity arising from an adjudication thereof may be overcome by evidence other than an adjudication of restoration; and where a married man residing in this state, and adjudged insane, deserted his family, and went to another state, residing there several years, being always considered as sane, and there procured a divorce on service by publication without actual notice to the wife, which divorce he set up as a bar to this action for divorce, he must be regarded as sane.

2. The courts of a sister state, if authorized by law, may dissolve the marriage relation between a husband domiciled there and a wife residing in this state on service by publication, although unknown to her, but such courts have no power to settle the title to lands in this state, nor to control the custody of children residing here; and where a husband deserted his wife and children, leaving them in the occupation of a homestead here, and, going to another state, procured a divorce in accordance with law, but without actual notice to the wife, held that, though such decree was effectual as to the status

of the parties, it was not a bar to the allowance of alimony in the homestead, nor as to the custody of the children, in a subsequent action brought by the wife here.

3. In an action brought by the wife against the husband for divorce, alimony, and the custody of children, it is error for the court to award and set apart to the children a portion of the real estate of their father.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturgis, Judge.

Action by Rebecca B. Rodgers and others against Alvin S. Rodgers and others for divorce and other relief. There was a judgment for plaintiffs, and defendant Rodgers, by his guardian, brings error. Reversed.

On January 9, 1878, at Manhattan, Kan., Alvin S. Rodgers was married to Rebecca B. Rodgers. They lived together as husband and wife until 1883, their home being in Cloud county, and three children were born of the marriage. On or about April 16, 1883, Alvin S. Rodgers was adjudged insane, and was committed to the asylum at Topeka, where he remained until June 28, 1883, when he was discharged as cured. He returned home, but stayed only a few days, and then left. During the time that he remained in Cloud county, his actions were unusual, and afterwards he wrote a letter from Morgantown of date August 10, 1883, strongly indicative of insanity. In it he declared a purpose of going to the Indian Territory. He never afterwards returned to Cloud county. He owned a quarter section of land, which he and his family occupied as a homestead, and also an adjoining 40-acre tract. At some time after the adjudication of insanity, Homer Kennett was appointed as guardian of said Alvin S. Rodgers. Soon after Rodgers left the country, the father of Mrs. Rodgers took her and the children to his home, in Ohio, where they remained about three years, until his death, when they returned to Kansas. Kennett, as guardian, let and leased the land, and, under direction of the probate court, applied the rents to the support of Mrs. Rodgers and her children, and about 1889 he let the premises to W. S. Gorsuch; but, Mrs. Rodgers desiring possession, in the fall of 1890 she was permitted to build a small house on the quarter section, into which she and the children moved. The whereabouts of Alvin S. Rodgers from 1883 until 1886 is not disclosed by the record, but from 1886 his home seems to have been at Wheeling, W. Va., where he was regarded and treated as entirely sane, being employed part of the time in a nail factory. On November 12, 1888, he commenced an action in the circuit court of Ohio county, W. Va., to obtain a divorce from Rebecca B. Rodgers, alleging that she had abandoned him more than three years before. He obtained service by publication only as authorized by the laws of West Virginia, and on July 17, 1889, he was granted a divorce, and an order was made purporting to bar Rebecca B. Rodgers of all

right, title, and interest in and to the estate, real and personal, then owned or thereafter to be acquired by said Alvin S. Rodgers. On November 20, 1890, this action was commenced by Rebecca B. Rodgers against Alvin S. Rodgers, to obtain a divorce on the ground of abandonment for more than one year, for the custody of the children, and for alimony, the real estate being specifically described, and praying that W. S. Gorsuch be enjoined from interfering with her occupancy of said land. Service was made by publication, and on January 31, 1891, the cause came on for hearing, and the court made certain findings of fact, stating, among other things, that Rodgers had been adjudged insane on April 16, 1883, and that subsequently said Homer Kennett had been appointed as his guardian; and thereupon Kennett was permitted to appear for himself as representative of the estate, and move that the action be dismissed on the ground of such insanity, but the court continued the case. In the meantime, on August 5, 1891, Rebecca B. Rodgers filed in the probate court a petition for the purpose of restoration of said Alvin S. Rodgers to his rights as a sane man, and the hearing was set for August 26, 1891. It does not appear that notice of any kind was given to Alvin S. Rodgers, but on August 26th Kennett appeared as his guardian, and on his request the case was continued until September 5th, at which time it was again called, Kennett appearing as guardian in person and by Charles N. Peck, his attorney; and the court, after hearing the evidence, adjudged that Alvin S. Rodgers was sane, and that he had been so ever since his discharge from the asylum, June 28, 1883. When the case was again called for trial in the district court, October 2, 1891, the record shows that the defendants appeared by Kennett, Peck, and Matson, their attorneys, and the defenses were orally interposed that Alvin S. Rodgers was insane, and also that he had procured a divorce in West Virginia. The court found generally in favor of the plaintiff, granting her a divorce, awarding her the custody of the children, and granting to her as alimony the north half of the quarter section, and granting to the children the south half thereof, and barring them from claiming any interest in the 40-acre tract remaining to Alvin S. Rodgers. Mrs. Rodgers knew nothing of the West Virginia divorce until after she had commenced this action.

Kennett, Peck & Matson, for plaintiffs in error. J. W. Sheafor, for defendants in error.

MARTIN, C. J. (after stating the facts).

1. We deem it unnecessary to decide whether the proceedings of the probate court in August and September, 1891, for the restoration of Alvin S. Rodgers to his rights as a sane man, were valid or not. It appears that, during his residence in West Virginia, he was always regarded as sane, and, two

years before this action was brought, he commenced proceedings for a divorce, and he actually obtained a decree on July 17, 1889, which was set up in his behalf as a bar to the present action. Under the circumstances, the defenses of insanity and a prior divorce are irreconcilable with each other. It is true that a presumption of continued insanity arises from an adjudication thereof, but this is not conclusive, and the evidence of the sanity of Alvin S. Rodgers ever since 1886 is sufficient to overthrow the presumption arising from the adjudication in 1883. An adjudication of restoration by the probate court is not indispensable, but the presumption of continued insanity may be overcome by other evidence. *Water-Supply Co. v. Root*, 56 Kan. —, 42 Pac. 715. The desertion of his wife and children by Alvin S. Rodgers was probably a manifestation of his mental disorder, and therefore originally not a cause for divorce; but certainly he should be held to an abandonment, at least, from the date that he commenced his divorce proceedings at Wheeling; and abandonment for one year is a sufficient cause for a divorce in this state.

2. As a divorce against a nonresident of this state may be obtained on service by publication, comity requires that we should give full faith and credit to decrees of the courts of sister states of a like nature when authorized by law. In such cases we must treat them as judicial records, and under the protection of section 1 of article 4 of the constitution of the United States. The question of jurisdiction, however, is always open to inquiry. Under the laws of West Virginia introduced in evidence, as well as our own, the status of married persons comes within the range of the judicial power, although the parties may reside in different states. But it will not be claimed that the title to land or the custody of children in one state can be settled by the decree of the courts of another; and, while the West Virginia court did make a general order purporting to bar the rights of the wife in the real and personal property of the husband, yet this part of the decree could have no extra-territorial force so as to settle the title of any property outside of that state. Mrs. Rodgers had acquired a homestead interest in the land upon which she resided with her children, and this could not be divested by the decree of any court of another state. We must therefore hold that the district court of Cloud county had jurisdiction over the question of alimony and the custody of the children, notwithstanding the West Virginia divorce, which must be held valid to the extent of dissolving the marriage relation. We think that the English common-law doctrine that alimony is an incident only to a suit for divorce, and cannot be the subject of an independent action, should be regarded as modified in this state, where we recognize the validity of service by publica-

tion and the right of a wife to sue for alimony alone. The defendant is often entirely ignorant of the proceeding for divorce, as in this case, and may know nothing of the place of residence of the plaintiff. The wife may have no opportunity of setting up a claim for alimony, nor for the custody of children; and, if she had knowledge of the proceeding, the court of another state would lack the power to deal effectually with these questions; and as stated by the supreme court of Ohio in *Cox v. Cox*, 19 Ohio St. 502, 512, the wife may be still regarded as holding that relation for the purpose of enforcing her claim to alimony and the custody of children. We think our position in this respect is supported by principle and upon authority. *Cox v. Cox*, *supra*; *Cook v. Cook*, 56 Wis. 195, 14 N. W. 33, 443, and cases cited.

3. It was error for the court to give by its decree to the children the south half of the quarter section. They were not parties to the action. Their mother brought suit for a divorce, for alimony, and for their custody; and the court had a right to award the whole quarter section to her as alimony and for the support of the children, and it appears that the south half was intended to be given for their support, but it was error to attempt to vest the title in them. "No one is an heir to the living." The children could not in any event inherit any property from their living parents, and the court had no authority to vest the title in them.

For error of the court in granting to Mrs. Rodgers a divorce, and thus failing to recognize the validity of the West Virginia decree in that respect, and the awarding of the south half of the quarter section to the children, the judgment will be reversed, and the cause remanded for further proceedings in accordance with this opinion. All the justices concurring.

# WALKER v. HOSACK.

(Supreme Court of Kansas Feb. 8, 1896.)

## REFEREE—FINDINGS.

Where a case is sent to a referee to find the facts and the law, and there are several important matters in controversy between the parties, it is the duty of the referee to find specifically as to each of them, so that, if it is desired, exceptions may be properly taken, and a review had thereon by the court.

(Syllabus by the Court.)

Error from district court, Wabaunsee county; William Thompson, Judge.

Action by O. M. Hosack against O. E. Walker. There was judgment for plaintiff, and defendant brings error. Reversed.

Vance & Campbell, for plaintiff in error. Waters & Waters, for defendant in error.

JOHNSTON, J. O. M. Hosack brought an action against O. E. Walker to recover \$2,-

083.79 upon an account for articles and money furnished and services performed. In Walker's answer he asked for judgment against Hosack in the sum of \$2,083.80 upon an alleged indebtedness embracing numerous accounts running for a period of about four years. With the consent of the parties the case was referred to a referee with directions to make findings of fact and of law upon the issues joined. A trial was had before the referee, after which he made a report, finding that Walker was indebted to Hosack upon the charges against him in the sum of \$1,977.93, and, further, that Hosack was indebted to Walker upon the charges made against him in the sum of \$607.51; and he further found that Hosack was entitled to recover the difference between these two sums, to wit, \$1,370.42. A motion was made by Walker to refer the report back to the referee for specific findings of fact on the several items or charges in issue between the parties, which was denied. The motion should have been sustained. The findings were too indefinite and general to admit of an intelligent review of the same in either the district or supreme court. Although there were quite a number of important matters in controversy, the referee failed to indicate how he determined any of them, and, instead, made a lump finding of the balance due upon all the charges made by each. It was impossible, therefore, to take exceptions on the ground that there was a want of testimony to sustain the findings of the referee, or to have a review of the controlling facts in the case. In such a case it has been held "that either party has the absolute legal right to have such a presentation of the controverted questions, where there are several of them, that errors can be assigned with reference to each one of them." *McMullen v. Schermerhorn*, 48 Kan. 739, 30 Pac. 188. The ruling of the cited case controls the disposition of the present case. The judgment will be reversed, and the cause remanded for further proceedings. All the justices concurring.

#### STATE v. KNESS.

(Supreme Court of Kansas. Feb. 8, 1896.)

##### CRIMINAL LAW—RECORD ON APPEAL.

The testimony taken in a criminal prosecution does not become a part of the record unless it is embodied in a bill of exceptions; and, where the record does not contain the testimony, or a statement of what it tended to or did establish, no review can be had of the rulings of the court in charging the jury, nor can the sufficiency of the evidence be examined.

(Syllabus by the Court.)

Appeal from district court, Phillips county; G. Webb Bertram, Judge.

I. A. Kness was convicted of horse stealing, and appeals. Affirmed.

Mann & Redmond and H. K. Sharp, for appellant. F. B. Dawes, Atty. Gen., and W. H. Pratt, for the State.

JOHNSTON, J. I. A. Kness appeals from a conviction for the larceny of a horse, and insists that the evidence in the case did not warrant the instructions of the trial court, nor sustain the verdict of the jury. He asserts that the testimony shows that the animal stolen was a gelding, and that proof of the larceny of a gelding does not support the charge of the larceny of a horse. He insists that the court failed and refused to make this distinction in charging the jury. The testimony is not preserved in a bill of exceptions, and, without it, we cannot determine the questions raised by the appellant as to the charge of the court, nor as to the sufficiency of the evidence. What purports to be a stenographer's transcript of the evidence in the case is attached to the record, but it is not referred to nor included in the bill of exceptions. It therefore forms no part of the record, and cannot be considered upon this appeal. *State v. McClintock*, 37 Kan. 40, 14 Pac. 511; *State v. Allison*, 44 Kan. 423, 24 Pac. 964; *State v. Tilney*, 44 Kan. 581, 24 Pac. 945. The judgment of the district court will be affirmed. All the justices concurring.

#### STATE v. PURTELL et al.

(Supreme Court of Kansas. Feb. 8, 1896.)

##### PRIZE-FIGHTING—WHAT CONSTITUTES.

1. Not all physical contests for a prize or reward are punishable, under the statute, as prize-fights. The contest must be a fight, and there must be an intent on the part of the contestants to do violence to, and inflict some degree of bodily harm on, each other.

2. In a prosecution against persons charged with prize-fighting, it is not necessary to show that the prize or reward was to be gained by one from the other. It is sufficient if they engaged in a fight for a prize, and the fact that a prize was awarded to the defeated as well as to the successful combatant does not necessarily prevent a conviction.

(Syllabus by the Court.)

Appeal from district court, Cherokee county; A. H. Skidmore, Judge.

Patrick J. Purtell and W. R. Johnson were convicted of prize-fighting, and appeal. Reversed.

W. R. Cowley and John A. Hale, for appellants. F. B. Dawes, Atty. Gen., and C. A. McNeill, for the State.

ALLEN, J. The defendants were convicted of prize-fighting, and sentenced to confinement in the penitentiary for one year. From this conviction they appeal. The contention on their behalf in this court is that the trial court erred in its definition of the term "prize-fight," as contained in the instructions given to the jury. The portion of the instructions most criticised reads as follows: "The word 'prize-fight,' as used in the statute of this state, and as used in the information, is used in its ordinary signification, and means a fight, or physical contest, between two persons for a prize or reward;

and it is immaterial whether such fight, or physical contest, is witnessed by many or few persons. The word 'prize,' or 'reward,' as used in the information, means a reward or sum of money to be gained by contest or competition. In order to constitute a prize-fight under the statute of this state, there must have been an expectation, on the part of the persons engaged therein, of a reward or prize, to be given to and received by such contestants, or the successful contestant; but it is immaterial whether such prize or reward is to be won by the successful contestant from the other, or to be otherwise awarded. But the guilt of each defendant must arise from the joint act, fight, or personal and physical contest of the two contestants." That a contest took place between the defendants at Sapp's Opera House, in Galena, at the time charged, is admitted. It is also admitted that it came off pursuant to a written agreement between the Galena Athletic Club on one part and the defendants on the other, under which the defendants agreed to give a sparring exhibition of 25 rounds with five-ounce gloves, according to the Marquis of Queensbury rules. It provided for a referee, with power to continue the contest for a greater number of rounds. For this exhibition the athletic club agreed to pay each of the defendants \$50. There was no substantial controversy, in the testimony offered at the trial, as to what was done. That a contest took place; that the parties used gloves weighing five ounces each; that there were 22 rounds of sparring with such gloves; and that the defendant Johnson was knocked down, and, failing to get up, was declared beaten,—is undisputed. The claim of the defendants, at the trial and in this court, is that this was a lawful exhibition; that it was what is fairly and properly termed a "sparring or boxing match with gloves," for the purpose of exhibiting the skill, strength, and agility of the contestants in a proper and lawful contest; that for this exhibition the parties were each paid a sum of money, the amount of which did not depend on the result of the contest; that it was not a prize-fight, within the meaning of the law, because it was not for a prize, to be gained only through success, nor a fight, because the parties were entirely friendly, and free from the purpose to injure each other. On the part of the state it is insisted that the testimony clearly shows that this was an ordinary brutal fight for money, and of the kind the statute was designed to prohibit; that the evidence shows, beyond question, that the parties fought till one of them was knocked senseless; and that the conviction was rightly had.

It is not for this court to express an opinion as to the guilt or innocence of the defendants under the testimony. They had a right to have the law correctly declared to the jury. Webster defines the word "prize-fight" as "a contest in which the combatants

fight for a reward or wager." The court instructed the jury that the word "prize-fight," as used in the statute, means a fight or physical contest between two parties for a prize or reward; and this phrase, "fight or physical contest," or the expression, "fight or contest," is repeated many times in the instructions. By this the court gave the jury to understand that it need not be a fight, but that a physical contest for a prize or reward was punishable under the statute. This is not the law. There are very many physical contests which are not only not punishable, but altogether permissible. It was conceded that the defendants engaged in a physical contest. It was even conceded that they engaged in a boxing match, but it was not admitted that they fought. It is a fight, only, that the statute reaches. Wrestling, fencing, boxing, and numberless other matches, in which the physical powers are employed by men in friendly contests with each other, are not punishable. It must be a fight. The word "fight" implies a purpose to use violence for the purpose of inflicting injury; and the jury alone had the right to determine whether the defendants in fact engaged in a fight, or merely in an innocent contest, with no purpose to inflict injury on each other. Whether the gloves used were such as rendered it improbable that the contestants could inflict injury on each other, or were put on as a mere subterfuge, to disguise a fight, was for the jury to determine. *State v. Burnham*, 58 Vt. 445; *People v. Taylor* (Mich.) 56 N. W. 27. We think that part of the instruction with reference to the prize or reward substantially correct, and that it makes no difference whether the prize or reward is to be won by the successful contestant from the other, or to be awarded by a third party. Nor do we deem it indispensable that the prize or reward should be given to the successful contestant alone, though there must be a prize to be gained by the contest. The evil designed to be remedied by the statute is that class of brutal exhibitions for giving which considerable sums of money were paid, and we do not think the statute can be evaded by rewarding the unsuccessful as well as the successful combatant. For the error in the instructions, the judgment must be reversed, and a new trial awarded. All the justices concurring.

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In re DYER, County Attorney.

(Supreme Court of Kansas. Feb. 8, 1896.)

DEATH SENTENCE—ENFORCEMENT.

No court has the power to fix a time for the execution of a death sentence before the governor has named a day for carrying it into effect, when he refuses to issue a warrant for that purpose.

(Syllabus by the Court.)

Application of A. C. Dyer, county attorney of Edwards county, for a writ of habeas corpus. Denied.

F. Dumont Smith and A. C. Dyer, for petitioner. F. B. Dawes, Atty. Gen., for respondent.

ALLEN, J. The defendants, Carl Arnold and William Harvey, were convicted in the district court of Edwards county, on the 13th of November, 1894, of the crime of murder in the first degree. The court thereupon rendered judgment that they be conveyed by the sheriff of Edwards county to the penitentiary, and there imprisoned at hard labor until the governor should sign an order for their execution; that, upon the signing of such order, and at such time as the governor should fix in the warrant, they should be taken from their cells to some place within the walls of the penitentiary, and should, at the time so fixed by the governor, and at said place, be hung by the neck until they were dead. In pursuance of said judgment the defendants were taken to the penitentiary, where they are still confined. This is an application by the county attorney of Edwards county to have the defendants brought before this court and a time fixed for their execution. It is alleged in the application that the governor has failed and refused to order the execution of the death sentence, and it is claimed that it is the duty of this court, under sections 270 and 271 of the Criminal Code, to cause the defendants to be brought before it, and, if no legal reason exists against the execution of the sentence, to issue a warrant commanding the execution, and fixing a time when it shall be done. Prior to 1872 the law provided that, whenever a convict should be sentenced to the punishment of death, the court should fix the day on which the sentence should be executed, not less than four nor more than eight weeks from the time of the sentence, and that it should be carried into effect by the sheriff of the county. In that year an act was passed amending the law. Section 259 of the Code of Criminal Procedure, as amended, reads: "The punishment of death prescribed by law must be inflicted by hanging by the neck at such time as the governor of the state for the time being may appoint not less than one year from the time of conviction." By other sections the governor is authorized to issue an order, directed to the warden of the penitentiary, to be executed by him, for the purpose of having the death penalty inflicted; but it is expressly provided that no governor shall be compelled to issue any such order. The sections of the statute under which it is claimed the court has authority to cause the infliction of the death penalty were contained in the General Statutes of 1868, and were not expressly repealed by the act of 1872. They read as follows:

"Sec. 270. Whenever for any reason any convict sentenced to the punishment of death shall not have been executed pursuant to such sentence, and the same shall stand in full force, the supreme court, or the district court of the county in which the conviction was had, on the application of the prosecuting attorney, shall issue a writ of habeas corpus to bring such convict before the court, or if he be at large a warrant for his apprehension may be issued by such court or any judge thereof.

"Sec. 271. Upon such convict being brought before the court they shall proceed to inquire into the facts, and if no legal reasons exist against the execution of such sentence, such court shall issue a warrant to the sheriff of the proper county, commanding him to do execution of such sentence at such time as shall be appointed therein, which shall be obeyed by the sheriff accordingly."

The contention of the county attorney is that, after the expiration of one year, if the governor refuses to issue his warrant, the court may proceed to order execution of the sentence, and may fix a time for carrying it into effect; that the other sections of the statute amended by the act of 1872 were expressly repealed, while sections 270 and 271 were allowed to stand; that the legislature evidently considered the whole subject, and intended to leave power in the court to carry the sentence into execution. It would be a sufficient answer to the claim of the county attorney in this case to say that, by the very terms of the judgment of the district court of Edwards county, the defendants were directed to be confined in the penitentiary until such time as the governor should fix by his warrant for their execution. We are not willing, however, to rest our decision on the form of the judgment. We are clear that, under the law as it now stands, the death penalty cannot be lawfully inflicted until the governor shall fix the time therefor, and issue his warrant in accordance with the act of 1872. It is probable that, if the governor should so fix a time for the execution of the sentence, and issue his warrant to the warden of the penitentiary for that purpose, and for any reason it should be impracticable for the warden to obey the warrant, owing to the escape of the prisoner, or other sufficient cause, proceedings might be had under these sections, and thus it may be that they still have some force, and were therefore allowed to remain unrepealed; but we do not need, nor do we now undertake, to construe these sections further than is necessary for the disposition of cases like this. Until the governor has appointed a day for the execution of the death sentence, there is no ground for invoking the jurisdiction of this court in the case. The application for the writ is denied. All the justices concurring.



UNION PAC. RY. CO. v. MOTZNER.<sup>1</sup>

(Court of Appeals of Kansas, Northern Department, W. D. Feb. 14, 1896.)

FIRE SET BY LOCOMOTIVES—INSTRUCTIONS.

In an action against a railway company for damages alleged to have been caused by the escape of fire from its engine through the negligence of the defendant in the management of the train, and the failure to employ suitable means to prevent the escape of fire from the engine, it is error for the court to refuse an instruction to the jury to the effect that a recovery could not be had if the engine in question was of an approved construction, and at the time the fire was alleged to have escaped therefrom was in good condition, and handled in a competent, careful, and skillful manner.

(Syllabus by the Court.)

Error from district court, Russell county; W. G. Eastman, Judge.

Action by John Motzner against the Union Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. L. Williams, N. H. Loomis, and R. W. Blair, for plaintiff in error. Sutton & Dollison and Geo. W. Holland, for defendant in error.

CLARK, J. This action was brought by John Motzner against the Union Pacific Railway Company to recover damages alleged to have been sustained by him through the negligent operation of the defendant's railroad. The particular negligence complained of is that the defendant, while running one of its trains on its road in Russell county, managed its train carelessly and negligently, and failed to employ suitable means to prevent the escape of fire from the engine that was used in running the train, and carelessly and negligently permitted dead and dry grass and other combustible material to accumulate and remain on its right of way and land near its railroad track; and by reason of said carelessness and negligence fire escaped from the engine, and ignited the said dry and dead grass and other combustible material; and by reason of a continuous body of dry grass and other combustible material the fire was communicated to plaintiff's premises, where it destroyed certain property belonging to him. Judgment was also asked for a reasonable attorney fee for prosecuting the action. The jury returned a general verdict in favor of the plaintiff for \$603.25 damages and for a \$150 attorney fee. The jury also made certain special findings of fact as requested by the parties to the action. The defendant in due time filed its motion for judgment in its favor upon the special findings and for a new trial, both of which were overruled by the court, and judgment entered in favor of the plaintiff for \$752.25 and costs of suit. The defendant duly excepted to the rulings of the court on its motion for judgment in its favor upon the special findings, and on its motion for a new trial, and to the rendition of the judgment in favor of

plaintiff, and has brought the case to this court for review.

Under the statutes of this state, when the plaintiff has established the fact that the fire complained of resulted from the operation of the railroad, a prima facie case of negligence on the part of the railway company is also established. The railroad company, however, insists that the plaintiff failed to establish the fact that the fire which destroyed his property was caused by the defendant in operating its railroad. The evidence on this point is not very satisfactory, yet, as there was some legal evidence tending to establish that fact, and the trial court having approved a finding of the jury that the fire which burned plaintiff's property was set by a locomotive being operated and managed by the defendant, this court is bound by such finding. The jury returned special findings of fact in answer to questions submitted by the defendant as follows: "(1) Was the fire which burned plaintiff's property communicated from one of defendant's engines?" "Yes." "(2) If so, what was the number of the engine?" "742." "(3) Who was the engineer?" "Thomas Mills." "(4) Was such engineer a careful, competent and skillful engineer?" "Yes, but not careful." "(5) Was such engine, at the time the fire was alleged to have escaped, handled in a competent, careful, and skillful manner?" "No." "(6) Was such engine of an approved pattern and approved construction?" "Yes." "(7) What appliances were used upon such engines to prevent the escape of sparks?" "An extension end." "(8) Was such engine supplied with approved appliances to prevent the escape of sparks?" "Not fully." "(9) Was such engine examined, with reference to its appliances to prevent the escape of sparks, immediately before it started out on the trip upon which the fire is alleged to have escaped?" "Yes." "(10) Was such engine examined, in reference to its appliances to prevent the escape of sparks, immediately after its return from the trip on which the fire is alleged to have escaped?" "Yes." "(11) Upon the several examinations, in what condition was the engine found?" "Good." "(12) Was not the netting of this engine ash pan carefully examined by a competent inspector, and found to be in good condition, immediately before it started out on said trip?" "Yes." "(13) Was not the netting in the extension front end of such engine examined, and found to be in good condition, by a competent inspector, immediately before starting out on such trip?" "Yes." "(14) Was not the netting of said ash pan of said engine carefully examined by a competent inspector, and found to be in good condition, immediately after such trip?" "Yes." "(15) Was not the netting on the extension front end and ash pan of such engine carefully examined by a competent inspector, and found to be in good condition, immediately after returning from such trip?" "No." "(22) Would a wire screen over the front

<sup>1</sup> Rehearing denied.

damper of the ash pan have interfered with the draught necessary to make steam?" "No." The evidence all tends to show that the engine was in good condition, and supplied with approved appliances to prevent the escape of sparks, and that, when an engine is so supplied, it is impossible, even by careful management, to absolutely prevent their escape; yet the jury, by finding No. 8, say that the engine was defective in not being fully supplied with approved appliances, while in their answers to special interrogatories 9, 10, and 11 they clearly contradict that finding. The assistant superintendent of motive power and machinery of the Union Pacific system, of many years' experience in such matters, testified that a screen damper in the front end of the ash pan of the engine would have been no protection against the escape of fire, as no fire could have escaped through that opening when the train was running with the wind; and the foreman of the roundhouse at Junction City, who had been a locomotive engineer for nine years, in answering the question as to what would be the effect upon the practical workings of an engine if it was supplied with a netting damper on the front end of its ash pan, testified that the effect would be bad, assigning as a reason therefor that, "as a netting damper on the front end of the ash pan would be almost under, and a little back of, the eccentric, more or less oil would drip from the eccentric, and this, with the dust that would accumulate, would clog the netting, making it impossible to get a draught sufficient to make steam." This testimony was uncontradicted, yet the jury specially found, in answer to questions submitted by the plaintiff, that a screen damper in the front end of the ash pan would have afforded better protection against the escape of fire, and that such appliance would not have interfered with the draught necessary to make steam. The inspector testified that after the engine returned from the trip on which the fire was alleged to have escaped he examined the netting in the extension front end of the engine by inserting a light at the end of a long rod, through an opening eight inches in diameter in the side of the extension, and that by so doing he could and did see its exact condition; that it was in good order; and that it required about a half hour's time to make such an examination. This evidence was undisputed, yet the jury, by special finding No. 15, say that no careful examination was made at the time. The jury found, in answer to questions submitted by the plaintiff below, as follows: "(2) Was the right of way of the defendant, at the place where the fire started, clear of dry and dead leaves and grass liable to be ignited by sparks or cinders from its engine?" "Yes." "(8) Did the fire which injured the plaintiff originate on the defendant's right of way?" "Yes." "(4) Did the defendant carelessly and negligently allow dead and dry and com-

combustible grass and weeds to accumulate on its right of way, liable to be ignited by sparks and cinders from defendant's engines?" "Yes." "(5) Had the defendant kept his right of way clear of dead and dry and combustible material, grass, and weeds, would the fire that destroyed plaintiff's property have been started?" "No." It will be observed that these findings are likewise conflicting. The jury also found that the engine was not handled in a competent, careful, and skillful manner at the time the fire was alleged to have escaped. There is nothing either in the findings or in the evidence, to indicate in what manner the employes of the road were negligent in the handling of the engine; nor is there anything in the record, aside from the findings of the jury, tending in any manner to discredit the testimony of the engineer and fireman that the engine was properly managed; nor do counsel for the defendant in error offer any suggestion as to what was done or could have been done by those in charge of the train, or as to what they failed to do which they should have done, from which negligence might, under the evidence, reasonably be imputed to them, except that there was no showing as to the particular kind of fuel that was used, or that it was not negligence to run the train at a speed of from 25 to 30 miles an hour. There is no evidence that any other fires were set by this engine, or that any other fires were ever caused by any engine when managed by those in charge of this train. No witness testified that he knew of any fire ever having escaped from this engine, either on this or any other occasion. While the evidence shows that the engine used on this occasion emitted a great volume of smoke, there was no direct evidence that any fire escaped, and the engineer testified that the unusual amount of smoke escaping from the engine was probably caused by the fireman throwing in coal or poking the fire. The uncontradicted evidence is that no more fire or sparks could be forced from the engine during that operation than would ordinarily escape when the fireman was not so engaged. In view of the fact that the jury made inconsistent findings as to the condition of the engine and its appliances, and also as to the condition of the right of way, we think it is fair to presume that they did not duly consider the evidence submitted by the defendant tending to rebut the statutory presumption of negligence in the management of the train.

Among other instructions which the defendant requested the court to give to the jury is the following: "The jury are instructed that the defendant railway company is not liable for fire occasioned by sparks when the engine is of an approved construction, and in good condition, and handled by a competent, careful, and skillful engineer, and at the time the alleged fire escaped the engine was handled in a competent, careful, and skillful manner." The court refused to give

this instruction, and an exception was duly saved to the ruling of the court. We think the court erred in this ruling. It must be borne in mind that the petition in this case does not allege generally that the injuries complained of were caused by the defendant "in the operation of its railroad." Under such a general allegation and proof in support thereof, it would probably be necessary, under the decisions of our supreme court, for the defendant to show that it was not negligent in permitting combustible material to accumulate on its right of way, liable to be ignited by fire accidentally escaping from a passing engine. Under the petition in this case the plaintiff could only recover for injuries resulting from a fire negligently caused by the defendant either in the management of the train or by failure to employ suitable means to prevent the escape of fire from the engine. *Railroad Co. v. Ayers* (Kan. Sup.) 42 Pac. 722. The court virtually instructed the jury to find for the plaintiff if they should find and believe from the evidence that fire escaped from the engine through no fault of the defendant, or those in charge of the train, and ignited combustible material which the defendant had carelessly and negligently allowed to accumulate and remain on the right of way, liable to be so ignited. This instruction is clearly erroneous. There is nothing in the findings or evidence to indicate whether the fire was purely accidental or whether it was caused by the negligence of the defendant, either in the use of a defective engine or its appliances or in the management of the train, as alleged in the petition; and, for aught that appears in the record, the jury may have based their general verdict solely upon the defendant's negligence in the care of its right of way; and under their finding that the defendant was negligent in this respect, they would have been justified, under this instruction, in returning a general verdict in favor of the plaintiff for damages sustained by him as a result of fire escaping from the engine through no fault of the defendant. The evidence in support of plaintiff's claim for damages is unsatisfactory, particularly so with reference to the value of the pasture, the straw, and some of the items of household furniture and wearing apparel. It also might be said that the court erred in some of its instructions to the jury other than the one pointed out, yet these errors are not sufficient in and of themselves to require a reversal of the judgment. The jury have passed upon the weight of the evidence, and no proper exceptions have been saved to the general instructions of the court; still we think it is proper to take these matters into consideration in passing upon the other assignments of error, even though the court might otherwise be in doubt as to whether or not the judgment should be disturbed.

After a fruitless attempt to harmonize the various conflicting findings of the jury, and to place such a construction thereon as would

warrant us in saying that they are consistent with the general verdict, and in view of the errors of the court both in giving and refusing instructions, as indicated herein, and its error in the admission and rejection of evidence offered, not herein particularly pointed out, as they will probably not occur upon a retrial of the case, we can reach no other conclusion than that another jury should pass upon the matters of fact in controversy between the parties, and the judgment will therefore be reversed, and a new trial awarded. All the judges concurring.

#### WATSON et al. v. BECKETT.

(Court of Appeals of Kansas, Southern Department, W. D. Feb 5, 1896.)

##### SALE—CONSTRUCTION OF WARRANTY.

A warranty given by the Sultan Cart Company reads as follows: "We warrant all of our work to be of good material, and made in workmanlike manner. In case breakage shall occur within one year, by reason of defective material, we will replace all broken parts free of charge, but the agent must be cautious and use his judgment in the matter. We will not make good any breakage,—only such that is defective." *Held*, that this warranty should be construed as a warranty of each cart, and every part thereof, as to workmanship and material, for the period of one year, with the privilege of having any defective part or cart replaced free of cost during said period.

(Syllabus by the Court.)

Error from district court, Rice county.

Action by J. R. Watson and others, copartners as the Sultan Cart Company, against C. K. Beckett. From a judgment for plaintiffs, they bring error. Reversed.

Samuel Jones and F. P. Green, for plaintiffs in error. C. F. Foley, for defendant in error.

COLE, J. This was an action brought in the district court of Rice county by the Sultan Cart Company, a copartnership, to recover the balance due upon an account for certain carts sold to the defendant in error, who set up in his answer certain damages alleged to have been sustained by reason of the failure of a certain warranty given with the goods purchased by him. The jury rendered a verdict for plaintiffs in error, but for a much less amount than that which was claimed, allowing the defendant a large sum for damages. From a judgment upon such verdict the Sultan Cart Company brings the case here for review.

The record discloses that on October, 1888, the Sultan Cart Company, through its agent, sold to C. K. Beckett a car load of carts, which were to be shipped from White Pigeon, Mich., to San José, Cal., and there sold upon the market. Accompanying the contract of sale was a written warranty, which reads as follows: "We warrant all of our work to be of good material, and made in workmanlike manner. In case breakage shall occur within one year, by reason of defective material

we will replace all broken parts free of charge, but the agent must be cautious and use his judgment in the matter. We will not make good any breakage,—only such that is defective." No question is raised in this case as to the delivery of the carts, or as to the balance unpaid upon the account; but, in his answer, the defendant sets up, in several distinct counts, various claims for damages alleged to have been sustained by the failure of the above warranty. It was the theory of the defendant in error, and also of the trial court, that the warranty in question was a general and continuing warranty with regard to workmanship and material, and a further warranty, limited to the space of one year, as to repairs made necessary by breakage occurring without fault of the purchaser. The contention of the plaintiffs in error is that the warranty of workmanship and material is limited by the latter clause thereof to one year, within which time the plaintiffs in error would replace all broken parts, where the breakage was caused by reason of a defect in material or workmanship; that the measure of damages for the failure of said warranty would be the cost of placing any defective cart in such condition that it would answer the warranty, in case plaintiffs in error refused so to do. Quite a number of errors have been assigned in this case, but our view is that all which are of importance may be considered in the determination of the question as to whether the trial court correctly construed the warranty in question. We are clearly of the opinion that the trial court committed error in this regard. The warranty in question must be construed to be one of material and workmanship, and containing an agreement to make good any defective cart, or part thereof, for a period of one year. The first portion of the warranty is to the effect that the carts in question are to be of good material, and made in workmanlike manner. A failure of this portion of the warranty, then, must arise either from defective material or workmanship. A defect in material or workmanship is either patent or latent. If patent in the carts sold, then, under the warranty, the defendant in error was not compelled to accept the same, but could insist that any part showing the defective material or workmanship should be replaced with a similar part of good workmanship and material. If the defective material or workmanship entered into the whole cart, or into a number of carts as a whole, then he could insist on the defective cart or carts being replaced with those which comply with the warranty. The latter part of the warranty recognized the fact that there might be latent as well as patent defects in the carts in question, and that if there were such latent defect, it would become patent when the defective part broke; and, under the warranty, such part was then to be replaced, if said breakage occurred within one year. Again, when a breakage occurred in any

part of a cart, it was for one of two reasons: Either, first, on account of defective material or workmanship; or, second, from a misuse of the cart or the part so breaking, for which neither the workmanship nor material were blamable. Now, under this warranty, if the breakage occurred for the first of these reasons, within the period prescribed in the warranty, the defendant in error was to be made whole; if for the latter reason, the person so causing the breakage was the loser. This interpretation of the warranty gives full force and effect to every part thereof, and is in harmony with the decisions of our supreme court in cases decided by it where warranties somewhat akin to this have been in question. *Raynor v. Bryant*, 43 Kan. 492, 23 Pac. 601. Under this warranty, plaintiffs in error should have been given the opportunity to replace any of the carts sold to defendant in error, or any parts thereof, which were defective in workmanship or material; and in case plaintiffs in error had refused to replace any defective cart, or part thereof, upon demand, then the measure of damages of defendant in error would be the necessary cost incurred to make the article fulfill the warranty. The construction given to this warranty by the trial court entered into the character of testimony admitted, the instructions to the jury, and the overruling of the motion for a new trial. We therefore consider it unnecessary to review the errors relating to each specific branch of the trial, as they are such as will not occur upon a retrial of the case. The judgment of the district court is reversed, and the cause remanded for a new trial. All the justices concurring.

#### ATCHISON, T. & S. F. R. CO. v. McFARLAND.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 9, 1896.)

#### RAILROAD COMPANIES—CROSSING ACCIDENT—PRESUMPTIONS OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—CAPACITY.

1. Negligence on the part of the operatives of a railroad train cannot be presumed from the mere fact that a personal injury was caused by such train to one to whom the railroad company owed no contract duty. To justify a verdict for damages against a railroad company on account of such injury, negligence must be affirmatively proven.

2. Proof of negligence need not be made by direct and positive evidence, and may be inferred from other facts which are proven in the case, when such inference is a reasonable and natural one to be made. But presumptions of negligence cannot be based upon mere theories, nor be simply deductions from other presumptions.

3. It cannot be held, as a necessary legal conclusion from the facts and circumstances of this case, that the parents of a child 22 months old were guilty of contributory negligence in not keeping such constant watch and care over it as would have prevented it from getting in the way of danger from a passing train of cars on a railroad running in close proximity to their residence; and the question of contributory negligence was properly submitted to the jury for their determination, under the instructions of the court.

4. Where the plaintiff sues in the capacity of administrator of the estate of a deceased person, and the petition alleges that he was duly appointed as such administrator by the probate court of the county in which the action was brought, and qualified as such, and the answer consists only of an unverified general denial, the legal capacity of the plaintiff to bring the action is conclusively admitted by the pleadings, and the defendant cannot, upon the trial, question the validity of the plaintiff's appointment.

(Syllabus by the Court.)

Error from district court, Douglas county; A. W. Benson, Judge.

Action by Thomas McFarland, administrator of Oden Toyne, deceased, against the Atchison, Topeka & Santa Fé Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Action brought by the defendant in error, as the administrator of the estate of Oden Toyne, deceased, to recover damages for the death of his intestate, which was alleged to have been caused by the negligence of the plaintiff in error in the operation of its trains. The accident occurred August 4, 1888, about five miles east of the city of Lawrence, at a public road crossing, the railroad running east and west, and the public highway north and south. The deceased was a child 22 months old, residing with its parents on a farm, the house being uninclosed, and situated about 200 feet north and 50 feet west from the crossing. No one saw the child at or near the crossing until after he had been struck by a passing train, nor was there any direct evidence as to how the accident occurred. A short time, probably about 15 minutes, before the train passed, the child, with his twin brother, was playing near the house, and this was the last known of his whereabouts until after he was injured. Within a few minutes after the passing of the train, the two children were found lying from 3 to 6 feet apart, 18 to 20 feet north of the railroad track, and on the east side of the public highway. Both children were seriously injured, Oden dying within a few hours after he was hurt. The passing train was a passenger, going east between 4 and 5 o'clock in the afternoon. The external injuries shown upon the body of the deceased consisted of a cut over the right eye, a fracture of the left arm, and a fracture and dislocation of the left hip, the injury on the head being the probable cause of death. The other child received somewhat similar injuries upon the head, and had a fracture of the right thigh. The jury returned a general verdict for the plaintiff for \$1,000, and made special findings of facts, among which were the following: "(14) Did any person or persons see Oden Toyne or his twin brother at the place where the accident occurred, at or shortly before it happened? and, if so, state who it was that saw them. Answer: No." "(16) Was not the whistle sounded for the road crossing, by the engineer, where the accident occurred, as the train approached it at that time? Answer:

No. (17) Was not the bell of the engine rung as the train approached the crossing at that time? Answer: Yes. (18) Was not the whistle of the engine of that train sounded at an audible distance from the crossing where the accident occurred, as the train approached it? Answer: Yes. (19) Was not the engineer upon his seat in the cab of the engine looking ahead along the railroad track at and before the time of the accident, and as his train approached the crossing where the accident occurred? Answer: Yes; he was on his seat, but was not looking ahead with proper diligence along the track immediately before and at the time of the accident. (20) Were not the engineer and fireman of said train both engaged in the proper discharge of their duty as they approached and passed said crossing, and, if not, wherein were they neglecting such duty? Answer: No; they were not looking ahead intently enough to observe objects upon the track. (21) Did not the fence running up to the cattle guard, on the west side of this crossing, create such an obstruction as might have prevented the engineer and fireman on said engine from seeing a small child or children standing on the highway near such fence, and within a short distance of the railroad track? Answer: Yes." "(23) If you find that the injury to Oden Toyne was caused by the negligence of the defendant, then state the particular act or acts of negligence that caused the injury. Answer: By not keeping a proper and careful lookout ahead. (24) Do you find from the evidence where the children were standing at the time they were struck, and whether they were struck by the engine or cars? Answer: Yes. (25) If you answer the last question in the affirmative, then state just where they were standing, and whether the engine or cars struck them. Answer: Standing about the middle of the highway, on the track, between the rails, near the north rail, and were struck by the pilot of the engine."

A. A. Hurd and W. Littlefield, for plaintiff in error. Riggs & Nevison, for defendant in error.

GARVER, J. (after stating the facts). The plaintiff in error contends that the evidence fails to show culpable negligence on the part of the railroad company, and that it does show contributory negligence on the part of the parents of the child injured. The allegations of negligence contained in the petition are of a somewhat general nature, but specifically charge negligence on the part of the employes in charge of the train in failing to give any warning signals of the approach of the train to the crossing, and also in failing to observe the child upon the track in time to prevent the train from running against and over it. The jury found that the bell of the engine was rung, but the whistle not blown, for the crossing, though the whistle was sounded

within an audible distance of the crossing as the train was approaching it. It was also found by the jury that the engineer and fireman, while in their proper places, were not looking ahead intently enough to observe the children upon the track, and this failure on their part in "not keeping a proper and careful lookout ahead" is the particular act of negligence found by the jury as the basis of the plaintiff's right to recover. This finding of negligence, it is claimed, is entirely unsupported by the evidence. It is evident that the injury complained of was caused by the train. But, outside of mere inferences and conjectures, there is no evidence which shows the proximity of the children to the railroad track immediately before the train reached the crossing, nor whether they were on or at the side of the track when the train struck them. The engineer and fireman both testified that they saw nothing of the children at the crossing, and knew nothing of any one being struck or injured at that point until the train arrived at Kansas City, when information of the accident was conveyed to them by telegraph. The finding of the jury that the children were standing between the rails, and were struck by the pilot of the engine, has its support in the testimony of a witness who saw the children as they lay upon the ground, within a few minutes after the accident, and who stated that a straight line drawn from where the surviving child lay through two marks upon the ground, which looked as if the body had struck at those points, and extended in a southwesterly direction, would cross the track at a point where the traveled part of the public highway and the railroad track intersected each other; that the distance from this point in the center of the track to the first mark on the ground was 13 feet, to the second mark 20 feet, and to where the body lay 31 feet. The children were found lying from 3 to 6 feet apart, and about 5 or 6 feet west of a board fence which extended north from the cattle guard on the east side of the public road. There were marks on and near this fence indicating that, when struck by the train, the deceased child was thrown against the fence, and rebounded to the place where he lay. The physician who was called in, and who testified as a witness for the plaintiff below, gave it as his opinion that the injuries, other than those to the head, were caused by contact with the fence. The evidence also shows that the children, when last noticed at the house, were playing with a small wagon, which was, after the accident, found in pieces, and scattered along and between the rails at, and for some distance east of, the crossing. It is, in our opinion, extremely doubtful that the jury drew a correct inference from these facts as to the situation of the children when struck by the train. There was no mark

on or about the engine or cars, or within a distance of 13 feet of where the jury found the children were when struck by the train, indicating what position they were in. Even assuming that the two marks upon the ground were made by the body of the surviving child striking at these points, and that the body was thrown in a direct line from the point where it was struck to where it was afterwards found, yet there is no more reason to infer that the child, when struck, was at a point on this line between the rails, than that it was on the same line outside of the north rail. It is also inconceivable that the pilot of an engine running at a speed of 80 or 85 miles an hour could strike a child without breaking its legs, and without leaving upon them any marks of violence, or that it could be struck with such terrible force, and not thrown with greater violence, and in an entirely different manner, from that supposed in this case. The injuries upon the head, the other injuries to the arms and thighs, the marks upon the ground, and the absence of injuries to the legs, indicate with more reasonableness that they, in some way, were struck by the side of the train, as it rushed past them. However, conjectures of this kind are now unimportant, except as they show the danger of a jury being carried away by the sentiment and sympathy aroused by the narrative of such a sad occurrence, and of their failing to weigh the evidence, under the instructions of the court, with that even-handed impartiality and fairness which should prevail in every case.

Is there any evidence to sustain the finding of the jury as to the particular acts of negligence upon which the general verdict was based? The burden of proof of negligence rested upon the plaintiff; and, while negligence might be inferred from other facts which were established by the evidence, it could not be based entirely upon mere presumptions not founded on facts. The learned trial judge very fully and clearly instructed the jury that they could not presume negligence on the part of those in charge of the train, from the mere fact that the child was injured, and that the presumption of law, in the absence of evidence to the contrary, was that the engineer and other employees in charge of the train were in the proper performance of their duties. This burden of proof upon the plaintiff, and these presumptions of law in favor of the defendant, were controlling in the entire course of the trial. The verdict and findings of the jury should have been directed and formed by them until they were superseded by evidence which satisfies and convinces. An examination of the record fails to disclose a single line of evidence tending to show that these children should have been seen by the engineer or fireman, if in the proper discharge of their duties, in time to have averted the accident. How

close they were to the track, and at what point on the public highway, a moment before the train reached the crossing, are left to mere conjecture. On the west side of the highway, and extending to within four or five feet of the track, was a board fence, to obstruct the view of the engineer and fireman, and tending to prevent their seeing a small child on the highway. There is no evidence that they did see them, or that they could have seen them by a careful lookout. Can it be said, under such circumstances, that it may be presumed that the children were on, or so near to, the track, and were there for such a length of time before the train reached them, that the train men could and should have seen them in time to have avoided the injury? We think not. It will not do to say, even against a railroad corporation, that the days of pure accidents have passed, and that injuries are not sustained except through the culpable negligence of another. This unfortunate occurrence appeals strongly to human sympathies, and invites the aid of the helping hand to alleviate the suffering and bereavement; but by no such considerations should the rights of parties be measured in a court of justice. For every wrong there should be an adequate remedy; but for injuries inflicted without wrong there is no legal compensation. The law does not justify the mulcting of a party in damages simply because he may have been the innocent cause of an injury and consequent loss to another. It is true, the jury in this case were not concluded by the testimony of the engineer and fireman that they were on the lookout, and did not see the children upon the track or about the crossing; but, if their testimony be laid out of the case entirely, there is nothing to show what they did see, or could or should have seen if at their posts in the proper performance of duty. In that situation the jury should have been governed by the rules of law laid down in the instructions of the court, which required the plaintiff to prove negligence as a basis of a right to recover, and which shielded the defendant by the presumption that its employes were in the proper performance of duty, and operating the train with due care. Beyond the fact of the injury and the location of the children thereafter, there is no direct proof of any fact tending to show how or why the accident occurred. The inferences drawn from the testimony are, for the most part, based upon other inferences and presumptions which just as reasonably warrant different conclusions. Mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from facts proven. *Carruthers v. Railway Co.* (Kan.) 40 Pac. 915; *Railway Co. v. Henrice*, 92 Pa. St. 431; *U. S. v. Ross*, 92 U. S. 281. As the verdict of the jury was based upon this

finding of negligence, we are of the opinion that it is not supported by the evidence, and should have been set aside, and a new trial granted. It is not a case of conflicting evidence, but there is an entire absence of evidence to prove the fact found.

Another error assigned is that the evidence shows contributory negligence on the part of the parents of the children. It is contended that because they lived in such close proximity to the railroad, on which frequent trains were passing every day, the exercise of ordinary care required such watchfulness as would have prevented the children from wandering to or upon the track. We cannot agree with counsel in this contention. We do not understand that the law is so severe as to require families situated as this one was to surround their infant children with impassable barriers, or to employ a custodian or nurse who would keep them away from danger. While the house and yard were not inclosed with a fence or other obstruction to prevent the children from going upon the public highway, yet the testimony does not show that they were inclined to wander from home, or were in the habit of going towards the railroad, or that any immediate danger in that respect was to be apprehended. The evidence, we think, shows that these parents were reasonably watchful, and were at this time in the exercise of ordinary care. In any event, we think the evidence shows a case of such a nature as to make the question of contributory negligence a proper one to be determined by the jury. *Smith v. Railroad Co.*, 25 Kan. 742; *Railroad Co. v. Calvert*, 52 Kan. 547, 34 Pac. 976.

There is one other matter of which complaint is made to which we will refer before closing this opinion. The petition alleged that the plaintiff had been duly appointed, by the probate court of Douglas county, administrator of the estate of Oden Toyne, deceased, and that he had qualified as such. The answer in the case was a general denial, unverified. On the trial, the railroad company offered to show that Oden Toyne died possessed of no estate, either in Douglas county or elsewhere, and that, consequently, the probate court of Douglas county having no jurisdiction or authority to appoint an administrator, the appointment of the plaintiff was void. This offer was refused by the court. We think the ruling was proper. This was simply an attempt to show that the plaintiff did not have the legal capacity to maintain this action, because he was not the administrator of the estate of the deceased. Section 108 of the Code provides that allegations of any appointment or authority shall be "taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." The allegation of the due appointment of one as administrator of an estate imports something more than the

mere fact of his being named as such; it implies legal authority for the appointment, and, when not denied under oath, the trial proceeds upon the conclusive admission that the party thus claiming to act by virtue of such appointment or authority has had the same legally conferred. *Walker v. Fleming*, 37 Kan. 171, 14 Pac. 470; *Rogers v. Coates*, 38 Kan. 232, 16 Pac. 463. The case of *Perry v. Railroad Co.*, 29 Kan. 420, to which we are referred by counsel for plaintiff in error, has no application in this case, for there the validity of the appointment of the plaintiff as administrator was challenged by the pleadings, and was properly made an issue in the case.

Other rulings of the court are complained of in the brief of the plaintiff in error, but, as they will probably not arise upon another trial, it is not necessary to consider them. Judgment will be reversed, and the case remanded for a new trial.

#### WHITTAKER BRICK CO. v. FIRST NAT. BANK OF SENECA.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 9, 1896.)

**MECHANICS' LIENS—ENFORCEMENT—BY WHAT LAW GOVERNED.**

The case of *Groesbeck v. Barget*, 41 Pac. 204, 1 Kan. App. 61, followed.  
(Syllabus by the Court.)

Error from district court, Nemaha county; R. C. Bassett, Judge.

Action by P. D. Kenyon against the First National Bank of Seneca and others to enforce a mechanic's lien. To a judgment sustaining a demurrer to its cross petition, defendant the Whittaker Brick Company brings error. Affirmed.

Getty & Hutchings, for plaintiff in error.  
S. K. Woodsworth, for defendant in error.

GILKESON, P. J. In 1888 the firm of Torrence & Kenyon entered into a contract with the First National Bank of Seneca, Kan., to erect a two-story brick building on certain premises owned by the bank. At about the same time said firm employed P. D. Kenyon to superintend the construction and purchase material for the erection of said building, they also entered into a contract with the Whittaker Brick Company to furnish the brick for this building. P. D. Kenyon performed all the conditions of his contract, as well as did the Whittaker Brick Company; but Torrence & Kenyon failed to pay these parties the amounts they had agreed upon, and on the 19th of August, 1889, they each filed their subcontractor's statement for a lien. On the 20th of February, 1890, P. D. Kenyon commenced an action to foreclose his lien against the First National Bank of Seneca, the Whittaker Brick Company, and Howard B. Kenyon as defendants. The defendant the Whittaker Brick Company filed

answer and cross petition in this action, setting up the lien. It is shown by the pleadings of Kenyon and the Whittaker Brick Company that the contract for the erection of this building was made in 1889; that the building was completed on June 21, 1889; that the last material furnished by the Whittaker Brick Company was on October 15, 1888; that the last service rendered or labor performed by Kenyon was on August 25, 1888. To the petition of Kenyon and the answer and cross petition of the Whittaker Brick Company the First National Bank filed demurrers, which were sustained by the court below, and judgment rendered in favor of the First National Bank for its costs. The Whittaker Brick Company brings the case here for review.

As stated by the plaintiff in error, the facts in this case are not identical with those in *Groesbeck v. Barget*, 1 Kan. App. 61, 41 Pac. 204; yet the question involved is the same, viz. the application of the several lien laws of this state to the lien claimed by plaintiff in error. Upon the authority of that case, the decision and judgment of the trial court must be affirmed. As held therein, the right to a lien must be determined by the law which was in force at the time the material was furnished,—that is, the act of 1872; but the time within which the statement should be filed to obtain a lien must be governed by the law of 1889 which took effect March 1, 1889. As the last materials were furnished more than 60 days prior to the taking effect of the law of 1889, and the building was completed thereafter, such a construction must be placed upon the law as will afford adequate remedy for such cases, and the plaintiff in error would have a reasonable time after March 1, 1889, within which to file its statement for a lien. Such reasonable time could not, in any case, exceed the period of time given by the statute after the day when the last material was furnished, which is 60 days. In other words, the plaintiff in error would have had 60 days from the time the act of 1889 took effect within which to file his statement, but certainly not any greater length of time; and as five months elapsed after the taking effect of the law of 1889 before the statement of the plaintiff in error was filed, we think it lost any right which it might otherwise have had to a lien. The judgment will be affirmed.

#### CHALLIS v. WOODBURN et al.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 14, 1896.)

**INDORSEMENT OF NOTE—BURDEN OF PROOF—APPEAL—REVIEW OF EVIDENCE.**

1. Where there is no evidence as to the date of an indorsement of negotiable paper the presumption of law is that it was made before maturity, and that the holder is a bona fide holder for value; and the party who denies this must prove it, and without such proof he cannot avail himself of the equities of defense.



2. Where the special findings and general verdict of a jury are clearly contrary to the evidence, there being a total failure of testimony upon every point necessary to sustain them, they will be set aside, although they may have been approved by the trial court.

(Syllabus by the Court.)

Error from district court, Nemaha county; R. C. Bassett, Judge.

Action by William L. Challis against John A. Woodburn and others. Judgment for defendants. Plaintiff brings error. Reversed.

Action by Challis (as plaintiff below) to recover upon note of \$1,000, and foreclose a mortgage on the N.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  of section 27, and the S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of section 22, and the south 26 $\frac{3}{4}$  acres of the N.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of section 22, township 4, range 14, Nemaha county, Kan., given by John A. Woodburn and Mary F. Woodburn, his wife, to George Lamberson, Jr., to secure said note, and by George Lamberson, Jr., transferred by indorsement in blank to Challis. The undisputed facts in this case, as disclosed by the record, are: That in April, 1883, George Lamberson, Jr., and his wife borrowed of the Wetmore State Bank the sum of \$1,000, giving their note therefor. That the plaintiff, Challis, signed this note with them as security. Shortly after this, May 22, 1883, John A. Woodburn and wife, being indebted to George Lamberson, Jr., in the sum of \$1,000, made, executed, and delivered to him their note for that amount, secured by mortgage on the property above mentioned. This note was by Lamberson indorsed to said Challis as collateral security to indemnify him as their security to the said Bank of Wetmore. The note given by Lamberson and wife to the bank was renewed from time to time until some time in 1888, when it was paid by Challis to the bank; Lamberson having become insolvent. That in the early part of 1884, Challis surrendered this note to George Lamberson, and, under an agreement that another note and mortgage should be substituted therefor, released of record this mortgage on the 16th day of April, 1884. On August 26, 1884, Woodburn and wife mortgaged this same property to Gilbert & Gay for the sum of \$2,000, and also at the same time gave a mortgage to Bartlett Bros., for the sum of \$300, to secure 10 certain coupons of \$30 each, and at the same time executed their note to Lamberson, Jr., for the sum of \$1,000, securing it by a mortgage on the same land; and in the said last-mentioned mortgage it is stipulated that it was a second mortgage, subject to the mortgage of Gilbert & Gay for the sum of \$2,000. This note was transferred to the plaintiff, Challis, by George Lamberson, Jr., indorsing his name thereon in pursuance to the agreement referred to, and indemnified him upon Lamberson's and wife's indebtedness to the bank, which had not been paid. This note and mortgage is the one in controversy in this action. On April 2, 1885, Woodburn and wife conveyed the land in controversy to George

Lamberson, Jr., by warranty deed, in which it is expressly stated that the land conveyed was subject to two mortgages, one for \$2,000 and one for \$1,000. On August 26, 1886, Lamberson and wife conveyed said land to one Charles D. Bidwell by warranty deed. This deed recites that the land is subject to a \$2,000 mortgage to Gilbert & Gay, and a \$3,000 mortgage to Bartlett Bros., both of which were assumed by Bidwell. No mention is made of the \$1,000 mortgage. On August 15, 1890, Bidwell and wife mortgaged said property to one John Worthy in the sum of \$2,500. The last note given by Woodburn and wife to Lamberson, and by him indorsed to Challis, was so indorsed about the 1st of September, 1884, and has been in Challis' possession ever since. The petition, amended petition, and replies filed by Challis set forth the facts as we have stated them, either by averment or admission. The execution of the note sued upon is not put in issue by the pleadings, and, in fact, is admitted. Defendant Bidwell, for his defense, pleads: First. General denial. Second. Denies that the note sued on was, on the 1st of September, 1884, or at any other time, assigned by George Lamberson, Jr., to Challis in writing and as collateral security to Challis, and denies that Lamberson ever verbally assigned to Challis the mortgage in controversy. Third. That when Lamberson purchased the property of Woodburn on the 2d of April, 1885, it was subject to the two mortgages aforesaid, one of which is the mortgage sued on in this action, but that it was expressly agreed between Lamberson and Woodburn that the note and mortgage sued on should be satisfied and canceled of record, and delivered to Woodburn, it having been paid in full; that at the time he so purchased the property, Lamberson informed him that the mortgage of \$1,000 had been fully paid and satisfied, but that he (Lamberson) had omitted to cancel it of record, but that he would do so in a few days; that Challis had full knowledge of all of the facts above set forth; and that Lamberson, at this time, was in Challis' employ, and they had conspired together for the purpose of cheating and defrauding this defendant, and of unlawfully establishing a lien upon the real estate, and that Lamberson did not, until recently, place in Challis' possession the note and mortgage sued upon. This answer was verified as to the second and third counts, or paragraphs. Sarah Bidwell, for her defense, filed an unverified general denial. John A. and Mary F. Woodburn filed separate defenses, consisting of—First, general denial; and, second, that said defendants further allege that they have paid the note for \$1,000 set up and sued on herein, as stated in the petition herein, and that defendant Lamberson promised and agreed to give them said note and satisfy said mortgage, of all of which said plaintiff, William L. Challis,

had due notice when he received said note from defendant Lamberson, and consented to the same. This is verified as to the first paragraph. Defendant Worthy filed an answer setting up general denial, and, second, his lien for \$2,500, and that, at the time the mortgage sued upon in this action was given by Woodburn to Lamberson, there was a mortgage of \$2,500 on the same land to Gilbert & Gay; that this mortgage to Gilbert & Gay is the one expressly admitted in the mortgage given by the Woodburns to Lamberson; that the money received from the loan made by him to Bidwell was used for the payment of this mortgage of Gilbert & Gay; that his mortgage is not due,—and asks to be subrogated to the rights of Gilbert & Gay. This answer is unverified. Challis, for reply to Bidwell, admits the execution of the deeds, denies each and every other allegation of the answer, and expressly denies fraud and conspiracy. His reply to the answer of Worthy is a general denial, and to the answer of Woodburn and wife a general denial, all unverified.

Trial had before court and jury. General verdict and special findings returned, as follows: General verdict: "We, the jury, duly impaneled and sworn to try this matter submitted to us in the above-entitled cause, do on our oath find for the defendants John A. Woodburn, Mary F. Woodburn, Charles D. Bidwell, and Sarah L. Bidwell." Special findings, or answers to questions, as follows: "Ques. 1. On or about what date did the plaintiff come into the possession of the note sued on, given by John A. and Mary F. Woodburn to George Lamberson, Jr., and indorsed by Lamberson to plaintiff? A. On or about December 27, 1889. Ques. 2. Did the plaintiff, at the time of receiving the note referred to in question No. 1, surrender to Lamberson a note then held by plaintiff for \$1,000, signed by John A. and Mary F. Woodburn, and payable to George Lamberson, Jr., in consideration of his receiving the note referred to in question No. 1? A. No. Ques. 3. Did the plaintiff, at or prior to the time when the note sued on was transferred to him by Lamberson, have notice of any payment made by the Woodburns to Lamberson? A. Yes. Ques. 4. Did plaintiff, after receiving the note referred to in question No. 1, have notice of or consent to the conveyance made by John A. and Mary F. Woodburn to George Lamberson, Jr., or to that made by George Lamberson, Jr., and Henrietta C. Lamberson to Charles Bidwell? A. Yes." Question 5 appears to have been stricken out, and was not answered. "Ques. 6. Did plaintiff, at any time after coming into possession of note referred to in question No. 1, instruct or authorize George Lamberson, Jr., to release the mortgage which was given to secure said note, or to represent that said mortgage had been satisfied? A. No. Ques. 7. Did plaintiff, at any time before or after coming into possession of the

note referred to in question No. 1, either conspire or connive with George Lamberson, Jr., for the purpose of setting up any false claim, or defrauding defendants Woodburn, the defendants Bidwell, or defendant Worthy? A. Yes. Ques. 8. Did plaintiff pay off the indebtedness of George Lamberson, Jr., and Henrietta C. Lamberson to the Wetmore State Bank, and for which plaintiff was liable as surety, by giving his own note for the amount, and which was accepted by said bank? A. Yes."

Motion to set aside special findings and general verdict as being inconsistent with each other, and for judgment for plaintiff, filed and overruled. Motion for new trial filed and overruled, and thereupon the court entered judgment as follows: "It is therefore ordered, adjudged, and decreed by the court, now here, that the said defendants Woodburn (John A. and Mary F. Woodburn), Charles D. Bidwell, Sarah L. Bidwell, and John Worthy do have and recover of and from the plaintiff, William L. Challis, their costs herein expended, taxed at \$—, and for all of which judgment is hereby rendered, and for which let execution issue. It is further ordered, adjudged, and decreed by the court that the plaintiff, William L. Challis, do have and recover of and from the said George Lamberson, Jr., and Henrietta C. Lamberson the sum of \$1,118.33, together with 6 per cent interest thereon from this date, and costs of this action." Challis brings case here for review.

Bally & Baldwin and J. E. Taylor, for plaintiff in error. B. F. Hudson, for defendants in error.

GILKESON, P. J. (after stating the facts). There are but two questions necessary to be decided in this case: First, that the court erred in giving certain instructions; second, that the verdict and special findings are not supported by, and are contrary to, the evidence. The instruction complained of is as follows: "The verified answer of the defendant Bidwell therefore puts in issue the assignment of said note to the plaintiff, and as to that fact the burden of proof is upon the plaintiff, and he must establish that the notes and mortgage sued upon were assigned to him, as alleged in the petition, and in good faith, for a valuable consideration." In this we think the court erred, and, under the pleadings and testimony in this case, the instruction was not applicable. "Where there is no evidence as to the date of the indorsement, the presumption of law is that it was made before maturity, and that the holder is a bona fide holder for value." *Rahn v. Bridge Manufactory*, 16 Kan. 530; *Eaton v. Harlan*, 20 Kan. 452; *Reynolds v. Thomas*, 28 Kan. 810; *Lyon v. Martin*, 31 Kan. 411, 2 Pac. 790; *Man v. Bank*, 34 Kan. 746, 10 Pac. 156; *Bank v. Elliott*, 48 Kan. 34, 26 Pac. 457. "And it is undoubtedly

a general presumption of law that indorsed paper was indorsed before maturity; and a party who denies this, and alleges it was indorsed when overdue, must prove it, nor, without this proof, can he avail himself of the equities of defense. When the time of indorsement becomes material to let in a defense of payment, etc., it is incumbent upon the defendant to show it, and rebut the legal presumption arising from the face of the transaction." 16 Kan. 530, *supra*; 34 Kan. 746, 10 Pac. 150, *supra*; 20 Kan. 452, *supra*. There was no such evidence in this case,—nothing that would overturn the *prima facie* case made by the pleadings and evidence of the plaintiff, and certainly nothing that would shift the burden of the proof back from the defendants to the plaintiff. The execution of the note is admitted. No fraud or illegality of the transaction is alleged, or attempted to be proven. In fact, the only thing attempted to be denied is that the indorsement on the note was not made in writing at the time stated, and never was made; yet the signature of the indorser is admitted to be genuine. There is not a scintilla of evidence contradicting the direct and positive testimony of the plaintiff that it was made on the 1st of September, 1884, and the testimony of the indorser himself that it was indorsed within a few days after it was made. In fact, this is all the testimony of any kind that refers to this date. Upon this proposition it is idle, therefore, to make further citations. The authorities are uniform. This note, then, was held by the plaintiff discharged of all equities between the maker and the plaintiff.

There remains, then, but a second question to be disposed of,—that the verdict and special findings are not supported by, and contrary to, the evidence. From what we have already said, we are compelled to hold that the answer to special finding or question No. 1 is without foundation upon any testimony adduced in this case. No. 2 is in the same condition. The testimony of the plaintiff is undisputed that he did, about the time or just before this note was given, deliver to Lamberson, at the request of him and Woodburn, such a note, under an arrangement that he was to receive another note in lieu thereof, and that he did receive, in fulfillment of that agreement or arrangement, the note sued upon in this case. The testimony of the mortgage of May 22, 1883, together with a release thereto by Lamberson a short time before this note was given, together with the fact that the land was, about this time, mortgaged to Gilbert & Gay, all corroborate plaintiff's testimony. No. 3 cannot, upon any theory we have been able to devise, be sustained. It is an undisputed fact that the note was transferred and indorsed to Challis not later than September 1, 1884. The defendant Woodburn does not claim that this note was paid until April 2, 1885, when he sold the land to Lam-

berson; yet the deed given at this time recites that this identical mortgage (and it is so admitted in the testimony) was at that time a valid lien upon the land. This, together with the uncontradicted testimony of the plaintiff that he knew nothing of any claim of payment, and, in fact, did not know of the transferring of this land until after it was so transferred, seems to us to constitute a total failure of proof upon this proposition. Even if we were to take the conversation between Lamberson and Woodburn at the time of this sale as binding upon Challis, it is not shown that it was ever brought to the plaintiff's knowledge. No. 4: We have failed to find any witness that has testified to any fact that even squints towards such a condition of affairs, and, from what we have said in reference to No. 3, this finding cannot be sustained, and the answer given to No. 6 is not only inconsistent with this finding, but negatives the propositions therein contained. No. 7 is wholly without foundation. "The law presumes, in absence of evidence to the contrary, that the business transactions of every man are done in good faith, for an honest purpose; and any one who alleges that such acts are done in bad faith, or having dishonest and fraudulent purpose, takes upon himself the business of showing the same." This rule is substantially laid down by the court in its fourteenth instruction, and is unquestionably the law. *Baughman v. Penn*, 33 Kan. 504, 6 Pac. 890. "Fraud is never presumed, but must be established by evidence, and no mere suspicion is the equivalent of proof."

We think it is wholly unnecessary to discuss the evidence or the facts in this case further. We cannot see what good or useful purpose can result therefrom. The very utmost that can be said of the evidence in this case is that it possibly raises a suspicion against Lamberson, but it does not go even that far as to the plaintiff, Challis. We cannot agree with counsel for the defendants in error that there are many remarkable and suspicious facts and circumstances proven in this case. His construction placed upon the testimony is ingenious, but not tenable; and we think it arises from his zeal in behalf of his clients, and the language used in his arguments is much stronger than is warranted by the facts in this case. After a careful and thorough examination of the record, we are compelled to hold that, upon all the material facts in this case, necessary to sustain the special findings and general verdict of the jury and the judgment rendered, there is a total failure of proof; and, unless an entirely different condition of affairs can be proven upon the rehearing of this case, we would suggest that the judgment herein should be in favor of the plaintiff and against the defendants George Lamberson, Jr., John A. and Mary F. Woodburn, for the amount paid by Challis to the Bank of Wetmore, with legal interest thereon from the date of payment; that the mortgage be declared a lien upon the land,

subject and inferior to a prior lien in favor of the defendant Worthy for the amount actually paid by him or used by the defendant Bidwell in the discharge of the \$2,000 mortgage to Gilbert & Gay, to whose rights under this mortgage he should be subrogated. The judgment of the district court will therefore be reversed, and the case remanded for further proceeding; in accordance with the views herein expressed. All the judges concurring.

### WANAMAKER et al. v. MANUFACTURERS' NAT. BANK.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 14, 1895.)

#### PRESUMPTIONS ON APPEAL—ASSIGNMENT OF ERRORS.

1. Where it cannot be ascertained, from the record brought to this court, that the motion for a new trial was filed within the time required by law, it will be presumed, for the purpose of upholding the judgment of the trial court, that such motion was not filed within the statutory time.

2. Where the errors complained of occurred at the trial, for which a new trial was asked, the complaining party will not be entitled to have the proceedings of the trial court reviewed unless the overruling of such motion is specifically assigned for error.

(Syllabus by the Court.)

Error from district court, Leavenworth county; R. C. Bassett, Judge.

Action by Wanamaker & Brown against the Manufacturers' National Bank. Judgment for defendant. Plaintiffs bring error. Affirmed.

Wm. A. Porter, for plaintiffs in error. Lucien Baker, for defendant in error.

CLARK, J. The petition in error in this case contains the following assignments of error: (1) Errors of law occurring at the trial, and excepted to by the plaintiffs; (2) irregularity in the proceedings of the court and prevailing party, by which plaintiffs were prevented from having a fair trial; (3) the verdict and ruling are not sustained by the evidence, and are contrary to law; (4) error in sustaining the demurrer to the evidence, and refusing to let the case go to the jury. The trial court sustained a demurrer to the evidence of the plaintiffs, upon the ground that the evidence did not show facts sufficient to constitute a cause of action in behalf of the plaintiffs and against the defendant, and the jury were discharged from the further consideration of the case, to which rulings of the court the plaintiffs duly excepted, and gave notice of a motion for a new trial, which motion was thereafter filed. The grounds upon which the application was based were that the plaintiffs were prevented from having a fair trial, in consequence of the order of the court discharging the jury and sustaining defendant's demurrer to the evidence, and that errors of law occurred at the trial which

were duly excepted to by the plaintiffs. It will be seen from the foregoing that the alleged errors occurred at the trial; and, although a motion for a new trial, in which the alleged errors were pointed out, was overruled by the court, we cannot say that the court erred in this ruling. The demurrer to the evidence was sustained on October 7, 1890, while the ruling on the motion for a new trial was not made until November 8th thereafter; and, for aught that appears in the record, this motion may have been overruled because it was not filed within the statutory time. The defendant in error, however, insists that no question based upon the proceedings of the trial court is presented for our consideration, as the assignments of error do not include the action of the court in overruling the motion for a new trial. Where the only errors complained of occurred at the trial, for which a new trial was asked, the overruling of such motion must be specifically assigned for error, or the complaining party will not be entitled to have the proceedings of the trial court reviewed. *Clark v. Schnur*, 40 Kan. 72, 19 Pac. 327; *Binns v. Adams*, 54 Kan. 615, 38 Pac. 792; *Chicago, B. & Q. R. Co. v. German Ins. Co. of Freeport* (Kan. App.) 42 Pac. 594. It therefore follows that the judgment must be affirmed.

### KIRWIN et al. v. UNITED STATES NAT. BANK.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 9, 1896.)

#### TRIAL BY COURT—GENERAL FINDINGS—REVIEW.

Where a case is tried by the court, and a general finding is made in favor of the defendant, and no special findings are requested or made, the general finding includes every material fact necessary to sustain a judgment based upon such finding; and where there is some evidence to support the general finding and judgment, they will not be disturbed by an appellate court.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by Kirwin & Tyler against the United States National Bank. Judgment for defendant. Plaintiffs bring error. Affirmed.

The plaintiffs in error, for some years prior to 1889, and during the times of the transactions herein complained of, were engaged in the manufacture and selling of fruit cans in Baltimore, Md. The United States National Bank was at the same time a banking corporation at Atchison, Kan. Prior to 1889, the firm of Sheppard, Jager & Co. was engaged in the fruit-canning business at Atchison, Kan., and had been doing business with Kirwin & Tyler, sometimes through the bank and sometimes not. In 1889 the firm of Sheppard, Jager & Co. evidently dissolved partnership, Jager retiring from the firm, and from that time it was known as the Sheppard Canning Company, Charles N. Shep-

pard having assumed sole charge of the business. At the time he took charge he visited Baltimore, and called upon the plaintiffs in error in reference to purchasing cans of them to carry on his business, and made arrangements with them by which he was to have one car of cans shipped to him on 30 and 60 days, for which he was to give his notes. This car was shipped as per the agreement, and notes given, due respectively June 22 and July 19, 1889. About July 2, 1889, a second car was shipped by Kirwin & Tyler to the Sheppard Canning Company, with sight draft for the price, \$973.50, attached, and bill of lading was sent to the defendant in error at Atchison. This sight draft was paid by the Sheppard Canning Company. On the 31st of July, 1889, the Sheppard Canning Company ordered another car load of cans from Kirwin & Tyler, which was shipped on August 1, 1889, railroad receipt taken by them, which shows the consignor shipped it to himself, or, in commercial parlance, to "shipper's order," viz. under the head of marks and consignee on the bill of lading was the entry thus: "Order Kirwin & Tyler. Notify Sheppard Canning Co., Atchison, Kansas." On the same day Kirwin & Tyler drew sight draft for this car load of cans on the Sheppard Canning Company, as follows: "\$862.95. Baltimore, Aug. 1, 1889. At sight pay to the order Kirwin and Tyler, eight hundred sixty-two and <sup>5</sup>/<sub>100</sub> dollars, value received, and charge to the account of Kirwin & Tyler. To Sheppard Canning Co., Atchison, Kansas." On this was indorsed as follows: "Pay to the order United States National Bank, Atchison, Kans., for collection. Kirwin & Tyler." The sight draft, with bill of lading attached, was sent by mail to the United States National Bank, and received by them. The letter of transmittal was as follows: "Baltimore, Aug. 1st, 1889. United States National Bank, Atchison, Kans.—Gentlemen: Inclosed please find sight draft on Sheppard Canning Co., \$862.95. These cans must not be delivered until remittance is made to us for previous shipments. Please notify us at once upon receipt if previous remittance is not made. Yours, respectfully, Kirwin & Tyler." It is concerning the price of this car load of cans that the controversy in this case has arisen. It appears that there were other cars shipped by the plaintiffs in error to the canning company, amounting in all to six car loads.

Plaintiffs in error were plaintiffs below, and brought suit to collect the amount of the draft August 1, 1889. The allegations of their petition are that the sight draft, with bill of lading attached, were sent to, and by due course of mail were received by, and came into the hands of, the defendant in the usual and ordinary course of business, and that thereupon it became the duty of the defendant to collect the same before delivering the bill of lading or the property to the

Sheppard Canning Company. It is also averred that the defendant did collect the amount of the sight draft from the Sheppard Canning Company, and retained the same, and refused to pay it over to them; that the defendant, in its answer, admits that the sight draft and bill of lading attached came into its hands by mail but denies it came into its hands in the usual and ordinary course of business, and avers that said car load of cans was shipped under the special agreement with Mr. C. N. Sheppard, and that said bill of lading was turned over to the Sheppard Canning Company by special authority from plaintiffs to the defendant to so turn said bill of lading upon payment, to wit, of all money obligations then due to the plaintiffs from said Sheppard Canning Company theretofore placed in the hands of the defendant for collection. Defendant also denies that it has collected the sight draft, or retains the proceeds thereof, and tendered the draft in court. Reply filed of general denial. Jury waived. Cause was tried to the court. Judgment entered for defendant. Motion for new trial overruled, and plaintiffs bring case here for review.

J. F. Tufts, for plaintiffs in error. W. W. & W. F. Guthrie, for defendant in error.

GILKESON, P. J. (after stating the facts). The cause of action set forth in the plaintiffs' petition is for money had and received; that the defendant bank had collected the draft mentioned, and failed, neglected, and refused to turn the proceeds thereof over to them. This is denied by the defendant in error as one of their defenses, and as a further defense they claim that they delivered the car of cans in compliance with the letter accompanying the draft, and, if there was any mistake made, it was an honest mistake on their part, and they were justified in doing as they did under the terms of the instructions given. It is evident that they did not collect the draft, as they made a tender of it in court; and we are inclined to the view taken by them with reference to the delivery of the car. The language used in the letter of instructions is susceptible of two constructions, and, as there is no testimony in this case tending to establish any collusion or bad faith upon the part of the defendant in error, we do not think they should be held liable for an honest mistake which the plaintiffs in error made possible to occur. They had it in their power, when choosing the language, to make themselves perfectly understood, but failed to do so; and we think it is the universal rule that "in all cases where a written contract is susceptible of two constructions, and a party has acted thereon upon a construction consistent with honest intention and good faith on his part, and the trial court gives such construction thereto, an appellate court will not overturn or set aside the judgment." And this is particularly true where

the written instrument is in the form of instructions, and the party required to act thereunder had no voice in the making thereof. The language therein being ambiguous, it should be most strongly construed against the maker. In this case the court made a general finding in favor of the defendant, and the rule has been adopted in this state that, "where a case is tried by the court, and a general finding is made in favor of the defendant, and no special findings are requested or made, the general finding includes every material fact necessary to maintain a judgment based upon such findings; and where there is some evidence to support the general finding, the judgment will not be disturbed by an appellate court." *Mushrush v. Zarker*, 48 Kan. 382, 29 Pac. 681. And there is not only some evidence to support the general finding in this case, but the evidence strongly supports every material fact necessary to be found in this case to sustain the judgment. But on examination of the issues presented by the plaintiffs' petition we are compelled to affirm this judgment. The cause of action, as we have said, set out therein, is for money had and received, yet the plaintiffs failed to show by any evidence that the defendant collected the sum of \$862, the amount of the drafts, as they claim it had, and refused to turn over, but retained it to its own use. There is an absolute failure of evidence to support this allegation of the petition, and the question therefore presented to us is not one of the parties' rights upon evidence, but upon evidence within the issue. The most favorable construction that could be placed upon the plaintiffs' pleadings in this case would be to say that the petition presented a claim of liability upon two counts: (1) That the defendant collected the sum of \$862.95, which it refused to turn over to the plaintiffs, and retained to its own use; and (2) that the defendant refused to return the bill of lading, or account for the car loads of cans, reasonably worth the full sum of \$862.95, the market value thereof. The first claimed ground of liability was upon the testimony, or rather upon the lack of testimony, decided adversely to the plaintiffs, and therefore settled, and the second claimed ground of recovery, viz. the refusal to return the bill of lading or account for the cans, was abandoned by them, if they ever considered it as a ground of recovery. There is not a syllable of testimony as to the market value of the cans, nor is there any showing the value of the bill of lading. There is, then, a total failure of proof on every material allegation necessary to support this ground of recovery, and a failure of proof (even under the liberal construction of the pleadings) of every material fact in this case, and this variance is fatal. "A party cannot allege one thing and support it by proof of an entirely different state of facts." *Railroad Co. v. Young*, 8 Kan. 658. The judgment in this case will be affirmed. All the judges concurring.

# STATE v. ETZEL.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 9, 1896.)

## INFORMATION—VERIFICATION BY PROSECUTOR—PERSONAL KNOWLEDGE.

It is not necessary, in a prosecution under the prohibitory law, that the prosecuting witness should have actual personal knowledge of the transactions charged in the information. It is sufficient if he have notice or knowledge thereof, and had the offense in contemplation when he verified the information which the witnesses testified to, and for which the defendant was convicted.

(Syllabus by the Court.)

Appeal from district court, Shawnee county; Z. T. Hazen, Judge.

Mike Etzel was convicted of the unlawful sale of intoxicating liquor, and appeals. Affirmed.

H. O. Safford and F. B. Dawes, for appellant. James J. Hitt, for the State.

GILKESON, P. J. Prosecution for the unlawful sale of intoxicating liquor. Conviction had at the January term, 1895. The defendant, Etzel, appeals. The information filed in this action contains seven counts, charging the defendant in the first, second, third, fourth, and fifth counts with having sold intoxicating liquors at No. 112 Klein street, in the city of Topeka, during the month of March, A. D. 1895; and in the sixth and seventh counts with having at the same place sold intoxicating liquor during the month of February. The information is sworn to positively by one D. N. Burdge. After the testimony was in, the state elected to rely for a conviction upon the first, second, and third counts of the information upon alleged sales made upon the 4th day of March, and testified to by Kimball and Meredith, and upon the fourth count, as testified to by Kimball and Woods, of sales made on the 5th day of March, and on the sixth count, as testified to by Meredith, of sales on the — day of March, 1895. Kimball and Meredith were the only witnesses introduced on behalf of the state who testified to any sales. The testimony of Kimball was that on the 4th day of March he purchased a half pint of whisky from the defendant, and paid him 50 cents therefor, and that on the same day he purchased at one time six glasses of beer from the defendant, and at another time, on the same day, he purchased of and paid the defendant for six glasses of beer; that Meredith was present at the time he made the second purchase above mentioned; that on the next day, the 5th of March, he purchased six glasses of beer from the defendant, paid him for the same, and that one Woods was with him at this time. Meredith testified that on the 4th day of March he purchased a half pint of whisky of the defendant, paid him therefor, and that Kimball was present at this time; that the

same evening Kimball purchased of the defendant six glasses of beer at one time, and six glasses of beer at another, and paid him for each of them. Wood testified that he never had purchased any beer of the defendant, never had seen any one purchase beer there, but that he drank beer there, but never saw any one pay for it. And this was all the testimony with reference to the sales of liquor made by the defendant as charged in the information. D. N. Burdge, who verified the information, testified that he never saw the defendant sell any intoxicating liquors; that the witnesses Kimball and Meredith had informed him that he was selling liquor,—beer and whisky,—and informed him of the sales which were testified to upon the stand; that at the time he swore to the information he had in contemplation what Kimball and Meredith told him, and the alleged sales made to them as testified to by them in this case. He had no personal knowledge of any sales, and that all he knew was what the witnesses Meredith and Kimball told him. This was all the testimony offered.

The defendant requested the court to instruct the jury, as follows: "That no conviction can be had on any offense, except such as D. N. Burdge knew of at the time the information was filed; and if you believe from all the testimony in this case that any offense relied upon for conviction by the prosecution was not known by said D. N. Burdge at the time this information was filed, that you cannot convict on such offenses. The knowledge referred to in the foregoing instruction means personal knowledge, not hearsay, or what some one else may have told him; and although you may believe from the evidence that prior to the filing of the information the witnesses Kimball and Meredith may have told said D. N. Burdge of said alleged sales, that would not constitute legal knowledge upon the part of D. N. Burdge." These instructions were refused by the court. The court did charge upon this proposition as follows: "Where an information in this kind of a case is verified by a private citizen, and in that case I instruct you that the defendant in such a case cannot be convicted of any offense of which the person verifying the information has no notice or knowledge at the time of verifying the information; and in this case I instruct you that defendant can only be convicted of such offense or offenses as D. N. Burdge, who verified the information, had notice or knowledge of at the time he so verified it; and if you believe from the evidence that D. N. Burdge had no notice or knowledge of any of the offenses charged in the information at the time of verifying the same, and upon which the state relies for a conviction, then you should acquit the defendant of all the offenses relied upon by the state of which Burdge had no notice or knowledge." The jury found the defendant

guilty as charged in the first, second, and third counts of the information, and not guilty on the fourth, fifth, and sixth counts.

There is but one question presented for the consideration of the court in this case, viz. that the court erred in refusing to give the instructions asked for by the defendant; and on the part of the defendant, in support thereof, we are cited to several decisions of the supreme court of this state, but we do not think that they apply. This question was not raised in *State v. Gleason*, 33 Kan. 252, 4 Pac. 369. That was upon the sufficiency of a complaint verified on information and belief. In *State v. Brooks*, 33 Kan. 708, 7 Pac. 591, Justice Valentine lays down the rule exactly as given by the court in its instructions, and Brooks was convicted upon a count in the information of which the prosecuting witness had not "the slightest thought or information." In *State v. Lawson*, 45 Kan. 329, 25 Pac. 864, testimony had been taken before the county attorney as provided by statute, and filed with the information. Lawson was convicted for sales not mentioned in such testimony. And in *State v. Heschor*, 48 Kan. 524, 23 Pac. 1022, the conviction was under the same circumstances as in the Lawson Case; and we have failed to find any authority which goes to the extent claimed by the defendant, "that there must be an actual personal knowledge of the offense committed;" in other words, that the party making the complaint must have been present and taken part in the unlawful transaction, for this is what is really claimed by the defendant when he says "that knowledge means personal knowledge, and not hearsay." Were this rule adopted, it would only be those who had actually drunk the liquor that would be competent to verify an information. While he might see some one else drink and pay for something, yet, if he did not drink himself, his information or knowledge as to what it was would be hearsay. To adopt a rule of this kind would make it impossible for crime to be punished. There is no contention in this case, as there was in the Gleason Case, that no legal foundation had been laid for issuing the warrant. The complaint here was regular in form, and supported by a positive oath. This conferred jurisdiction. The testimony as to certain sales made at certain times is direct and positive, and the testimony of D. N. Burdge that he had these identical transactions in his mind—"in contemplation"—when he verified the information. The defendant was found guilty upon these specific sales, and was convicted of the identical offenses which were in the mind of Burdge at the time he made the complaint. The court instructed the jury fully and fairly, and gave him the benefit of all that was his due under the law, and we do not think that any of his rights were prejudiced. "An information charging the unlawful sale of

intoxicating liquor, verified by the county attorney upon information and belief, is sufficient for all purposes, except to procure the issuance of the warrant and the arrest of the defendants. And a verification in such a charge by the county attorney stating positively that the allegations of the information are true, when in fact he did not see the unlawful sales made, but received information from other sources, does not invalidate the information, nor prejudice the substantial rights of the defendant." *State v. Mosell*, 49 Kan. 142, 30 Pac. 189. And where a county attorney files an information, charging the defendant with keeping a nuisance, and positively verifies the same "as true in substance and in fact," motions to quash the warrant and information, and a plea in abatement upon the ground that the information is not properly verified, and that the county attorney has no personal knowledge of the facts alleged therein, are properly overruled. We do not think the court erred in refusing the instructions asked for by defendant. The judgment of the district court must be affirmed. All the justices concurring.

#### STATE v. BARBER.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 9, 1896.)

#### INTOXICATING LIQUORS—ILLEGAL SALES—NUISANCE —FORMER JEOPARDY—CREDIBILITY OF WITNESS.

1. Under the statutes in this state, an illegal sale of intoxicating liquor constitutes an entirely different offense from that of keeping a place where intoxicating liquors are sold in violation of law. The latter offense is declared by our statutes to be a nuisance, and an acquittal, under a charge of making an illegal sale, is no bar to a prosecution for keeping and maintaining a place where illegal sales are made; and evidence of any sales made in the place alleged to be kept where intoxicating liquors are sold in violation of law is competent proof in support of the charge of maintaining such nuisance, even though such sales may have been made prior to the date of such former acquittal, and evidence thereof offered at the trial, which resulted in such acquittal.

2. It is the exclusive province of the jury to weigh the evidence submitted upon the trial, and to determine as to the credibility of the witnesses; and where the verdict was approved by the trial court, the judgment rendered thereon cannot be disturbed by this court, merely on the ground that the complaining witness, upon whose testimony the jury necessarily returned their verdict, admitted at the trial, upon cross-examination, that he was pecuniarily interested in the result of the prosecution of the case.

(Syllabus by the Court.)

Appeal from district court, Morris county; James Humphrey, Judge.

J. N. Barber was convicted of violating the prohibitory law, and appeals. Affirmed.

M. B. Nicholson and Geo. P. Morehouse, for appellant. Lambert, Graves & Dickson and John Malloy, for the State.

CLARK, J. The defendant was prosecuted in the district court of Morris county for violations of the prohibitory liquor law of this state. The information was filed October 20, 1894. In the first count the defendant was charged with keeping and maintaining a nuisance, viz. a place where intoxicating liquors were sold in violation of the statutes of this state; while in the second and third counts he was charged with the illegal sale of intoxicating liquors. After the state had introduced its evidence and rested, the county attorney announced that the state would rely, for a conviction under the second count, upon a sale of two bottles by the defendant in September, 1894, to one Mad Sorenson, as testified to by the latter, of beer and brandy; that it would rely, for a conviction under the third count, upon a sale of two bottles of beer to one George Leeson in the month of September, 1894, as testified to by the said witness Mad Sorenson; and that the state would rely, for a conviction under the first count, upon all the testimony introduced. The trial resulted in a verdict of guilty under the first and second counts, and not guilty under the third count. A motion for a new trial, setting up the statutory grounds, was duly filed, and overruled by the court, to which an exception was saved; and the defendant was adjudged to pay a fine of \$100, and sentenced to be imprisoned in the county jail for a period of 30 days under each of the counts upon which he had been found guilty.

The defendant alleges that the court erred in its admission and rejection of certain evidence upon the trial, and in its instructions to the jury. The verdict of guilty of the charge of keeping a nuisance, as set out in the information, was, we think, fully warranted by the evidence. The defendant produced, as a witness in his behalf, one Hugh Stewart, a justice of the peace of the city of Council Grove, and sought to introduce in evidence a complaint filed with said justice of the peace in which the defendant herein was charged with selling intoxicating liquor in violation of law. The plaintiff objected to the introduction of this evidence as being incompetent, irrelevant, and immaterial to any issue in the case; and, upon an examination of the complaint, the court, finding that the defendant was therein charged with having made illegal sales prior to the dates mentioned in the information, and prior to the dates of the alleged sales upon which the state had elected to rely for a conviction in this case, under the second and third counts, sustained the objection, to which the defendant duly excepted. The defendant then made the following offer: "The defendant offers in evidence the complaint and the docket entries in the trial of the defendant, J. N. Barber, before Hugh Stewart, a justice of the peace of the city of Council Grove, Morris county, state of Kansas, charged, in a complaint with two counts,



with a violation of the prohibitory law, which trial was had before said Stewart, J. P., before a jury, on the 13th day of July, 1894, and said jury rendered a verdict in favor of said defendant, J. N. Barber, finding him not guilty as charged in the complaint." The state objected to the introduction of this evidence as being incompetent, irrelevant, and immaterial, which objection was sustained, and an exception thereto saved. We see no error in these rulings of the court. The trial before the justice of the peace was had on the 13th day of July, 1894, more than two months prior to the date of the particular sales upon which the state announced that it would rely for a conviction under the counts charging the defendant with illegal sales. Hence, the introduction of this evidence would not have been competent, relevant, or material in this case, when applied to the charge of selling intoxicating liquor in violation of law. There was no attempt to show that any of the evidence introduced upon the trial before the justice of the peace had any reference whatever to any of the transactions to which the witnesses testified in this case. Hence, the evidence offered would not be competent, relevant, or material, when applied to the charge of maintaining a nuisance by keeping a place where intoxicating liquors were sold in violation of law. An illegal sale of intoxicating liquors constitutes an entirely different offense from that of keeping a place where intoxicating liquors are sold in violation of law; and an acquittal or conviction under a charge of making an illegal sale is no bar to a prosecution for keeping and maintaining a place where illegal sales are made. The test is, not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. In *Com. v. Bubser*, 14 Gray, 83, the defendant, charged with being a common seller of intoxicating liquors, pleaded a former acquittal upon an indictment for a nuisance in keeping a tenement house for the unlawful sale of intoxicating liquors. Mr. Justice Hoar, in announcing the opinion of the court, said: "The gist of one offense is the keeping of a tenement house for an illegal purpose, which makes it a nuisance; of the other, the doing of certain acts which constitute an offense, to the commission of which it is not necessary that the defendant should have been the keeper of any building or tenement whatever. On the trial of the first indictment, the jury would have been properly instructed to acquit the defendant if he did not keep the tenement described, however great a number of sales of intoxicating liquors he might have made within it." Under the statutes of Georgia, a person was indicted for selling intoxicating liquors without a license. He pleaded former conviction. It was shown that, in the former case, he had been convicted of selling liquor to a minor without the written

consent of his parent or guardian, and the court held, that while the act of selling was identical in both cases, yet the offenses were separate and distinct. Two different laws were violated,—one, in selling to a minor without the written consent of his parent or guardian; the other, in selling without a license from the proper authority. Bleckley, C. J., in concurring specially in the opinion of the court, said: "I have very grave doubt, upon principle, whether a single act, although it may have violated two statutes, or two sections of the Penal Code, will constitute two offenses; \* \* \* but I have examined the authorities to my satisfaction, and they seem to justify this sort of proceeding." *Blair v. State* (Ga.) 7 S. E. 855. In *Ruble v. State*, 51 Ark. 126, 170, 10 S. W. 23, 262, the appellant sold one pint of ardent spirits to a minor without the consent of his parents or guardian. For doing so, he was indicted for, and convicted of, selling liquor without a license. He was subsequently indicted for selling intoxicating liquor to a minor without the written consent of his parents or guardian. To the second indictment he pleaded such former conviction, and not guilty; but the court sustained a conviction under the second indictment, holding that the defendant had been convicted of two separate and distinct offenses. In *Com. v. Sullivan*, 150 Mass. 315; 23 N. E. 47, the court said: "Selling intoxicating liquors may be evidence of the offense of maintaining a tenement used for the illegal keeping and selling of such liquors; but it is not the same offense, and a party may be guilty of the former without being guilty of the latter. Therefore, an acquittal of the latter is not a bar to a prosecution for the former, even if it appears that the sale now relied on was given in evidence in the prosecution for maintaining the tenement." In *Com. v. Bakeman*, 105 Mass. 53, the following rule is laid down: "The test as to the legal identity of the two offenses is to be found in the answer to this question: Could the prisoner, upon any evidence that might have been produced, have been convicted, upon the first indictment, of the offense that is charged in the second?" In *State v. Horneman*, 16 Kan. 452, Brewer, J., cites with approval the following from Wharton on Criminal Law: "It may be generally said that the fact that the two offenses form part of the same transaction is no defense, when the defendant could not have been convicted at the first trial, on the indictment then pending, of the offense charged in the second indictment." He also cites, with approval, Russell on Crimes, as follows: "The acquittal on one indictment, in order to be a good defense to a subsequent indictment, must be an acquittal of the same identical offense charged in the first indictment." See, also, *State v. Coombs*, 32 Me. 529; *State v. Wheeler*, 62 Vt. 439, 20 Atl. 601; *State v. Stewart*, 11 Or. 52, 4 Pac. 128;

State v. Inness, 53 Me. 536; Arrington v. Com., 87 Va. 96, 12 S. E. 224; Com. v. McCabe (Mass.) 40 N. E. 182.

The defendant also calls attention to a discrepancy between the election as to the particular sales upon which the state announced that it would rely for a conviction, and the instructions of the court, and urges that, because of this discrepancy, the rights of the defendant may have been prejudiced. A sufficient answer to this suggestion is that, as the record does not show that the attention of the trial court was called to this discrepancy, and as no objections were made to the instructions as given, nor amendments offered thereto, nor other and additional instructions requested, any errors in the instructions as given must be held to have been waived, especially as it appears that the sale referred to in the election by the state and the one covered by the instructions of the court were made at the same time, and both testified to by the same witness.

And, finally, the defendant asks this court to reverse the judgment, and order a new trial, on the ground that the only witness who testified to the particular sale of which the defendant was convicted admitted, upon cross-examination, that he had been furnished the money with which to make the purchases testified to by him; that he at that time expected to be used as a witness against the defendant; that he had been hired to make the complaint, and to become a witness; that he cared nothing about the enforcement of the law; and that, in making the complaint and becoming a witness in this case, he was prompted solely by the money which had been promised him by others. In other words, this court is asked to declare, as a matter of law, that such a witness is unworthy of belief, and that the defendant should not be deprived of his liberty, property, or reputation on the unsupported testimony of a "spotter," although such evidence was uncontradicted, and no attempt was made to impeach the witness, save by showing the motives which prompted him to do what he did towards securing the conviction of the defendant. The trial court was not requested to submit to the jury an instruction embodying that proposition, and we know of no law which would have authorized such an instruction. Neither do we know of any precedent which we might follow, were we to declare the rule to be as argued, even if we entertained the views expressed by counsel. The argument made before this court upon this branch of the case might, with much propriety, have been made to the jury. Great latitude in the discussion of the question as to the credibility of this witness, and the reliability of the testimony given by him, would undoubtedly have been allowed under the following instructions given by the court: "The law constitutes you the sole

judges of the evidence, and also the credibility of the witnesses. You must determine what faith and credit you will give to the testimony of each witness; and you may, for the purpose of determining their credibility, and the weight to be given to their testimony, note their appearance and demeanor upon the witness stand, what, if any, interest they have in the prosecution, or motive to vary from the truth, or are disinterested, except as citizens desiring the enforcement of the law. It is the duty of the jury to judge the witnesses fairly, and weigh all the evidence impartially, with a view to an ascertainment of the truth relative to the charges in the information, and to declare the truth as you find it, in your verdict. If the jury believe that any witness has sworn, willfully, falsely to any material fact in the case, you may disregard the whole of the testimony of such witness. You should view and weigh, carefully and impartially, all the evidence, and declare in your verdict your honest conviction of the truth, when that is held free from reasonable doubt." The question before this court is not as to what weight would have been given to the testimony of this witness, Sorenson, by the members of this court, had they been sitting as jurors in the case; but, rather, was there any proper evidence upon which to base the verdict of the jury? The court properly instructed the jury that they were the sole judges of the evidence and the credibility of the witnesses. The trial judge approved the verdict of guilty by the jury; and, as there was some proper evidence upon which to base the verdict, even though it be that of a mercenary witness, this court cannot disturb it. The judgment will be affirmed.

CHICAGO, R. I. & P. RY. CO. v. KENNEDY.  
(Court of Appeals of Kansas, Northern Department. E. D. Jan. 9, 1896.)

RAILROAD COMPANIES—CROSSING ACCIDENT—SPEED OF TRAIN—NEGLIGENCE PER SE—CONTRIBUTORY NEGLIGENCE—DAMAGES.

1. When the ordinances of a city through which a railroad runs prohibit the running of trains at a greater speed than six miles an hour within the city limits, the running of a train at greater speed than that allowable is negligence per se, but it is not such negligence as authorizes the recovery of damages for an injury inflicted by such train, unless it appears from the evidence that such unlawful speed was the proximate cause of the injury.

2. Contributory negligence is not imputable, as a matter of law, to a child 10 years of age, who is injured while attempting to cross a railroad track in front of an approaching train, at a public street crossing, from the mere fact that he was familiar with the crossing, knew that engines and trains were frequently passing, that it was dangerous to cross in front of a moving train, and failed to look for approaching trains before making the attempt. Questions relating to care or negligence, in such case, are dependent on the capacity and experience of the child, and its ability to guard against danger, and must ordinarily be determined by the jury.

3. Before damages can be awarded for permanent injury, it must be made to appear that such injury is reasonably certain, and not merely possible.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; T. P. Anderson, Judge.

Action by Frank Kennedy, by William Kennedy, his next friend, against the Chicago, Rock Island & Pacific Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Action to recover damages for a personal injury alleged to have been sustained by the defendant in error, who was the plaintiff below, through the negligence of the plaintiff in error, at a street crossing in Kansas City, Kan. The plaintiff, Frank Kennedy, was a boy 10 years of age at the time of the accident. The jury returned a verdict, upon which judgment was rendered, for \$1,250 in favor of the plaintiff, and also made certain special findings of facts, among them being the following: On request of the plaintiff: "(2) Was the plaintiff just before and at the time of his injury, considering his age and experience, in the exercise of ordinary care? Ans. Yes. (3) Was the locomotive and train of defendant causing the injury to plaintiff, at the time and place of the injury to plaintiff, running at a rate of speed to exceed six miles an hour? Ans. Yes." "(6) Was the plaintiff's view obstructed by cars upon the side track at the time and place where he was injured, so that he was prevented from seeing the approach of said locomotive or train? Ans. Yes. (7) Was there any signal or warning given by those in charge of the locomotive and train of its approach at the crossing where plaintiff was injured? Ans. The jury cannot determine." On request of defendant: "(1) How many railroad tracks running parallel with each other were then at the place where plaintiff was injured, which crossed Third street? Ans. Five. (2) On which of said tracks was the train that injured the plaintiff passing at the time of the accident? Ans. Second from the north." "(7) Was not the plaintiff familiar with the crossing at the time of the accident, and prior thereto? Ans. Yes. (8) Did not plaintiff know at the time of the accident, and prior to that time, that trains and engines were at all hours of the day passing backward and forth over the crossing? Ans. Yes. (9) At and before the time of the accident, did not the plaintiff know that any railroad track was a place of danger? Ans. Yes. (10) At the time of the accident, did not the plaintiff know that it was dangerous to attempt to cross the railroad in front of a moving train or engine? Ans. Yes. (11) If the plaintiff, at the time he stepped from the north track, going south, had looked to the west, how far could he have had an unobstructed view of a train approaching from the west on the track on which the accident occurred? Ans. Could have seen quite a distance if the train had not been approaching. (12) Was the

plaintiff running or was he walking at the time of the accident? Ans. Walking fast. (13) Is it not a fact that plaintiff, at the time of the accident, was attempting to cross the railroad in front of the engine that struck him? Ans. He was attempting to cross the track, but did not know the train was approaching. (14) Did the plaintiff look for an approaching train before attempting to cross the track at the time of the accident? Ans. Just as he was going to look, the engine struck him. (15) If he did look, did he see the approaching train before he attempted to cross the track where he was hurt? Ans. Not until the train struck him. (16) If he looked, and did not see the approaching train, what prevented him from seeing it? Ans. Cars on the side track. (17) If he did not look for the approaching train before attempting to cross the track, could he have seen it if he had looked after he had crossed the north track? Ans. Could have seen it if not right onto him." The railway company alleges error in the trial, and seeks a reversal of the judgment.

M. A. Low, W. F. Evans, and J. E. Dolman, for plaintiff in error. Miller & Kirling and Sherry & Hughes, for defendant in error.

GARVER, J. (after stating the facts). The only act of negligence, under the evidence and findings of the jury, attributable to the railway company, is the running of the train which inflicted the injury at a rate of speed prohibited by the ordinances of the city in which the accident occurred. The allegation that warning signals of the approaching train were not given falls to the ground in the face of the finding of the jury that they cannot determine whether or not such signals were given. As it devolved upon the plaintiff to prove that fact, if it existed, such a finding negatives its existence, for the purposes of this case. *Morrow v. Com'rs*, 21 Kan. 484.

At the time of the accident, the city ordinances prohibited the running of railroad trains in said city at a greater speed than six miles an hour. The train in question was being run at a greater speed than was allowable, but what the actual speed was the jury does not say. It is not disputed that a city may, by ordinance, regulate the speed of trains within its limits. It also seems to be a well-settled rule that a violation of such municipal regulation is negligence per se. *Railroad Co. v. Morgan*, 31 Kan. 77, 1 Pac. 298; *Railway Co. v. Pierce*, 33 Kan. 61, 5 Pac. 378; *Karle v. Railroad Co.*, 55 Mo. 476; *Baker v. Railroad Co.*, 68 Mich. 90, 35 N. W. 836; *Railroad Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20; *Correll v. Railroad Co.*, 38 Iowa, 120. Upon this feature of the case, the trial court instructed the jury as follows: "(9) It is negligence on the part of a railroad company to run its trains through a city, incorporated town, or village at a rate of speed prohibited by the ordinances of said city; and if

a railroad company does so run its trains, and thereby causes injury to a person who is himself in the exercise of reasonable care and caution to avoid injury, the company will be liable." It is contended that this instruction was misleading and erroneous; that it virtually directed the jury to return a verdict against the defendant if they found that the train was running at a greater speed than six miles an hour at the time it struck the plaintiff. In this particular instruction, the court selected a single fact from the evidence, and attempted to state to the jury how it might be made the basis of a right to recover damages. There is always danger in such practice that other essential facts will be overlooked which should be taken into consideration. The act thus conclusively condemned as negligent, and properly so, is of a presumptive or technical character. In this case the excessive speed of the train may in no manner have contributed to the injury, and therefore may have been an entirely immaterial circumstance in the determination of legal liability. Although thus negligent, the company would not be liable unless the proximate cause of the injury was the unlawful speed of the train. *Railroad Co. v. Morgan*, 81 Kan. 77, 1 Pac. 298; *Pennsylvania Co. v. Hensil*, 70 Ind. 569; *Railroad Co. v. Loomis*, 13 Ill. 548; *Railroad Co. v. Wellhoener*, 72 Ill. 60; *Railroad Co. v. Stebbing*, 62 Md. 504; *Stoneman v. Railroad Co.*, 58 Mo. 503. The mere fact that the plaintiff was struck by a train which was running at the rate of 8, 10, or 12 miles an hour, and was thereby injured, would not prove that the unlawful increase of the speed of the train was the proximate cause of the injury. It does not necessarily follow that the same accident would not have happened had the speed of the train been within the lawful limit. The court applied this rule in the instruction concerning a failure to ring the bell of the engine, as required by the city ordinances. After giving upon that subject substantially the same instruction that was given as to the speed of the train, the court said: "The neglect of ringing the bell of an engine while passing through a city, incorporated town, or village, in violation of its ordinances, is not of itself such negligence as will justify a recovery for damages to a person injured upon the track. To entitle the plaintiff to recover for such injury, it must appear from the evidence that the injury was the result of such omission to ring the bell." The court neglected to add a similar qualification with reference to the speed of the train, and thus, by contrast with the other instruction, emphasized the objectionable feature of the one of which complaint is made. In the absence of such qualification, we think it is open to the objection that its natural tendency was to mislead the jury to think that the negligent running of the train at an unlawful speed was, of itself, sufficient to fix the liability of the company, without any inquiry to determine whether such violation of

the ordinances was the proximate cause of the injury.

Counsel for plaintiff in error next urge, with much force and earnestness, that the findings show such contributory negligence on the part of the plaintiff as precludes any recovery by him, even conceding that the train men were also negligent. If the plaintiff had been a person of mature years and judgment, this contention of counsel would have to be sustained. The plaintiff attempted, apparently, to cross the railroad tracks without looking or listening with such care as is required of a foot traveler under similar circumstances; and, had he looked, he must have seen the danger of such attempt. It is the duty of a person about to cross a railroad track to look and listen for approaching trains; and, where the failure so to do contributes to an injury sustained from a train of cars, such contributory negligence will defeat a recovery of damages by the person injured. *Railway Co. v. Adams*, 33 Kan. 427, 6 Pac. 529; *Clark v. Railway Co.*, 35 Kan. 350, 11 Pac. 134; *Railroad Co. v. Priest*, 50 Kan. 16, 31 Pac. 674.

The difficulty in this case arises from the fact that the plaintiff was a boy only 10 years of age, and therefore, as claimed by his counsel, not subject to the severity of the general rule as to contributory negligence. Can it be held, as a matter of law, that the failure of a boy 10 years of age to exercise the care and prudence demanded of an adult before attempting to pass over a railroad at a public crossing is such culpable negligence as will bar a recovery for an injury sustained by the negligent running of a train of cars, even though he had sufficient intelligence and experience to know that more or less danger usually accompanied such an undertaking? Upon this question the authorities are not without conflict; yet, we think, they are, for the most part, distinguishable or reconcilable because of the facts peculiar to each case. The decided cases all agree in holding that the law does not require of a child the same degree of care that is required of a person of mature years; that a child is to be held responsible only for the exercise of such capacity and discretion as it possesses. It is also generally agreed that whether contributory negligence is imputable to a child is in each case a question to be determined by the jury upon the particular facts and circumstances in evidence. From such facts and circumstances, the jury can judge of the degree of its intelligence, its capacity to appreciate danger, and its ability to exercise proper judgment to avoid it. In this case the jury found that the plaintiff was familiar with the crossing, being accustomed to pass over it about four times every day; that he knew that engines and trains were at all hours of the day passing back and forth at that point; and

that it was dangerous to attempt to cross the railroad in front of a moving train or engine. The jury also found that the plaintiff, at the time of his injury, considering his age and experience, was in the exercise of ordinary care. The findings, which are most favorable to the plaintiff in error, as to the knowledge of the boy, are upon somewhat abstract or general propositions, rather than upon facts immediately related to the time of the injury. The principal matter to be determined was not so much the plaintiff's knowledge of the dangers generally to be apprehended at a railway crossing as it was his capacity to exercise proper care and judgment, when placed, without fault on his part, in a situation of danger, to guard against it. It is within the observation of every one that boys of this age lack the experience and discretion of older persons, and have impulses and propensities which frequently lead them into dangerous situations, when they do not think of subjecting themselves to any special risk of danger. They may have knowledge of imminent danger, and yet, through the natural thoughtlessness and recklessness of youth, not have that watchful ward against it which would be expected in one of more mature years. The plaintiff was at a place where he had a legal right to be,—on a public street, on his way to school. A train, passing on the third of five parallel tracks south of him, had obstructed his passage for a time; and, as soon as it had passed, he started on a fast walk to cross over and was struck by a train moving eastward on the second track he had to cross. On the first track, on each side of the street, stood freight cars, obstructing the view of the approaching train, until after the first track had been crossed. Between the different tracks was a distance of about eight feet. It is evident that a person of mature years, in the exercise of ordinary care under these circumstances, should have looked for an approaching train before going upon the second track. But the degree of care reasonably to be expected from this plaintiff, under the circumstances in which he was placed, must be otherwise determined, and was properly submitted to the jury as a mixed question of law and fact. The conclusion at which we have arrived in this matter, while not in harmony with the decisions of some courts of high character, is, we think, founded in the better reason, and is sustained by ample authority. *Railway Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Kerr v. Forgue*, 54 Ill. 482; *Railroad Co. v. Becker*, 76 Ill. 25; *Benton v. Railroad Co.*, 55 Iowa, 496, 8 N. W. 330; *Railway Co. v. Bohn*, 27 Mich. 503, 513; *Baker v. Railway Co.*, 68 Mich. 90, 35 N. W. 836; *Lovett v. Railroad Co.*, 9 Allen, 557; *Plumley v. Birge*, 124 Mass. 57; *Kunz v. City of*

*Troy*, 104 N. Y. 344, 10 N. E. 442; *Railroad Co. v. Stout*, 17 Wall. 657. As the law furnishes no definite rules for the determination of liability in such cases, each case is necessarily largely dependent upon its own peculiar facts. Even when the facts are clearly established, but are of such a character that reasonable and equally impartial minds may differ in the conclusions and inferences to be made therefrom, the making of the conclusions and inferences in any case must ordinarily be left to the jury. *Railway Co. v. Richardson*, 25 Kan. 391; *Osage City v. Brown*, 27 Kan. 74. The case of *Railroad Co. v. Todd*, 54 Kan. 551, 38 Pac. 804, to which counsel for plaintiff in error calls our attention, presented a case clearly distinguishable from this. There the child was a willful trespasser, going upon the railroad tracks and under cars, knowing that he thereby was engaged in a wrongful and dangerous act; and the jury specially found that he had sufficient intelligence and experience to understand and appreciate the danger he was incurring in doing that which occasioned his injury. Upon such findings, the supreme court held, as a matter of law, that he was guilty of contributory negligence. The facts in this case are quite different from those found in the *Todd Case*, and require the application of different principles.

Complaint is also made because of the instructions of the court as to the allowance of damages for permanent injuries. Before such damages can be given, the evidence must show that the permanence of the injury is reasonably certain; there must be more than a mere possibility that such will be the result. *Railway Co. v. Cosby*, 107 Ind. 32, 7 N. E. 373; *Fry v. Railway Co.*, 45 Iowa, 416; *White v. Railway Co.*, 61 Wis. 536, 21 N. W. 524. There was, we think, sufficient evidence upon which to submit this question to the jury; but the court should have further instructed as to the degree of proof required when such damages are claimed. The failure to so instruct would probably, of itself, not be reversible error, in view of the fact that no further instruction was requested on that subject.

Other instructions of the court may be open to criticism, but, as any error in them is unimportant, under the facts found by the jury, and is not liable to occur upon another trial, we shall not lengthen this opinion by any particular consideration of them. Considering the instructions of the court as a whole, and construing them together, we are of the opinion that they were liable to mislead the jury upon material issues, to the prejudice of the legal rights of the plaintiff in error. The judgment will therefore be reversed, and the case remanded for a new trial.

**BOWERS et al. v. KAUTS.**

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 14, 1895.)

**DIVORCE—ATTORNEYS' FEES—DISMISSAL.**

Where, in a divorce suit brought by a wife against her husband, an order was duly made requiring the defendant to pay the attorneys for the plaintiff a certain sum therein named, so as to enable them to suitably prepare the case for trial, and the services for which such allowance was made were duly rendered by such attorneys, and the order of the court was not complied with by the defendant nor vacated by the court, and at the solicitation of the defendant the divorce suit was thereafter dismissed at his cost, an action will lie against the defendant in favor of such attorneys to recover the attorneys' fees so allowed them by the court.

(Syllabus by the Court.)

Error from district court, Doniphan county; J. F. Thompson, Judge.

Action by Alcid Bowers and S. L. Ryan against Henry F. Kauts. Judgment for defendant, and plaintiffs bring error. Reversed.

A. Bowers and S. L. Ryan, pro se. J. J. Baker and A. S. Brewster, for defendant in error.

**CLARK, J.** This action was originally commenced before a justice of the peace of Wolfe River township, in Doniphan county, and was subsequently taken upon appeal to the district court of said county. In due time the case was regularly called for trial, and a witness was sworn to testify in behalf of plaintiffs, whereupon the defendant objected to the introduction of any evidence in the case upon the ground that plaintiffs' bill of particulars did not state facts sufficient to constitute a cause of action against the defendant. The objection was sustained, and judgment was thereafter rendered against the plaintiffs for costs. They have brought the case to this court for review, and the question for our determination is as to whether or not the court erred in its ruling on the objection to the introduction of any evidence in behalf of the plaintiffs, and this question is fairly presented by the record. The plaintiffs' bill of particulars alleges that the plaintiffs are, and have been for more than two years prior to the commencement of this action, attorneys at law, with full power and authority to practice in all the district and inferior courts of Kansas; that the defendant and one Alice Kauts are, and for more than ten years last past have been, husband and wife; that on the 18th day of April, 1890, the defendant and the said Alice Kauts were living separate, and not as husband and wife; that defendant had possession of all the personal property of his said wife, amounting in value to several hundred dollars, which he withheld from her, and appropriated to his own use; that the defendant refused to live or cohabit with his said wife as her husband, and had long prior to the 18th day of April, 1890, refused to permit her to live with him, or occupy their homestead, but

rented out the same without her consent, and appropriated the rents thereof to his own use, and left her in destitute circumstances, and because of her ill health she was unable to provide herself with the necessities or comforts of life, and was dependent upon the charity of friends for maintenance and support; that the defendant had for a long time theretofore been guilty of extreme cruelty to her, and was an habitual drunkard; that the defendant was the owner of certain real and personal property in addition to their said homestead, in said Doniphan county; that on the said 18th day of April, 1890, she employed the plaintiffs, on the credit of the defendant, to bring an action against him for a divorce and for alimony, and that on said day they did bring such action in the district court of Doniphan county, and thereafter, on due notice to the defendant, procured an order from the judge of said court for the payment by defendant of temporary alimony for the support and maintenance of his said wife during the pendency of said action, which order also provided for the payment by the defendant to the plaintiffs herein of the sum of \$50 as attorneys' fees to suitably prepare said action for trial; that defendant refused to pay the greater part of said temporary alimony, and refused to pay the said \$50 attorneys' fees so allowed by the court, or any part thereof, and that such proceedings were thereafter had in said action that the defendant was committed to the jail of said county by the said court for refusing and neglecting to comply with said order; and that while defendant was confined in said jail under said commitment, at the solicitation of the defendant, the said case was settled, and, agreeably to the terms of settlement, the said suit was dismissed at the cost of the defendant, and he was adjudged by the court to pay all the costs and expenses of the litigation in that action, and his wife was adjudged to be the owner of certain personal property, which was therein ordered to be turned over to her. The plaintiffs further allege that it was necessary to perform said legal services and to bring said suit for the protection of and to secure to the said Alice Kauts her rights, and therein to obtain said order for the payment of temporary alimony for her support and the allowance of said attorneys' fees to insure an efficient preparation of her case, and that said services were reasonably worth \$100, and were rendered on the exclusive credit of the defendant; that the plaintiffs had paid out for railroad fare and hotel bills, which were necessary in performing said services, the sum of \$10; and that defendant is indebted to the plaintiffs in the sum of \$110, with interest; and that the same is just, due, and wholly unpaid; wherefore they pray judgment.

The defendant in error insists that the plaintiffs' bill of particulars fails to state facts sufficient to constitute a cause of action against him, as it does not allege that Mrs.

Kauts was authorized by him to make any such contract with the plaintiffs in error, and to bind him to pay for the services rendered in her behalf in the divorce suit; and that such services cannot properly be classed as necessities for the payment of which she could pledge her husband's credit; that attorneys' fees for services rendered for the wife in a suit brought by her for a divorce, where the suit is subsequently compromised and dismissed, cannot be recovered in an action against the husband; and that, as the bill of particulars shows on its face that an order for attorneys' fees had been made and allowed in the divorce suit, it was the privilege and duty of plaintiffs in error to have their fees taxed as costs against the defendant in that suit, and judgment rendered thereon for the same. We do not feel called upon at this time to decide as to whether or not an action would ordinarily lie in favor of an attorney to recover from the husband for services rendered his wife in a suit against him for a divorce when such services were not specially authorized by him. The issues joined in this case upon the objection to the introduction of evidence do not necessarily involve that question. Section 644 of the Code of Civil Procedure provides that after a petition has been filed in an action for divorce and alimony the court or the judge thereof in vacation may make such order relative to the expenses of the suit as will insure to the wife an efficient preparation of her case. This the court did in this case by making an order requiring the defendant to pay to the plaintiffs in error \$50 as attorneys' fees to enable them to suitably prepare the case for trial. This order was never complied with by the defendant, nor was the order ever vacated, but by agreement between the parties to that action the suit was thereafter dismissed, and the defendant agreed to pay all the costs and expenses of the litigation; and in the journal entry of judgment, a copy of which was attached to the bill of particulars, the defendant was adjudged to pay all such costs and expenses, and the case was dismissed at defendant's cost, and execution was awarded therefor. The order that was made in the divorce suit requiring the defendant to pay the plaintiffs in error the sum of \$50 as attorneys' fees was, in effect, an adjudication that that amount was necessary in order to "insure to the wife an efficient preparation of her case." This allowance should have been entered as part of the costs in the case, but whether in fact it was so entered the record does not disclose. After its allowance by the court it became, in effect, a judgment for that amount in favor of the plaintiffs in error, which could be recovered upon execution, or it might be made the basis of a recovery in an independent action against the husband. The bill of particulars stated a cause of action in favor of the plaintiffs for the amount allowed them by the court in the divorce

suit, especially as its sufficiency was challenged in no other manner than by an objection to the introduction of any evidence thereunder, and the court erred in sustaining said objection, wherefore the judgment will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

### WHEAT v. BROWN.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

#### TENANT FROM YEAR TO YEAR—RIGHT TO CROPS—FORECLOSURE—RIGHTS OF PURCHASER—INSTRUCTIONS.

1. Where a tenant occupies a farm under a written lease for two years, and, after the termination of the time specified in the written lease, remains in the actual occupancy of the farm with the assent of the owner, cultivating the same, and paying the same rent that he did under the written lease, he becomes a tenant from year to year; and it requires a notice, in writing, for three months prior to the end of the year, to terminate such lease.

2. Where a tenant from year to year is in the actual occupancy of the farm, cultivating the same, and has been in the actual occupancy thereof for about three years, and the farm is subject to a mortgage, and the mortgagee commences an action against the mortgagors to foreclose the mortgage, and does not, in such action, make the tenant a party to the foreclosure proceedings, a decree of foreclosure, and sale under such decree, does not affect the tenant's right to occupy the premises. The purchaser at the sheriff's sale acquires all the right and title of the mortgagors in the premises, and will be entitled to receive the rents for all immature crops at the time of his purchase; but he is not entitled to all crops grown on the land by the tenant, and is not entitled to take forcible possession of the premises, and distrain the tenant's cattle as trespassing animals thereon.

3. When requested, at the conclusion of the evidence, to instruct the jury in writing, it is error for the court to refuse to instruct in writing, and then instruct them orally, and request the court stenographer to take the instructions, and afterwards reduce them to writing. *Rich v. Lappin*, 23 Pac. 1038, 43 Kan. 666, followed.

(Syllabus by the Court.)

Error from district court, Barber county; C. W. Ellis, Judge.

Replevin by James R. Brown against John H. Wheat. From a judgment for plaintiff, defendant brings error. Reversed.

This is a suit in replevin to recover possession of 35 head of cattle, consisting of cows, helpers, and steers, alleged to have been wrongfully taken and unlawfully detained by John H. Wheat from the possession of James R. Brown, and damage for the wrongful taking and detention thereof. Brown alleges that he had a special ownership of the cattle described in his petition and affidavit in replevin; that the defendant, John H. Wheat, wrongfully took them away from his possession, and unlawfully detains the same to his damage. The action was tried by the court and a jury, and resulted in a verdict for James R. Brown, plaintiff below; and defendant below, John H. Wheat,

filed a motion for new trial, which was overruled, and excepted to; and Wheat also excepted to the judgment of the court, made case, and asks for a reversal of this judgment.

S. L. Overstreet and W. S. Denton, for plaintiff in error.

JOHNSON, P. J. (after stating the facts). This suit was commenced in the district court of Barber county, Kan., on the 14th day of November, 1888, by James R. Brown, as plaintiff, against John H. Wheat, as defendant. The suit was for the recovery of the possession of 35 head of cattle, consisting of cows, heifers, and steers, described in the petition and affidavit in replevin of plaintiff, and for damage for the wrongful taking and unlawful detention thereof. The plaintiff below, James R. Brown, in his petition and amended petition alleges that he had a special ownership in the cattle, and their value, and was entitled to the immediate possession thereof, and that John H. Wheat, defendant below, wrongfully took them away from him, and unlawfully detains the possession of them from him. To the petition of the plaintiff below the defendant below filed his answer, denying each and every allegation of the plaintiff's petition; and upon these issues the case was tried by the court with a jury. Upon the trial of the case, after the plaintiff below had introduced all of his evidence to prove his ownership in the cattle, their value, and that the cattle were taken away from his possession by the defendant below, the defendant sought to justify the taking and holding of the cattle under the estray laws of the state of Kansas, and, for the purpose of showing his right to take the cattle and hold them from the possession of the plaintiff below, introduced evidence which proved the following state of facts: That James R. Brown, in the years 1886 and 1887, was the tenant of two quarter sections of land in Barber county, Kan.; that he resided in the dwelling house situated on one of these quarter sections; that the two quarter sections were joining, and constituted one half section of land; that the two quarter sections of land belonged to different owners; that one quarter of said land was mortgaged; that Brown cultivated the improved portions of each quarter section in 1886 and 1887 under a written lease; that he continued to occupy and cultivate said land in 1888; that he had no written lease for the land in 1888; that in 1888 the mortgage was foreclosed on one of these quarter sections of land, and the same was sold by the sheriff in July, 1888; that the defendant, John H. Wheat, purchased said quarter section of land at sheriff's sale in August, 1888, and a sheriff's deed was issued to him for said land; and by reason of these proceedings, and by reason of the purchase and his deed from the

sheriff, he claims that he became the owner of the land, and was entitled to the immediate possession of the same, and of all the growing crops thereon, and that, the plaintiff's (Brown's) cattle being on the premises, and eating the crops thereon, he was entitled to take possession of them, and drive them off of said lands to his own farm, where he lived, about one mile distant, and take them up as estrays under the law. We do not think that this contention is correct. Brown was in the actual occupancy of these premises as a tenant at the time the suit of foreclosure was commenced, and he was not made a party to the foreclosure proceedings, and the decree of foreclosure, and sheriff's sale under the decree, did not affect his rights as a tenant, as he was entitled to the possession of the premises until his tenancy was determined in some lawful manner. He was in the actual occupancy in 1886 and 1887, and, having remained on the premises with the assent of the owner, and cultivated the same from year to year thereafter, he was then deemed a tenant from year to year, and to determine his tenancy required at least three months' notice in writing prior to the expiration of the year, which would be the 1st day of March. Wheat, by the purchase of the land at sheriff's sale, obtained all the right, title, and interest in and to the land that the mortgagors had, and was entitled to the rents from the land from all immature crops at the time he received his sheriff's deed for the premises; but, Brown not being a party to the foreclosure proceedings, the decree did not terminate his lease. Wheat could determine the lease on the 1st day of March thereafter by giving the notice required by law, but could not go on and take forcible possession of the land, and take and distrain Brown's cattle for trespass on the land. Brown was not a trespasser. Being in possession under a lease which continued from year to year, he had a right to keep his cattle on the land; and, if he failed to pay the rents, Wheat would have his lien on the crops grown on the premises for the year 1888, and could enforce his lien by attachment or other proper proceedings, but it would not justify the distraining of Brown's cattle without some legal proceedings being first had.

It is seriously contended by counsel for plaintiff in error, in his brief, that the court erred in refusing to give instruction No. 1, as requested by defendant, Wheat, that it was necessary for Brown to prove the allegations of his petition with reference to the ownership of the cattle. We do not think this instruction was correct under the evidence. We have examined the evidence set out in the record carefully, and think there can be no question but that Brown proved a special and general ownership to the property, and there was no evidence on the part of the defendant tending in the remotest de-



gree to contradict the proof of ownership. The defendant below did not dispute the ownership of Brown to the cattle on the trial, but justified the taking of the cattle as a right to take them up, under the laws of Kansas, as trespassing animals on his premises, and a right to hold them for damage done to crops on the premises.

There are several assignments of error set out in the petition and in the record, all of which, but one, we do not think are necessary to be considered, as the court did not err in the particulars complained of. But this case must be reversed for the sixth assignment of error. On the conclusion of the evidence, the defendant below requested the court to give written instructions to the jury in said case; and the court refused to give written instructions to the jury, as requested by defendant, but instructed the jury orally, requesting the court stenographer to take said instructions, and such instructions, being taken by the court stenographer, were afterwards reduced to writing, and signed by the judge, without being numbered. To the manner of giving the instructions the defendant at the time objected and excepted. Was this a compliance with the statute in relation to giving instructions to the jury? Subdivision 5 of section 275 of the Code of Civil Procedure reads: "When the evidence is concluded and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, and numbered, and signed by the party or his agent or attorney, asking the same, and delivered to the court. The court shall give general instructions to the jury which shall be in writing, and numbered and signed by the judge, if required by either party."

\* \* \* All instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record." This section of the Code is imperative, and the giving of instructions orally, when requested to instruct in writing, is not a compliance with this section of the Code. It is a right that a party has under this section to have the instructions reduced to writing by the judge of the court, to have them set out in separate paragraphs, and each paragraph numbered, and the instructions, so reduced to writing and numbered, must be signed by the judge, so that the party may except to such parts of the instructions as he deems erroneous, and accept those that he thinks contain correct statements of the law, applicable to the pleadings and facts as proven on the trial. *Rich v. Lappin*, 43 Kan. 686, 23 Pac. 1038; *State v. Bennington*, 44 Kan. 583, 25 Pac. 91; *State v. Potter*, 15 Kan. 303; *City of Atchison v. Jansen*, 21 Kan. 580. For the error in refusing to instruct the jury in writing, as requested by the defendant below, the judgment is reversed, and the case remanded for a new trial. All the judges concurring.

# RICHARDSON v. GREAT WESTERN MANUF'G CO.<sup>1</sup>

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

APPEAL—PARTIES—CONDITIONAL SALE—RIGHT TO POSSESSION.

1. A case in this court will be dismissed for want of necessary parties only when it is made to appear that the decision of the court might prejudicially affect the rights or interests of some person not before it.

2. A. enters into a contract with B., by the terms of which A. agrees to furnish some new machinery, and put it with the old machinery already in the mill of B., and is to remodel said mill, and guarantees to change it so that it will do certain things. B. agrees, when the mill fulfills the guaranty of A., to accept and settle for it. *Held*, that B. is not bound to accept and settle for it, and is not in default in the payments contracted for, until it fulfills the guaranty.

3. Where such contract provides for the conditional sale of the new machinery, and stipulates that the title to the same shall remain in A. until fully paid for, and that, upon default of any of the payments, A. may take such machinery into his possession, *held*, that the title remains in A. until full payment is made, but that A. is not entitled to the possession thereof until default is made in the payments.

4. Where one of the recitals in a written contract is, "It is expressly agreed that no warranty, or verbal or other understanding of any kind, exists in regard to this contract or to said machinery, other than what is herein expressly stated," it is error to permit the introduction of evidence of an oral warranty by either party to said contract.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

Replevin by the Great Western Manufacturing Company against True Richardson and others. From a judgment for plaintiff, defendant Richardson brings error. Reversed.

A. E. Parker, for plaintiff in error. James Laurence, Lucien Baker, and W. C. Hook, for defendant in error.

DENNISON, J. A motion has been filed by the defendant in error to dismiss this case because the necessary parties have not been brought into this court. None of the defendants below have been brought here as parties except Richardson, and it is claimed that the others are necessary to the determination of this suit. This is purely a jurisdictional question. Before a court can adjudicate the rights of a person, or disturb him in the enjoyment of his property, or take from him any privilege he now legally has in relation thereto, it should have jurisdiction over the person and the property sought to be disturbed. When the question of jurisdiction is brought before us, we must consider the status of all the other parties to the controversy, and how their rights may be affected by our decision. If their rights can be prejudicially affected by any decision we may make, then we must have jurisdiction of the persons before we can adjudicate their rights. If the record shows they have no interest or concern in the subject-matter of the suit, and

<sup>1</sup> Rehearing pending.

their interests can in no way be jeopardized by the reversal or modification of the judgment, it is not necessary for this court to obtain jurisdiction over them in order to adjudicate the rights of the real parties in interest as to the subject-matter in controversy. Because a person is made a party upon either side of an action, it does not necessarily follow that jurisdiction of such a person is necessary to the full determination of the subject-matter of the suit. We may say, in this connection, that the dismissal of cases over the protest of the plaintiff in error is not favored by this court. The motion therefor will be granted only when the defendant in error has a clear legal right to demand it. This plaintiff in error has been to considerable expense, and has been endeavoring for about 6 years to obtain a legal adjudication of the controversy between himself and the defendant in error; and we do not think this court should summarily throw his case out of court unless a clear legal reason is shown therefor. A case in this court will be dismissed for want of necessary parties only when it is made to appear that the decision of the court might prejudicially affect the rights or interests of some person not before it. We have carefully examined the decisions of our supreme and appellate courts, and are satisfied that that is as far as they ever intended to hold. Such seems to be the ruling of the supreme court in *Ex parte Polster*, 10 Kan. 204; *Ferguson v. Smith*, Id. 394; *Armstrong v. Durland*, 11 Kan. 15; *Hodgson v. Billson*, Id. 357; *Bassett v. Woodward*, 13 Kan. 341; *State v. Cummerford*, 16 Kan. 509; *Richardson v. McKim*, 20 Kan. 346; *Browne's Appeal*, 30 Kan. 331, 1 Pac. 78; *Wilson v. Auditing Commission*, 31 Kan. 261, 1 Pac. 587; *Paper Co. v. Hentig*, 31 Kan. 322, 1 Pac. 529; *McPherson v. Storch*, 49 Kan. 313, 30 Pac. 480; *Paving Co. v. Botsford*, 50 Kan. 331, 31 Pac. 1106; *Steele v. Baum*, 51 Kan. 165, 32 Pac. 918; *Central Kansas Loan & Inv. Co. v. Chicago Lumber Co.*, 53 Kan. 677, 37 Pac. 132; *Norton v. Wood* (Kan. Sup.) 40 Pac. 911; *Hyde Park Inv. Co. v. First Nat. Bank* (Kan. Sup.) 42 Pac. 321. And the same seems to be the ruling of the court of appeals in *Bain v. Insurance Co.* (Kan. App.) 40 Pac. 817; *Bonebrake v. Insurance Co.* (Kan. App.) 41 Pac. 67; *First Nat. Bank of Frankfort v. First Nat. Bank of Westmoreland* (Kan. App.) 41 Pac. 976. To hold that the rights of the real parties to a controversy cannot be adjudicated by a court because some person not before it may be incidentally benefited by a modification or a reversal of the judgment, would be to apply the rule when the reason for it did not exist. In the case at bar *Horace Pardee*, *Eugene Pardee*, *Emma Pardee*, and *A. G. Forney* were made defendants in the court below, and were not made parties in this court. Therefore it will be necessary to inquire into what rights they have in the property in controversy, and how their rights might be injuriously affected by a reversal or

a modification of the judgment rendered herein. This action was brought to recover the possession of specific personal property. No damage for its detention is claimed. No one claims to own, or control, or detain the property, adverse to the alleged rights of the plaintiff below, except *Richardson*. No demand was ever made upon *Horace* or *Eugene Pardee* for the property. When the demand was made upon *A. G. Forney* and *Emma Pardee*, they both told the person who made the demand to go and take the property. No one detained the property from the defendant in error except *Richardson*. The gist of the action of replevin is the wrongful detention. The action should have been brought against *Richardson* only. The fact that other parties who did not detain the property were made parties defendant certainly should not now be ground for dismissing the case. Suppose none of these persons had been made parties in the court below, and the necessary steps had been instituted to make them parties; can it be contended that the trial court should have ordered it done after the court was convinced that not one of them had wrongfully detained the property in controversy from the possession of the plaintiff below? Certainly not. At the trial of this case in the court below, the defendant in error did not claim that any one except *Richardson* had detained the property, or was interested in this controversy. In the statement of the case to the jury, the defendant's attorney made the following statement: "The real controversy in the action is between *True Richardson* alone and the plaintiff, the *Great Western Manufacturing Company*. The other parties are simply made defendants because they are supposed to have more or less connection with the subject-matter of the controversy. The real merits or gist of the business is between *Richardson* and the plaintiff."

Counsel for defendant in error contends that, as *Horace Pardee* signed the original contract and notes, he will be injuriously affected by a modification or reversal of the judgment. This is not an action to foreclose a lien, or to recover the amount due upon the notes and contract. It is an action in replevin to recover the personal property. It is true that *Richardson* alleged a breach of the contract by the manufacturing company, by reason of which no payment became due, and that therefore his detention of the property was not wrongful; but certainly *Pardee's* interests cannot be jeopardized by a reversal or modification of this judgment. *Richardson* is the owner of *Pardee's* interest in the mill, and *Pardee* has no interest in the machinery. We must refuse to dismiss this action upon the first ground set forth in the motion to dismiss.

The other ground of the motion to dismiss is that the case made does not contain such recitations as are necessary to challenge the attention of this court, because it does not state that it contains all the motions, jour-

nal entries, orders of the court, and other proceedings. The record recites that the case was tried upon the issues joined in the pleadings therein set forth, and that the proceedings therein indicated were had. The allegations as to evidence, objections, exceptions, and all the rulings of the court thereon, are certainly complete. The allegations as to the instructions refused and given, the special interrogatories and verdict, the motion for a new trial and the action thereon, the judgment, and the journal entry, all seem to be sufficient. The record is at least sufficient to show some of the errors complained of, and we will examine the material ones. If however we find the record deficient, so far as it relates to any assignment of error, we will not pass upon such error.

We will now proceed to an examination of this case upon its merits. The defendant in error brought this suit in the district court to recover the possession of certain milling machinery it had placed in the mill of Richardson and Horace Pardee. As an evidence of its ownership, it attaches to its petition a copy of the following contract, entered into between it and Richardson & Pardee:

"An agreement, made this 4th day of November, A. D. 1887, between Great Western Manufacturing Company, Leavenworth, Kansas, of the first part, and Richardson & Pardee of Belle Plaine, county of Sumner, and state of Kansas, of the second part, as follows: The party of the first part, in consideration of the promises and agreements, and on the condition, hereinafter contained, do agree to sell to the party of the second part the following described machinery, which is to be located as follows (contract subject to approval of the Great Western Manufacturing Company): In their mill near Belle Plaine, Kansas. The parties of the second part are to deliver said machinery from the depot in Belle Plaine into said mill free of charge to the parties of the first part. The parties of the first part agree to place the said machinery, which is specified in memorandum attached hereto, in said mill in a workmanlike manner, and guaranty each and every piece of it to be first-class in every respect, and when so placed, in connection with the machinery now in use in said mill, to constitute a mill of about 40 barrels' capacity in 24 hours' run, which will produce as good grades of flour from like grades of wheat as any mill in the state of Kansas. It is agreed by the parties hereto that the parties of the first part are to control and use, free of charge, any or all of the machinery now in said mill that they may deem suitable in overhauling said mill, but no less new machinery than hereinafter specified. It is agreed by the parties of the second part that they will furnish good No. 2 soft wheat with which to test said mill when completed. The parties of the first part agree to furnish the machinery, etc.,

specified, pay all freights, millwright work, hardware, tin and tinner's work, and complete the job in about 40 days from the time the machinery is delivered into the mill, for the sum of thirty-three hundred dollars, to be settled and paid as hereinafter provided. The parties of the first part have nothing to do with moving the water wheel to new location. It is agreed by the parties of the second part that they will promptly accept and settle for said mill as per the terms of this contract, so soon as the parties of the first part shall have fulfilled their guaranty. It is further agreed by the parties of the first part that said mill shall make a barrel of flour from five bushels of good sixty-pound soft wheat. Said machinery to be delivered on board cars in the city of Belle Plaine. Said sale to be made on the payment by the second party therefor, of the sum of (\$3,300.00), thirty-three hundred dollars, as follows: \$500.00 cash down; \$500.00 subject to check when machinery arrives; \$1,000.00 in nine months' note; \$1,300.00 in fourteen months' note. Such deferred payments to bear interest from the time such machinery shall be ready for delivery, pursuant thereto, at ten per cent. per annum, for which deferred payments notes, satisfactory to the first party, in the several amounts and at the several times of payment and with such interest as above specified, and current rate of exchange on Leavenworth, shall be given,—all of such notes to be made payable at Belle Plaine Bank, and to bear date, on the day the mill is accepted, 18—; and on making such cash payment, and delivery of such notes, said machinery to be controlled by the party of the second part, subject to the condition hereof. In case of any defect in material or workmanship of said machinery, the party of the first part will make the same good at their shops without charge; and should it not perform as well as is customary for machinery of like size and proportions, the second party is to notify and give the first party a reasonable chance to make the same perform in a proper manner. It is expressly agreed that no warranty, or verbal or other understanding of any kind, exists in regard to this contract, or to the said machinery, other than what is herein expressly stated; and all claims for damages must be presented in writing within sixty days from the delivery of such machinery. Said machinery shall have proper care and attention while in the charge of the party of the second part; and the party of the second part shall insure such machinery in the sum of \$2,300.00 for the benefit of the party of the first part. And it is hereby stipulated, and it is the express condition of this agreement of sale and purchase, that, until full and complete payment of the purchase money herein mentioned, and the interest thereon, whether such purchase money or any part of it is evidenced by said promissory notes, or any renewals

thereof, is made, the title, ownership, and right of possession of said machinery does not pass from the party of the first part; and said first party may, at any time after default of any payment and agreement heretofore mentioned, reduce the same to possession, and, for the purpose, may, with or without legal process, enter upon any premises where the same or any part thereof may be, and may sever and detach the same or any part thereof from any freehold, land, tenement, appurtenances, or fixtures to which the same may be attached, whether the same has become a part thereof, or not, because of such attachment, and may remove the same, and have, hold, and retain possession thereof, with the full right thereafter to use, sell, or dispose of the same for their sole use and benefit; and, upon the taking of such possession, and all every claim to or upon, or interest in, or right of possession of, the said machinery or any part thereof, by the said party of the second part or his assigns, shall cease, end, and determine, and any part of the purchase money which shall have been paid shall be forfeited to the party of the first part, and no claim therefor shall be made or maintained by the party of the second part. Great Western Mfg. Co., by Jos. W. Wilson. Richardson & Pardee. True Richardson. Horace Pardee."

The memorandum of machinery is as follows: "For Richardson & Pardee, Belle Plaine, Kansas. From Great Western Manufacturing Co., Leavenworth, Kansas, Nov. 4, '87. Remodel old mill to 40 to 50 bbls. Old machinery to be used: 1 Allis 8-roll mill, with 2 pair 9x8, corrugated; 1 pair 9x12, corrugated, for 3 breaks; 1 pair 9x12, smooth. 1 No. 5 Smith centrifugal. 1 No. 2 Excelsior purifier. 1 No. 0 Smith purifier. 1 No. 1 California brush smutter, new brush. 11 elevators, water wheel, shafting, pulleys, gearing, sprockets, chain and other items. Richardson & Pardee to reset water wheel, put building in proper condition, dig out basement, etc., below grinding floor. New machinery [and then follows a list of the machinery "in controversy]."

Said manufacturing company alleged a compliance upon its part of the terms of the contract, and a failure upon the part of Richardson & Pardee to pay a part of the contract price, and also alleged a demand for the return of the property. Richardson answers by a denial of all the allegations of the petition except such as are therein specially admitted. He admits the execution of the contract, and that the manufacturing company partially performed its part of said contract, but only to the extent of shipping the machinery to Belle Plaine and placing it in the mill. He alleges that the mill, when completed by said manufacturing company wholly failed to perform the things which it had been warranted to perform by said manufacturing company in said contract, and said company failed and refused to make it

so perform, although notified to do so; also, that the machinery furnished was not of the quality represented by said company in said contract; also that, after a final test of the mill, the firm of Richardson & Pardee notified said manufacturing company that the mill had wholly failed to comply with the conditions of its warranty, and that they refused to accept the same, and that it must make the mill comply with the terms of the warranty, or remove its machinery from the mill, and pay the damages they had sustained, and return the money paid; also, that said company fails and refuses to comply with the conditions of said notice; and also alleges damages to the mill because of the changes made in it by said manufacturing company. The company filed a reply, in which it alleges that Richardson & Pardee represented and guaranteed that the power to run the mill after the machinery, etc., was placed in it, would be a wheel running under a 10-foot head of water, and that there was sufficient water for a 10-foot head, and that the contract was based upon said guaranty, and that the failure of the mill to do as guaranteed was because of such lack of power. The case was tried with a jury, and they returned a verdict for the manufacturing company, and judgment was rendered thereon. Richardson brings the case here for review.

An examination of the contract shows that the manufacturing company agreed to furnish first-class new machinery (not less than the itemized list), and remodel the mill by using it and whatever of the old machinery in the mill it desired, and were to do the work in a good, workmanlike manner. It guaranteed that the mill, when completed as they agreed to remodel it, should constitute a mill of about 40 barrels' capacity in 24 hours' run, which would produce as good grades of flour from like grades of wheat as any mill in the state of Kansas, and that said mill should make a barrel of flour from 5 bushels of 60-pound soft wheat. The things to be done by Richardson & Pardee are to furnish the original mill, haul the machinery from the station to the mill, reset the waterwheel, put building in proper condition, dig out basement, etc., below grinding floor, to furnish good No. 2 soft wheat to test said mill when complete, and to promptly accept and settle for said mill, as per the terms of the contract, as soon as the parties of the first part shall have fulfilled their guaranty. The issues raised by the pleadings relate to these agreements. The defendant alleges full compliance upon its part and nonpayment of part of the contract price upon the part of the plaintiff in error. The plaintiff in error denies that the defendant in error has ever fulfilled its guaranty, and hence he is not bound to accept and settle for the same, but that he is entitled to damages because of such failure. The defendant in error, in its reply, claims that the reason that

It did not fulfill its guaranty was because Richardson & Pardee did not furnish a 10-foot head of water, as they had agreed to do, and that the water wheel had been improperly set. These questions were all properly in issue, and the evidence and instruction should have been applied to them. The real question is, had default been made in the payment of the contract price? If it had, then the manufacturing company, by the terms of the contract, had the right to possession of the property in controversy. The contract stipulates that the title shall remain in it until full payment is made, and upon default in any payment it may take possession. The title, therefore, is still in the manufacturing company. If default has been made in any payment of the contract price, it is entitled to the possession of the machinery it furnished; but, if no default has been made in any such payment, it is not entitled to the possession of the machinery. Richardson & Pardee were to accept and settle when the manufacturing company had fulfilled its guaranty. Until it had done so, Richardson & Pardee were not liable for any sum other than the first two payments of \$500 each, and they were to have been made before the machinery was put into the mill. The manufacturing company should not have been permitted to introduce oral evidence to establish its claim of a breach of warranty as to the head of water to run the wheel. It relies upon a contract in writing, and that contract stipulates that "it is expressly agreed that no warranty, or verbal or other understanding of any kind, exists in regard to this contract, or to the said machinery, other than what is herein expressly stated," etc. There is no warranty in the contract as to power. Its terms cannot be varied or contradicted by either party to said contract.

The notes which were given by Richardson & Pardee seem to have been given before the mill was completed, and cannot be held to absolve the manufacturing company from fulfilling its guaranty. The contract in this case must be construed as a whole. Each party must do all the things it agrees to do. Neither party can partially perform his part of the contract, and then refuse to proceed further, unless some condition precedent, to be performed by the other party, has not been performed. We think the sale under this contract was a conditional sale, and that the title to the machinery will never vest in Richardson until payment is made. We think, also, that this machinery was sold under certain other conditions, among which are that the manufacturing company will put it with certain other machinery in said mill, and that said company will make the mill do certain things, before it can demand an acceptance and settlement from Richardson & Pardee. Until the guaranty is fulfilled, there is no default in payment of the contract price. Until default in such payment is made, the manufacturing company is not entitled to the

possession of the machinery. It would be unjust to say that the manufacturing company might proceed under the contract, and tear out and work over and destroy the old machinery in the mill, and partially perform its contract, and, when it found that the mill would not do the things it had guaranteed that it should be made to do, that it will be permitted to take out the machinery, and thereby practically destroy the value of the mill. The court gave to the jury the following instruction: "You are further instructed that, under the terms of the contract of sale which was executed by the parties to this suit, the plaintiff would be entitled to the immediate possession of the property, if the notes were not paid at maturity, whenever the plaintiff made a demand upon the person having possession of the property." All through the trial of the case the court proceeded upon this theory. It refused to permit the introduction of evidence of any breach of the contract, except breach of payment by the plaintiff in error. This was prejudicial error. This expression of our views renders it unnecessary for us to examine the assignments of error in detail. We may mention, however, that a sufficient demand was made upon Richardson for the return of the property. The judgment of the district court is reversed, and the case is remanded for a new trial. All the judges concurring.

#### GRIFFIS, Sheriff, v. WHITSON.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

#### CHATTEL MORTGAGE—RECORDING—LIEN—ADVERSARY AS WITNESS—IMPEACHING.

1. Where the plaintiff in an action in replevin claims the right of possession under and by virtue of a certain chattel mortgage, and it is admitted that the property covered by said mortgage remained in the possession of the mortgagor, it is necessary for the plaintiff to establish the fact that such chattel mortgage was on file in the office of the register of deeds of the proper county at the time an attaching creditor levied upon such goods, in order to impart validity to such chattel mortgage as against an attaching creditor without actual notice.

2. Where the bona fides of a transaction is in question, a wide latitude of examination should be permitted; and where a party, under such circumstances, uses his adversary as a witness, while he may not impeach the general character or reputation of such witness, he may show that such adversary had made contradictory statements, not for the purpose of impeaching him, but as original evidence of his admissions.

(Syllabus by the Court.)

Error from district court, Chase county; Frank Doster, Judge.

Action by C. C. Whitson against J. W. Griffis, sheriff of Chase county, Kan. Judgment for plaintiff. Defendant brings error. Reversed.

Solomon & Bland, for plaintiff in error. Madden Bros., for defendant in error.

COLE, J. This was an action in replevin, brought in the district court of Chase county by O. C. Whitson, against J. W. Griffiths, as sheriff of said county, to recover the possession of certain personal property claimed by Whitson under a chattel mortgage, and which had been taken by the sheriff under a certain order of attachment issued out of said court in an action brought by the Smith-Frazier Boot & Shoe Company against M. E. Breese. From a verdict and judgment in favor of Whitson, the sheriff brings the case here for review.

A number of errors are alleged, the first being the admission of a certain promissory note as evidence in the trial of said cause. It appears from the record that the claim of Whitson was founded upon a certain note and chattel mortgage. A verified answer was filed in the case, which put in issue the execution of the promissory note, and when said note was offered in evidence there appeared a discrepancy in the date and amount as compared with the note described in the mortgage. We think the court committed no error in admitting the note in evidence. Proof of the execution thereof had been made, as well as an explanation of the difference in date and amount.

The next objection raised is the admission of the chattel mortgage alleged to have been given to Whitson. It is claimed upon the part of the plaintiff in error that the mortgage was subject to two objections: First, that it was void upon its face; and, second, that it was not properly identified as having been recorded, or as being a part of the records of the office of the register of deeds of said county. So far as the first objection is concerned, it cannot be considered here at this time, for the reason that the same question was before the supreme court in a former hearing of this same case, and upon said hearing the chattel mortgage in question was held not to be void upon its face. *Whitson v. Griffiths*, 39 Kan. 211, 17 Pac. 801. That question is therefore settled, and we will proceed to consider another. Under the pleadings in this case, and the evidence as shown by the record, we are of the opinion that the court committed error in admitting this chattel mortgage in evidence. From the pleadings it appears to have been admitted that there was no change in possession of the goods described in the mortgage, but that the same remained in the possession of the mortgagor. It therefore became a very essential question whether said mortgage was of record when the levy was made by the sheriff. The answer being verified, every allegation of the petition was put in issue. The mortgage bore the indorsement made by one who purported to be a deputy register of deeds, and we think the court properly admitted evidence as to the fact that the person who purported to be said deputy was publicly acting and generally recognized as such; and we also think that the evidence introduced established prima

facie the official character of the deputy in question. But that is not sufficient in this case. The provisions of the statute with relation to chattel mortgages differ from those with regard to real-estate mortgages. A chattel mortgage, when properly filed, becomes, and should remain, a part of the files in the office of the register of deeds; and, where property remains in the possession of the mortgagor, either the chattel mortgage itself or a copy thereof must be so shown to be on file in said office, in order to confer any rights on the mortgagee as against the creditor of the mortgagor. No attempt was made in this case to show that the mortgage in question was a part of the records of the office of the register of deeds of Chase county, either at the time of the trial or at the time the defendant sheriff levied upon the goods in question. The chattel mortgage appears in the possession, not of a public officer, but of the plaintiff below himself; and when the specific objection is raised that no showing has been made that such chattel mortgage is a part of the files of the office of the register of deeds, the proof is still omitted. Nor is it claimed that any copy was placed on file. While the presumption arises from the prima facie showing of the official character of the deputy that the mortgage was filed at the date indorsed thereon, yet this raises no presumption in favor of its having remained in the custody of the officer up to the time when the levy was made where the mortgage appears in the possession of the mortgagee himself, and no attempt is made to show that it, or a copy of it, remained in the custody of the proper officer. A more strict rule would apply, of course, in the case of a chattel mortgage, for the law does not provide for the recording of the same in full, but only for the recording of what may be termed a synopsis of the mortgage under different heads; the mortgage itself or a copy thereof remaining in the custody of the officer for examination as to the full contents thereof by any person interested therein. Paragraph 3904 of the General Statutes of 1889 provides as follows: "Upon the receipt of any such instrument, the register shall indorse on the back thereof the time of receiving it, and shall file the same in his office, to be kept there for the inspection of all persons interested." It is true that paragraph 3907, Gen. St. 1889, provides that a certified copy of the original or copy so filed shall be received in evidence, but the same section specially provides that it shall be received as evidence of in the following language: "But only of the fact that such instrument or copy and such affidavit was received and filed according to the indorsement of the register thereon, and of no further fact." It being necessary, therefore, that a chattel mortgage remain on file, and the certificate of the register being evidence of no further fact than the original filing, it certainly follows, at least where a verified answer is filed, that it is necessary to show that

either the original chattel mortgage or a copy thereof remained on file when the only copy of such instrument claimed to have been filed is found, not in the possession of the public officer, but of the mortgagee, and there has been no change of possession in the property mortgaged.

The next objection raised is the ruling of the court regarding certain testimony offered by the defendant below upon the examination of C. C. Whitson, plaintiff below. The object of the questions asked was to draw from plaintiff below a detailed account of where he obtained the money which he claimed to have loaned to M. E. Breese, and which it was claimed formed the consideration for the chattel mortgage in question, the bona fides of the transaction being questioned. While the supreme court held that the mortgage in question was not void upon its face, they also held that it was proper for the plaintiff in error in this case to question the good faith of the parties to the transaction, and it is universally held that where a transaction of this character is had between near relatives, as in this case, and the mortgage itself contains so many conditions favorable to the mortgagor, that the widest latitude should be permitted in the examination of one claiming rights thereunder. It is true, Whitson was being examined by plaintiff in error as his own witness, but the circumstances were such as to render his being called by the opposite party a necessity. He was the only person who could have knowledge of many of the facts surrounding the giving of this chattel mortgage. The principal fact in controversy in this case was whether the chattel mortgage executed by Mrs. Breese to Whitson was so executed for the purpose of hindering, delaying, and defrauding the creditors of Mrs. Breese, and one of the elements involved in that question was whether Whitson had ever loaned Mrs. Breese the money claimed to be the consideration for said mortgage. We think, under the circumstances, it was competent for plaintiff in error to show, if possible, that Whitson had made different statements at different times, under oath, with regard to the transaction, and this, too, although the plaintiff in error had made Whitson his own witness upon the trial of the case. In many respects the testimony offered and the circumstances under which it was offered are the same as in the case of *Wallach v. Wylie*, 28 Kan. 138. In that case the court say: "Wylie introduced in evidence the deposition of Wallach, taken on behalf of Wylie; and the plaintiff in error, Wallach, now claims that Wylie was and is bound by everything that was testified to in such deposition by Wallach. This certainly is not the law, and such a thing never was the law. It is true that when a party introduces a witness he cannot then impeach the general character or

reputation of such witness for truth and veracity; and it is generally true that he cannot show that the witness has made statements at other times and at other places contradictory to those which he testifies to. But neither of those cases is this case. Wylie did not attempt to impeach the general character or reputation of Wallach for truth and veracity, nor did he attempt to show that Wallach had made statements at other times and at other places contradicting the statements made by him in his deposition, although Wylie would certainly have had the right in the present case to show such contradictory statements, for the very good reason that Wallach himself was a party to this action. Wylie could have shown such contradictory statements, not for the purpose of impeaching Wallach, but as original evidence,—original evidence of Wallach's admissions. The principal fact in controversy in this case was whether the chattel mortgage executed to Wallach by Max N. Stetter, as the attorney in fact of Nathan Stetter, was executed for the purpose of hindering, delaying, and defrauding the creditors of Nathan Stetter or not; and the deposition of Wallach was introduced by Wylie for the purpose of proving or tending to prove that it was; and of course Wylie believed that it did prove, or tend to prove, that fact." In this case Whitson had detailed what may be denominated a peculiar story of the manner in which he had received the money loaned Mrs. Breese, the substance of which was that he had been left the sum of \$5,000 as a legacy, and that the money had been brought to him by one Stone. The witness was asked the following question: "Q. You testified about that matter in your Topeka deposition, did you not, judge?" and, said question being objected to, the objection was sustained. The further question was propounded to the witness: "Q. You testified in this case, on the trial before in this court, that you did not know why Mary Pennington left you this money, did you not?"—which question was also objected to, and the objection sustained. The witness then testified upon the same subject that Stone brought the legacy in question to him partly in gold and partly in currency, and that the \$5,000 was delivered by Stone to him in the office of the probate judge in Chase county; and he was then asked the following question: "Q. Do you want the jury to understand, judge, that this man came to you with \$5,000 in cash, currency and gold, and delivered it to you?" An objection was also sustained to this question. We are of the opinion that sufficient facts had been shown in this case with regard to the financial condition of Whitson to make this testimony very material,—that is, whether he received the money which he claimed to have received,—and that under the circumstances of this case the court should have permitted the

witness to answer the questions. We are not pretending to pass upon the bona fides of the transaction between Whitson and Mrs. Breese, but it was one which is entitled to strict scrutiny, as shown by the records.

The next contention is that the court erred in refusing to admit certain depositions offered by plaintiff in error. The evidence contained in the depositions tended to prove that the statements of Whitson as to obtaining the money referred to in his testimony were not true, and the depositions were refused upon the ground that they were incompetent and immaterial, and only tended to impeach one who had been used by plaintiff in error as his own witness. The question is one which is not free from doubt. The general rule that a party may not impeach his own witness is too well established to need any citations for its support, and, although the circumstances of the case are peculiar, we are inclined to the opinion that the evidence was properly refused. A number of other errors are assigned, among them certain objections to the instructions of the court, and exceptions to the refusal of the court to give certain instructions asked by plaintiff in error. We have carefully examined the instructions given and those refused, and are of the opinion that no error was committed by the court in that regard. All other questions raised will probably be eliminated upon another trial of the case, and will therefore not be considered here. For the errors above referred to, the judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

#### MUTUAL BEN. LIFE INS. CO. v. SACKETT et al.<sup>1</sup>

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

##### APPEAL—CASE MADE—CERTIFICATE OF JUDGE.

The certificate of a judge to a case made should show affirmatively that he has settled it; and where the certificate fails to show such fact, the action must be dismissed in this court, when challenged for that reason.

(Syllabus by the Court.)

Error from district court, Butler county; C. A. Leland, Judge.

Action by the Mutual Benefit Life Insurance Company against Samuel Sackett and others. From a judgment for defendants, plaintiff brings error. Dismissed.

Beardsley, Gregory & Flannelly, for plaintiff in error. Wall & Brooks, for defendants in error.

COLE, J. This was an action brought by the Mutual Benefit Life Insurance Company in the district court of Butler county, Kan., against the defendants in error upon a note and mortgage. From a verdict and judgment for the defendants below, the insurance company brings the case for review.

Our attention is first directed to a motion filed by defendants in error to dismiss the petition in error and affirm the judgment of the court below, for the reason that the record does not show that the case made attached to the petition in error has ever been settled by the trial judge, as required by law. The certificate is as follows: "State of Kansas, Butler County. I, C. A. Leland, judge of the district court of Butler county, Kansas, do hereby certify that I am the judge before whom was tried the above-entitled action in said court: that the foregoing case made contains a true and correct copy of the pleading filed therein, and a true, full, and correct statement of all the proceedings, evidence, objections, exceptions, motions, and orders therein, and of the judgment rendered therein; and the clerk of said court is hereby ordered to attest this certificate with his official signature and the seal of the said court, and to file the said case made as a part of the records of said court in said action. C. A. Leland." Under the decisions of our supreme court, the position of defendants in error is well taken. The cases of *Bank v. Becannon*, 51 Kan. 716, 33 Pac. 595; *Mudge v. Bank* (decided Jan., 1896, and not yet officially reported) 43 Pac. 255, are decisive of this question. In the latter case the certificate was as follows: "And now, on this 28th day of June, 1892, came the parties, by their attorneys, and present this made case to me for final settlement; and, having considered said made case, and the amendments suggested thereto, I do hereby certify that the foregoing is a full, complete, and correct record of all the pleadings, process, evidence, and proceedings in said case." And in that case the supreme court, in passing upon the question, say: "The certificate, although signed by the judge, lacks the essential statement that the case made was settled, and is therefore fatally defective. The certificate of a judge to a case made should show affirmatively that he has settled it. *Allen v. Krueger*, 25 Kan. 74; *Bank v. Becannon*, 51 Kan. 716, 33 Pac. 595. It is not absolutely essential that the words of the statute should be employed, but the expressions used should clearly indicate that the judge has determined that what he has considered and signed is a true case made; but probably no better or briefer terms can be employed than those found in the statute. As the word 'allowed,' as well as 'settle,' is found in the statute, it may be safely used in the certificate. *Railroad Co. v. Cone*, 37 Kan. 567, 15 Pac. 499. The statements in the certificate as to what is contained in the case made are without force, and must be ignored. Stripped of these statements, nothing remains except a certificate that the case was presented to the judge for settlement, and that he considered the same." The certificate of the trial judge being insufficient, the proceeding must be dismissed. All the justices concurring.

<sup>1</sup> Rehearing pending.



## DOBSON et al. v. SHOUP.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

## HOMESTEAD—ACQUISITION—OCCUPATION.

1. A purchaser of an 80-acre tract of farming land, with a view of occupancy within a reasonable time, receives from the time of the purchase a homestead exemption from seizure upon execution of attachment. *Monroe v. May*, 9 Kan. 466.

2. Where a purchaser of an 80-acre tract of farming land at the time of the purchase has a family, consisting of himself and wife, and his wife is residing in a foreign state and has never been in Kansas, and her coming to Kansas to reside depends upon uncertain contingencies, and the owner of the land moves upon it himself, claiming the same as exempt from sale under execution as the homestead of himself and family, *held*, that the homestead exemption does not attach until the lands are occupied by the family of the owner.

3. Occupation by the family of the owner, either actual or constructive, is essential to give the character of homestead to a tract of land claimed as exempt from sale under execution.

(Syllabus by the Court.)

Error from district court, Barber county; G. W. McKay, Judge.

Action by Frederick Shoup against James W. Dobson and another. From a judgment for plaintiff, defendants bring error. Reversed.

This suit was commenced in the district court of Barber county, Kan., on the 6th day of March, 1891, by Frederick Shoup, as plaintiff, against James W. Dobson and George W. Stevens, as defendants, to enjoin them from selling the N.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 29, township 34, range 11 W., in Barber county, Kan., under execution. James W. Dobson was sheriff of said county, and by virtue of his office had levied an execution on this tract of land, issued on a judgment which had theretofore been rendered in the district court of Barber county against Frederick Shoup in favor of George W. Stevens, and was proceeding to advertise and sell the same under said execution; and upon filing of the petition verified, the judge of the district court granted a temporary restraining order, enjoining the defendants from proceeding further under said execution.

The plaintiff below filed the following petition:

"The plaintiff, Frederick Shoup, complains of the defendants, and says: That he is a resident of the county of Barber, and state of Kansas; that heretofore, to wit, on the — day of —, 1890, he purchased the following described real estate in Barber county, Kansas, to wit, the north half of the northeast quarter, section twenty-nine, township thirty-four, range eleven, for the sole purpose and with the sole intention of occupying the same, together with his family, as a residence for himself and family. Plaintiff avers that he was unable to occupy the same as a residence until some time during the latter part of February, 1891, from which said time he has occupied the same as his homestead, and as a residence for himself and

family, and expects to continue to occupy the same as a residence for himself and family. And plaintiff further avers that he is the owner of no other real estate, and has no other home except the above-described premises, which he purchased for a home for himself and family. Plaintiff further avers that on the 13th day of February, 1891, the defendant James W. Dobson levied upon said above-described real estate, under and by virtue of an execution issued out of the district court of Barber county, Kansas, in favor of the defendant George W. Stevens. And plaintiff further avers that on the 6th day of March, 1891, he notified the said sheriff, James W. Dobson, in writing, that he claims, and did claim, the above-described real estate as his homestead. Plaintiff further avers that the said sheriff has advertised said property for sale, and threatens to sell the same, under and by virtue of said execution as aforesaid, and, unless restrained and enjoined from selling the same, will so do. Wherefore, plaintiff prays judgment that said sheriff may be perpetually enjoined from selling his said homestead, and that the said defendants be restrained from selling said described real estate during the pendency of this action, and for all other and proper relief in the premises.

"State of Kansas, Barber County—ss.: W. S. Denton, being duly sworn upon his oath, says: That he knows the contents of the foregoing petition, and that the same is true in substance and in fact. W. S. Denton.

"Subscribed and sworn to before me this 6th day of March, 1891. H. S. Landis, Clerk. [Seal.] By Aug. Schmidt, Deputy."

To this petition the defendants below, on the 6th day of May, 1891, filed the following demurrer:

"And now come the defendants, James W. Dobson and George W. Stevens, and demur to the plaintiff's petition for the following reasons, to wit: First, that the said petition does not state facts sufficient to constitute a cause of action against them and in favor of the plaintiff; that there is a defect of parties plaintiff in this action; that there is a defect of parties defendant in this action."

The demurrer was overruled by the court, and defendants below duly excepted, and afterwards defendants below filed their answer, in words and figures as follows:

"And now come the defendants, James W. Dobson and George W. Stevens, and for their joint answer to the plaintiff's petition filed herein against them, allege: That they deny that the plaintiff purchased the N.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of Sec. 29, Tp. 34, of range 11 W., in Barber county, Kansas, with the sole intention of occupying it as a homestead and residence for his family and himself. (2) These defendants deny that the plaintiff ever occupied or intended to occupy the said tract of land as a residence for himself and family prior to the levy of the execution by the sheriff, James W. Dobson, on the judgment of his

codefendant in this action, as set forth and averred by the plaintiff in his petition. (3) These defendants deny that the real estate described in the plaintiff's petition is now or ever has been the plaintiff's homestead, or that he has ever occupied it as such. Therefore these defendants pray that the plaintiff's injunction be dissolved, and that they be allowed damages against the defendants for the sum of 200 and a reasonable attorney's fee of 100 dollars, and all other and proper relief.

"State of Kansas, Barber County—ss.: George W. Stevens, of lawful age, and being duly sworn, upon his oath says: That he is one of the defendants in the above entitled cause; that he has heard the foregoing answer read, and knows the contents thereof; and affiant avers that said answer is true. George W. Stevens.

"Subscribed and sworn to before me this 8th day of May, 1891. H. S. Landis, Clerk. [Seal.] By Aug. Schmidt, Deputy."

Upon the petition of plaintiff, and answer of the defendants, the case was tried by the court without a jury; and upon the final hearing in said case the injunction was made perpetual; and defendants excepted, filed motion for new trial, which was overruled, and exceptions taken to the ruling, and case made brought to this court for review.

Martin & McNeal and Frank Shannon, for plaintiffs in error. W. S. Denton and Mr. Overstreet, for defendant in error.

JOHNSON, P. J. (after stating the facts). This suit was commenced in the district court of Barber county to enjoin the sheriff of that county from selling a tract of land, containing 80 acres, which he had taken under execution, and was proceeding to advertise and sell the same on an execution issued by the clerk of the district court on a judgment theretofore rendered in said court. On filing of the petition, duly verified, the judge of the district court, at chambers, made an order granting the plaintiff below a temporary restraining order enjoining the sheriff and the execution creditor from proceeding further under said execution. To the petition of the plaintiff below the defendants filed a general demurrer, which was overruled by the court, and excepted to by the defendants below; and this ruling of the court is the first error complained of in this court. The plaintiff's petition alleges that he is a resident of the county of Barber and state of Kansas, and that in 1890 he purchased the land described in his petition, for the sole purpose and with the sole intention of occupying the same, together with his family, as a residence for himself and family, and that he was unable to occupy the same as a residence until some time during the latter part of February, 1891, from which said time he has occupied the same as his homestead and as a residence for himself and family, and expects to continue

to occupy the same as a residence for himself and family; and further alleges that on the 13th day of February, 1891, J. W. Dobson levied upon said tract of land, under and by virtue of an execution issued out of the district court of Barber county, Kan., in favor of George W. Stevens, as plaintiff, and that on the 6th day of March, 1891, he notified the sheriff, in writing, that he claims and did claim the said land as his homestead. The contention of the plaintiffs in error is that this petition does not state facts sufficient to entitle the plaintiff below to the relief sought by this suit; that it does not contain such clear and concise statements of fact as to show that plaintiff below was entitled to have this tract of land protected against the levy and sale under execution; that it does not show that the land was the homestead of Frederick Showp.

Section 9 of article 15 of the constitution of Kansas reads: "A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of the husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon; provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife." The Code of Civil Procedure requires the plaintiff in his petition to state the facts constituting his cause of action, in ordinary and concise language, without repetition. Now, does this petition contain a statement of such facts, all being admitted as true, as would entitle him to the relief sought by this suit? Does the petition state such facts as to show this land to be the homestead of the plaintiff below? We do not think it does. It does not state that the plaintiff and his family were occupying this land at the time the levy of execution was made, nor does it state that the plaintiff and his family have since at any time occupied this land as a homestead or residence. He alleges that he has occupied the same as his homestead, and as a residence for himself and family, but there is no statement that he and his family are in the occupancy of this land as their homestead,—but that he occupies it for himself and family. This is not equivalent to an allegation that the land is occupied by the family of the plaintiff below. The petition should be liberally construed for the purpose of determining its effect, and construed with a view of substantial justice between the parties; but in the liberal construction of the petition we are not authorized to interpolate therein necessary

avermments intentionally omitted by the pleader, so as to give force and effect thereto. It is the allegations contained in the pleading itself that should receive the liberal construction, in view of the substantial rights of the parties. The petition itself should contain all of the necessary averments to show that he is entitled to the relief demanded. It is essentially necessary, to constitute a quarter section of land as the homestead of the owner, that it be occupied by the owner and his family, and, where a party seeks to protect his homestead against a sale on execution or other process in a court of equity, to set up all the necessary facts that go to constitute the land the homestead. The petition alleges that the plaintiff purchased the land for the sole purpose, and with the sole intention, of occupying the same together with his family, as a residence for himself and family; and avers that he was unable to occupy the same as a residence until some time during the latter part of February, 1891. There is no statement anywhere in the petition of the facts showing any reason why he could not occupy this land with his family; nor is there any allegation in the petition that his family at any time were residing in the state of Kansas, or that they were residing with the plaintiff. The petition, failing to contain the necessary allegations to show that this land was his homestead, failed to state a cause of action in his favor, or to entitle him to the relief sought by this action. The demurrer was improperly overruled.

The final contention of the plaintiffs in error is that the evidence on the trial of this case was not sufficient to prove a cause of action in favor of the plaintiff below, or to entitle him to a perpetual injunction against the enforcement of the execution by a sale of the land levied on. We have examined the evidence contained in the record carefully, and do not think it proves that the plaintiff below was entitled to the strong protecting arm of a court of equity to protect the land as a homestead. The evidence shows that plaintiff was a married man; that he had himself resided in Barber county, Kan., for about two years; that he came to Kansas on a visit, intending to go on to the territory south of Kansas in search of a claim; that the opening up of that country had been delayed much longer than he anticipated, and that he concluded to make his home in Kansas; that his children were all married, and his family consisted only of himself and wife, and that his wife resided in the state of Pennsylvania, and had never been in Kansas; that she was living in Pennsylvania, taking care of an invalid sister of hers in that state, and her coming to Kansas depended upon certain contingencies as to whether she could make suitable arrangements for the care and maintenance of this invalid sister. The sister being the owner of real property in Pennsylvania, plaintiff's

wife would remain in Pennsylvania until such time as she could make suitable arrangements for the care of the sister, and also until such time as a distribution of her property could be made among those entitled to distribution. The plaintiff moved upon this land about the 1st day of March, 1891, and execution was levied on the same about the 13th day of February. Plaintiff testified that he purchased this land in 1890, with the intention of making it his homestead, thinking that his wife would at some time in the future be able to make arrangements to leave Pennsylvania and come to Kansas to live with him on this land. In his cross-examination he testified as follows: "Q. Didn't you tell the sheriff, when he went to make this levy, that you expected your daughter and son-in-law to live there? A. Yes, sir. Q. At that time, you did not expect to use it for a homestead for you and your wife? A. My daughter and son-in-law was to come first, and my wife was to come after; would perhaps make arrangements to come with them. Q. Were you all to live there on this homestead? A. That is the arrangement that I wanted to make, and which I am about making. Q. And when you purchased the place, you supposed your son-in-law and your daughter would occupy the place first, and afterwards, if your wife came, they would occupy it with you? A. Yes, sir. Q. And that was your arrangement and your idea, when you purchased it? A. Well, the daughter,—I had made arrangements for the daughter to come first. They wanted to come, and they made the arrangements, but sickness in the family prevented them from coming. They may come. Q. They have not come yet? A. No, sir; I cannot tell when they will be ready to come. Q. Or you cannot tell when your wife will be ready to come? A. No, sir; they may have the arrangements made, and it may take much more time in completing the arrangements for keeping this invalid sister, on account of the real estate and the distribution of it. If she was to be kept in the county institute. Q. It is a question, then, as to what she will do with the invalid sister, whether your wife will come or not? A. Yes, sir; of course she will come as soon as she can dispose of that." The evidence did not show that the plaintiff had ever been in the occupancy of this land before the lien of the judgment and the levy of the execution attached. If the plaintiff had purchased this land in good faith, for the purpose of a homestead for himself and family, and with the intention of occupying the same by himself and his family within a reasonable time, and he and his family were then in a condition to take possession thereof within a short time after the purchase, and were citizens of the state, and thereafter made all necessary arrangements to occupy the same,

and had been prevented therefrom by some unavoidable circumstance, the homestead right might have attached; but where a married man whose family resides in a foreign state, and who have not made arrangements to come to this state to make it their home, and their coming depends upon the happening of certain contingencies which may or may not occur, no homestead right in real estate can attach, under the constitution. The constitution prescribes that the property must be occupied by the family of the owner thereof. Under the homestead exemption laws no person can hold real estate exempt from execution sale unless the property is occupied as a residence by the family of the owner. *Farlin v. Sook*, 26 Kan. 397; *Koons v. Rittenhouse*, 28 Kan. 359; *Hiatt v. Bullene*, 20 Kan. 557. There being a clear omission of any evidence whatever, on the trial of this case, to impart the homestead qualities to this land, the judgment of the court should have been for the defendants below for costs of suit, and the temporary injunction should have been set aside. The judgment of the district court is reversed, and the case remanded, with direction to set aside the injunction herein and render judgment against plaintiff below for costs of suit. All the judges concurring.

#### FRICK CO. v. CARSON.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

##### PLEADING—PETITION—RES JUDICATA.

1. It is not the proper rule and practice of pleading for the petition to allege a denial or avoidance of some of the facts which may be set up by the defendant as a defense to the cause of action contained in the petition. If such facts are alleged in the answer, the proper place to deny or avoid them is in the reply.

2. Where the pleadings and the statement of the case to the jury are silent upon the question of a former adjudication of any facts or causes of action at issue, and the pleadings and journal entry of judgment of the former trial are not offered in evidence, and no reason given for the failure to offer them, *held*, that there is no evidence which would warrant the court in giving instructions to the jury that such fact or cause of action was *res judicata*.

(Syllabus by the Court.)

Error from district court, Conley county; M. G. Troup, Judge.

Action by the Frick Company against William Geddes Carson. From a judgment for defendant, plaintiff brings error. Affirmed.

Beach & Torrance, for plaintiff in error. Ben S. Henderson, for defendant in error.

DENNISON, J. This action was commenced in the district court of Cowley county, Kan., by the plaintiff, to recover \$300, which it alleges was owing to it from the defendant, being a part of the purchase price of a threshing engine sold by it to the de-

fendant. It appears from the evidence that one Clark and Andrews purchased the engine from the Frick Company, and to secure \$200 of the purchase price thereof they executed and delivered to said company a chattel mortgage upon said engine, two mules, a horse, and a wagon. The mortgage was duly recorded and renewed. Clark and Andrews also executed and delivered to the Bank of Oxford a second chattel mortgage upon said engine, and to Ed. J. McMullen & Co. a third one. The engine was taken and sold upon one or both of these subsequent mortgages, and was purchased by one Smith, a member of the firm of McMullen & Co. Shortly afterwards this defendant purchased the engine for the sum of \$275. He received a bill of sale from the bank, and an assignment of their note and mortgage from McMullen & Co. At the time of his purchase he knew nothing of the existence of the first mortgage. Afterwards he expended about \$100 for repairs upon the engine. Some time afterwards the Frick Company commenced its action in replevin against this defendant to recover the possession of the engine, alleging its special ownership by reason of said chattel mortgage. The amount due and unpaid upon said mortgage was \$122.47 and interest. Carson, relying upon the bank and McMullen & Co. to defend the title to the engine, made default, and the Frick Company obtained a judgment for the possession of the engine, and it was taken into the possession of the sheriff under an execution issued thereunder, but was afterwards released. David C. Beach, who was the attorney for the Frick Company, also became the attorney for Carson, and brought suit for him against the Bank of Oxford and McMullen & Co. to recover the purchase price of the engine from them. During the time Beach was acting as attorney for both these parties, he was endeavoring to sell the engine to Carson, and some considerable negotiations were had between them about it. Beach claims that on December 31, 1888, Carson agreed to buy the engine for \$400, and pay \$100 cash and \$300 in one year thereafter at 8 per cent. interest, with approved security. There was some oral evidence tending to show that some time prior to the commencement of this suit the company, by said Beach, its attorney, brought suit against said Carson for the \$100, and had obtained a judgment for the sum of \$100 and costs against said Carson, which he paid in full. Some time after Carson had employed another attorney to protect his rights, he tendered to said Beach, as agent and attorney for the Frick Company, the sum of \$160, as being the amount of the balance due it upon the mortgage by virtue of which it held its special lien, and its costs. Beach refused to accept the tender because of the claim of ownership of the engine. In the original petition filed in this case the plaintiff, in addition to the allega-

tion of indebtedness and the nonpayment thereof, set up the former suit, and a claim that the question of the sale and delivery of the engine had been adjudicated between these parties, and that the same had become *res judicata*. The court sustained a motion to strike out all that portion of the petition as being redundant, irrelevant, and surplusage, and prejudicial to the rights of the defendant. The plaintiff thereupon filed an amended petition, alleging the sale and delivery, and the failure to pay \$300 of the purchase price. The defendant answered, denying generally and specially all the allegations of the petition. The defendant also filed an amended answer, but the most of it was stricken out upon motion, and he obtained leave to withdraw the remainder of it. Judgment was rendered against the defendant on default, but upon a sufficient showing it was opened up, and he was let in to defend. Afterwards the plaintiff filed a motion for leave to amend its petition by refiling its original petition, which said motion was overruled. Verdict and judgment were rendered for the defendant, and the plaintiff brings the case here for review.

All the errors complained of in this case relate to the one question of *res judicata*, and the only thing for us to determine is the rights of the parties in relation thereto. The defendant's attorney argues at considerable length in his brief the question of whether there was a sale and purchase of the engine. That question was submitted to the jury, and they decided that there was not. The court approved their finding, and, as there was evidence tending to establish that finding, and the court committed no error in instructing the jury upon this point, there is nothing for us to review thereon. The only question for us to determine is as to whether the defendant is estopped from denying the sale, and, if so, did the plaintiff pursue the right course to obtain a ruling in its favor upon the question? The court committed no error in striking out that portion of the petition which pertained to the former trial, or in refusing permission to refile the same, for the reason that the plaintiff had no right to anticipate the defense of the defendant, and allege in the petition things which would be proper to plead in the reply if warranted by the answer. The petition must contain a statement of the facts constituting the cause of action in ordinary and concise language, and without repetition. See Gen. St. 1889, par. 4170. If the answer had set up a defense which had been adjudicated, it should have been traversed by the reply. This is the proper rule and practice of pleading. But suppose the question had been properly put in issue by the pleadings, or if the evidence of a former adjudication could be introduced under the general allegations without being specially pleaded, the question would then be as to the sufficiency of the evidence; in other

words, what was adjudicated in the former suit, what were the issues joined, and what was the finding? The pleadings in the former suit were not offered in evidence; neither was the journal entry of judgment. The attorney for the plaintiff said nothing about the former adjudication in his statement of his case to the jury, but squarely made the issue upon the sale and delivery of the engine and the failure to pay \$300 of the purchase price thereof. Beach testified that \$100 had been paid on the contract. On cross-examination he said that the \$100 had been paid after judgment had been rendered for it, and that it was finally agreed that the whole matter should be adjudicated by the trial of that case in the justice court for \$100. Mr. Carson said, "If we won that case in the justice court, that would settle the whole controversy." It does not clearly appear what controversy was meant. If the contention of Beach is correct, Carson had violated his whole agreement, which was to buy the engine, and pay \$100 cash, and give approved security for the remaining \$300 in one year at 8 per cent. interest. For aught that appears here to the contrary, the former suit may have been for damages for the failure of Carson to perform the whole agreement. This may have been the adjudication to which he referred. We do not know, because there is nothing in the record to inform us. There was no evidence in this case which would warrant the court in giving instructions to the jury that the facts in this case were *res judicata*, and there has been no material error committed prejudicial to the substantial rights of the plaintiff in error. On the contrary, the plaintiff has received everything it is entitled to, either in law or in equity. It had received the total purchase price for the engine from Clark and Andrews, except \$122.47 and interest. It had been tendered, and had refused, because of a claim of ownership, \$160 from Carson, who was the owner of the engine at that time, subject to the rights of the plaintiff under its mortgage, which gave it a special ownership to secure the balance of the purchase price. The plaintiff had reduced the engine to possession under its mortgage, but had not sold it, either publicly or privately, as it was required to do by the express terms of the mortgage. It was not the absolute owner of it, and had no right to it after it had received the amount of its claim and the expenses it had incurred by reason thereof. Fair treatment to this defendant would have permitted him to pay the company its claim, and then have sued the Bank of Oxford and McMullen & Co. for the amount he had expended in extinguishing a prior lien. The court, in its instruction to the jury upon the question of a former adjudication, probably assumed that there was more evidence in the record upon that point than the record warrants, and upon the assumed con-

dition of the record its instruction is not strictly the law upon the question of res judicata, but the rights of the plaintiff in error are not prejudiced thereby. The judgment of the district court is affirmed. All the judges concurring.

#### WOOD v. DILL et al.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

#### MECHANIC'S LIEN—PRESERVATION—SERVICE OF SUMMONS.

In an action to enforce a mechanic's lien, service of summons upon the owner within the period of limitation prescribed by statute for the commencement of such an action does not preserve the lien as against other incumbrancers who are not made parties to such an action within the period of limitation.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by the Farmers' Loan & Trust Company against the North & South Lumber Company and others. Various parties were made defendants, and cross petitions filed. From the judgment in favor of plaintiff, Frank Wood, trustee, brings error. Reversed.

G. O. Erwin and Sankey & Campbell, for plaintiff in error. Campbell & Dyer, for defendant in error North & South Lumber Co.

COLE, J. This action was originally commenced September 20, 1888, by the Farmers' Loan & Trust Company of Kansas, in the district court of Sedgwick county, to foreclose a certain mortgage upon real estate belonging to W. W. Dill and Mattie J. Dill, which mortgage was executed and delivered May 2, 1887, and recorded May 28, 1887. The North & South Lumber Company, Elizabeth Buxton, and W. R. Stone were made parties defendant. On October 9, 1888, the North & South Lumber Company filed its answer and cross petition, in which it alleged that on or about the 10th day of February, 1887, the defendants Dill entered into a contract with the North & South Lumber Company to furnish certain material for the erection and improvement of the premises described therein, and which premises were the same as those upon which foreclosure was sought. It further set forth the amount due and unpaid upon the contract for material, and alleged the filing of the lien statement in the office of the district clerk of Sedgwick county, and asked judgment for the balance due on the account, and that said judgment be declared a first lien upon the real estate therein described. The plaintiff below afterwards filed a reply to the answer and cross petition of the North & South Lumber Company, alleging the pendency of another action between the

North & South Lumber Company, as plaintiff, W. W. and Mattie J. Dill, Elizabeth Buxton, and J. R. Stone, as defendants, in the court of common pleas of Sedgwick county, involving the same matters that were set up in the answer and cross petition of the North & South Lumber Company. On February 19, 1890, the North & South Lumber Company filed, by leave of court, an amended answer and cross petition, alleging that on the 26th of April, 1888, and within one year after the completion of the building referred to in its original answer and cross petition, it commenced an action in the district court of Sedgwick county against W. W. and Mattie J. Dill, as the owners of said real estate and others, as judgment creditors of the defendants Dill, for the foreclosure of its mechanic's lien upon said premises, and that the action was afterwards transferred to the court of common pleas of Sedgwick county where it was still pending and undetermined, and asking a consolidation of the two actions, in order that a complete determination of the issues involved might be had. On April 19, 1890, Frank Wood, trustee, by leave of court, was made a party to this action, and filed his answer and cross petition therein, in which he admitted that the defendants Dill were the owners of the property in question; that they executed the note and mortgage sued upon by the plaintiff below, and had made default in payments due upon the same; that the North & South Lumber Company, Elizabeth Buxton, and J. R. Stone claimed an interest in the mortgaged premises, but alleged that the interest of each of said parties was inferior to the lien of the mortgage set forth in the plaintiff's petition. He further alleged that, as such trustee, he was the owner of the notes and mortgage described in the plaintiff's petition, having purchased the same on the 6th of June, 1887, and admitted that the assignment then made to him of the mortgage was not placed of record until the 18th of November, 1889. He further alleged that, by reason of the default of defendants Dill, he was entitled to foreclose, and prayed for judgment for the amount due, and that said judgment be declared a lien upon the premises therein described superior to that of each and all the defendants. On November 11, 1890, the North & South Lumber Company filed a supplemental answer, setting forth the fact of the rendition of judgment in the action which had been pending in the court of common pleas of Sedgwick county, wherein said North & South Lumber Company were plaintiffs, and W. W. and Mattie J. Dill were defendants; attached a copy of said decree as a part of said supplemental answer; and asked a priority of lien upon the real estate in controversy as against all the other parties to this action. This cause was tried to the court, a jury being waived, and resulted in a judgment declaring the claim of the North

& South Lumber Company to be a lien prior and superior to that of the mortgage of Frank Wood, trustee; and from such judgment the said Frank Wood, trustee, brings the case here for review.

There was but one real issue in the court below, and practically but one question is presented to this court for its decision, and that is the question of priority of lien as between Frank Wood, trustee, and the North & South Lumber Company. The record shows that the contract for furnishing material for erecting the building upon the premises of the defendants Dill was made prior to the giving of the mortgage of Frank Wood, trustee; and that, in the action to foreclose the mechanic's lien of the North & South Lumber Company, neither the Farmers' Loan & Trust Company of Kansas, which was the original owner of said mortgage, nor Frank Wood, trustee, was made a party. It is contended upon the part of the plaintiff in error that as more than one year had elapsed between the time of furnishing the material by the North & South Lumber Company to Dill and the time when this action was commenced and when Frank Wood, trustee, was made a party thereto, the North & South Lumber Company cannot enforce said lien as against the mortgage in question, for the reason that neither the original payee nor the present holder of said mortgage was made a party to the action brought by the North & South Lumber Company to foreclose its lien, nor were they in any manner brought into court to have their rights to the premises in question adjudicated until more than one year from the completion of the contract between the North & South Lumber Company and Dill; and that, therefore, the court erred in decreeing the lien of the North & South Lumber Company to be superior to that of plaintiff in error.

We are of the opinion that the position of the plaintiff in error is correct. The statute in force with regard to mechanics' liens at the time of the contract in question was as follows: Section 633, Code Civ. Proc. 1885: "Such lien may be enforced by civil action in the district court of the county in which the land is situated, which action shall be brought within one year from the time any new building, erection or improvement is completed." Section 634: "In such action all persons whose liens are filed as herein provided, and other incumbrancers, shall be made parties, and issues shall be made and trials had as in other cases." Section 636: "In all cases where judgments have been or may hereafter be rendered in favor of any person or persons, to enforce a lien under the provisions of this act, the real estate or other property shall be ordered to be sold as in other cases of sales of real estate, such sale to be without prejudice to the rights of any prior incumbrancer, owner, or other person not parties to the action." The right to a mechanic's lien is purely statutory in its nature;

and, where one desires to avail himself of such right, the provisions of the statute must be strictly complied with. We presume it will not be questioned that, where the statute prescribes a specific length of time within which an action may be maintained, such action may not be maintained after the expiration of the time stated, unless some exception appears in the particular case at issue. And as the statute above quoted fixes one year as the time within which an action may be maintained to enforce a mechanic's lien, when the year has expired, a person who relies upon such lien as a right would still possess the right without means of enforcement under statute. And, if an action is commenced within the time prescribed by the statute, such action could only affect persons who were made parties thereto. If there were others, not made parties to such action, who had or claimed rights in the premises affected by the lien, such person or persons would have the right to rely on any defense to which they were legally entitled when brought into a court of competent jurisdiction.

It was the evident intention of the statute that a person claiming a lien thereunder should have one year from the completion of his contract to enforce his claim against any and all persons shown by the records to have any interests in the premises upon which a lien was claimed; and it was also the evident intention of the statute that if a person claiming such a lien did not see fit to avail himself of the privilege given thereby, within the period of limitation contained therein, his right to insist upon an enforcement of his lien should cease as against all parties whom he failed to attempt an enforcement against within one year. In this case, at the time when the North & South Lumber Company commenced its action to enforce a lien upon the property in question, there appeared upon the records a mortgage to the Farmers' Loan & Trust Company of Kansas. It is true that at said date said mortgage had been assigned to Frank Wood, trustee, and the Farmers' Loan & Trust Company of Kansas had no interest therein. It is also true that the assignment to Frank Wood, trustee, was not recorded, but it plainly appeared of record that there was an incumbrance upon the premises; and it cannot be doubted that if the Farmers' Loan & Trust Company had been a party to such action, and properly served, not only their rights could have been adjudicated, but a judgment in such action would have been binding upon their assignee, whose assignment was not of record. It cannot be successfully contended that, by bringing the owner of the property affected into court, the statute of limitation would cease to run as to the mortgagee. Their interests were neither identical nor in common. As well might it be claimed that a payment by one of several makers of a promissory note would relieve

the holder thereof from the bar of the statute in an action against other makers in favor of whom the period of limitation had run.

In *Smith v. Hurd*, 50 Minn. 503, 52 N. W. 922, the court made use of the following language in deciding a question similar to the one here in issue: "As to each defendant in an action, the action is commenced and is pending only from the time of service of the summons on him or of his appearance without service; and, where each may object that the action was not commenced within the time limited by statute, its commencement as to his objection is to be determined by the time of service on him, and not by the time of service on some other defendant. This is a rule applicable to every action, and applies as well to actions to enforce mechanics' liens as to any others. And any one who may defend against such a lien, who may show that for any reason it is not a lien as against his interest, may object that the lien had expired, or the remedy upon it been lost by lapse of time, before the action was commenced against him. This also is a rule applicable to every action. It amounts to just this: that, when an action is commenced as to any defendant, there must be an existing cause of action against him, and the right to a remedy upon it." In the case of *Ballard v. Thompson*, 40 Neb. 529, 58 N. W. 1133, the supreme court of that state reaffirm the case of *Green v. Sanford*, 34 Neb. 363, 51 N. W. 967, in the following language: "It is therein declared to be the plain meaning of the statute that the lien is preserved as against those persons, only, who are made parties to the suit, prior to the expiration of the statutory period for enforcing it by action." The Minnesota statute, at the time of the decision first referred to, after providing for the filing of the lien, says: "It shall operate as a lien until the expiration of two years after the completion of such skilled services or labor or the furnishing of such materials." And the Nebraska statute under which the case of *Ballard v. Thompson* was decided, after providing for the manner of filing the statement of accounts in order to procure a lien, reads as follows: "Which account \* \* \* shall, from the commencement of such labor or the furnishing of such materials for two years after the filing of such lien, operate as a lien on the several structures and buildings and the lots on which they stand." It is contended by counsel for the North & South Lumber Company that the statutes of Minnesota and Nebraska are so dissimilar to ours that the decisions of the courts of those states are not applicable in the construction of our statute. Counsel argues that in those states the statute provides a period of limitation for the lien itself, and not for the remedy for the enforcement of such lien. Conceding it to be true that the statute of those states do so provide, it still appears to us that the doctrine announced applies with the same force whether the statute

provides that the lien itself shall terminate or the right to enforce the same shall terminate at a specific time. Our statute provides (paragraph 4102, Gen. St. 1889): "When a right of action is barred by the provision of any statute, it shall be unavailable either as a cause of action or ground of defense." Under the different sections of the statutes cited, it seems clear to us that the lien of defendant in error could not in this action be successfully pleaded either as a cause of action or a defense, so far as the claim of Frank Wood, trustee, was concerned. The case of *Rice v. Simpson*, 30 Kan. 28, 1 Pac. 311, cited by counsel for defendant in error does not, we think, go to the extent claimed by counsel; still it tends strongly to support the same line of reasoning as is adopted by courts with statutes somewhat similar to our own.

It is contended by the North & South Lumber Company that the objection here raised by plaintiff in error cannot be considered, for the reason that the statute of limitations was not pleaded in the court below, and that the only objection which was made to the introduction of evidence was for the reason that the answer and cross petition of the North & South Lumber Company did not state facts sufficient to constitute a cause of action. The position is not well taken. We are of the opinion that the defect complained of appeared upon the face of the pleadings filed by the North & South Lumber Company; that the manner in which the plaintiff in error was brought into the case, and the time at which he appeared as a party, taken in connection with the face of the pleadings, made the objection to the introduction of evidence the proper method of raising the question. We think the case comes fairly within the rule laid down in *Brown v. Smelting Co.*, 32 Kan. 528, 4 Pac. 1013, and also within the rule laid down in *Greer v. Adams*, 6 Kan. 203.

We deem it unnecessary to discuss any further questions raised by plaintiff in error. The judgment will be reversed, and the cause remanded, with instructions to the district court of Sedgwick county to render judgment in accordance with the views herein expressed. All the justices concurring.

#### SCULLY v. PORTER.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

REPLEVIN—PLEADING AND PROOF—LANDLORD AND TENANT—LIEN ON CROP—BONA FIDE PURCHASER.

1. The gist of an action in replevin is the wrongful and unlawful detention of specific personal property, and on the trial of such action anything may be given in evidence under a general denial by the defendant, which shows that he does not wrongfully detain possession of the property.

2. Where the court sustains a demurrer to one count set up in an answer, and allows the



party to amend his answer by interlineation, and the defendant immediately amends his answer, and a demurrer is filed to the amended answer, and is overruled, and the record fails to show what the amendment consisted of, and the party afterwards has the benefit of the amended answer on the trial of the case, *Acid*, that the record does not disclose any error in sustaining the demurrer to the original answer.

3. One who purchases a crop growing or made on leased farming lands, with notice of the landlord's lien, is liable to the landlord for the value of the crop purchased, and not to exceed the amount of rent due or payable. One who purchases the crop without notice of the claim of the landlord for nonpaid rent, takes it freed from all claims of the landlord.

4. Secret liens are not favored by our law. The legislation of this state has ever been against the right of a lienholder to enforce his lien against an innocent purchaser of the property where he has not, in some of the modes prescribed by law, given notice of his lien

(Syllabus by the Court.)

Error from district court, Butler county; C. A. Leland, Judge.

Replevin by J. H. Porter against Charles Schram, sheriff, for whom was substituted William Scully. From a judgment for plaintiff, defendant brings error. Affirmed.

On the 7th day of February, 1890, J. H. Porter commenced an action in the district court of Butler county, Kan., against Charles Schram, sheriff of Butler county, in replevin, to recover possession of 2,500 bushels of corn in the ear, in a crib upon a farm in Towanda township, in Butler county, Kan. The sheriff of Butler county had seized this corn on the 3d of February, 1890, on an order of attachment issued in a case wherein William Scully was plaintiff and J. N. Bledsoe was defendant. This corn had been raised upon premises leased by William Scully to J. N. Bledsoe during the year 1889, and, Bledsoe not having paid the rent to Scully, an attachment was commenced by Scully, and the corn taken in attachment by the sheriff. Bledsoe had sold the corn to J. H. Porter. A small part of the corn had been delivered to Porter under this sale, but the greater portion of the corn was then in cribs on the premises where grown. The plaintiff's petition contained the following allegations: "Now comes said plaintiff, and for his cause of action against said defendant, says: (1) That said defendant is, and has been for more than one year last past, the duly qualified and acting sheriff of Butler county, Kansas. (2) That this plaintiff is the owner of, and entitled to the immediate possession of, the following described personal property, namely: 2,500 bushels of corn in the ear, in two cribs, that adjoin each other, upon a farm in Towanda township, in said county, occupied by J. N. Bledsoe, which said corn is worth the sum of 11 cents per bushel, and the total value of said corn being \$275. (3) Said defendant unlawfully took said corn from the possession of this plaintiff on the 3d day of February, A. D. 1890, and has ever since then, and still does, unlawfully detain said corn from the possession of this plaintiff. Although demanded, he still

refuses to give up possession of the same. (4) Said defendant has damaged this plaintiff in the sum of \$100 by the said unlawful detention of said corn, in this: that he thereby prevented this plaintiff from having the same to feed to his cattle, he being a dealer in cattle, and having said corn for the purpose of feeding to his said cattle; and has been further damaged by having teams employed to haul said corn from where it is located to the feed lots of this plaintiff, near the town of Towanda, in said county, a distance of about 5 miles. Wherefore this plaintiff asks judgment against said defendant that he, the said defendant, return to this plaintiff the said corn, and for the sum of \$100 as damages, sustained as aforesaid, by reason of said unlawful detention, and for the costs of this suit, and such other relief as he may be entitled to." After the filing of the petition and affidavit in replevin and the replevin of the corn, William Scully appeared, and filed his motion asking to be substituted as defendant in place of Charles Schram, sheriff, for the reason that he was the real party in interest. And afterwards, to wit, on the 5th day of June, 1890, parties all being before the court, the application of Scully to be substituted as party defendant was sustained, and Scully was substituted as defendant, and at the same time filed his answer to the petition of the plaintiff, as follows: "Now comes said defendant, William Scully, and for answer to the petition filed herein says: That he denies each and every allegation in said petition contained, except that Charles Schram now is, and for more than one year last past has been, the duly qualified and acting sheriff of Butler county, Kansas. And, further answering, said defendant alleges: That he now is, and for several years last past has been, the owner and in possession of the following described farming lands, situated in the county of Butler and state of Kansas, to wit: The southeast quarter of the southeast quarter of section 32, and the southwest quarter of section 33, all in township 26 south, range 4 east of the 6th P. M. That on the 27th day of October, 1886, said defendant leased said premises to J. N. Bledsoe for a term of five years, beginning on the 1st day of March, 1887, which said lease is hereto attached, marked 'Exhibit A,' and is hereby made a part hereof. That by the term of said lease there was due and owing from said J. N. Bledsoe to the defendant on the 3d day of February, 1890, the sum of \$595.88, with interest thereon from said date at the rate of 10 per cent. per annum, for the payment of which sum this defendant had a lien on all crops growing or made upon said premises. That said corn replevied by plaintiff herein was a part of the crop grown and made on said premises during the year 1889, and subject to said lien, and was at the time of the commencement of this action upon said premises, and had never been removed therefrom; and that the said Charles Schram had taken,

and had at the time of the commencement of this suit, possession of said corn in a proceeding by said landlord, for the purpose of enforcing said lien." To this answer the plaintiff below filed the following demurrer: "Comes now the plaintiff, by Redden & Schumacher, his attorneys, and demurs to the matters and things set forth as a second defense in the answer of the defendant, William Scully, and Charles Schram, sheriff, for the reason that the facts stated by way of a second defense in the answer of said defendant do not constitute a cause of defense in this action in favor of said defendants and against this plaintiff." Which demurrer was afterwards sustained, and the plaintiff given leave to amend his answer by interlineation, which was amended, and the plaintiff below then filed the following demurrer to the amended answer: "Now comes said plaintiff, and demurs to the second cause of defense set up in amended answer filed in this cause, and for cause of demurrer says that the same does not state facts sufficient to constitute a cause of defense in favor of defendant and against plaintiff." This demurrer was by the court afterwards overruled, and the plaintiff below filed the following reply: "Now comes said plaintiff, and for his reply to the second cause of defense set up in the amended answer of defendants says, that he denies each and every allegation therein contained. For a further reply to said second cause of defense this plaintiff says that he had no notice of any ownership or claim of ownership on the part of Scully to the land described in said answer, and he had no notice, and did not know, that said Scully claimed any interest in or to the crops growing on said land, or to the corn involved in this suit. He did not know that Bledsoe was a tenant of Scully's, and that he purchased said corn in good faith, and paid a valuable consideration therefor." The plaintiff below then filed the following demurrer to the reply of plaintiff: "Now comes defendant, William Scully, by Hazlett & Harris, his attorneys, and demurs to the second count of the reply of plaintiff filed herein." Which demurrer was afterwards overruled by the court. To the order and ruling of the court William Scully excepted. The issues being fully joined, the cause was tried before the court and a jury, and resulted in a verdict and judgment for the plaintiff below. Defendant made case, and brings case here, and asks for a reversal of the judgment.

R. H. Hazlett and O. L. Harris, for plaintiff in error. Redden & Schumacher, for defendant in error.

JOHNSON, P. J. (after stating the facts). In 1887, William Scully, plaintiff in error, was the owner of a certain farm, containing about 200 acres, situated in Towanda township, Butler county, Kan. He leased this land by written lease to one J. N. Bled-

soe for a period of five years; rents payable, in cash, annually, as specified in the written lease. Bledsoe was in the occupancy of this farm from the time he leased it up to and including March 1, 1890. In 1889, Bledsoe raised a crop of corn on the leased premises, and when it was gathered he placed the corn in two cribs on the farm where it was raised, being about 2,500 bushels. About the 20th of January, 1890, Bledsoe sold the corn in the two cribs to J. H. Porter, defendant in error. On the 14th day of February, 1890, William Scully commenced an action against J. N. Bledsoe in the district court of Butler county, Kan., to recover the rents then due on said farm, and to enforce a lien therefor on the crops grown on the said farm in the year 1889. The corn then still being in cribs on the farm, was attached by the sheriff, and while the sheriff held said corn under the attachment this suit in replevin was commenced to recover the possession of said corn.

Under the order of delivery issued on the commencement of this action the coroner of Butler county took the corn out of the possession of the sheriff, and delivered the same to J. H. Porter, plaintiff below. Plaintiff claimed to be the owner of the corn by virtue of a purchase from Bledsoe on or about the 20th day of January, 1890, and payment for which was made January 30th, and without any notice that the corn was raised on leased lands, or that Scully had any lien upon the same. This suit was commenced by J. H. Porter as plaintiff against Charles Schram as sheriff. After the commencement of the suit, William Scully, being the real party in interest, was, on motion, substituted as party defendant in this action, and said Scully appeared then, and answered the petition of the plaintiff below, and all proceedings thereafter were had in the action between Porter and Scully. After issues were fully joined, the case was tried before the court with a jury, and verdict and judgment for plaintiff below. Defendant below excepted, and brings the case here for review.

The first error complained of by plaintiff in error is the sustaining of a demurrer of plaintiff below to the second defense set up in the answer of the defendant below. This assignment of error is not tenable, for upon the sustaining of said demurrer the court permitted the defendant below to amend the second defense by interlineation, and to the amended answer the plaintiff below renewed his demurrer, and it was overruled by the court. The record fails to show the particular reason for sustaining the demurrer to the second defense set up in the original answer, or in what particular the amendment consisted, but it is evident that the amendment consisted in some slight correction in the phraseology in the second defense, and the defendant below had the

benefit of the defense contained in the second defense in the original answer. This action being in replevin, the defendant could show any defense that would make his possession lawful. Therefore, the defendant in this case having a general denial to the answer, the other defenses set up in his answer were immaterial.

The second error complained of by the plaintiff in error is to the overruling of the motion of defendant below to strike out the second count in the reply of plaintiff below, and in overruling the demurrer of defendant below to said second count of the reply of plaintiff below. The second paragraph of the reply of plaintiff below, to which these objections are taken, is as follows: "For a further reply to said cause of defense this plaintiff says that he had no notice of any ownership or claim of ownership on the part of Scully to the lands described in said answer, and he had no notice, or did not know, that said Scully claimed any interest in or to the crops grown on said lands, or to the corn involved in this suit; he did not know that Bledsoe was a tenant of Scully's; and that he purchased the corn in good faith, and paid a valuable consideration therefor." This brings us to a consideration of the statute respecting landlords and tenants, and the lien of a landlord on the crops grown on leased lands, and the effect of a sale of crops by tenant grown on leased lands, where the rents have not been paid. Chapter 55 of the General Statutes of 1889, being an act in relation to landlords and tenants, is as follows:

"Sec. 24. Any rent due for farming land shall be a lien on the crops growing or made on the premises. Such lien may be enforced by action and attachment therein, as hereinafter provided."

"Sec. 26. The person entitled to rent may recover from the purchaser of the crop, or any part thereof, with notice of the lien, the value of the crop purchased, to the extent of the rent due and damages.

"Sec. 27. When any person who shall be liable to pay rent (whether the same be due or not, if it be due within one year thereafter, and whether the same be payable in money or other things) intends to remove, or is removing or has within thirty days removed his property, or crops, or any part thereof, from the said premises, the person to whom the rent is owing may commence an action in the court having jurisdiction; and upon making an affidavit stating the amount of rent for which the person is liable, and one or more of the above facts, and executing an undertaking as in other cases, an attachment shall issue in the same manner and with like effect as is provided by law in other actions."

Under section 24 the landlord has a lien on the crops growing or made on the leased premises for rents due or payable on farming lands, and this lien may be enforced by

attachment as provided in section 27. Section 26 makes the purchaser of the crop, who purchased with notice, liable to the landlord for the value of the crop purchased, not to exceed the amount of rent due. The main question for consideration in this case is, does the lien of the landlord affect the purchaser of the crop without notice of the landlord's lien? Or, in other words, can the tenant in possession sell the crops grown on the leased premises to a stranger, who has no notice of the landlord's lien, and pass a title of the crop to him freed from the lien? One who purchases the crop with notice of the landlord's lien is liable to pay the landlord the value of the crop purchased, not to exceed the amount of rent due or payable. It would seem to follow that one who purchased the crop without notice would take it freed from all claims or liens of the landlord. Secret liens are not favored by our law. The legislation of this state has ever been against the rights of lienholders who do not in some of the modes prescribed by statute give notice of their liens. A party holding a lien on real estate may lose it if he does not have the same recorded in the office of the register of deeds of the county where the property is situated, or give actual notice in some manner to those about to deal with the owner thereof. So in cases of liens by mortgages or otherwise on personal property, if the instrument containing such lien is not filed in the office of register of deeds of the county where the property is situated, and a person purchases the same from the owner thereof, who has possession of the property, and has no knowledge of such lien, he takes it freed from the lien. A tenant who raises a crop on leased lands, where he is required by the terms of his lease to pay cash rent, is the owner of the crops raised by him, subject only to the lien of the landlord for rents due or payable; but he may sell and dispose of the crop and pass a title to the purchaser, the purchaser being liable to pay the landlord the value of the crops purchased, if purchased with notice of such lien; but, if the purchaser has no notice of the lien of the landlord, he takes them freed from any lien, unless he is in possession of such facts as would put a reasonably prudent person on inquiry as to whether the crops were raised on leased premises, and whether the rents were paid. There was no error in the ruling of the court in overruling the motion to strike out, and in overruling the demurrer to the second count in the reply of the plaintiff below.

The final contention of the plaintiff in error is that the court erred in the instructions given to the jury, and in refusing to instruct them as required by the defendant below. The argument in support of this assignment of error is based on the theory that the landlord is given a lien on crops grown or made on the leased premises by virtue of the statutes of this state, and that it is a paramount.

lien, which every person must take notice of. It is true, the landlord has a lien on the crops grown on leased land created by statute, and the mode of enforcing it is prescribed by the same statute, and the statute creating the lien makes the purchaser liable to the landlord for the value of the crops purchased when the same are purchased with notice of a lien. The construction claimed by plaintiff in error would render all purchasers of crops from a tenant liable to the landlord for the value of the crop purchased, whether he had notice of the lien or not. We do not think that the landlord's lien is any more sacred than any other lien on personal property, or that every person dealing with the tenant must take notice of the lien of the landlord. In order to arrive at the meaning and intention of this statute, we must construe the act as a whole, and give to each section and sentence a reasonable interpretation, so that the sense of each section, sentence, and word may be fully gathered, and the internal sense of the whole may be understood. On an examination of chapter 55, Gen. St. 1889, being an act relating to landlords and tenants, we find it contains what shall constitute a tenant at will, how tenancies are created and determined, for the occupancy of joint tenants and tenants in common, for the maintenance of action for waste, the lien of landlords for crops grown or made on farming land, that where rents are payable in a share or certain proportion of the crops the lessor shall be deemed to be the owner of such share, and the manner of obtaining possession of such share if the lessee should refuse to deliver it over. The person entitled to the rent may recover from the purchaser of the crop, or any part thereof, with notice of the lien, the value of the crop purchased to the extent of the rent due and damages, and then provides the manner of enforcing the lien against the tenant. Giving to this entire act a fair construction, it is evident that the tenant is the owner of the crop grown or made on the leased premises, subject only to the lien given the landlord by law, and that this lien is subject to no higher rights than other liens on personal property, and persons dealing with the crop are held to no other or different rule than persons dealing with other personal property subject to liens. The tenant, being the owner of the crop, and in possession thereof, may sell the same as he might any other property covered by a lien, and the title of the property would pass by such sale to the purchaser, and if he had notice of the lien he would be liable to the landlord for the value of the crops purchased; but if he is an innocent purchaser, for value, without notice of any lien, he would take the property free from the landlord's lien. The written lease in this case was not filed or recorded in the office of the register of deeds of Butler county, and there was nothing to give constructive notice of the landlord's claim

on the crops, unless the fact that the corn was in cribs on the leased premises. We do not think this fact alone would be such as to put the purchaser on inquiry as to who the land belonged to, or as to whether Bledsoe was a tenant, occupying the lands of some other person, or whether there was any claims against the crop for unpaid rents. Persons in possession of personal property are generally presumed to be the owners thereof, and the general presumption is that it is clear from incumbrance, unless there are some facts in connection with its use, location, or condition that would be calculated to create suspicion, or to put ordinarily prudent persons on inquiry as to liens or claims against it; and where there is nothing of record in some office provided for by law for giving constructive notice of a lien on personal property, and a person without notice, either actual or constructive, purchases the same in good faith, and for a valuable consideration, he receives a good title to the same.

We have examined the authorities cited by counsel for plaintiff and relied upon as authorities in this case, which were made in other states, under similar statutes to ours, but find the fact of notice and the right of the tenant to sell crops are materially different from the provisions of the Kansas statutes, and do not think they are applicable to the facts in this case. They are not in accord with the general policy and decisions of our own state. The law respecting landlords and tenants in some of the states formerly gave the landlord a lien on all crops grown on the leased premises, and also on all implements and animals used on the premises to raise the crops, and the courts in some of those states held that the tenant could not sell or dispose of any portion of the crop raised on the leased premises, or sell or dispose of any of the animals or farm implements used to make the crops, until all rents were fully paid; and that the purchaser of the animals that had been used to make crops on leased lands must take notice of the lien, and the property might be followed into the hands of an innocent purchaser without actual notice, and taken and sold for the payment of rents; that the purchaser took the property at his own risk, the same as the purchaser of stolen goods. These decisions are not authority under the laws of Kansas respecting the rights and liabilities of landlords and tenants, and are not in harmony with the general policy of our laws respecting parties dealing with property incumbered with liens. The laws of England and the earlier period of this country were intended for the special protection of the rights of the landlord, and the tenant's rights in every respect were subordinated to those of the owner of the soil, and the tenant did not seem to acquire any property rights in the crops grown by him on leased premises until the landlord had been

paid his rents in full; but under more recent and humane legislation the severity of the laws as to tenants have been greatly modified, and the tenant is given more consideration, and his rights are treated as equal with those of his landlord, and he does acquire an ownership to the crop raised by him, and he may use the same or sell it, subject to the lien of the landlord. The laws of some of the cotton states make it a criminal offense for a tenant to remove or sell any portion of the crop grown by him on leased premises until all the rents have been paid; but the courts in some of these states hold that, where he has removed the crop and sold it, the purchaser takes the title freed from the lien of the landlord where he purchases without notice of the lien for unpaid rents.

We think the court below instructed the jury on the correct theory of the law applicable to this case, and the instructions requested by the defendant below did not contain the correct theory of the law; and the jury, after being instructed on the law, having found the facts in favor of the plaintiff below, we cannot say that their verdict was not sustained by sufficient evidence. The judgment of the district court is affirmed. All the judges concurring.

# CANNON v. GRIFFITH et al.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

**SALE—WHEN COMPLETED—CONTINUANCE—READING TESTIMONY TO JURY.**

1. The ruling upon a motion for a continuance is largely in the discretion of the trial court, and where the continuance is granted there is less cause for a reviewing court to interfere than where it is refused.

2. Where two parties agree upon all the terms and conditions which shall govern the sale of a machine, provided a sale is made, and the purchaser is to take the machine and test it, and, if he is satisfied with it, he will keep it and pay for it, *held*, that the sale is complete, and the purchaser is liable for the purchase price agreed upon, when the condition is fulfilled, and whether or not the condition is fulfilled is a question of fact, to be determined by the jury.

3. When the jury request the court to have the evidence of any witness read to them, it is proper for the court, in the presence of the parties to the action, to direct the stenographer to read the evidence of the witness asked for.

(Syllabus by the Court.)

Error from district court, Lyon county; Charles B. Graves, Judge.

Action by Griffith & Ewing against Joseph Cannon. From a judgment for plaintiffs, defendant brings error. Affirmed.

J. G. Hutchinson and Cunningham & McCarty, for plaintiff in error. Lambert & Dickson, for defendants in error.

DENNISON, J. This action was brought in a justice court in the city of Emporia, Lyon

county, Kan., by Griffith & Ewing, as plaintiffs, against Joseph Cannon, as defendant, to recover the purchase price of a "Buckeye frameless binder, complete, with bundle carrier and trucks." Judgment was had against Cannon, and he appealed to the district court. The case was there tried with a jury, and judgment rendered against Cannon for \$130; and he brings the case here for review.

The plaintiff in error contends that the court erred in sustaining a motion for a continuance of this case to the next term of the court. The question of continuing a case is very largely in the discretion of the court, and where the continuance is granted there is less cause for a reviewing court to interfere than where the continuance is refused. Was the plaintiff in error prevented from having a fair trial by reason thereof? We think not.

The evidence in this case is in some things very conflicting, but the following facts may be considered as established by the evidence. Griffith & Ewing were selling binders. Cannon wanted to buy one. He would not give an order; but he offered to take one home, and test it, and, if he was satisfied with it, he would keep it, and pay \$130 cash for it. Griffith & Ewing acceded to his proposition, and he took the machine home. On Thursday of that week, Eastman, an agent of the manufacturers of the machine, and Smith and Wells, who were in the employ of Griffith & Ewing, went out to Cannon's place and set up the machine, and Smith and Cannon both ran it in Cannon's wheat. The machine, with the exception of the bundle carrier, performed well; and Cannon testified that he told Eastman and Smith that he was satisfied with it as far as it had gone, and that if, upon further trial, he was still satisfied with it, he would come in and pay for it. Eastman testifies that Cannon said he was satisfied with the machine, and that he would pay for it the first time he was in. Smith testifies that "we set up the machine, and run it an hour or two, until we seen it had given satisfaction, or, at least, he said it had; and it was getting along 6 o'clock, I suppose, in the evening then, and Mr. Cannon said to me, 'Tell the boys I'll be in Saturday, and settle for the machine.'" Wells, who is a son-in-law of Cannon, does not seem to remember much about it. Cannon testifies that he continued to run the machine until Saturday noon, and then came to the store of Griffith & Ewing and said to Mr. Griffith, "I guess I'll take the machine." He also testifies that he was thoroughly convinced, Saturday noon, that he was not satisfied with the machine. He also testifies that he said to Griffith, on Saturday evening, "I could have paid you for that machine to-day if the bank had not been closed." Griffith and Ewing both testified that he said he had hurried to get in before the bank closed, and pay them for the machine. But it did not matter. He would be in the first of the week, and

pay them for it. The testimony of all the parties was that the bundle carrier did not do good work, but there was some evidence tending to show that Griffith & Ewing had agreed that they would furnish a new one, or deduct the price, if it did not finally work all right, and that Cannon seemed to be satisfied with this arrangement. Cannon continued to use the machine until he had cut his wheat and that of one of his neighbors, and had commenced upon the field of another neighbor. The axle and one of the drive wheels had begun to wear and cut each other, until the wheel leaned over, and would catch into some of the other parts of the machinery; and when it would run no more, Cannon took it back to Griffith & Ewing. It is not our province to weigh this conflicting testimony. We are willing to concede this pleasure to the jury. We can only determine whether any error was committed in the introduction of evidence and in the instructions given to the jury.

The instructions complained of are contained in the following: "(5) It appears, from the evidence, that the only condition upon which the defendant would buy the machine was that he would try it, and if, upon trial, it should work satisfactorily, then he would keep it, and pay cash therefor. It further appears that defendant was permitted to take the machine upon these conditions, with no definite time fixed in which the trial should be made, nor as to the manner and extent of the trial. (6) Under such an agreement, the defendant would have the right to make such reasonable tests as he might desire, and for that purpose he might keep the machine a reasonable time. (7) If, after a trial, great or small, long or short, the defendant became satisfied with the machine, and fully concluded in his own mind to buy the same, this would complete the sale; and the title to the machine would immediately pass to the defendant. (8) The delivery of the machine to the defendant, under the conditions agreed upon, was a compliance with the conditions of the sale on the part of the plaintiff; and when, if at all, the defendant determined to accept the machine as satisfactory, then, at that moment, there was such a meeting of the minds as would complete the sale. (9) Of necessity, there is always some point of time when a transaction, between the parties thereto, becomes final and fixed: In this transaction, this point of time is, if at all, when the defendant became satisfied, and determined in his own mind to buy the machine and pay for it. (10) If you find that the sale at any time became completed, then the machine became the property of the defendant; and no defects subsequently discovered could change the relation of the parties, and nullify such sale. (11) If the defendant did not fully conclude, at any time, to accept the machine and pay for it, then no sale was made, and the plaintiffs have been the continuous owners of the ma-

chine, and in that event you will find for the defendant. (12) In determining whether the defendant fully accepted said machine as satisfactory, and as a completed sale, or not, you will consider what he said and what he did in relation thereto, and all the circumstances shown."

There is no prejudicial error in these instructions. The attorney for the plaintiff in error argues the question of the acceptance of the machine entirely upon the theory that there must be a contract of acceptance. In this case the contract of sale was made. Its terms and conditions had all been agreed to. If the sale should be made at all, the contract of sale was entered into before Cannon took the machine. The only question left open was, shall there be a sale? This was to be decided, not by anything Griffith & Ewing might do or say, but by the satisfaction of Cannon. When Cannon was satisfied, the sale was completed, and Cannon was liable for the purchase price agreed upon. Suppose Cannon had proposed to take the machine home upon the condition that, if he could, on the next day, collect the money due upon a note he then held against one of his neighbors, he would keep the machine, and pay the cash for it, but if he failed to collect said money he would, on the second day, return the machine, and Griffith & Ewing had assented to the offer; what would have completed the sale, so far as the liability of Cannon for the purchase price was concerned? The collection of the note. If he obtained the money on the note the next day, the moment he obtained it he was liable for the price of the machine. The question of whether the condition had been fulfilled was a fact, to be determined by the jury. Mr. Smith was asked about the testimony of Mr. Cannon before the justice of the peace relative to the bundle carrier, and was asked the following question: "Do you remember I asked him, if there had been nothing wrong but the bundle carrier, would he have raised any objections to the machine? Do you remember what he said to that?" Defendant objected to the question as incompetent, irrelevant, and immaterial, and not cross-examination. The objection was overruled, to which defendant excepted. "Q. Go ahead, Mr. Smith. Ans. Well, the best of my memory now is that he said he would not have raised any objections if the bundle carrier had been the only thing." And he was also asked if he knew what the bundle carrier was put in at, and he answered that he guessed it was worth about five or six dollars. The plaintiff in error contends that proof of this character is wholly immaterial. There was considerable evidence introduced tending to show that Cannon was satisfied to rely upon the promise of Griffith & Ewing to replace the bundle carrier, or deduct the value of it if it failed to work. Upon this theory, the value of the bundle carrier was proper; and it was also material evidence to establish the

fact that Cannon was relying upon the promise of Griffith & Ewing to remedy that defect.

The plaintiff in error also claims that the machine was sold with a warranty, and that, therefore, the court erred in giving instruction No. 10, *supra*. The evidence in this case would not sustain a contract of warranty. On the contrary, Cannon refused to buy on any terms but those he dictated. However, the language of instruction No. 10 was amply explained by the following language, contained in instruction No. 13: "If you should find that there was a completed sale, and that the machine became the property of the defendant, still the defendant claims that the machine was warranted to be a first-class machine, and to do good work, and on a fair trial it showed it was unable to do so. If this claim on the part of the defendant is established, by preponderance of the evidence in the case, then you will find for the defendant. A person who buys a machine which is warranted to be first-class, and capable of doing good work, may, if, after a fair and reasonable test, it proves to be deficient, return it, if done within a reasonable time; and, if he does so, he cannot be required to pay for it. The burden of proof is upon the defendant to establish the alleged warranty, and the breach of it, by preponderance of the evidence in the case. Upon the question of warranty, as soon as the defendant ascertained to his satisfaction that the machine was not as warranted, it was his duty to return the machine at once, or notify the plaintiff of its deficiency; and any unnecessary delay in this matter would be held to be a waiver of his right to return the machine. Whether the defendant acted with reasonable prudence in this respect, or not, is for you to determine from the evidence."

The plaintiff in error contends that the court erred in permitting the evidence of Smith and Eastman to be read to the jury. It appears that, about 6 o'clock p. m., the judge called the jury from their room, and asked them how they were getting along, and one of the jurors replied, "If we could hear the evidence of Smith and Eastman read, we could decide it in 10 minutes." The judge replied, "I will try and have the stenographer come down after supper, and read it to you." After supper, the judge directed the stenographer to read the evidence, as requested by the jury. Cannon was present each time. This is a matter largely in the discretion of the trial court. In this case, he certainly did not abuse his discretion. The jury are sworn to try the case according to the law and the evidence. If they are in doubt as to what the law is, or some of them have misunderstood the court's instructions, it is highly necessary that they should be informed as to what the law actually is, so that they can comply with the terms of their oath. If they are in doubt as to what the evidence is, or some of them

have an impression that it is different from what others of them believe it to be, they certainly should be informed as to what the evidence really is, so that they can decide the case according to the evidence. This right is given them by paragraph 4375 of the General Statutes of 1889. It is there provided that the court may give its recollections as to the testimony on the point in dispute. This law was passed before the stenographer had come into general use in our courts. If the court may give its recollection of the testimony, how much better it is that he may require it read from the shorthand notes of the stenographer. If the stenographer has not taken the testimony correctly, the judge can then correct it; and the chances of getting the testimony exactly correct are tenfold greater than when one must rely upon the recollection of any person. In *Thompson v. McEwen*, 24 Kan. 757, the evidence of the plaintiff in error was wholly oral, and that for the defendant in error was wholly written, and the court permitted the depositions of the latter to be taken by the jury into their room for deliberation, and it was held not error. See, also, *Hargrove v. Millington*, 8 Kan. 480, and *Wood v. Wood*, 47 Kan. 617, 28 Pac. 709. Counsel for plaintiff in error contends that it does not appear that there was any disagreement among the jury as to the evidence of these two witnesses. When one member of the jury said to the judge, "If we could hear the evidence of Smith and Eastman, we could decide it in 10 minutes," and the others, by their silence, acquiesced therein, we think it appeared to the judge that there was some disagreement as to what these witnesses had testified to, and he did just what he ought to have done in requiring it to be read to them. The judgment of the district court is affirmed. All the judges concurring.

#### OMAHA, H. & G. RY. CO. v. DONEY.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

#### RAILROAD COMPANIES—CONDEMNATION PROCEEDINGS—MEASURE OF DAMAGES.

1. The measure of damages to land by the location of a railroad through it, aside from the value of the land appropriated for the right of way, is the depreciation in the market value of the land by reason of such location of the road; and, as tending to show such depreciation, all the inconveniences directly caused by the road may be taken into consideration.

2. Upon the trial of an appeal from the award of commissioners for compensation for the value of land taken by a railroad company in condemnation proceedings, and for damages sustained by the owner of the land by reason of such taking, in determining the question as to the actual depreciation of the market value of the balance of the land resulting from the construction of the road through it, evidence may be permitted of, and the jury have a right to take into consideration, the proximity of the road to the house of the owner, and the noise and smoke in the operation of the trains; but these facts cannot be taken into ac-

count as a basis or ground for awarding damages, because they rest upon sources of injury too remote.

3. It is error for the court to refuse an instruction to the jury to the effect that such inconveniences are not a basis for awarding damages in condemnation proceedings.

(Syllabus by the Court.)

Error from district court, Kingman county; S. W. Leslie, Judge.

Appeal by M. Doney from the award of commissioners for compensation for land taken by the Omaha, Hutchinson & Gulf Railway Company in condemnation proceedings, and for damages sustained by reason of the taking. From a judgment for appellant, respondent brings error. Reversed.

W. M. Whitelaw, for plaintiff in error.

COLE, J. This was an appeal from the award of commissioners for compensation for the value of land taken by the Omaha, Hutchinson & Gulf Railway Company in condemnation proceedings, and for damages sustained by the owner of the land by reason of such taking. The railroad company brings the case here for review. All the alleged errors in this case may be considered together, for all relate to practically the same question. It appears from the record that the plaintiff in error, in the construction of its line of road, crossed a three-acre tract belonging to the defendant in error, located in the suburbs of the city of Kingman. Condemnation proceedings were had under the statute, and the defendant in error appealed from the award of the commissioners. Upon the trial of this appeal in the district court, evidence was received, over the objection of plaintiff in error, as to the damages sustained by reason of the smoke, noise, jarring of the ground from the operation of the trains of said road, and the proximity of the road to the house of the owner. At the close of the testimony, plaintiff in error requested the court to instruct the jury that no damages could be awarded in favor of the defendant in error on account of the smoke, noise, escape of steam, and the operation and running of trains, which instruction the court refused. The jury returned a verdict allowing \$100 as damages for the land appropriated, \$200 for damages on account of noise, smoke, steam and operation of trains, and \$246 for other causes not specified. The admission of the evidence with regard to these inconveniences, and the refusal of the court to give the instruction requested, is what the plaintiff in error here complains of.

We are of the opinion that this case was tried upon an erroneous theory of the law. It is contended by plaintiff in error that, in the assessment of damages sustained by the owner of land by reason of the construction of a railroad through it, evidence is not permissible as to the noise, smoke, and such kindred inconveniences; and counsel

relies, in support of his position, on the decisions of our supreme court in *Railway Co. v. Garside*, 10 Kan. 552, and *Railway Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. 1051. These cases hardly support the view contended for by counsel. Both were actions brought by owners of abutting property for damages sustained by reason of the operation of a railroad over a public highway adjoining their premises; the later case simply reaffirming the doctrine laid down in the former. In the *Garside* Case the court held that damages for the inconveniences above named could not be recovered—First, for the reason that the plaintiff, not being the owner of the fee in the public highway, sustained no damages from the causes named which were not sustained by the public in general; and, second, that such damages are too remote to form the foundation for a cause of action. And this we conceive to be the proper rule in cases of this character. But, where a railroad is constructed across the premises of a person, the measure of damages, aside from the value of land actually appropriated, is the depreciation of the market value of the balance of the premises, resulting from the construction of the road; and, in determining what this depreciation is, evidence may be permitted of, and the jury have a right to consider, the proximity of the road to the house or other buildings of the owner, the smoke and noise incident to the operation of the road, and any other inconvenience directly caused by the construction of said road, not as a basis or ground for damages, but as affecting the market value of the premises. *Weyer v. Railway Co.*, 68 Wis. 181, 31 N. W. 710; *Hartshorn v. Railway Co.*, 52 Iowa, 613, 3 N. W. 648; *Railroad Co. v. Janecek*, 30 Neb. 276, 46 N. W. 478; *Railroad Co. v. Gardner*, 45 Ohio St. 309, 13 N. E. 69. When evidence is permitted, however, of the inconveniences above named, the trial court should properly instruct the jury as to the purpose for which such evidence is received; and the refusal of the trial court to so instruct, when requested, is material error. In this case the trial court proceeded upon the theory that the owner of land across whose premises the railroad is constructed has a right to recover specific damages for such inconveniences as are above named. This was error. Ordinarily, where the jury have found a specific amount of damage upon an erroneous measure of damages, a modification of the judgment is sufficient; but, in this case, such an order would be unfair to both parties to this action. The evidence in the case, aside from that which establishes the value of the land actually appropriated, was practically confined to the supposed elements of damage above described; and, while the jury allowed a specific sum for such damage, the evidence does not sustain a verdict for any other



damages. We therefore deem it proper to remand the case for another trial, under proper instructions from the court. The judgment of the district court is reversed, and this cause remanded for a new trial. All the justices concurring.

**ATCHISON, T. & S. F. R. CO. v. DITMARS**  
et al.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

**INJURIES TO STOCK—ACTION FOR DAMAGES—PLEADING—SUFFICIENCY OF EVIDENCE**  
—INSTRUCTIONS.

1. The affidavits filed in this case bring it within the rule laid down in *Bank v. Rowlinson*, 43 Pac. 304, 2 Kan. App. —.

2. The supreme court has overruled a motion to dismiss this case, therefore we will not now sustain such a motion.

3. If the railroad company is not liable in this case as a common carrier, its liability is defined by paragraph 1250 of the General Statutes of 1889, and under this statute it is necessary for the plaintiff to allege and prove the negligence of the company, and the damages resulting therefrom.

4. The evidence need not be very explicit to sustain the action of the court in overruling a demurrer to the evidence. If there is any evidence which fairly tends to establish the material allegations necessary to a recovery, it is sufficient. *Railway Co. v. Couse*, 17 Kan. 571.

5. The showing of negligence of the railroad company, and the damages to the cattle resulting therefrom, is sufficient to sustain the judgment rendered in this case.

6. While cattle are being shipped by a railroad company over its road they are in the possession and under the control of said railroad company, and not of the owner or his employes.

7. If the railroad company desires any relief from any contract which may have been entered into, it should plead and prove the contract.

8. Where the undisputed evidence of the plaintiffs shows that the employes of the railroad company, in switching, bumped the cars, and knocked the cattle off their feet, and threw them down, and that this occurred several times, it is not error for the court to instruct the jury that "evidence was introduced tending to show that the trains were shifted about, and bumped the cars in a needless manner; that is to say, in such a manner that a person of ordinary care would not have been guilty of. That is a fact for you to consider under all the evidence,—whether that is true," etc.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by Ditmars, Voris & Vandevere against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for injuries to stock. From a judgment for plaintiffs, defendant brings error. Affirmed.

A. A. Hurd and Bentley & Ferguson, for plaintiff in error. J. D. Houston, for defendants in error.

DENNISON, J. This case was submitted to us at the October, 1895, term of this court, and was, on December 7, 1895, ordered dismissed for the reason that no showing was made that the defendants in error were present at the time and place of set-

ting and signing the case, or that they were notified or waived notice thereof, or had waived their right to make amendments. 2 Kan. App. —, 42 Pac. 933. It appears now that this question had been raised in the supreme court in 1891,<sup>1</sup> and upon a motion to dismiss, there had been filed several affidavits bearing upon the presence of W. H. Boone, one of the attorneys for the defendants in error, at the time the case was settled and signed. These affidavits were not delivered to us with the other records in the case, nor was the certified copy of the finding of the supreme court overruling the motion to dismiss given to us with the records. A motion to reinstate the case was heard at the January, 1896, term of this court, and our attention was called to these matters, and the case was ordered reinstated, and is resubmitted for a decision. We will therefore proceed with the case the same as if it now came to us for the first time, accompanied by the affidavits and the certified copy of the journal entry overruling the motion to dismiss. The affidavits filed in support of the case made bring this case clearly within the rule laid down in the case of *Bank v. Rowlinson*, 2 Kan. App. —, 43 Pac. 304. The supreme court, on October 6, 1891, having overruled a similar motion, is also a sufficient reason why we should not now sustain this one. We shall hold that the case is properly before this court, and it will now be considered upon its merits.

The case was originally begun in a justice court of the city of Wichita, Sedgwick county, Kan., by Ditmars, Voris & Vandevere, as plaintiffs, against the Atchison, Topeka & Santa Fé Railroad Company, as defendant, upon a claim set forth in the following bill of particulars (omitting title): "Plaintiffs state that they are now, and were at all times hereinafter mentioned, partners doing business under the firm name and style of Ditmars, Voris & Vandevere. That defendant is a corporation organized and existing under the laws of the state of Kansas. That on or about the 25th day of October, 1888, plaintiffs shipped over the defendant's road, from Panhandle city, Texas, to Kansas City, Missouri, three car loads of cattle, containing 90 head, for hire then and there paid by plaintiffs to defendant. That by reason of the negligence of the defendant in failing to properly carry said cattle through in proper time and manner the said cattle were greatly damaged and injured, and the market value greatly depreciated. And by reason of the negligence of the defendant and its agents the cattle were bruised and scarred, disfigured and maltreated, and caused to go without food and water for a long space of time, unnecessarily, all to plaintiffs' damage in the sum of \$300. Wherefore plaintiffs ask judgment for \$300 and costs. W. H. Boone, Attorney for Plaintiffs." This is the only

<sup>1</sup> No opinion filed.

pleading filed in the case. Judgment was rendered against the railroad company for \$300, and they appealed to the district court of Sedgwick county, Kan. The case was tried with a jury. At the close of plaintiffs' evidence the defendant demurred thereto. The demurrer was overruled. The defendant, electing to stand on the demurrer, introduced no evidence. The court thereupon instructed the jury, and they afterwards returned a verdict in favor of plaintiffs for the sum of \$300. Judgment was rendered thereon, and the defendant brings the case here for review. The plaintiffs in error contend that the court erred (1) in overruling the demurrer to the evidence; (2) in the instructions given to the jury.

The first point raised and discussed in the briefs is whether the company received and transported the cattle as a common carrier or as a private carrier or bailee. We do not consider it necessary to determine this controversy, for the reason that a sufficient prima facie case has been made to sustain the judgment rendered herein, even if the liability of the company is restricted to that of a private carrier or bailee. This case, from the beginning to the end, has been conducted upon the theory of damages occasioned by the negligence of the railroad company. The allegations in the bill of particulars of the plaintiffs, the failure of the defendant to plead a limitation of the common carriers' liability, all the evidence in the case, the instructions of the court, and the special findings of the jury all show that negligence is the foundation of the claim. The only exception to this is that Mr. Voris was asked if "they shipped them as common carriers, and you paid them for carrying them over the railroad as common carriers," and he answered, "Yes, sir; I did." Waiving, therefore, the question of the liability of the railroad company as a common carrier, what is the liability of the railroad company in this case? If it is not liable as a common carrier, then we apprehend it is liable under paragraph 1230 of the General Statutes of 1889, which reads as follows: "That railroads in this state shall be liable for all damages done to person or property, when done in consequence of any neglect on the part of the railroad companies." *St. Louis & S. F. Ry. Co. v. Bryan Fruit Co.*, 1 Kan. App. 551, 42 Pac. 267. Under this statute it is necessary for the plaintiffs to allege and prove the negligence of the company, and the damages resulting therefrom. The bill of particulars alleges damages resulting from the negligence of the company, and at least for the purposes of making a prima facie case the evidence establishes the damages to the cattle and the negligence of the company. It must be remembered that the evidence need not be very explicit to sustain the action of the court in overruling a demurrer to the evidence. If there is any evidence which fair-

ly tends to establish the material allegations necessary to a recovery, it is sufficient. In *Railway Co. v. Couse*, 17 Kan. 571, the supreme court held: "As sustaining a demurrer to evidence works a final disposition of the case, the court does not err in overruling such a demurrer whenever there is testimony which, although weak and inconclusive, yet fairly tends to prove every essential fact, and is sufficient to justify a court in overruling a motion to set aside a verdict based thereon." *Simpson v. Kimberlin*, 12 Kan. 579; *Jansen v. City of Atchison*, 16 Kan. 358; *Railroad Co. v. Doyle*, 18 Kan. 62; *Schafer v. Weaver*, 20 Kan. 296; *Railroad Co. v. Dryden*, 17 Kan. 278; *Waterson v. Rogers*, 21 Kan. 529; *Brown v. Railway Co.*, 31 Kan. 1, 1 Pac. 605."

The evidence in this case establishes the fact that the cattle were shipped from Amarilla, Tex., over the Ft. Worth & Denver Railroad to Panhandle city, and from Panhandle city, over the road of this company, to Kansas City, with the privilege of the Wichita market; that they left Panhandle city about 9 o'clock p. m. on the 24th, and arrived in Wichita, Kan., about 3 p. m. on the 26th, making about 42 hours to come less than 400 miles. It also establishes the fact that the stock were shipped part of the way on local freight trains, and that the train in which they were shipped made quite a number of stops. It also establishes the fact that the motive power was poor, and the train a heavy one; that during the time occupied by some of the stops which were made the train crew did considerable switching; that the cars containing the cattle were left in the train attached to the engine during the switching; that the engine would be backed up very abruptly to obtain slack, so the train could be started; that by reason thereof the cars in which the cattle were standing were bumped very violently, and the cattle knocked down, when the cars were jammed against each other; and that this occurred several times. It also establishes the fact that the cattle were kept on the cars about 29 hours from Amarilla and about 24 or 25 hours from Panhandle city without having been watered, fed, or unloaded; that they were unloaded into a muddy yard, about 9 o'clock at night, at Wellington, and kept there until the next morning, when they were shipped to Wichita. It also establishes the fact that the cattle were good, strong, butcher stuff when they were delivered to the company, and that by reason of the things above mentioned quite a number of the cattle were thrown down and trampled upon, and badly bruised and damaged, so much so that five of them died, and many of the others were scarred and swollen about the head and sides. The evidence establishes many things which were done that an ordinarily prudent man would not do. Surely an ordinarily prudent man would not first weaken his cattle by

keeping them a long time in the car without food or water, and then bump the cars in which they were standing so violently as to throw them off their feet. An ordinarily prudent man would refrain from several of the things which were done with these cattle. He certainly would endeavor to have sufficient motive power to run the train. He would also see to it that the train was not so heavy that it could not be handled without such violent bumping; and, if he could not well do that, he would certainly have set out the cars containing the cattle while such switching was being done. An ordinarily prudent man as well as a humane man would have furnished food and water and rest for the stock before they had become so weakened as to be unable to stand up. The showing of the negligence of the railroad company, and the damages to the cattle resulting therefrom, is sufficient to sustain the judgment rendered in this case; therefore it was not error for the court to overrule the demurrer of the plaintiff in error to the evidence of the defendants in error.

The plaintiff in error endeavors to avoid the charge of negligence by claiming that the cattle were in charge of an employé of the defendants in error, and that, therefore, he was responsible for the care of the cattle. The evidence establishes the fact that one N. C. Houston, who was in the employ of the defendants in error, accompanied the cattle from Amarilla to Wichita. This does not sustain the contention that the cattle were in the charge of Mr. Houston. The evidence in this case does not clearly show when the cattle first came into the possession of the plaintiff in error, but at least when the engine of the railroad company began to move the cars in which the cattle were loaded they were in the possession and under the control of the railroad company. No one else was in control of the cars or the railroad. The railroad company dictates in which train they go, how fast they go, when they stop, when they start, when and where they are unloaded and when reloaded, what position the cars in which they are loaded shall have in the train, how heavy the train shall be and how many cars it shall contain, how much switching shall be done, and when and where it shall be done, and where the cars in which the cattle are loaded shall be while the switching is being done, and when the cattle shall arrive at their destination. The owner or his employé who may accompany the cattle cannot control one of these things. He is absolutely powerless in the matter. He may watch over the stock, and see how they are being handled; he may do what he can to keep the cattle on their feet while in the cars; he may help to load and unload them; he may help about feeding and watering them, but he must do all this while the cattle are in the possession of the railroad company, and at such times as it chooses to select for the purpose.

During the trial of this case it was developed that when these cattle were shipped from Amarilla Mr. Houston got a shipping contract, shippers' release, or pass, or something of that kind; but just what it is does not clearly appear. The plaintiff in error contends that the defendants in error are bound to set up and prove the contents thereof. The nature of the writing does not clearly appear, and we are unable to say whether it should have been pleaded and proved or not. We may say, however, that if it had been an ordinary stock contract, by which the railroad company had endeavored to relieve itself from the liability of a common carrier, that this case must have been determined upon the same identical lines that it now has been. We may also say that if the railroad company had desired any relief from any contract which may have been entered into, it should have pleaded and proved the contract. Our supreme court has held that it must do this, and also that, if they do not plead the special contract, they will not be permitted to prove it. See *Missouri Pac. Ry. Co. v. Wichita Wholesale Grocery Co.*, 53 Kan. 525, 40 Pac. 899.

The instruction of the court complained of is No. 10, which reads as follows: "Evidence was introduced tending to show that the trains were shifting about and bumping the cars about in a needless manner; that is to say, in a manner that a person of ordinary care would not have been guilty of. That is a fact for you to consider under all the evidence,—whether that is true. If you find the railroad has not given that ordinary care which a man of average prudence, similarly situated, would have given to the stock in question, then, in that event, you will find a verdict for the plaintiff for the amount of damages which you shall agree on." After careful examination of the evidence, we fully agree with the trial judge that the evidence tended to prove the statements contained in the instruction, and it was proper to tell the jury that it was for them to decide whether it was true. This instruction and the other instructions given were a fair statement of the law governing the case upon the theory of a claim for damages caused by the negligence of the railroad company. No material error prejudicial to the substantial rights of the plaintiff in error has been committed by the trial court. The judgment of the district court is affirmed. All the judges concurring.

#### HARDING v. GUARANTY LOAN & TRUST CO. OF KANSAS CITY.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

#### DISSOLUTION OF ATTACHMENT—CLAIMS OF THIRD PARTIES—RETURN OF SHERIFF—DESCRIPTION OF PROPERTY.

1. Where lands have been levied upon under an order of attachment, any person claiming to be

the owner thereof, and interested in discharging the property attached, although he is not a party to the original action, may move the court to discharge the attachment as to the property claimed by him.

2. The sheriff's return on an order of attachment must show what property he attached. It is not sufficient if it simply refers to the papers and proceedings in some other case or in some other court for a description. The return itself must contain a sufficient description of the property attached. The attachment does not create a lien on any other property than such as is described in the return of the sheriff.

3. When the return of the sheriff on an order of attachment shows that he levied an order on certain property designated in the inventory and appraisal, and returns the same with the order, and the inventory and appraisal contain only a description of certain articles of personal property, the lien of the attachment does not attach to any other property except such as is shown in the inventory.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

This was a proceeding in attachment by the Guaranty Loan & Trust Company of Kansas City, Mo., against George M. Boyd, in the district court of Sedgwick county. Certain real estate was claimed to be taken in the attachment as the property of George M. Boyd, by the sheriff of said county; and Charles F. Harding appeared and intervened in the action, and moved the court to discharge the property from the attachment proceedings, for the reason that he was the owner of the land; that he obtained title thereto under and by virtue of a sheriff's deed; and that the Guaranty Loan & Trust Company of Kansas City, Mo., never obtained a valid lien on the property, for the reason that the attachment was not levied on the land according to law. The motion of the intervener was overruled, and he duly excepted, made case for review, and asks for a reversal of the judgment of the district court. Reversed.

Edwin White Moore and C. H. Brooks, for plaintiff in error. Holmes & Haymaker, for defendant in error.

JOHNSON, P. J. In 1889 one George M. Boyd, of Wichita, seems to have been financially embarrassed, and was indebted to a number of different parties. In April, 1889, his creditors, in order to secure the payment of their debts, commenced various suits against him by attachments, and his property was seized by the sheriff of Sedgwick county under different orders of attachment. Some of his creditors commenced suit without attachment, and obtained judgment thereon against him. On the 13th day of April, 1889, the Wichita National Bank commenced action against George M. Boyd, in the court of common pleas of Sedgwick county, in case No. 460; and on the same day an order of attachment was duly issued by the clerk of said court directed to the sheriff of said county. On the 15th day of April, the sheriff levied said attachment on the S. E.  $\frac{1}{4}$  of section 6, township 29, range 1 W., and

made return of said order of attachment on the 18th day of April, showing his doings thereunder. This was the first attachment on the lands, and said land was the property of said George M. Boyd at that time. The second attachment was issued on the 15th day of April, 1889, in the suit of John V. Farwell et al. v. Boyd, in suit No. 10,739, in the district court of Sedgwick county. This attachment was levied upon certain personal property belonging to Boyd, and also on the same tract of land as the attachment in the case of the Wichita National Bank against George M. Boyd; and judgment was rendered in said action against Boyd on the 8th day of July, 1890, for the sum of \$777 and costs of suit. On the 18th day of September, 1890, an order was made by said court sustaining said attachment, and for the sale of said property to pay said judgment. On the 12th day of June, 1889, a judgment was rendered against George M. Boyd and George L. Roice, Jr., for the sum of \$583.60, by the district court of Sedgwick county, in a case then pending in said court, wherein Harry J. Thomas was plaintiff and George M. Boyd and George L. Roice, Jr., were defendants (suit No. 5,700). On the 20th day of August, 1890, an execution was duly issued on said judgment, and placed in the hands of the sheriff of said county for service. This execution was duly levied on the S. E.  $\frac{1}{4}$  of section 6, township 29, range one, the same land taken under attachment in the case of the Wichita National Bank against George M. Boyd. This land was sold under said execution to Charles F. Harding, for \$1,200. On the 20th day of October, the sale was confirmed, and sheriff ordered to execute deed to purchaser; and sheriff's deed was executed and delivered to said Charles F. Harding on said day. On the 26th day of September, 1890, an order of sale was issued by the clerk of the district court of Sedgwick county on the judgment of John V. Farwell et al. against George M. Boyd, directing the sheriff of said county to proceed and carry out the judgment and decree in said order and to sell the attached property. The sheriff of said county, having both the execution and order of sale in his hands at the same time, advertised and sold the real estate under the execution in the case of Thomas v. Boyd et al., and made return of said order and execution, showing his doings thereunder. On the 17th day of October, 1890, an order was made by the district court of said county, directing the sheriff, out of all proceeds of said sale, to satisfy—First, the judgment and cost of Farwell et al.; and, second, apply the surplus thereof to the judgment of Harry J. Thomas.

On the 16th day of April, 1890, the Guaranty Loan & Trust Company of Kansas City, Mo., commenced an action in the district court of Sedgwick county against Boyd & Yocum and George M. Boyd (being case No. 10,740), and on said day caused an order of attachment to be issued therein, and deliv-

ered to the sheriff of said county for service. On said 16th day of April, the sheriff served the order of attachment, and seized certain property thereunder, and made the following return of his doings, indorsed on said order of attachment:

"Received the within order this 16th day of April, 1889, at 11 o'clock a. m.; and, as commanded therein, I went to the place where the property of the within-named defendant, Boyd & Yocum, described in the inventory and appraisalment hereto attached, was found, to wit; and there, at 12 o'clock m. on the 16th day of April, 1889, in the presence and hearing of Howard M. Davis and C. E. Case, two credible persons, declared that, by virtue of said order, I attached said property at the suit of the Guaranty Loan and Trust Company of Kansas City, Mo., v. George M. Boyd and L. G. Yocum, as Boyd & Yocum, and that Howard M. Davis and C. E. Case, two disinterested householders, residents of Sedgwick county, Kansas, who were by me first duly sworn to make a true and impartial inventory and appraisalment, did make an inventory and appraisalment of said property on the 16th day of April, 1889, which is hereto attached, and made a part of these returns. I also attached all the property fully described and appraised and copies filed therewith, and subject to cases Nos. 10,721 and 10,739 in the district court, and case No. 460 in the court of common pleas of Sedgwick county, Kansas. [Signed] W. W. Hays, Sheriff of Sedgwick County, Kansas.

"I also attached the bank stock of the Fourth National Bank, as described in the accompanying inventory. I left copies of this writ on all lands and properties attached."

Inventory attached to said writ is as follows:

"State of Kansas, Sedgwick County—ss.: We, Howard M. Davis and C. E. Case, being duly sworn, do hereby make oath that we will make a true inventory and appraisalment of the property attached in this action, on actual view thereof. So help us God. Howard M. Davis. C. E. Case.

"Sworn to before me, and subscribed in my presence, by the above-named appraisers, the 16th day of April, 1889. W. W. Hays, Sheriff Sedgwick County, Kansas."

"State of Kansas, Sedgwick County—ss.: In the District Court of Sedgwick County, Kansas. The Guaranty Loan and Trust Company of Kansas City, Mo., Plaintiff, vs. George M. Boyd and L. G. Yocum, as Boyd & Yocum, Defendants. We, Howard M. Davis and C. E. Case, disinterested householders, residing in Sedgwick county, state of Kansas, having been by W. W. Hays, sheriff of said county of Sedgwick, duly summoned to appraise the property of George M. Boyd in this cause, after first being sworn, do return that upon actual view of said premises, and after having been on said premises, we find and estimate the same to be of the total value and appraisalment of \$154.00 dollars, the said prop-

erty being described and separately appraised as follows, to wit: Matting, \$7.00; stove and stovepipe, \$12.00; standing desk, \$10.00; flat top desk, \$17.00; four chairs, \$8.00; safe, \$75.00; cabinet, \$5.00; letter press and stand, \$10.00; carpet, \$10.00,—subject to prior attachments in favor of Wichita National Bank. Howard M. Davis. C. E. Case.

"Dated April 16th, 1889, at 11:30. W. W. Hays, Sheriff."

On the 19th day of March, 1891, the district court made an order in the case of the Guaranty Loan & Trust Company of Kansas City v. Boyd & Yocum for the sale of the S. E.  $\frac{1}{4}$  of section 6, township 29, range 1 W., being the same lands sold by the sheriff of said county on the execution of Thomas v. Boyd; and thereupon Charles F. Harding intervened, and made a motion to set aside said order of sale, on the ground that he was the owner of said land by virtue of the sheriff's deed issued in the case of Thomas v. Boyd, and that said Guaranty Loan & Trust Company did not obtain a valid attachment thereon. This motion was overruled by the court, and Charles F. Harding duly excepted, made case, and brings case here on petition in error, and asks this court for a reversal of said judgment overruling said motion.

The real and only question involved in this case is whether the Guaranty Loan & Trust Company of Kansas City, Mo., ever acquired a valid lien on the lands in controversy by reason of the attachment proceedings commenced against Boyd & Yocum. This must be determined from the proceedings as shown by the record. Proceedings in attachment for the collection of a debt are a rank and stringent remedy given by statute under certain conditions; and in order to seize and hold the property of the debtor, and acquire a valid lien thereon before judgment, the statute must be strictly followed in obtaining the order, and in the service of the same. There is no question raised in this case as to the sufficiency of the proceedings in procuring the issuance of the order of attachment; but it is urged by the plaintiff in error that the order was never served on the land in question, or on any other land. In order to determine whether the proceedings had in this case constitute a valid lien upon the lands of Boyd, it is necessary to examine the statutes in relation to the service of orders of attachment. Section 197 of the Code of Civil Procedure reads: "The order of attachment shall be executed by the sheriff, without delay. He shall go to the place where the defendant's property may be found, and declare that, by virtue of said order, he attaches said property at the suit of the plaintiff; and the officer, with two householders, who shall be first sworn or affirmed by the officer, shall make a true inventory and appraisalment of all property attached, which shall be signed by the officer and householders, and returned with the order." Section 198: "When the

property attached is real property the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order. \* \* \*

Section 203: "Different attachments of the same property may be made by the same officer, and one inventory and appraisalment shall be sufficient; and it shall not be necessary to return the same with more than one order." Section 204: "Where property is under attachment it shall be attached under separate orders, as follows: First. If it be real property, it shall be attached in the same manner prescribed in section 198. Second. If it be personal property, it shall be attached as in the hands of the officer, and subject to any previous attachment. \* \* \*

Section 205: "The officer shall return upon every order of attachment, what he has done under it. The return must show the property attached, and the time it was attached; when the garnishees are served, their names, and the time each was served, must be stated. The officer shall also return with the order all undertakings given under it." The return of the sheriff is evidence of the manner in which he has executed the writ; and, if the return be incorrect in any particular, he may, on application to the court, be allowed to amend his answer so as to show the truth of the manner of executing the same. There was no effort on the part of either party to this proceeding to ask for an amendment of the return. All parties seem to be satisfied with the return, and with the statements set out in the return. The statute provides how sheriffs shall proceed under the attachment; that he shall go to the place where the defendant's property is found, and declare that, by virtue of the order, he attaches the property at the suit of the plaintiff; that he shall, with two householders, make an inventory and appraisalment of the attached property; that different attachments of the same property may be made by the same officer, and one inventory and appraisalment shall be sufficient, and it shall not be necessary to return the same with more than one order. This provision seems to relate to the sheriff or other officers who hold several orders of attachment against the same party at the same time, and is to the effect that, when he returns the writ, it shall not be necessary to return the inventory and appraisalment in more than one case, simply referring in his returns to the other writs,—that it has been inventoried and appraised in certain other cases; but where the officer has writs of attachment issued out of different courts, and which have come into his hands at different times, he should make an inventory and appraisalment and return with one order of attachment to each of the different courts. When property is under attachment by previous attachments, the officer must proceed under the subsequent orders to attach real property in all respects in the manner prescribed in

section 198. The return of the officer upon every order of attachment must show what he has done under it. The return must show the property attached, and the time when attached. When garnishees are served, their names and the time each was served must be stated. This being the requirement of the law, does the return of the officer in the case of the Guaranty Loan & Trust Company of Kansas City, Mo., show what property he has taken under attachment? The return itself must show what property is attached, and it will not do to simply refer to some other court or some other case for a description of the property attached. Section 205 is imperative that the return must show the property attached; but, if we take the return of the sheriff to the order of attachment in the Guaranty Loan & Trust Company case, we find his return says, after the formal part, that "Howard M. Davis and C. E. Case, two disinterested householders, residents of Sedgwick county, Kansas, who were by me first duly sworn to make a true and impartial inventory and appraisalment, did make an inventory and appraisalment of said property on the 16th day of April, 1889, which is hereto attached, and made a part of these returns. I also attached all the property fully described and appraised, and copies filed therewith, and subject to cases Nos. 10,721 and 10,739 in the district court, and case No. 460 in the court of common pleas of Sedgwick county, Kansas. [Signed] W. W. Hays, Sheriff of Sedgwick County." The inventory and appraisalment attached to a return with the order of attachment describes no real property whatever. It is exclusively personal property that is described in the inventory. This record nowhere discloses anything about what property was attached in cases Nos. 10,721 or 460 in the court of common pleas of Sedgwick county, nor is there any inventory and appraisalment shown in case 10,739. The reference to the cases in the district court and the court of common pleas is so indefinite and uncertain that the attachment would be void for the reason that it does not describe any property attached. We do not think that there was such a compliance with the law by the sheriff in his attempt to execute the order of attachment in the case of the Guaranty Loan & Trust Company against Boyd & Yocum as would constitute a valid lien upon these lands.

The Guaranty Loan & Trust Company of Kansas City, Mo., not having obtained a valid lien on said lands, can the plaintiff in error, not being a party to the action of the Guaranty Loan & Trust Company of Kansas City, Mo., against Boyd & Yocum, come in and have the order of attachment set aside, and the lands declared not subject to any lien under the attachment proceedings? Section 45a of the Code of Civil Procedure provides: "Any person claiming property, money, effects or credits attached, may in-

terplead in the cause, verifying the same by affidavit made by himself, agent or attorney, and issues may be made upon such interpleader and shall be tried as like issues between plaintiff and defendant." The parties treated the interplea of Charles F. Harding as sufficient in all respects to try the question of ownership to the land and the validity of the attachment lien thereon; and, there being no objection to the form of the plea, it is sufficient for the purpose of authorizing the plaintiff in error to come into this case to try the question of ownership to the land and the validity of the attachment lien thereon; and the matter seems to have been tried on the records of the court in the several attachments and judgments, as they are all set out in the case made, and it purports to contain all the evidence had on the trial of the interplea.

We think, the plaintiff in error being the owner of the land under sheriff's deed, that he may move the court to discharge the attachment proceedings against the property owned by him. *Long v. Murphy*, 27 Kan. 375. The motion of the plaintiff in error should have been sustained. The judgment of the district court is reversed, and case remanded, with direction to sustain the motion of the plaintiff in error, and set aside the order of attachment, and the order for sale of the real estate described in plaintiff's motion. All the judges concurring.

# **FIRST NAT. BANK OF HUTCHINSON v. McINTURFF.**

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

## **NATIONAL BANKS—USURY—ACTION FOR PENALTY.**

1. Sections 5197 and 5198 of the Revised Statutes of the United States prohibit any national banking association from charging a greater rate of interest than is allowed by the laws of the state in which the bank is located, and provide that the taking, receiving, reserving, or charging a greater rate shall be deemed a forfeiture of the entire interest. Under said sections, a note containing usurious interest bears no interest, and the bank is entitled to the principal debt only. A renewal note containing such usurious interest is also usurious. A payment upon any such note is a payment upon the principal debt, and not upon the interest, which is forfeited. A cause of action for usurious interest does not arise, nor the statute of limitations begin to run, under such sections, until the payment of the principal debt.

2. Under said sections, if such usurious interest has been paid, the person so paying the same may recover back twice the total amount of interest paid.

(Syllabus by the Court.)

Error from district court, Reno county; L. Honk, Judge.

Action by A. McInturff against the First National Bank of Hutchinson. From a judgment for plaintiff, defendant brings error. Modified and affirmed.

W. M. Whitelaw, for plaintiff in error.  
D. W. Dunnett, for defendant in error.

COLE, J. The defendant in error brought his action in the district court of Reno county to recover the penalty provided by sections 5197 and 5198 of the Revised Statutes of the United States for the charging and receiving of certain usurious interest upon the part of plaintiff in error. From a judgment in favor of the defendant in error the bank brings the case here for review. The facts in this case are practically agreed upon, and the law, in our opinion, is fully established in this state. The petition of the plaintiff below as amended, and upon which the case was tried, alleged a number of separate causes of action, but it is admitted by counsel, and the record discloses, that these various causes of action arise upon three separate and distinct series of notes. That which we may denominate the first series consists of an original note and several renewals, upon which certain payments have been made, but not a sufficient amount to pay the principal sum of either of the said notes. The payments which were made were in the nature of usurious interest, and the trial court allowed the plaintiff below to recover the penalty prescribed by the statute upon this series of notes. It is contended by the defendant in error that the record discloses that the bank treated each of the renewal notes as a payment of the note formerly given, and that, therefore, he was entitled to recover upon each of said notes so treated by the bank as having been paid. This position is not well taken. Each of the notes given after the maturity of the original note of this series was simply a renewal, and was so treated by all parties. Any payment which may have been made upon either the original or either of the renewals of this series would, in an action brought upon said note, be credited as payment upon the principal sum, all interest being forfeited in the event that it was shown that the transaction was tainted with usury. But a cause of action would not arise for the penalty prescribed by statute until a sufficient amount had been paid to cover the principal sum represented by said series of notes. *Bank v. Turner* (Kan. App.) 42 Pac. 936.

The other question involved in this case is the construction of that portion of the United States statute regarding the amount of penalty to be recovered where the principal sum and usurious interest had been paid, and the decision of this question is involved in the determination of the rights of the parties to this action under what may be termed the second and third series set forth in the petition of plaintiff below. It is contended upon the part of the plaintiff in error that the penalty prescribed by statute is double the amount of the excess paid over and above the amount permitted by the statute, while the defendant in error contends that a proper construction of the statute gives as a penalty double the total

amount of interest paid. It is true that the courts of different states, in construing these sections of the United States statutes, have adopted different rules, some taking the position occupied in this case by the plaintiff in error; but our opinion is that the weight of authority is in harmony with the decisions of the supreme court of this state upon this question, and with the views announced by this court in *Bank v. Turner*, supra. Both the doctrine enunciated in this last case and the opinion of the court as prepared by Dennison, J., were carefully considered by this court, and we have also given the matter further study and consideration since the submission of this case, and can see no good reason for changing the views therein expressed. In *Fraker v. Cullum*, 24 Kan. 679, Brewer, J., in delivering the opinion of the court, upon the construction of this same statute, says: "The section creates a forfeiture, and, in case the party wronged has actually parted with his money, allows him to recover double damages. Usury, says the statute, forfeits all interest. That is the penalty for the forbidden act. It is in the nature of punishment for an infraction of the law. If no interest has been paid, but only contracted to be paid, that is the only effect of the statute. It thus far nullifies the contract, and forbids the recovery of such interest; but, if it has been paid, the party may recover it back, and as much more. The forfeiture is not avoided by the fact that the contract has been performed, but, as though performance had increased the wrong, the damages are doubled." In *Bank v. Grimes*, 49 Kan. 219, 30 Pac. 474, Johnston, J., in delivering the opinion of the court upon a construction of this same statute, uses the following language: "Under this provision, a national bank which knowingly stipulates for usury upon a note to be paid in the future forfeits the entire interest, and in an action upon the same can only recover the face of the note, less the interest charged or included therein. If the interest is charged and collected in advance, the person paying it, or his legal representative, may, in an action in the nature of debt, recover twice the amount of interest paid." And these decisions, and the authorities therein cited, were the basis of the opinion of this court in *Bank v. Turner*, supra. We believe the doctrine therein announced should be here reaffirmed. It follows from the views herein expressed that the trial court erred in permitting a recovery upon the first series of notes. In this case, however, we are of the opinion that it would be useless to reverse the case for that reason, and compel the parties to have a new trial; a modification being sufficient. This cause will be remanded to the district court of Reno county, with instructions to deduct from the judgment rendered in said cause the amount which plaintiff below was per-

mitted to recover upon the first series of notes. In all other respects the judgment will be affirmed. The costs of this court will be equally divided between the parties to this action. All the justices concurring.

#### JONES, Sheriff, et al. v. MARSHALL

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

#### SUMMONS—VALIDITY—RETURN OF SHERIFF—CONCLUSIVENESS.

1. Where the paper purporting to be a copy of a summons, left at the usual place of residence of the defendant by the sheriff, fails to state the name of the plaintiff; the answer day; is not dated; does not have the name of the clerk signed thereto; and has no indication of a seal thereon,—*held*, that the purported copy is not a sufficient notice to the defendant to give the court jurisdiction over his person, and a judgment rendered against him upon such notice only is void.

2. A sheriff's return of original process may be questioned, and the truth shown, as to the facts upon which jurisdiction depends.

(Syllabus by the Court.)

Error from district court, Reno county; L. Houk, Judge.

Action by W. R. Marshall against John W. Jones, sheriff, and the First National Bank of Hutchinson. Judgment for plaintiff. Defendants bring error. Affirmed.

W. M. Whitelaw, for plaintiffs in error. Davidson & Williams, for defendant in error.

DENNISON, J. This is an action brought in the district court of Reno county, Kan., by W. R. Marshall, as plaintiff, against John W. Jones, sheriff, and the First National Bank of Hutchinson, Kan., as defendants, in which he asks to have the defendants enjoined from further proceeding with the attempted enforcement of a judgment rendered against him by default in favor of said bank, on its cross petition filed in an action begun in said court on July 6, 1889, in which Virgil Bull was plaintiff, and Amos H. Robinson, Elvira H. Robinson, John W. McGuire, Velasco P. Caffrey, J. H. Lawson, W. R. Marshall, P. B. Price, First National Bank of Hutchinson, Hutchinson Union Stock-Yards Company, Martha Musick, Hutchinson National Bank, and J. H. Harris were defendants. The summons in that case, as returned by the sheriff, shows that service was had upon W. R. Marshall by leaving a copy thereof, with the indorsements thereon duly certified, at his usual place of residence.

The paper actually left contained only the following words: "State of Kansas, Reno County—ss. The State of Kansas, to the Sheriff of Reno County, Greeting: You are hereby commanded to notify Amos H. Robinson, Elvira H. Robinson, John W. McGuire, Velasco P. Caffrey, J. H. Lawson, W. R. Marshall, P. B. Price, First National Bank of Hutchinson, Hutchinson Union



Stock-Yards Company, Martha Musick, Hutchinson National Bank, and J. H. Harris that he has been sued in the district court within and for the county of Reno, in the Ninth judicial district of the state of Kansas, and must answer the petition filed by the plaintiff on or before the — day of —, A. D. 189—, or the said petition will be taken as true, and judgment rendered accordingly. And return this writ on the — day of —, A. D. 189—. In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at my office in Hutchinson, in said county, this — day of —, A. D. 189—. —, Clerk of District Court of Reno Co."

Upon the back thereof also appear the following certificates or indorsements:

"Virgil Bull v. Amos H. Robinson et al. If the defendant fail to answer, the plaintiff will take judgment for \$1,000.00, less \$280.00, with interest thereon at the rate of 12 per cent. per annum from the 2d day of June, A. D. 1884, and costs of suit foreclosure trust deed. Jno. B. Vincent, Clerk.

"Issued July 6, 1889. Returnable July 16, 1889. Filed — 189—. Jno. B. Vincent, Clerk.

"State of Kansas, Reno County—ss. I hereby certify the within to be a true copy of the original summons, with the indorsement thereon. Dan. E. Miller, Sheriff."

There is no controversy as to the facts in this case. All agree that the only paper served is the one above set out. The deputy sheriff who served the paper testifies that what he served he supposed was a copy of the original summons, and that the supposed copy is the only paper he did serve. By the undisputed evidence in the case, the judgment is unjust. It appears in evidence that Marshall et al. became sureties for some money owing by one V. P. Caffrey, and were compelled to, and did, pay the same. That the said Caffrey, to secure them, made and placed upon record the deed, by which they are charged with assuming and agreeing to pay the mortgage debt, without Marshall ever having seen it or knowing of its contents or consenting thereto, and that he never assumed, agreed to pay, or contracted the debt for which judgment was rendered against him. The court granted its temporary injunction, as prayed, and on the final hearing thereof made the same perpetual. The defendants bring the case here for review.

There are but two questions raised in the briefs, and a decision of them is all that is required to determine this case. The questions are: First, was the paper left at the residence of Marshall a sufficient copy of the summons to give the court jurisdiction of his person? Second, if not, can the sheriff's return be impeached in a suit for an injunction to perpetually restrain the collection of the judgment rendered without such jurisdiction?

We will first proceed to decide the sufficiency of the copy of the summons, and answer the first question. The determination of this point involves a construction of paragraphs 4138 and 4143 of the General Statutes of 1889, which read as follows:

"Par. 4138. The summons shall be issued by the clerk upon a written praecipe filed by the plaintiff; shall be under the seal of the court from which the same shall issue, shall be signed by the clerk, and shall be dated the day it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants, named therein, that he or they have been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true, and judgment rendered accordingly; and where the action is on contract for the recovery of money only, there shall be indorsed on the writ the amount, to be furnished in the praecipe, for which, with interest, judgment will be taken, if the defendant fail to answer. If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs."

"Par. 4143. The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence at any time before the return day."

Is the copy to be served by the sheriff to be construed with the same strictness as the original summons? The original summons is a writ commanding the sheriff to do certain things. It commands him to notify the defendants named therein that they have been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true, and judgment rendered accordingly. He is to notify them, by delivering a copy of the summons to the defendant, or by leaving one at his usual place of residence, at any time before the return day. We apprehend that the sheriff must obey this command, before the court can have jurisdiction of the defendant. In this case, he must have notified Marshall that he had been sued by Virgil Bull, and that the answer day was the 5th day of August, etc. This he failed to do. It may be that the sheriff could leave out some of the things which the summons must contain to be a legal command to him, and yet the copy served give the court jurisdiction over the person of the defendant, and the judgment be only voidable; but surely he cannot leave out of the copy the vital things of which he is commanded to give the defendant notice, without rendering the judgment void. We shall presume the sheriff had a legal summons (although the copy contained in the record as being a copy of the one introduced in evidence by the plaintiff in error contains no seal or copy thereof, or anything indicating one). The fault, then, lies wholly with the sheriff; but does that

help the matter? Suppose he had notified some one else, or had left the copy at the usual place of residence of some other person; or suppose he had not served it at all; or suppose he had got the copy mixed with his copies in some other suit, and had served Marshall with a copy of a summons in the case of John Doe v. Richard Roe,—none of these things would be sufficient notice to give the court jurisdiction over the person of Marshall. We therefore must hold that the purported copy was not a sufficient notice to Marshall to give the court jurisdiction over his person. It therefore follows that the judgment rendered in this case against Marshall is void. "A judgment rendered against any person where the court has no jurisdiction of such person is void." *Railway Co. v. Streeter*, 8 Kan. 133; *Chambers v. Bridge Manufactory*, 16 Kan. 270; *Litowich v. Litowich*, 19 Kan. 451.

We will now take up the second question, to wit, can the sheriff's return be impeached in an action for an injunction to perpetually restrain the enforcement of the judgment rendered without a sufficient notice? Whether the copy served by the sheriff is or is not a true copy is a question of fact. It either is or is not a true copy. The return of the sheriff upon a summons in which he states that it is a true copy is a very high class of evidence. The plaintiff in error contends that it is evidence of such a high character that it cannot be disputed. This used to be the rule, when the service of the writ to obtain jurisdiction of the person was the first thing done in the commencement of an action. Since that time we have changed the practice, and the petition is the first step to be taken in the commencement of an action, and the reason for the old rule is gone. Then, jurisdiction of the person was first obtained, and the claim set up afterwards. Now the claim is first set up, and jurisdiction of the person obtained afterwards. In Kansas, our supreme court has permitted the return to be questioned, and the truth to be established; but in each case that has been before it the fact certified to by the sheriff was not a fact necessarily within his personal knowledge, but might have been ascertained by him upon inquiry. Such is the age of a minor; the usual place of residence of the defendant; the proper officer of a corporation or its place of business. *Bond v. Wilson*, 8 Kan. 228; *Starkweather v. Morgan*, 15 Kan. 274; *Chambers v. Bridge Manufactory*, 16 Kan. 270, and cases therein cited. A summons being an original process by which the court obtains jurisdiction of the person of the defendant, his rights thereunder ought to be jealously guarded. A person's rights should not be adjudicated or his property taken from him without his knowledge, unless he has been negligent in protecting his rights. It is clear that a court should have jurisdiction of the person of the defendant before it attempts to adjudicate his rights or take his property

from him. If the court has attempted to adjudicate the rights of a person, it ought to be permitted to inquire whether it actually had such jurisdiction. The authorities are not uniform upon this question, but the greater weight of authority in states having a procedure similar to ours, and the better reasoning, seem to uphold the right of the court to let in the truth. The case at bar is a strong one to uphold the justness of permitting the truth to be shown. In this case, the plaintiff's return says a true copy was served. The paper actually served was practically no copy at all. The deputy sheriff who served it says he supposed he served a true copy, but the supposed copy is all he did serve. Shall the sheriff's return in this case be such a high class of evidence as to establish the truth of its recitals? If so, then it is sufficient to establish a falsehood for truth. This should not be allowed upon an original process. We think the proper rule for Kansas may be laid down as follows: A sheriff's return of original process may be questioned, and the truth shown as to the facts upon which jurisdiction depends. This brings this case clearly within the rule laid down in *Chambers v. Bridge Manufactory*, 16 Kan. 270. It is there held that "an action may be maintained to perpetually enjoin the enforcement of a void judgment, where such judgment appears to be valid and regular upon its face"; and this is especially true where the judgment is also unjust. The judgment of the district court is affirmed. All the judges concurring.

#### CITY OF WICHITA v. COGGSHALL.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

TRIAL—DEMURRER TO EVIDENCE—INSTRUCTIONS—MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—CONTRIBUTORY NEGLIGENCE—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS.

1. Where a verdict is returned into court on the 12th day of October, 1890, and motion for new trial is filed on the 14th of October and overruled the 18th of October, and the final judgment is rendered on the verdict on the same day of overruling the motion for new trial, the party has one year after the 18th day of October, 1890, to file his petition in error and commence his proceedings for the reversal or vacation of such judgment.

2. Where there is some evidence tending to prove each fact necessary to sustain the plaintiff's right to recover, a demurrer to evidence should be overruled and the facts submitted to the jury for their findings, under proper instructions from the court.

3. Where the court in its general instructions to the jury charges them on certain propositions of law, and the charge contains the law correctly, it is not error for the court to refuse to charge them on the same proposition in the language set out in the written request of the party.

4. A person who has notice of a defective condition of a sidewalk in a city is not necessarily negligent in using the same, if she does so in a careful and prudent manner.

5. Where a person has been educated as a physician and surgeon, he may give his opinion on questions pertaining to his profession, and may testify from his personal examination; and when

he does so his opinion must be derived from his examination, and not dependent upon the statements of others. If the witness does not speak from his personal examination, his opinions must be based on hypothetical questions propounded to him; the hypothesis must be based on the truth of all the evidence given in the case, and must be so framed that the witness can answer it intelligently; and the answer of the witness must be based on the hypothesis stated, and not from a consideration of what might or might not happen under certain conditions; it should be an opinion of the witness predicated on the hypothesis containing the facts.

6. Where a witness, in his answer to a hypothetical question, makes answer that is not responsive to the question, and states facts that are incompetent as evidence, the court should strike the answer out, and direct the jury not to consider it as any part of the evidence in the case.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county; Jacob Balderson, Judge.

Action by Jane Coggeshall against the city of Wichita. From a judgment for plaintiff, defendant brings error. Reversed.

This action was commenced in the court of common pleas of Sedgwick county on the 29th day of April, 1890, by Jane Coggeshall against the city of Wichita, to recover the sum of \$5,000 as damages which she claimed to have received by reason of the negligence of the city in permitting and suffering one of its sidewalks, within the municipal corporation, to become and remain out of repair, defective, and dangerous, by reason of which she was injured. That at the time of her injury she was in the exercise of due care and caution. The city, by way of defense to the action of the plaintiff below, in its answer denies generally all the allegations made by the plaintiff below, and alleges that, if she was injured as claimed, the same was due to her own carelessness and negligence, which contributed directly thereto, and the city was without fault. The case was tried by the court and jury. On the trial, there were various objections taken to evidence and rulings of the court in admission of evidence, and in the refusal of the court to admit certain other evidence, and in the refusal of the court to give instructions requested by the defendant below. The trial resulted in a verdict and judgment for the plaintiff below in the sum of \$500. The city filed motion for new trial, which was overruled, exceptions taken, case made and filed in the supreme court, and afterwards duly certified to this court for its decision.

Adams & Adams, for plaintiff in error. Noah Allen and Sankey & Campbell, for defendant in error.

JOHNSON, P. J. (after stating the facts). This action was commenced in the court of common pleas of Sedgwick county on the 29th day of April, 1890, by the defendant in error, against the city of Wichita, to recover damages alleged to have been received by reason of a defective and dangerous sidewalk in said city, which the city had negligently permitted to be and remain in a defective

and dangerous condition for a long time, with full knowledge of its condition; that while plaintiff below was traveling over said sidewalk, in company with other parties, going to church, and while in the exercise of due care, and without any fault on her part, she had her foot caught in a hole in the sidewalk, and was thereby thrown down and injured. After the issues had been joined, the case was tried by the court and jury, and resulted in a verdict and judgment in favor of the plaintiff below. Defendant below excepted, made case, and filed the same in the supreme court, which was duly certified to this court for review.

The first matter for the consideration of this court arises on the motion of the defendant in error to dismiss the petition in error for the reason that the petition in error was not filed in the supreme court within the time allowed by law. The record brought to this court shows that the jury was impaneled and the trial commenced on the 10th day of October, 1890, and jury returned their verdict into court on the 12th day of October; the plaintiff in error filed its motion for a new trial on the 14th day of October; the motion was overruled on the 18th day of October; and that final judgment was rendered on the verdict of the jury October 18, 1890, and defendant below given 60 days to make and serve case for review; afterwards, on the 5th day of December, 1890, time was further extended to make and serve case; that the case was made and served within the time given by the court, and was settled and signed by the judge who tried the case on the 17th day of April, 1891, and the petition in error, with the case made attached, was filed in the office of the clerk of the supreme court on the 16th day of October, 1891. Section 556 of the Code of Civil Procedure fixes the limit of time in which proceedings in error for the reversing or vacating of a judgment or final order can be commenced. This section limits the time to one year from the rendition of the judgment or making the final order. The judgment and final order in this case was not made until the 18th day of October, 1890, and the petition in error was filed in the supreme court within one year after the overruling of the motion for a new trial and the rendition of final judgment. The motion to dismiss is not well taken, and must be overruled.

The first error complained of by counsel for plaintiff in error is that the court erred in overruling the demurrer of the plaintiff in error to the evidence of the defendant in error. The plaintiff introduced some evidence tending to show that at the point where she was injured there were slight defects in the sidewalk; that it was a board walk, an old one; that the stringers were laid on the ground, and they had been there for such length of time that they had partially decayed and settled, until the boards forming the top of the walk, at one

end, lay on the dirt, and at one place there was a depression or hole in one of the boards; and while plaintiff below was on her way to church, in company with others, in passing over this part of the walk, in the dark, she caught her right foot in the hole in the decayed board, and was precipitated to the walk, falling on her shoulder and back; that she was unable to get up, and had to be assisted; that she continued on, with her husband and Dr. Adams and her children, to the Methodist church, and she remained in the church until near the close of the services, and then she and the other parties who accompanied her to church returned home, and after her return home Dr. Adams made some kind of preparation, and applied it to the injured portions of her person; that she suffered pain while in the church and on the way home, and has continued to suffer pain, more or less, ever since; that she was confined to her bed for a long time, and under the care of a doctor, and was unable to do her usual household work, and has never since been able to do any kind of hard labor; that before her injury she was a strong, healthy woman for one of her age (being 64 years old); and that the sidewalk had been in a defective condition for a long time prior to the time that she was injured, and that the walk was in the city limits, and on one of the public streets of the city. This is, briefly, what the evidence tends to prove. There was some evidence on each material fact tending to prove the claim of the defendant in error for damages, and it was the duty of the trial judge to submit the facts to the jury for their determination, as to the liability of the city, under proper instructions. *Steelsmith v. Railway Co.*, 1 Kan. App. 10, 40 Pac. 992; *Insurance Co. v. Hall*, 1 Kan. App. 18, 41 Pac. 65; *Rouse v. Youard*, 1 Kan. App. 270, 41 Pac. 428; *Railway Co. v. O'Melia*, 1 Kan. App. 374, 41 Pac. 437; *Richards v. Griffith*, 1 Kan. App. 518, 41 Pac. 196. It is claimed by plaintiff in error that the court erred in refusing to give the jury the following instructions: "That the law makes it the duty of the defendant city to keep its streets and thoroughfares in a condition reasonably safe for the traveling public; but the law does not require that its sidewalks and thoroughfares shall be absolutely safe, or in a condition that precludes the possibility of accident. This would be wholly impracticable. There is absolute safety nowhere, and cities cannot be held to insure every traveler from accident. They are bound to exercise only ordinary care, considering the nature and circumstances of the case. In determining whether the city used ordinary care, you may take into consideration the number of miles of wooden sidewalk in the defendant city. If you find the sidewalk where the defendant received (if at all) her alleged

injury was in a condition, considering the nature and circumstances of the case, reasonably safe for the average traveler, then you must return a verdict for the defendant." This instruction does not contain the law applicable to this case. That portion of this instruction relating to the city keeping its streets and thoroughfares in reasonably safe condition for public travel, and that the city is only bound to exercise ordinary care in caring for its streets and sidewalks, is correct; but the number of miles of wooden sidewalk in the city is not to enter into the consideration of the jury, in determining the question of whether the walk where the injury is claimed to have been received was safe or not. The only question for the jury to determine was whether the walk was defective and dangerous at the point where the accident happened, and whether the city had notice of its dangerous condition, or whether it had been in such defective and dangerous condition for such length of time that the city should be presumed to have had notice of its condition. That portion of this instruction that contains the law correctly is substantially given to the jury in the general charge of the court, and it was not error for the court to refuse to give the instruction in the form as requested. The second instruction asked by the plaintiff in error does not contain the law on the question of the rights and duties of the traveler on the public streets and sidewalks in the city. In the case of *Falls Tp. of Chase County v. Stewart* (decided by this court on the 7th day of December last) 2 Kan. App. —, 42 Pac. 926, Stewart was injured while driving a wagon loaded with hay over a certain highway and culvert in Falls township, in which the road and culvert were defective and dangerous; and counsel for the township requested the court to instruct the jury, "If the jury believe from the evidence that the plaintiff was warned or had knowledge of said highway or culvert being unsafe, and, with such knowledge, and with the defects in said highway or culvert, if any existed, plainly to be seen by any person looking for the same, ventured upon said highway or culvert and sustained injury thereby, he cannot recover, even if you should find said highway and culvert was unsafe." The district court refused to give this instruction to the jury, and this court, commenting upon the case, says: "We do not think the court erred in refusing to give these instructions as requested. If they contain the correct principle of law, it would make every person traveling upon a highway or bridge that is unsafe guilty of negligence. Such is not the law. The supreme court of this state, in several well-considered cases, lays down a different rule. In the case of *Corlett v. City of Leavenworth*, 27 Kan. 673, the court says: 'The fact that a person attempts to travel on a street or sidewalk after he has notice

that it is unsafe or out of repair is not necessarily negligence.' In the case of *Langan v. City of Atchison*, 35 Kan. 318, 11 Pac. 38, the court says: "The mere fact a person knows the sidewalk is defective will not prevent him from using it, and, ordinarily, a person is not obliged to forsake the sidewalk and travel in the street, or take another way, because he has knowledge of its defect. \* \* \* Of course, a person having knowledge that the sidewalk is defective or somewhat dangerous, he must use ordinary care and prudence to avoid danger.' In the case of *Maultby v. City of Leavenworth*, 28 Kan. 746, the court says: 'Neither is a party, although he is aware of the condition of the sidewalk, necessarily obliged to go around the block or on another street.' In the case of *City of Emporia v. Schmidling*, 33 Kan. 487, 6 Pac. 893, the court says: 'However, there is a more serious objection to the instruction. It expresses the idea that if the plaintiff undertakes to pass over the walk, with the knowledge that it was defective or dangerous, then that of itself would constitute negligence which would defeat recovery. This is not the law. Persons are not to be entirely debarred from the use of the streets because they are out of repair. A person is not to be deprived of the right to use a public highway because he knows that it is in a dangerous condition or unsafe. It requires of him the exercise of a higher degree of care and prudence while using it,—such care and caution as a reasonably prudent person would exercise under like circumstances. It is a question of fact for the jury to say, under all the evidence, whether his acts were those of a reasonably prudent person, and if the injury is without his own negligence. While he is in the exercise of an undoubted right, he is entitled to recover for such injuries.' " Prudence should dictate to a reasonable person that it is safer to travel on a street or sidewalk where it is known to be safe and free from any defect, but he is not bound to select some other particular street or walk because he may have notice that it is defective; but such notice does require of him to exercise greater care and caution while using it than it would if he had no notice of the defects. We think the following instructions lay down the correct rule in relation to the rights and duties of travelers on the streets and walks: "(3) You are further instructed that every person passing over the sidewalk of a city is required to exercise such care and diligence in doing so as persons of ordinary care and diligence would use under the same or similar circumstances; but the fact that a person attempts to travel on a street or sidewalk after having notice of its defective condition is not necessarily negligence, and in determining whether the plaintiff used such care and diligence at the time she received the in-

juries complained of you will consider the nature of the alleged defects, whether unsafe or not, the time of day, the light or darkness at the time or place the injury was received, the knowledge of the plaintiff with regard to its condition at and previous to the alleged injury, and any other fact or circumstance disclosed by the evidence which would tend to show such care or want of it." "(11) You are further instructed that the plaintiff was bound to use ordinary care and diligence in the use of the sidewalk, and in this connection you may take into consideration the knowledge of the plaintiff, or her opportunity for knowledge, in regard to the condition of the sidewalk where the alleged injury was received. If you find the sidewalk where the accident occurred was in a defective condition, so as not to be ordinarily safe for the average traveler, and that this dangerous condition was known to the plaintiff, and that the plaintiff voluntarily and unnecessarily chose to use such sidewalk, then it must be assumed that plaintiff did not exercise ordinary prudence, entered the peril at her own risk, and cannot recover in this action."

It is urged by counsel for plaintiff in error that the court erred in the admission of improper testimony, over the objection of the defendant below, and that the court erred in overruling the motion of the defendant below to strike out and take from the consideration of the jury incompetent testimony that was not responsive to the questions propounded. On the trial of the case, the plaintiff below called, and had sworn and examined as a witness on her behalf, one Dr. J. M. Minick, and, after showing his profession and his competency as an expert, counsel for plaintiff below propounded to him the following hypothetical question: "Q. Doctor, assuming it to be a fact, on or about the 8th day of December, 1889, the plaintiff, Mrs. Coggsball, while traveling along the sidewalk on Fourth avenue, in this city, stepped into a hole in said sidewalk with the right foot, as a result of which she fell back on said sidewalk, striking upon the same with her hip and elbow, or arm, her right foot remaining in said hole, and thereby twisted or injured her back and spine, from the effects of which she was confined to her bed for several months, and was unable to turn herself in bed, on account of the pain and suffering in her back and spine, for a great portion of the time, and during all of which time, after said accident and up to the present time, she has suffered severe pains in her back and spine, and after having gotten out of her bed was compelled to walk for a long time with a crutch and cane, and now suffers severe pain in her back when she dresses, or in doing any heavy lifting, or while bending over or stooping down; and that the plaintiff's foot was caught in the hole in said sidewalk so

as to twist, fracture, or sprain her right ankle by the fall; and that the plaintiff was 64 years of age at the time of said accident, had never suffered or been troubled with any weakness or pains in her back or spine prior to receiving said fall, and that her pain and suffering in her back and spine are so severe now that the plaintiff is unable to sleep or rest for the greater portion of the night,—assuming all these propositions to be true, state your opinion as to whether said injuries to the plaintiff's spine or back are permanent or otherwise." This question was objected to as incompetent and assuming facts not proven or in evidence, nor based on facts in evidence, or tending to prove facts, and being too indefinite. This question was not consistent with the facts proven, and it assumed more than was shown by the evidence, and the objection ought to have been sustained. A hypothetical question propounded to a scientific witness should contain substantially the facts as shown by the evidence on the trial, and should be clear and definite, so that the witness could give a concise and definite answer thereto. The question asked in this case was so indefinite, and was contrary to the facts proven, that it could not be answered intelligently. The witness made the following desperate effort to answer this question: "A. Well, yes; I presume it would be permanent under such circumstances as that. As a matter of fact, of course that depends on the injuries in the back. Medical men, surgeons, consider sprains one of the most serious accidents that can possibly befall a person, where they are severe. Be they so slight, impairing, maybe, the fiber of the ligament to that extent, and that even in spinal column the cartilage between the vertebrae—that is, between the joints of the backbone—may be dislocated, the muscles drawn, and ligaments torn, causing extravasation of blood, and all of these things combined make it very serious. Of course, under the presumption that is stated, there might have been some injury to the bone even, and there might have been a tearing of the ligaments, and when the ligament is torn it also tears the small nerves and blood vessels, as a general thing. Those small nerves may become, in the cicatrization that occurs, where it holds, they may become held in the cicatrix, according to Ashely and Grove. And I would presume that if the case was injured as stated, that there would be some symptoms and observable signs, whereby we could distinguish something in regard to the injury." The defendant below moved to strike out all of the explanatory remarks of the witness as not competent and not responsive to the question, which motion was overruled by the court. We think the explanatory remarks were entirely unnecessary and highly improper. The witness, in answer to this question, tells the jury what might have been the effect of the fall,

and what injury might have been done, and discusses the matter learnedly, as though he was delivering a lecture on injuries of the spine and shoulders to a class of medical students, as to what injuries do sometimes happen by reason of serious and violent falls,—that they sometimes tear and rupture the muscles and bones of the spine and shoulder. Where an expert does not speak from personal examination, the question must be put hypothetically, based either upon the hypothesis of the truth or of the evidence given in the case, or upon an hypothesis specially framed of certain facts within the limits of the evidence. The question should be so framed that it is capable of a definite answer, and the answer should be clear enough that the jury could know what the opinion of the witness really was; but in this case we are unable to discover, really, what Dr. Minick's opinion was or is. He says: "Well yes; I presume it would be permanent under such circumstances." Almost any intelligent person could presume or guess what the result might be, or could give as clear an opinion as Dr. Minick did. This explanation was highly improper, and was prejudicial error. There are other objections and exceptions to the introduction of evidence, but the same errors may not occur on a retrial of this case, and it is unnecessary for us to discuss them here. The judgment is reversed, and the case remanded to the district court of Sedgwick county, with direction to set aside the verdict of the jury, and grant a new trial herein. All the judges concurring.

#### CURD v. BOWN et al.

(Court of Appeals of Kansas, Southern Department. C. D. Feb. 6, 1896.)

#### CONDITIONAL SALE—FAILURE TO RELEASE—PENALTY.

1. The claim for \$100 damages and attorney's fee mentioned in paragraph 3892 of the General Statutes of 1889 does not become due upon a failure to enter satisfaction of a title or conditional sale note described in paragraph 3916, supra.

2. The right to recover the penalty provided for by paragraph 3892 of the General Statutes of 1889 is a right which runs with the property, and no one except the owner of the property can recover the penalty. *Thomas v. Reynolds*, 29 Kan. 304; *Coffman v. Hillard*, 24 Pac. 1098, 44 Kan. 538.

(Syllabus by the Court.)

Error from district court, Marion county.

Action by D. B. Curd against S. P. Bown and Richard Williams. From the judgment sustaining a demurrer, plaintiff brings error. Affirmed.

Keller & Dean, for plaintiff in error. H. A. McLean, for defendants in error.

DENNISON, J. This action was brought in a justice court of the city of Marion, Marion county, Kan., and in some manner, not

shown by the transcript of the record, got into the district court. D. B. Curd filed a bill of particulars against the defendants, S. P. Bown and Richard Williams, which reads as follows, omitting caption: "Plaintiff complains of the said defendants, who are partners under the firm name of Bown & Williams, for that the plaintiff, on or about the 24th day of June, 1890, executed and delivered to said defendants his certain promissory note, due in sixty days after date thereof, for the sum of \$25.00, the same being the balance due said defendants from the plaintiff on the purchase of a certain horse, five years old, and in which note it was provided that the title to said horse should remain in said defendants until said note was paid in full. Said defendants immediately deposited said note in the office of the register of deeds in and for Marion county, Kansas, the same being the county wherein said horse was kept, and said note was entered as a chattel mortgage by said register in Chattel Mortgage Record Book L, on page 34, on the 9th day of July, 1890. Afterwards, and on the 27th day of August, 1890, the plaintiff demanded of said Bown & Williams that they enter or cause to be entered satisfaction of said note on the record of the same in the office of the register of deeds aforesaid, he, the plaintiff, having fully paid and satisfied said note on the 18th day of August, 1890, yet the said defendants refused and neglected, and still refuse and neglect, to enter satisfaction of said note and mortgage on said record, to the damage of the plaintiff in the sum of one hundred dollars. Wherefore plaintiff prays judgment against said defendants for \$100.00 damages as aforesaid, and \$25.00 as a reasonable attorney's fee for preparing and presenting this action. Keller and Dean, Attys. for Plaintiff." In the district court the defendants filed a general demurrer to the bill of particulars, which was by the court sustained. The plaintiff excepted, and brings the case here for review. But two questions are raised in the briefs, viz:

1. Does the claim for \$100 damages and attorney's fee mentioned in paragraph 3892 of the General Statutes become due upon a failure to enter satisfaction of a title or conditional sale note described in paragraph 3916, supra? Said paragraph 3916 was passed in 1889. It was evidently intended to prevent secret liens. Its title is "An act to regulate the recording of title notes or evidences of conditional sales." Section 1 of said act provides that such instruments shall be void as against innocent purchasers or creditors, unless the original instrument, or a copy thereof, shall be deposited in the office of the register of deeds in and for the county where the property is kept, and when so deposited shall be subject to the law applicable to the filing of chattel mortgages. The plaintiff in error claims that it must be held to also be subject to the law relating to the satisfaction of chattel mortgages. We cannot so hold.

The act is sufficient to accomplish the end sought, without this interpretation. It serves to prevent secret liens. To construe the law as contended for by the plaintiff in error, we must not only supply the words "and satisfaction" to the law itself, but must also supply the same words to the title. Not only this, but we must add a penalty to the law as passed by the legislature. We cannot do this. If the legislature desires to add a penalty to this paragraph, it may do so. It is the only power that can.

2. Can the penalty provided for by paragraph 3892, supra, be recovered by any one except the owner of the property? The right to recover the penalty provided for by paragraph 3892 is a right which runs with the property, and no one except the owner of the property can recover the penalty. *Thomas v. Reynolds*, 24 K. 304; *Coffman v. Hillard*, 44 Kan. 333, 24 Pac. 1008. The petition fails to allege that the plaintiff is the owner of the property. The demurrer was properly sustained.

We do not hold that the maker of the note or the owner of the property could not have recovered whatever damages they may have actually sustained by reason of the refusal of the payees to enter satisfaction of the note. That question is not raised in this case. The judgment of the district court is affirmed. All the judges concurring.

# SMITH et al. v. SAVAGE.

(Court of Appeals of Kansas, Southern Department. C. D. Feb. 6, 1896.)

JUDGMENT LIEN — BONA FIDE PURCHASER — UNRECORDED DEED.

1. A judgment lien attaches merely to the interest of the judgment debtor in the land, and nothing more.

2. A judgment creditor is not a bona fide purchaser, within the meaning of the statute.

3. In this state an unrecorded deed takes precedence over a judgment lien acquired after the execution and delivery of the deed, but before the same was recorded, although the judgment creditor has no notice of such deed.

(Syllabus by the Court.)

Error from district court, Lyon county; Charles B. Graves, Judge.

Action by Caroline M. Savage against F. E. Smith and Julia Smith. Judgment for plaintiff, and defendants bring error. Affirmed.

Almerin Gillett and J. A. Smith, for plaintiffs in error. L. B. Kellogg and T. N. Sedgwick, for defendant in error.

COLE, J. This was an action in ejectment brought by the defendant in error in the district court of Lyon county. The court made certain conclusions of fact and law, and decreed plaintiff below to be the owner in fee simple of the undivided half of the real estate in dispute. Plaintiffs in error bring the case here for review.

The facts in this case, briefly stated, are as

follows: The plaintiff below had a connected and continuous chain of title to the real estate in controversy from one W. T. Irwin, who conveyed to Samuel Lahman February 4, 1868. Lahman conveyed to Samuels December 6, 1868, and these conveyances, together with the one previously made to Irwin, were recorded December 4, 1869. Samuels conveyed to Savage October 2, 1869, which conveyance was recorded October 16, 1869. Savage conveyed to plaintiff below September 9, 1879, and said conveyance was recorded September 17, 1879. Plaintiffs in error claim title upon the following facts: In 1880 the land in controversy was sold for taxes of 1879, and the purchaser assigned his certificate to one Cunningham. In May, 1881, Cunningham took possession of and fenced said land. In June, 1881, Cunningham assigned said certificate, and surrendered his possession to the plaintiffs in error, who ever since said date have been in the actual, open, and visible possession of said land, and who paid the subsequent taxes of 1880 and 1881. August 9, 1882, John W. Savage redeemed the land from the sale of 1880, and the redemption money so paid was received and accepted from the county treasurer December 4, 1889. Plaintiffs in error also urged as against the title of defendant in error the following facts: February 9, 1868, Todd, Booth & Co. obtained a judgment against W. T. Irwin before a justice of the peace in Riley county, and filed a transcript thereof in the office of the clerk of the district court of said county March 7, 1868, and in the office of the clerk of the district court of Lyon county August 10, 1868. On the last-named date, an execution was issued out of the office of the clerk of the district court of Riley county, upon said judgment directed to the sheriff of Lyon county, who levied on the land in controversy August 16, 1868, and sold the same September 22, 1868, to the plaintiffs in said suit, Todd, Booth & Co., for the amount of their judgment. This sale was confirmed September 11, 1871. Todd, Booth & Co. had no actual knowledge of any of the unrecorded deeds at the date of their purchase.

We are of the opinion that the judgment of the district court in this case was correct. So far as any rights obtained by plaintiffs in error under the tax-sale certificate are concerned, they amount to nothing in this controversy, for they had received the redemption money from the county treasury, and surrendered the tax-sale certificate, long prior to the commencement of this action; and, having accepted the benefits arising from the surrender of such certificate, they cannot now be heard to claim title thereunder.

The only remaining question in this case is, was the title of the original grantor of defendant in error affected by the judgment and sale thereunder of Todd, Booth & Co.? At the time the transcript of judgment in the case of Todd, Booth & Co. v. Irwin, was filed in the office of the clerk of the court of Lyon

county, the deed from Irwin to his immediate grantee, Lahman, had been executed and delivered, but was not of record, nor did Todd, Booth & Co. have any actual knowledge of such conveyance. We apprehend that the fact that the subsequent conveyances were not recorded until some time after their execution and delivery is of but little importance, and that the vital question is, what was the effect of the filing of the transcript of the judgment against Irwin under the circumstances above set forth? It appears to us this question has been settled definitely by a number of decisions in this state, commencing with the case of Swarts v. Steer, 2 Kan. 241. In that case, in determining the rights of a judgment lienholder and the holder of an unrecorded prior mortgage, the court say: "They [judgment lienholders] are not purchasers. Their lien is upon the lands and tenements of the debtor, and not upon lands and tenements not in fact belonging to him." When Todd, Booth & Co. purchased at sheriff's sale, they only obtained the interest, if any, which their judgment debtor had in the property.

The questions involved in this case were carefully considered in the case of Holden v. Garrett, 23 Kan. 98, and an able and exhaustive opinion delivered thereon by Brewer, J. In the course of this opinion, the following language is used: "Again, it may be laid down as familiar law that a judgment creditor is not a bona fide purchaser. He parts with nothing to acquire his lien. He is in a very different position from one who has bought and paid or has loaned on the face of a recorded title. The equities are entirely unlike. One has, and the other has not, parted with value upon the face of the record. If the real prevails over the apparent title, the one is no worse off than before he acquired his lien,—has lost nothing; while the other loses the value paid or loaned. Hence equity will help the latter, while it cares nothing about the former. Further, in nearly every state in which an unrecorded mortgage has been postponed to a judgment lien, the statute has expressly declared that such a mortgage shall be void as against creditors; and the courts have laid stress upon this fact in their opinions." It is true the conclusion in that case was arrived at, as is stated by the learned justice who delivered the opinion, with considerable hesitation; but the doctrine therein announced has been followed and reaffirmed by our supreme court in a number of later cases, and has been established thereby as the proper rule in this state. In Forwarding Co. v. Mahaffey, 36 Kan. 152, 12 Pac. 705, the supreme court again review the decisions upon both sides of these questions. That case presented a contest between an attaching creditor and the holder of a prior unrecorded mortgage. After citing approvingly from section 245 of Drake on Attachments the following language: "A fundamental principle is that an attaching creditor can acquire no greater right in attached property than the



defendant had at the time of the attachment,"—the court say: "In attaching the property he parts with nothing, and cannot in equity claim more than the person under whom he takes had a right to claim." The same doctrine is announced in as late a case as that of *Bowling v. Garrett*, 49 Kan. 504, 31 Pac. 135. These decisions make a plain distinction between a purchaser for value and a judgment creditor, and also between the decisions under the statutes of certain states which require the recording of an instrument in order to impart validity to the same and that of our state which does not go to that extent.

It is suggested by counsel for plaintiffs in error in his brief that the trial court did not find that the various conveyances through which the defendant in error claims title were warranty deeds, nor that the defendant in error was a bona fide purchaser. It is a sufficient answer to these suggestions that the court did not find to the contrary of these propositions, and we cannot here assume that defendant in error was not a bona fide purchaser, nor can we assume that the deeds through which she claims title conveyed any less than the whole interest of those who executed them.

Perceiving no error, the judgment of the district court will be affirmed. All the justices concurring.

# WESTERN UNION TEL. CO. v. GETTO-McCLUNG BOOT & SHOE CO.<sup>1</sup>

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

## INCOMPETENT EVIDENCE—PREJUDICIAL ERROR.

Where the court, on the trial of a case, permits the plaintiff, over the objection of the defendant, to give in evidence, to prove the material facts necessary to sustain his case, the statements, letters, and declarations of persons not parties to the suit nor interested therein, it is prejudicial error, for which a new trial ought to be granted.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county; Jacob Balderson, Judge.

Action by the Getto-McClung Boot & Shoe Company against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. E. Stanley and Rossington, Smith & Dallas, for plaintiff in error. Sankey & Campbell, for defendant in error.

JOHNSON, P. J. The Getto-McClung Boot & Shoe Company, a wholesale firm doing business in the city of Wichita, Kan., in 1889, sold boots and shoes to a firm by the name of Darling Bros., doing business at Oklahoma City, Ind. T. In February, 1890, the firm of Darling Bros. were indebted to the wholesale firm in the sum of \$502, which was then past due, and the wholesale house was urging them for payment of the debt; and Darling Bros. were making promises of payment, and

representing that their stock was largely in excess of their indebtedness, and that they would be abundantly able to pay all their indebtedness, and would pay it in the course of a short time. Some time about the middle of February, the wholesale firm concluded to investigate the financial circumstances of Darling Bros. and try and collect their debt, and for the purpose of accomplishing the object in view, one member of the wholesale firm went to Oklahoma City, and took with him an attorney, for the purpose of taking such legal steps to collect the debt as they might find necessary. On their arrival at Oklahoma City, and making such examination and investigation as was satisfactory to them, they concluded that the debt could only be collected by proceedings in attachment; and, Oklahoma City being situated in the Indian Territory at that time, was within the jurisdiction of the United States court at Muskogee, in said territory; that there was no other court through which the claim could be collected by suit, and, there being no direct line of travel by rail from Oklahoma City to Muskogee, the parties returned to Wichita, and sent a statement of account, duly verified, to a firm of attorneys located at Muskogee, with direction to proceed at once against Darling Bros. by attachment. The attorneys at Muskogee, on the receipt of the papers, at once sent a telegram, by the Western Union Telegraph line, to the attorneys of the wholesale firm at Wichita, requesting them to wire an indemnity to a party at Muskogee to become bondsman in the contemplated attachment proceedings. The message was sent direct to Wichita, and was received there the same day, but was not delivered to the attorneys for the wholesale firm for some three days thereafter, and not until they had received a letter by mail from the attorneys at Muskogee. Darling Bros., on the 5th day of February, had given a bill of sale of the stock of goods at Oklahoma City and of their stock of goods located at Enid to one Huey, of Arkansas City, Kan., to secure the payment of the sum of \$3,100, being borrowed money. A short time thereafter Huey, by his agent and attorney, took possession of Darling Bros.' stock of goods, and on or about the 24th of February, 1890, removed them to Arkansas City, and there sold them at private sale, the goods not selling for sufficient to pay the debt then due to Huey; so that, by the time the wholesale firm got bonds for securing an attachment, and a writ issued and placed in the hands of the United States marshal, the goods formerly belonging to Darling Bros. could not be reached by the marshal under the attachment from the United States court at Muskogee. The wholesale firm at once commenced an action in the court of common pleas of Sedgwick county, Kan., against the Western Union Telegraph Company to recover damages on account of negligence in not delivering the message sent by their at-

<sup>1</sup> Rehearing pending.

torneys at Muskogee to their attorneys at Wichita, claiming that, by reason of the negligence in not delivering such message within a reasonable time after receipt, they were defeated in their efforts to collect their debt out of the property of Darling Bros., which was then liable to attachment, and subject to the payment of their claim. The telegraph company, by way of defense to the action, denied all the matters set out in the petition of the plaintiffs below; and, upon the issues joined between the parties, the case was tried before the court with a jury, and resulted in a general verdict for the plaintiffs below. The jury also made and returned special findings of fact, and upon the general verdict of the jury the court rendered judgment for the plaintiffs below, and the case comes here for review.

The errors complained of by plaintiff in error consist principally of the objections and exceptions taken to the introduction of evidence on the trial of the case. Under the issues in this case, it was necessary for the plaintiffs below to prove that they had a valid claim against Darling Bros.; that it was due; that Darling Bros. had property within jurisdiction of the United States court at Muskogee liable to pay their claim, and that it was subject to attachment; that such facts existed as rendered them subject to have an attachment issued under the laws in force in the jurisdiction where they were located; that the telegram was sent over the Western Union Telegraph Company's lines; that it was not delivered at Wichita within a reasonable time after it was sent; that, by reason of the failure to deliver the message within a reasonable time after it was received, the wholesale firm was deprived of the benefit which the law entitled them to by way of attachment against the property of Darling Bros. And these facts were material to support the claim of the wholesale company, and they should have been established by competent evidence. The plaintiffs below, on the trial of the case, sought to prove many of the essential facts necessary to support their case by what Darling Bros. said, at different times and places, about their stock of goods and the value thereof, and what the plaintiffs and their attorneys learned from a bank at Oklahoma City, and what Huey had told them; also, conversation between members of the wholesale firm and their attorneys and letters written by them to Darling Bros., and the letters of Darling Bros., written to the wholesale house; also, conversation between plaintiffs below and their attorney with one of Darling Bros., at Wichita, after the effort to collect the debt in the court at Muskogee had been commenced. This evidence was all incompetent, and it was material; and without it the defendant in error could not have recovered. The principal witness on the trial was Getto, one of the members of the wholesale firm, and his testimony was principally made up of conversation between himself and

Darling Bros., and correspondence between them, and statements by them as to their stock of goods, their value, the taking of inventories thereof, and as to the decision that he and one of the firm's attorneys came to as to what they must do to collect the debt from Darling Bros. All of these statements were allowed to be given in evidence to the jury, over the objection of the defendant below, and the jury were required to give it full consideration as a part of the facts in the case, and it was evidently considered by them in arriving at their verdict. For the errors in admitting incompetent testimony, the judgment of the court of common pleas is reversed, and the case remanded to the district court of Sedgwick county, with instructions to set aside the verdict, and grant a new trial herein. All the judges concurring.

#### GEORGE v. STATE.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

##### CRIMINAL LAW—RECOGNIZANCE—VALIDITY.

1. When a prisoner is legally in custody, charged with a public offense, and the justice of the peace has ordered that he be released from such custody upon furnishing a sufficient recognizance, in the sum of \$300, for his appearance at the next term of the district court, and such a recognizance is furnished, and is approved by the sheriff, and the prisoner is discharged from custody, and given his liberty, by reason of giving such recognizance, held that, upon a forfeiture of such recognizance, a recovery thereon cannot be defeated because the justice of the peace neglected to indorse upon the order of commitment the amount of bail required.

2. If a blank in an order of commitment, which is left for the insertion of the name of the county containing the jail, is left vacant by the justice of the peace, this is no ground for defeating a recovery upon a recognizance to procure the release of the prisoner from the jail in which the justice orders him confined.

(Syllabus by the Court.)

Error from district court, Sumner county.

Action by the state against William George. From a judgment for plaintiff, defendant brings error. Affirmed.

W. W. Schlinn, for plaintiff in error. F. B. Daues, Atty. Gen., and H. L. Woods, Co. Atty., for the State.

DENNISON, J. This is an action brought in the district court of Sumner county, Kan., by the state of Kansas, as plaintiff, against William George, as defendant, to recover the amount due upon a forfeited recognizance which had been executed by said William George as surety. The record in this case shows that one Charles George had been arrested on a charge of grand larceny, and a preliminary examination had been held before one W. E. Cox, a justice of the peace. Said justice found that a felony, to wit, the crime of grand larceny, had been committed, and that there was probable cause for believing that said

Charles George was guilty of said crime, and that said George should be held to bail, in the sum of \$300, for his appearance at the next term of the district court of Sumner county, Kan., for trial for said crime, and in default of bail should be committed to the common jail of said county until he was discharged by due course of law. Failing to give the bail required, he was committed to the county jail. Afterwards William George entered into the following recognizance:

"The State of Kansas, Plaintiff, vs. J. J. Wilson and Charles George, Defendants. Before W. E. Cox, a Justice of the Peace of the City of Wellington, in Sumner County, Kansas. State of Kansas, Sumner County—ss.: Whereas, it appears that the offense of grand larceny has been committed, and there is probable cause to believe that the defendants, Charles George and J. J. Wilson, are guilty of its commission: Now, we, the undersigned, residents of said county, bind ourselves to the state of Kansas, in the sum of three hundred dollars, that said defendant Charles George shall appear before the district court of Sumner county on the first day of next term thereof, to answer the complaint in said cause alleged against him, and not depart the same without leave. William George.

"Approved by me this 2d day of November, 1889. T. M. Adams, Sheriff, by J. P. Millard, Undersheriff."

Indorsed as follows:

"Affidavit of Sureties. State of Kansas, Sumner County—ss.: We, the undersigned, sureties on the within undertaking, do solemnly swear that we are residents of said county and state, and that we are each worth three hundred dollars over and above all exemptions, debts, and liabilities. So help us God. William George.

"Subscribed and sworn to before me this 2d day of November, A. D. 1889. T. M. Adams, Sheriff, by J. P. Millard, Undersheriff."

The above recognizance being approved and accepted by the sheriff of Sumner county, Kan., the said defendant Charles George was discharged from custody. At the next term of the district court of said Sumner county, the said defendant Charles George failed to appear, and, being in default, the above recognizance was forfeited.

To the petition of the state setting up the above state of facts, the defendant, William George, filed the following answer (omitting title):

"The defendant, William George, for answer to the plaintiff's petition herein, denies that he ever entered into an obligation to or with the plaintiff, and he denies that he executed the recognizance and written obligation sued on to the plaintiff. He admits that he signed the instrument of writing sued on, and that the same was delivered to one J. P. Millard; that one T. M.

Adams was at that time the sheriff of said Sumner county; that said J. P. Millard was acting, or pretending to act, at said time, for and on behalf of said sheriff as undersheriff. He further admits that Charles George had been committed to the jail of said county for want of bail, and avers that such commitment was by a warrant issued by W. E. Cox, justice of the peace, and directed to any constable of said county, and that, at the time of said signing, said warrant of commitment had been executed, and said Charles George was then in the jail of said county, and in the custody of the keeper thereof. But this defendant avers that no direction or authority to take bail was indorsed on or contained in said warrant of commitment, and that it did not appear, either in or upon said warrant of commitment, that said Charles George was to be admitted to bail in the sum of three hundred dollars, nor in any specified sum, nor that he was to be admitted to bail at all; that neither said sheriff nor said undersheriff ever had any authority, by virtue of any order of any court, or judge, justice of the peace, or any other officer, nor from any other source, nor in any way whatever, to take any bail from said Charles George, nor for his appearance. He says that said instrument was not given in pursuance of the order of said W. E. Cox, justice of the peace, and that the order alleged in plaintiff's petition to have been made by said W. E. Cox did not purport nor attempt to give to said sheriff, nor to said undersheriff, nor to any constable, nor other person, any right, power, or authority to take, approve, or accept from said Charles George, or from any surety for him, any bail or recognizance whatever; and said commitment so issued by said W. E. Cox did not contain, nor have indorsed thereon, any authority to any officer or person to take, accept, or approve any bail whatever; that no other writ of any kind was issued in said prosecution, nor any order respecting the taking of bail was ever made, except as above stated, and that the act of John P. Millard in attempting to take and approve said bond was wholly without authority; that no other officer or person ever took or approved, nor accepted, nor attempted to take, approve, or accept, said written instrument, except said John P. Millard, and that only in the manner and form as aforesaid. And defendant further avers that said warrant of commitment did not contain any command for taking said Charles George to the jail of Sumner county, Kansas, nor to the jail of any particular or specified county. A copy of said warrant, with all the indorsements thereon, is filed herewith, marked 'Exhibit A.' William George, Defendant, by Reed & Nebeker."

Exhibit A:

"The State of Kansas, Plaintiff, vs. J. J. Wilson and Charles George, Defendants. Be-

fore W. E. Cox, a Justice of the Peace of City of Wellington, in Sumner County, Kansas. State of Kansas, Sumner County—ss.: The State of Kansas to any Constable of said County—Greeting: Whereas, it appearing that the offense of grand larceny has been committed, and there is probable cause to believe that the defendants, Charles George and J. J. Wilson, are guilty of the commission of said offense; and, whereas, no sufficient bail has been offered in said defendants' behalf, for his appearance at the next term of the district court of said county, to answer said charge alleged against him: You are therefore commanded to take and commit the said defendant to the jail of — county, there to remain until he shall be discharged by law, and deliver this writ to the jailer thereof.

"Witness my hand at Wellington, in said county, this 26th day of October, 1889. W. E. Cox, Justice of the Peace."

To the above answer the state filed a general demurrer, which was by the court sustained. The said defendant, William George, electing to stand upon the sufficiency of his answer, refused to file any further answer in the case, and judgment was rendered against him for the amount due upon said recognizance, and he brings the case here for review.

The only question to be determined by us, then, is the sufficiency of the answer. The plaintiff in error alleges that the recognizance is void, because it was taken and approved by the sheriff, without having an order of commitment from the justice of the peace, specifying that Charles George should be confined in the jail of Sumner county, and without having indorsed on said order of commitment the amount of recognizance required by said justice. The defendant in error contends that all the requirements of paragraph 5219 of the General Statutes of 1889 have been strictly and fully complied with in this case. Said paragraph reads as follows: "No action upon a recognizance shall be defeated, nor shall judgment thereon be arrested, on account of any defect of form, omission of recital, condition of undertaking therein, neglect of the clerk or magistrate to note or record the default of any principal or surety at the term or time when such default shall happen, or of any other irregularity, so that it be made to appear that the defendant was legally in custody, charged with a public offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained, from the recognizance, that the sureties undertook that the defendant should appear before a court or magistrate for examination or trial for such offense." The answer admits that the defendant was legally in custody charged with a public offense, and that he was discharged therefrom by reason of the giving of the recognizance; and there can be no question but that it appears from the recognizance that

the surety undertook that the defendant should appear before the court or magistrate for examination or trial for such offense. Paragraph 5119, Id., reads as follows: "If the defendant is committed to jail, the magistrate shall make out a written order of commitment, signed by him, which shall be delivered to the jailer by the officer who executes the order of commitment. He shall indorse upon the order of commitment the sum in which bail is required." By this paragraph the justice is required to indorse upon the order of commitment the sum in which bail is required. He did not do so. Can the action upon this recognizance be defeated because of this irregularity? We think not. The prisoner was legally in custody, charged with a public offense. The examining magistrate had ordered that he should be released upon furnishing a sufficient recognizance, in the sum of \$300, for his appearance at the next term of the district court. He furnished the recognizance, and he was discharged from custody, and given his liberty by reason of giving such recognizance. When this plaintiff in error signed the recognizance, he knew that he was signing the recognizance to procure the release of the prisoner, and that he was giving a bond to be held in lieu of the prisoner. He knew that the recognizance was taken for such purpose, and that it procured the release of the said prisoner. It is no concern of his whether the recognizance was ever approved by the sheriff, or by the justice of the peace, or anybody else. The sheriff might have refused to approve and accept the recognizance because of the failure of the justice of the peace to indorse on the commitment the amount for which the recognizance was required; but, if he does accept the recognizance in lieu of the prisoner, and the recognizance is for the correct amount, and proper in all respects, and the prisoner is released by reason of the execution and delivery thereof, an action upon said recognizance cannot be defeated by the irregularity of the examining magistrate in not indorsing said amount upon the commitment.

The omission of the word "Sumner," in the blank left in the commitment for the insertion of the name of the county containing the jail to which the person is ordered to be committed, is immaterial in this case. The commitment was addressed to any constable of Sumner county, and commanded him to take the said defendant to the jail of — county, and the prisoner was committed to the jail to which he was ordered to be committed by the examining magistrate. If the commitment is defective in that particular, it should have been taken advantage of before the prisoner was released upon the recognizance. Falling in this, he must be considered to have waived that irregularity, if irregularity it was. The judgment of the district court is affirmed. All the judges concurring.

**LIMERICK v. BARRETT et al.<sup>1</sup>**

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

**PLEADING—FAILURE TO VERIFY—EFFECT—CONTRACT.**

Where the petition in an action on the official bond of a justice of the peace alleges the collection of certain moneys by the principal of such bond as a justice of the peace, and the answer to such petition admits the execution of said bond, and alleges that the moneys so collected were collected by virtue of a contract made and entered into between the plaintiff in the action and the said justice of the peace, and a copy of said contract is made part of the answer, which contract shows upon its face that it was a written agreement, and also that it was illegal and void, as being against public policy, and a reply is filed, consisting of a general denial, unverified, *held*, that the execution of the written contract was properly alleged, under section 108 of the Code, and was not put in issue by the allegations of the unverified reply. *Held*, further, that under such pleadings the legal effect of the instrument set forth in the answer is admitted, and that a judgment for the defendant was properly rendered upon the pleadings.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by J. F. Limerick, doing business as J. F. Limerick & Co., against S. L. Barrett and others. From a judgment for defendants, plaintiff brings error. Affirmed.

J. V. Daugherty, for plaintiff in error. Holmes & Haymaker, for defendants in error.

COLE, J. Plaintiff in error brought his action in the district court of Sedgwick county upon the official bond of S. L. Barrett as a justice of the peace of said county. In his petition he alleged the collection of certain moneys by Barrett as justice of the peace, a demand for the same, and refusal to pay over said moneys. The petition also contained a copy of said bond, and asked judgment against the principal and sureties for the amounts alleged to have been received and retained by said justice of the peace. Separate answers were filed by the principal and sureties, both alleging the same defenses, which were: First, a general denial; and, second, that the moneys collected by Barrett were received by him under and by virtue of a certain contract made and entered into between the plaintiff in error and said Barrett, a copy of which said contract is attached to each of said answers, and made a part thereof. A reply was filed, consisting of a general denial, unverified, and, the action coming on for trial, a motion was filed by the defendants below for judgment upon the pleadings, which motion was sustained by the court, and judgment entered in favor of defendants in error and against plaintiff in error for costs, from which judgment plaintiff in error brings the case here for review.

Two questions are presented for our consideration. Plaintiff in error claims first

that the contract set forth in the answer was not so pleaded as to require a verified denial under section 108 of the Code. This position is not well taken. Each of the answers alleges that the contract referred to was made and entered into between the plaintiff and said Barrett, and makes a copy of the contract a part thereof. The contract shows upon its face that it was a written agreement. It appears to us that to say, where the allegation is that a contract was executed, such allegation is sufficient, but that where it alleges that it was made and entered into such allegation is insufficient, would be to create a distinction without a difference. If persons make and enter into a written contract, they execute it, for that is the only manner in which a written contract can be made and entered into.

Plaintiff in error further contends that, admitting the contract was so pleaded as to require a verified denial, still that the court erred in sustaining the motion for judgment upon the pleadings, for the reason, as he claims, that as the answer alleged that the moneys collected by Barrett were received by him under such written contract, and the reply consisted of a general denial, such reply put in issue the allegation of the manner in which said moneys were collected. To ascertain whether the trial court was correct in its ruling, we must consider the pleadings as a whole as presented by the record. The petition alleges that the defendant Barrett was a justice of the peace, and that he collected the moneys in question as such justice of the peace. It also sets up a copy of his official bond. The answers, being unverified, admit that Barrett was a justice of the peace, and then allege that he entered into a certain contract with plaintiff in error, and received the moneys in question under such contract. The contract is set forth in full, and shows plainly upon its face that it was void as against public policy, for it attempts to make the justice of the peace the agent of plaintiff in error in certain actions which he, the said justice of the peace, was to bring before himself; and as a consideration moving from plaintiff in error all business of said plaintiff in error in that company was to be given to said justice of the peace. It being settled that the contract was properly pleaded, an unverified reply admitted not only its execution, but the legal effect of such instrument. The record discloses that the moneys for which suit was brought were all alleged to have been collected by Barrett after the execution of the contract in question. The only logical deduction from these pleadings is that Barrett collected certain moneys as justice of the peace under the contract set forth in the answer, that being admitted to be a subsisting contract at the time said moneys were alleged to have been collected, and the only one shown by any of the pleadings. The legal effect of the contract

<sup>1</sup> Rehearing pending.

being admitted, it follows that every transaction thereunder was tainted with fraud. This position, we are satisfied, is supported by the decisions in *Reed v. Arnold*, 10 Kan. 104; *Walker v. Fleming*, 37 Kan. 171, 14 Pac. 470; *Rogers v. Coates*, 38 Kan. 232, 16 Pac. 463. In *Walker v. Fleming* the petition alleged the assessment and levy of taxes on certain premises, and the execution and delivery of tax-sale certificates. The answer was unverified. In that case the court held that the defendant's denial, not being verified, admitted not only the execution of the tax-sale certificates, the indorsement thereon, the assignment of the same, and the execution of the tax deed, but, the execution and authority being admitted, that the legal effect would be a regular assessment, levy, and sale. In *Rogers v. Coates* the petition contained an allegation that the plaintiff was the duly qualified and acting assignee of a bank in the state of Missouri, and such averment was not denied under oath, and in that case the court held as follows: "We believe that averment to mean that all necessary steps have been taken by plaintiff under the laws of Kansas to authorize him in a court of Kansas to bring his action as an assignee of the Mastin Bank of Kansas City, Mo." We are of the opinion that the court committed no error in sustaining a motion for judgment upon the pleadings in this case, and the judgment of the district court is therefore affirmed. All the justices concurring.

**ST. LOUIS & S. F. RY. CO. v. HOOVER et al.**  
(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

**RAILROAD COMPANIES—ACTION FOR FIRE—MEASURE OF DAMAGES—ATTORNEY'S FEES—NEGLIGENCE—INSTRUCTIONS.**

1. While the law makes it the duty of a railway company, in the operation of its road, to provide suitable and safe engines, and furnish them with the most approved appliances known to science to prevent the escape of fire, and to see that they are kept in good repair, and to employ competent and skillful engineers and firemen to operate, and to operate them carefully to avoid injury to property of persons living along or near the line of its road, and to take care of its road, and be careful in the management of its trains and right of way, the law does not make the railway company the insurer of all property along its line of road. It only requires of it the exercise of such care and caution in providing machinery, the employment of agents in the operation of its road, and caring for its right of way, as an ordinarily prudent person would exercise under all the surrounding circumstances if all the property to be affected thereby belonged to himself.

2. In all actions for the recovery of damages occasioned by fire set out in the operation of a railroad, if the party recovers against the company he is entitled to a reasonable attorney's fee for the prosecution of his action.

3. Where the court has given the jury, in his general instructions, the law correctly on any given proposition, it is not error to refuse to further instruct on the same proposition in different language, as requested by the party.

4. The burning and destruction of an orchard

by fire communicated to the premises by a railway company, in the operation of its road, is an injury to the real estate itself; and the true measure of damages for such injury is the difference in the market value of the land immediately before and after the injury. *Railway Co. v. Haynes*, 42 Pac. 259, 1 Kan. App. 536, followed.

5. A railway company, in the operation of its railway, with locomotive engines propelled by steam, generated by fire, and drawing its trains over its road in the usual and ordinary manner, is not liable for damages done by mere unavoidable accidental escape of fire from its engines.

6. Where special findings of fact, by the jury, are inconsistent with the general verdict, and the special findings are inconsistent with each other, they should be set aside and a new trial awarded.

(Syllabus by the Court.)

Error from district court, Butler county; C. A. Leland, Judge.

Action by Anna Hoover and others against the St. Louis & San Francisco Railway Company. From a judgment for plaintiffs, defendant brings error. Reversed.

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error. G. P. Aikman and Thomas J. Brooks, for defendants in error.

JOHNSON, P. J. C. E. Hoover was the owner of a quarter section of land in Little Walnut township, Butler county, Kan. He and his family were occupying this land as their homestead. In 1889 he died, leaving surviving him Anna Hoover, his widow, and five minor children. The family continued to reside on the quarter section of land as their homestead. There were situated upon this quarter section of land an orchard of about two acres, consisting of apple trees, peach trees, cherry trees, plum trees, grape vines, blackberry and gooseberry bushes. There were also some forest trees, consisting of cottonwood, Lombardy poplar, and walnut. The line of the St. Louis & San Francisco Railway was located about one-half mile from this farm. In March, 1890, a fire was set out by one of the passenger trains passing over the St. Louis & San Francisco Railway, and it spread and ran over a vacant quarter section of prairie land, and was then communicated to the premises of the Hoovers, and ran through their orchard, and burned and injured the trees in the orchard, and also burned and injured the forest trees on said premises. On the 31st day of April, 1891, Mrs. Hoover, for herself and as next friend of her minor children, commenced a suit in the district court of Butler county against the St. Louis & San Francisco Railway Company, to recover damages on account of the injury to the orchard and forest trees on said farm. The petition of the plaintiffs below alleges: "That on the 24th day of March, 1890, the said defendant, while running one of its trains, in the daytime, on its said road in said Butler county, Kansas, to wit, the east-bound 11 o'clock passenger train, managed its train carelessly and negligently, and failed to provide suitable means to prevent the escape of fire from the engine that was running the said train, and also permitted dead

and dry grass and other combustible material to remain on the right of way of said defendant, near the track of the road of said defendant, so that, by reason of its carelessness and negligence aforesaid, fire escaped from the engine of said defendant's company, and set fire to the dry grass and other material on the right of way, and by reason of a continuous body of dry grass and other material, and without any fault of the plaintiffs herein, and then and there injured, burned, and destroyed the following property, to wit, growing upon said real estate, to wit: 100 apple trees, 10 years old, and of the value of \$1,000; 314 peach trees, from 5 to 10 years old, and of the value of \$445; 8 plum trees, 10 years old, and of the value of \$16; 15 cherry trees, 10 years old, and of the value of \$50; 2 crab trees, 10 years old, and of the value of \$6; 3 apricot trees, 10 years old, and of the value of \$8; about 250 forest trees, consisting of cottonwood, Lombardy poplar, and of the value of \$30; 33 walnut trees, of the value of \$16.50; 5 rods of grape vines, of the value of \$2; a patch of blackberry and raspberry vines, about 2 rods wide and 5 rods long, of the value of \$3; double row of gooseberries, 6 rods long, of the value of \$4,—belonging to the said plaintiffs, and of the aggregate value of \$1,598.50. That the sum of \$400 is a fair and reasonable attorney's fee for prosecuting this action." The railway company, in its answer, denies each and every allegation contained in the petition, and, for an affirmative defense, alleges negligence on the part of the plaintiffs below contributing directly to the injuries complained of in their petition. The case was tried before the court, with a jury, and a verdict was returned in favor of the plaintiffs below; and the jury also made special findings of fact in response to questions submitted to them by the court. Judgment was rendered on the general verdict of the jury in favor of the plaintiffs below, and plaintiff in error excepted, made case, and filed its petition in error, with the case attached, in the supreme court, which was afterwards, by order of the supreme court, duly certified to this court for review.

The plaintiff in error, in its brief, complains of three separate causes or grounds as error, for which it asks this court to reverse the judgment of the district court, which are as follows: "First. The court erred in instructions given to the jury. Second. That the court erred in refusing to instruct the jury as requested by the plaintiff in error. Third. The court erred in overruling the motion of plaintiff in error for a new trial, and in giving judgment for the defendant in error." We will consider the several assignments of error in the order complained of in the brief of plaintiff in error.

The first instruction claimed to be erroneous is No. 4, as follows. "(4) A railroad company is chartered to use engines and cars to carry passengers and freight at great rate of speed, and in large quantities, and is

authorized to use extraordinary means and powers to accomplish these purposes, but, while so using them, it is the duty of the company to so construct its machinery, and so conduct its road, and care for its right of way, as not to damage the property of the people living along the line of its right of way." It is claimed that this instruction is so framed, and its language is such, that it gives the jury to understand that the railway company insures the owner of property along the railway against loss or damage resulting from fires caused by the operation of its trains. While the law makes it the duty of a railway company, in the operation of its road, to provide suitable and safe engines, and furnish them with the most approved appliances known to science to prevent the escape of fire, and to see that they are kept in good repair, and to employ competent and skillful engineers and firemen to operate them, and to operate them carefully, to avoid injury to property of persons living along or near the line of its road, and to take care of its road, and be careful in the management of its trains and right of way, the law does not make the railway company the insurer of all property along its line of road. It only requires of it the exercise of such care and caution in providing machinery, the employment of agents in the operation of its road, and caring for its right of way, as an ordinarily prudent person would exercise under all the surrounding circumstances if all the property to be affected thereby belonged to himself. Scientific machinists, in their inventions for the construction of engines and the mechanical appliances attached thereto to prevent the escape of fire, have never yet been so far successful in their discoveries as to make them absolutely safe as against the escape of fire; and where the railroad company provides the best make of engines in use on the railways of the country, and provides them with the most approved appliances known to science to prevent the escape of fire, and employs skillful engineers and firemen, and if fire escapes therefrom accidentally, and destroys the property of persons living along the line of the railway, it is a mere misfortune, for which the railway company cannot be held liable. While we do not think that the court intended in this instruction to convey to the minds of the jury that the railway company was bound to so construct its engines and machinery and manage its road so that damages could not possibly occur to the property of the people along its line of road, yet we think the language employed in this instruction was too broad, and was calculated to mislead the jury.

The plaintiff in error also claims that the court erred in giving the jury instruction No. 6: "(6) If you find from the evidence that the plaintiffs are entitled to recover in this action, your verdict should be for a reasonable and fair compensation for the actual in-

jury sustained, with interest at seven per cent. from the date of injury; also a reasonable attorney's fee for prosecuting this action." It is claimed that this instruction was erroneous, as it was too broad, and authorized the jury to take into consideration attorney's fees that might be necessary in the prosecution of this case in the supreme or other courts before which it might be carried. We do not think that this instruction is open to the criticism placed on it by counsel for plaintiff in error. Section 2, c. 155, Laws 1885, reads: "In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment." The attorney's fees provided for are to be determined in the trial of the case which results in a judgment against the railway company. We do not think the instruction of the court can be construed to mean any more than the attorney's fee authorized by law. The court, after saying to the jury, if they find for the plaintiffs, what they shall allow them as damages by way of compensation, then said they should allow also a reasonable attorney's fee for the prosecution of this action. The instruction cannot be construed to mean any other prosecution of the action than the action that was then on trial, and for services leading up to that trial.

It is insisted that the court erred in refusing to give instruction No. 1, asked on behalf of the defendant below, as follows: "(1) The defendant is not liable to the plaintiffs if the fire that damaged the plaintiffs' property was of accidental origin." This instruction contains the law correctly, and it was refused by the court; but was it an error to refuse to give this instruction to the jury under the evidence in this case? It has been repeatedly decided by the supreme court of this state, as well as the highest judicial tribunals of other states, that railway companies are not insurers against fire, but are liable only for negligence; and, if they are guilty of no negligence, then no action can be sustained against them for accidental fires caused by the escape of fire from the engines. The statute of this state has made the fact that damages occasioned by fire resulting from the operation of a railroad prima facie evidence of negligence. The evidence in this case discloses that the fire was caused in the operation of the railway, and was therefore evidence of negligence. There was no evidence whatever introduced or had on the trial of the case as to how the fire did escape, or as to whether the engine was in good condition and safe, or whether it was equipped with necessary mechanical appliances to prevent the escape of fire. There was no evidence whatever that would authorize or require this instruction to be given.

Plaintiff in error claims that the court erred in refusing to instruct the jury as requested in instructions Nos. 3 and 4, which are as follows: "(3) The measure of damages

in this case is the difference in the market value of the property described in plaintiff's petition just prior to the fire and just afterwards. (4) The property the plaintiffs claim was injured by the fire was a part of the realty,—that is, part of the southwest quarter of section No. 24, in township No. 27 south, of range No. 6 east; and, if you find for the plaintiffs, the rule of damages is the difference in the market value with all the improvements thereon just prior to the fire and the market value of the land with its improvements just after the fire." The court, in the general instructions to the jury, did not give any direction to them as to the elements that are to be taken into consideration as to the measure of damages. The plaintiffs below based their action entirely on the injury to the real estate, and it was error for the court to refuse to instruct the jury as requested in these two paragraphs. In the case of *Railway Co. v. Haynes*, 1 Kan. App. 586, 42 Pac. 259, this court held "that the burning and injury to the orchard was an injury to the real estate of the party, and the rule of damages in such case is the damages done to the farm itself. \* \* \* Where the injury is to the real estate itself, the damages are to be measured by the difference in the market value of the land immediately before and after the injury."

It is urged that the court erred in refusing to instruct the jury as requested in relation to the question of contributory negligence. While the instructions presented by the defendant below and refused by the court were substantially correct in principle, the court gave the jury the law on the question of contributory negligence correctly, as fully as the evidence in this case required it, as follows: "(5) You are also instructed that persons living near a railroad track must know that fire may escape from engines and trains of the railroad company, and they must take precautions to protect their property from fire as a prudent man would take under such circumstances, and a failure to take such reasonable precautions as a prudent man would take would be contributory negligence on their part. Therefore, in this case, if you find under the evidence that the railway company was guilty of negligence originally, in setting out the fire, yet, if you should also find from the evidence that plaintiffs were guilty of contributory negligence in not taking reasonable precautions to avoid the spread of the fire upon their premises, then you should find for the defendant."

The final error complained of by plaintiff in error is that the special findings of fact are inconsistent with the general verdict, and that the fifth and sixth findings are inconsistent with each other, and for these reasons the verdict should have been set aside, and a new trial awarded. Our attention is directed specifically to the following special findings of the jury: "(2) Had not



the defendant's company burned the grass off of its right of way in September, prior to the time of the alleged fire? A. Yes. (3) Where did said alleged fire start? A. Near the right of way of defendant's. (4) Did not said fire start at a point off of the defendant's right of way? A. It did. (5) Was not said fire set out by accident? A. Yes. (6) Was said defendant's railroad company guilty of any negligence which caused said fire? A. Yes. (7) If the above question is answered, 'Yes,' please state fully in what said negligence consisted. A. Deficient smokestack." "(39) Had the orchard over and through which the alleged fire burned been cultivated for some time prior to said fire? A. No." If findings 2, 3, 4, and 5 are correct, the railway company would not be liable to the plaintiffs for the injury to their orchard. The jury find that the fire did not originate on the right of way, and that the fire was set out by accident. A railway company, in the operation of its railway, with locomotive engines, propelled by steam, generated by fire, and drawing its trains over its road in the usual and ordinary manner, is not liable for damages done by the mere unavoidable accidental escape of fire from its engine. *Railway Co. v. Cook*, 18 Kan. 261; *Railway Co. v. Fudge*, 39 Kan. 543, 18 Pac. 720; *Railroad Co. v. Dennis*, 38 Kan. 424, 17 Pac. 153. In the fifth finding, the jury find that the fire was set out by accident; and, in the sixth finding of fact, they find that the railway company was guilty of negligence. These two findings of fact are too inconsistent with each other to a fair consideration of the rights of the parties on the trial of this case. In the seventh, the jury find that the negligence consisted in a defective smokestack, but this finding is without one sentence of evidence to support it, as there was no evidence as to how or in what manner the fire did escape. The only evidence in relation to the origin of the fire was that, after the train passed, about one or two minutes, fire was discovered near the right of way. There was no evidence of other fires along the line of the road; nor was there any evidence that any person discovered sparks being emitted from the smokestack, or that the smokestack was deficient in any particular; no evidence to show what kind of a smokestack it was, whether it was an extension to the end of the boiler with a smokestack, or whether it was a large smokestack with a bell top. There was an entire omission of any evidence on this subject as to how the fire did escape. The fact that fire was communicated to the dead grass by the operation of the road would have been sufficient proof of negligence of the company to entitle the plaintiff to recover if she showed that the fire was caused in the operation of the road; but where the jury disregard all evidence, and find facts not authorized by the testimony or by any circumstance in the case, it shows that they

did not give the evidence on the trial a fair and impartial consideration.

The special findings of fact are not consistent with the general verdict in this case, and the verdict should have been set aside, and a new trial granted. The judgment of the district court is reversed, and the case remanded, with direction to set aside the verdict of the jury, and grant a new trial herein. All the judges concurring.

# FLORENCE, E. D. & W. V. R. CO. v. LILLEY et al.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

## CONDEMNATION PROCEEDINGS—WHEN MAINTAINABLE—PROCEDURE—APPEAL FROM COMMISSIONERS.

1. A condemnation proceeding can be instituted under the right of eminent domain only to subject the private property of one owner to the public use of another, and to award the compensation therefor. It cannot be instituted by a corporation to quiet its title to land it claims to already own; nor can it be instituted for the purpose of compelling a specific performance of a contract already entered into between the corporation and others.

2. *Railroad Co. v. Wilder*, 17 Kan. 239, cited and followed as to the judgment to be rendered by the district court upon an appeal from the award of the commissioners appointed in condemnation proceedings.

(Syllabus by the Court.)

Error from district court, Marion county; Frank Doster, Judge.

Action by the Florence, El Dorado & Walnut Valley Railroad Company against Joseph C. Lilley, John Lilley, and Charles I. White, copartners. Judgment for defendants. Plaintiff brings error. Modified.

On February 10, 1890, the plaintiff in error instituted proceedings to condemn certain additional lands along the original right of way of its railroad at Burns Station, in Marion county, Kan., claimed to be necessary for station grounds, depot, and sidetrack purposes. The report of the commissioners appointed by the judge of the district court in said proceedings shows that they condemned the land demanded by the railroad company, and awarded as damages on account of such condemnation the sum of one dollar, and that the name of the owner of the land was unknown. The report was duly filed, and the amount of the award was by said company paid into the county treasury for the owner. In due time, Joseph C. Lilley and John Lilley, as copartners, doing business under the firm name of J. C. Lilley & Co., filed a bond appealing from the amount of damages as allowed by said commissioners. The appellants were required by the court to file a petition setting out their cause of action against the railroad company, which they did; and in said petition they set up that they were the owners in fee and in the actual possession of the land condemned and other lands adjoining

thereto; that they had made lasting and valuable improvements upon said land along and adjacent to the line of said defendant's said railroad, to wit, a hay barn and hay press room, an engine room, a coal house, and office building, two wells, a set of scales, and other buildings and improvements, all of which were peculiarly adapted and arranged for the purpose of baling and loading and shipping hay and other products over said railroad, and were located at a convenient distance from the track of said railroad for the aforesaid purposes, and, at the time before mentioned, said plaintiffs were actually engaged, and had been engaged for more than a year prior thereto, in the business of baling and shipping hay and other products on said premises, and had valuable machinery, consisting of a steam engine and boiler and hay press, in said buildings, suitable for, and actually used in, said business; and also set up the condemnation proceedings, and allege that the fair value of the property taken and the damage to their other property was \$3,500. The railroad company, as defendants, filed an answer, in which it denies generally the allegations of the petition. It then alleges that it has been in the possession of the land since 1882, under an oral contract with one Strotkampff, who contracted for himself and as the agent of one Werry, who were then the owners of said lands, in which they agreed for various considerations to give, sell, convey, and grant to it the land sought to be condemned; that it took possession of said land under said agreement, and erected lasting and valuable improvements thereon, and has remained in the possession thereof up to the present time, either personally or by its tenants, J. C. Lilley & Co.; that said Strotkampff attempted to convey to said railroad company, by deed, his interest in said land; that said railroad company has paid, and Strotkampff and Werry have received, the consideration for said grant, sale, and conveyance of said land to it, and that it was during the year 1882, and ever since has been, and now is, the real and true owner of said land; that, as such owner, it did on August 29, 1888, lease a portion of said land to the plaintiffs; that, as its documentary evidence of title to said land which it received from said Strotkampff and Werry was not perfect, it instituted these condemnation proceedings by which the land was condemned for its use. All of this answer except the general denial was stricken out by the court. The plaintiffs replied with a general denial. The plaintiffs asked and obtained leave of the court to amend the petition and appeal bond by adding the name of Charles I. White as one of the members of the firm of J. C. Lilley & Co. They also asked and obtained leave of the court to amend their reply by alleging that they executed the lease with the railroad company upon the faith of its false and fraudulent

representations, and under the mistaken belief that said railroad company did own the premises leased; that they learned that it did not own said premises; and that it admitted that it did not own said premises; and that they served notice upon it to cancel the lease. The defendant amended its answer, and set up that the plaintiffs did not own the land at the time of said condemnation, nor thereafter, and were not entitled to receive the award or any part thereof, or to prosecute the appeal. It also set up largely the same state of facts which were stricken from its former answer, and they were again stricken out. Upon the trial, the plaintiffs, Lilley & Co., showed deeds from the Atchison, Topeka & Santa Fé Railroad Company, in whom the original title is admitted, to Strotkampff and Werry, and from Strotkampff to Werry, and from Werry to J. C. Lilley & Co.

This is a very brief statement of the facts shown by the record, but it is probably sufficient to show upon what this opinion is predicated. The jury returned a verdict for the plaintiffs, assessing the amount of their recovery at the sum of \$1,675, and judgment was rendered against the railroad company for that amount, and they bring the case here for review.

A. A. Hurd and Bentley & Furgeson, for plaintiff in error. Keller & Dean, for defendants in error.

DENNISON, J. (after stating the facts). The major part of the errors complained of can be settled by a determination of the proposition of whether or not a railroad corporation can institute proceedings under the law of eminent domain for the purpose of having certain lands condemned for its use, and then, upon appeal by a person claiming to be the owner thereof, be heard to assert that it is the equitable owner of the land, and entitled to the award. This proceeding was instituted under the right of eminent domain,—under the power to take private property for public use. To hold that a railroad company may ask the district court to use this power to condemn land for its use, and to have the value thereof and the damages awarded to the owner, and then be permitted to show that it is already the owner of said land, and entitled to the award, would be to turn this proceeding into a farce, and subject the district courts to ridicule. A condemnation proceeding under the right of eminent domain can be legally maintained only to subject the private property of one owner to the public use of another, and to award the compensation therefor. It cannot be instituted by a corporation to quiet its title to land it claims to already own, nor can it be instituted for the purpose of compelling a specific performance of a contract already entered into between a corporation and others.

Only one other assignment of error need be considered by us. The plaintiff in error contends that the court erred in entering a judg-

ment against it; that it should have entered an award. The court should have entered a judgment against the railroad company for all costs. As to the amount found as the value of the real property taken and the damages to that not taken, no personal judgment should be rendered. The court should find such value and damages in the nature of an award. This question has been fully discussed in the case of *Railroad Co. v. Wilder*, 17 Kan. 239. In that case it was held: "On an appeal in the district court in condemnation proceedings, it is error for the court to render an ordinary personal judgment against the railroad company for the damages assessed to be collected by execution. The judgment for damages in such a case should be in the nature of an award of damages, such as is made by the condemnation commissioners." *Railroad Co. v. Callender*, 13 Kan. 496; *Blackshire v. Railroad Co.*, Id. 515; *Railroad Co. v. Moore*, 24 Kan. 328; *Railroad Co. v. Merrill*, 25 Kan. 424. Also, in delivering the opinion of the court in that case, Mr. Justice Valentine says: "After the judgment is rendered in a case of this kind, then the railroad company may take the land or not, at its option. *Blackshire v. Railroad Co.*, 13 Kan. 515. But, until it pays for the land, it gets no title. And, if it does not pay for the land within the time prescribed by law, it may be ejected from the premises, provided, of course, that it has taken possession thereof. *Railroad Co. v. Callender*, 13 Kan. 496. An owner of land would not want to take a judgment against an irresponsible and insolvent railroad company as payment for his land; nor would a railroad company want to pay an enormously excessive award of damages for its right of way. Therefore, it is right that each should have some choice in the matter. Upon this question, see authorities above cited, and *Gear v. Railroad Co.*, 20 Iowa, 523; *Stacy v. Railroad Co.*, 27 Vt. 39; *Railroad Co. v. Miller*, 30 Ind. 209."

This view of the case renders a consideration of the other assignments of error unnecessary. The case will be remanded to the district court, with orders to modify the judgment in accordance with the views expressed in this opinion. The costs in this court will be equally divided. All the judges concurring.

#### STATE v. O'CONNOR.

(Court of Appeals of Kansas, Southern Department, C. D. Feb. 6, 1896.)

#### INTOXICATING LIQUORS—CRIMINAL PROSECUTION—EVIDENCE—SEARCH AND SEIZURE LAW—CONSTITUTIONALITY.

1. In the trial of a criminal case, where the defendant is charged in separate counts of an information with illegal sales of intoxicating liquors, and also with maintaining a nuisance by keeping a place where intoxicating liquors are sold, bartered, or given away in violation of the statute, it is competent for the state to introduce in evidence, and for the jury to consider, certain jugs, bottles, and other paraphernalia shown to

have been seized by the officer at the place claimed to be a public nuisance, as bearing upon the question whether such place was or was not a "nuisance," as defined by the statute.

2. Under an information like the above, evidence that the building described in the information was a place where liquor was unlawfully sold immediately prior to the time of the defendant having charge thereof; that there was no change in the business after the defendant took charge thereof; that he sold or gave away intoxicating liquors; permitted them to be drunk upon the premises as a beverage; that he gave intoxicating liquors to minors,—is all competent as tending to show the character of the place kept, and who the keeper of the place was.

3. Paragraph 2533, Gen. St. 1889, being that portion of the prohibitory liquor law known as the "search and seizure clause," was enacted by the legislature to assist in the proper exercise of the police power of the state, in a matter over which the legislature had control, and is not in contravention of either section 10 or 15 of the bill of rights.

4. Instructions in this case examined, and upheld.

(Syllabus by the Court.)

Appeal from district court, Sumner county; J. A. Burnett, Judge.

Barney O'Connor was convicted of maintaining a common nuisance, and appeals. Affirmed.

H. L. Woods, Co. Atty. (John G. Woods, of counsel), for appellant. O. G. Eckstein and James Lawrence, for the State.

COLE, J. Barney O'Connor was tried in the district court of Sumner county upon an information containing eight counts; the first seven being for specific sales of intoxicating liquor, and the eighth charging the maintaining of a common nuisance. At the close of the testimony, the county attorney dismissed the first seven counts, and the defendant was convicted under the eighth count, and sentenced by the trial court, from which conviction and sentence he appeals to this court.

The first question raised by counsel for defendant is that the court permitted illegal, incompetent, and irrelevant evidence to go to the jury, and under this head our attention is directed to the evidence of certain witnesses who testified about the appearance of saloons in general, and the appearance of the particular place charged as being a nuisance immediately prior to the time when it was alleged the defendant took charge, and also, in connection with such evidence, who testified that the business in said place was carried on in the same manner after defendant took charge as before, also to the testimony of certain witnesses who were asked if they were familiar with the paraphernalia and other fixtures ordinarily kept around a saloon, and whether or not the paraphernalia and fixtures seized were the same as those ordinarily kept in a saloon. We think this evidence was competent, as all of it tended to establish the character of the place, and bore upon the question as to whether the building was a "nuisance" or not, as defined by the statute.

In this case, at the close of the evidence,

all of the counts in the information charging specific sales were dismissed; and the court instructed the jury that they were not to consider any evidence as tending in any way to prove illegal sales charged in the information, and that, as to the counts charging such illegal sales, they were to find the defendant not guilty. The jury evidently fully understood the instructions of the court, as shown by their verdict. Under the information as it stood when the case was given to the jury, it was not necessary for the state to prove even a single sale of intoxicating liquor. All it was necessary for the state to show was that the place described in the information was one where intoxicating liquors were kept for sale, or where persons were permitted to resort for the purpose of drinking intoxicating liquors, and the further fact that the defendant was the keeper of such place. In *State v. Reno*, 41 Kan. 674, 21 Pac. 803, the following language is used: "There was no error in permitting evidence of violations of law of which Mr. Titus, the prosecuting witness, had no knowledge, for the information was not only verified by Titus, but it was also verified by the county attorney, and each verification was sufficient. Besides, this is not a case like the case of *State v. Brooks*, 33 Kan. 708, 7 Pac. 591. This is a prosecution for keeping a nuisance at a particular place, while that was a prosecution for the sale of intoxicating liquors. In this case it is not necessary to show to whom the liquors were sold, while in that case it was. In this case the defendant might be convicted of the offense charged against him without showing that he ever sold a single drop of any kind of intoxicating liquors; while in that case the gravamen of the offense charged was the sale of the liquor to some person. In cases like the present, a showing of a mere keeping of intoxicating liquors for sale, or the keeping of a place 'where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage,' is sufficient, under the statutes, to render the place where the liquors are kept, or where the persons are permitted to resort, a nuisance, and to render the keeper thereof guilty of keeping a nuisance." In this case there was an abundance of testimony to support the propositions that the place described in the information was such a one as is prohibited by the statutes, and also that the defendant was the keeper of such place. While a number of the witnesses were affected with a lapse of memory, there were a number who testified to procuring beer from the defendant in person at the place in question, and there was also the testimony of the officer who made the arrest as to the character of the goods which he found in the place.

We perceive no error in the admission of testimony in this case. The second, fourth, and fifth grounds upon which a reversal is

asked may be considered together. The first of these three relates to certain misconduct of the jury in examining certain boxes, jugs, bottles, and other vessels said to contain liquor, during a recess of the court. All that the record discloses of the matter is that the articles described were at the court-room door when the jury returned after a recess of the court. There is nothing in the record which shows that they were brought to the attention of the jury at that time, or that the minds of the jury were in any way prejudiced by seeing them at the court-room door. They were afterwards admitted in evidence, brought into the court room, and shown to the jury. We cannot see from the record that the defendant was prejudiced in any way by this fact. These views also answer the question raised as to the misconduct of the county attorney who tried the case in bringing the articles to the court-room door. The record discloses that these articles were brought to the court room by order of the court, who permitted them to be used in evidence; and, if the defendant has been prejudiced, it is by the introduction of these articles, if that was error, and not by the circumstances referred to by counsel.

The next objection is that the court erroneously permitted certain jugs, bottles, and other paraphernalia seized by the officer at the time of making the arrest to be introduced in evidence, as against the defendant. Counsel for the defendant urges that they could only be admitted upon the theory that they belonged to the defendant, and, if such was the case, propounds the question: "Can property belonging to a defendant, and seized by an officer, be a witness against himself?" Counsel argues that it cannot; that it is contrary to sections 10 and 15 of the bill of rights to seize the property of the defendant, and use it as a witness against him. The case of *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, is referred to as supporting this position. A careful reading of the opinion in that case will, it seems to us, convince any fair-minded person that a plain distinction is made between such an act of seizure as was in question in the *Boyd* Case and that which took place in this case. It is true that the bill of rights provides that no person shall be a witness against himself, and also declares that "the right of the people to be secure in their persons and property against unreasonable searches and seizures shall be inviolate." In the *Boyd* Case a seizure had been made of private papers to be used as evidence against the defendant. The papers themselves were not unlawful, were the property of the defendant, and rightfully in his possession; and it was exactly that kind of seizure which the federal constitution and our own bill of rights sought to protect the citizens of this country and state from. Both the federal constitutional provisions and those contained in our own bill of rights were enacted because of the tyrannous policy of monarchial

rulers, who, under cover of the king's warrant, abused the liberties of the people. Those warrants reached out after that which was the property of the individual, rightfully in his possession, and where the possession of the things seized was not prohibited. But in this case the act under which the seizure was made was one directly within the police power of the state. It does not seek nor take the lawful property of any individual, but simply reaches out, through the proper officials of the state, to gather in those things the possession of which, for the purposes prohibited by the state, is itself prohibited. The law is akin to that which prohibits counterfeiting of the coin of the realm, and which seizes, in the possession of any person, counterfeit coin. The coin itself is the property of the individual in whose possession it is found, and yet it will not be questioned that either the federal or state authorities may not only arrest the individual in whose possession the coin is found, but seize the coin itself, and use it as a silent witness against the defendant, charged with counterfeiting, upon his trial. The laws of this state prohibit any person (excepting in the manner therein provided) either from selling intoxicating liquors, or from keeping a place where intoxicating liquors are either sold, bartered, or given away as a beverage. It is true, under this statute, a person may have any amount of liquor in his possession for his own private use, or he may set it upon his table in the ordinary social affairs of life, if he so desires, without violating any provision of the statute; but when he stands charged with keeping and maintaining a place where intoxicating liquors are sold, bartered, or given away in violation of the statute, and the evidence discloses sales made by the defendant in a place fitted up for that purpose, and when it further appears that such place is one where people generally congregate to drink intoxicating liquors as a beverage, it is certainly competent for the court to permit the state to introduce in evidence the prohibited articles which are shown to have been taken from the place charged as being a public nuisance.

The only remaining question is with regard to one of the instructions given by the court. Evidence was introduced upon the trial of the cause tending to prove that the defendant, at the place charged as a public nuisance, gave intoxicating liquors to a certain minor, and we think such evidence was properly admitted as tending to show the character of the place. The instruction complained of cited section 412 of the statute which relates to the treating or giving any intoxicating liquors to minors, and provides a punishment therefor, and added to such section the following words: "But the defendant is not on trial for that offense, but it may be considered under the charge of maintaining a nuisance." We see no error in this instruction. It appears to us that it was favorable to the defendant, and ought to have been given.

Counsel for the defendant and appellant claim that, as the defendant was not on trial for that offense, the instruction was misleading. As we understand the instruction, it simply advised the jury that, while the giving of liquor to a minor was an offense in itself, they could not consider evidence of that character as against the defendant except as it tended to prove the offense charged in the information, viz. the maintaining of a public nuisance. Perceiving no error in the record, the judgment of the district court will be affirmed. All the justices concurring.

#### BELL et ux. v. COFFIN.

(Court of Appeals of Kansas, Northern Department, W. D. Feb. 14, 1896.)

#### GENERAL AND SPECIAL VERDICTS—PAROL EXTENSION OF MORTGAGE.

1. In a case tried by jury, in which a trial by jury is a matter of right, a general verdict must be rendered; and, while it is the duty of the court to submit special questions upon request of the parties, it cannot, by so doing, dispense with a general verdict.

2. A mortgage given to secure a certain debt cannot be extended, by mere oral declaration, to secure an entirely different indebtedness contracted subsequently to the execution of the mortgage.

(Syllabus by the Court.)

Error from district court, Graham county; Charles W. Smith, Judge.

Action by H. A. Coffin against Lewis A. Bell and wife. Judgment for plaintiff. Defendants bring error. Reversed.

This was an action brought upon a promissory note, and to declare a deed given to be a mortgage for the security of the same, and that it be foreclosed. The petition alleges that on the 20th of May, 1890, the defendants, Bell and wife, were indebted to the plaintiff, H. A. Coffin, in the sum of \$2,500, for which they gave their note, drawing 10 per cent. interest; that on the same date they executed a warranty deed to certain real estate in Graham county, in consideration of the sum of \$2,300; that it was the understanding of all the parties that this deed was given as a mortgage to secure all of the indebtedness existing between plaintiff and defendants, and the sum of \$2,300; that between May 20 and August 18, 1890, the defendants Bell had made certain payments upon this note, leaving at that time a balance due of \$1,157.34; that on August 18, 1890, the defendants gave their note for this amount to the plaintiff, and it was at this time agreed and understood that this sum should be secured by the deed before given, and the same should continue in force as security therefor; that upon this last note payments have been made, so that the balance due at the time suit was brought was \$545.90. The answer of the defendants admits the indebtedness of May 20, 1890, of \$2,500, but says that it has been fully paid, and that the note given therefor was delivered up

and canceled. That the payments upon said \$2,500 note were as follows: June 6, 1890, \$423.77; August 4, 1890, \$1,627.42; August 12, 1890, \$618.26,—showing a total amount paid of \$2,669.45. They admit the execution of the deed, and aver it was given as security for the \$2,500 note only. That on August 18, 1890, they borrowed from the plaintiff the sum of \$1,157.34, and this was secured by a chattel mortgage. Plaintiff replies by general denial, and then admits the payments as stated by defendants, but says the amount was placed to the credit of defendants, and was checked out and used by them in the purchase of stock, except the sum of \$1,342.66, which was applied to the payment of the debt for which the deed was given; that the note of \$1,157.34, and chattel mortgage to secure the same, were given as additional security to the deed. Trial had before court and jury; special findings of facts returned by jury; no general verdict returned. The court rendered judgment in favor of the plaintiff and against defendants for the sum of \$575.89, and decreed the deed to be a mortgage, and that the same was a lien upon the land therein described, and ordered the same to be sold for the payment of the judgment so rendered. The defendants objected, in proper time, to the rendering of any money judgment in this case, for the reason that no general verdict had been returned by the jury, and to the rendition of any judgment herein for the same reason, which being overruled, motion for a new trial was filed, which was overruled and excepted to, and defendants now bring case here for review.

G. W. Jones, for plaintiffs in error. Z. C. Trett, for defendant in error.

GILKESON, P. J. (after stating the facts). The record in this case discloses that no general verdict was rendered by the jury; that upon the filing of their special findings of fact they were discharged; nor were all the issues in the case submitted to them by the special findings, nor in the instructions of the court. The special questions were submitted to the jury by the court upon its own motion, and are as follows: "(1) Has the defendant Lewis A. Bell paid the indebtedness to the plaintiff represented by the \$2,500 note executed May 26, 1890, in full? A. No. (2) If you answer the above question in the affirmative, state when and in what manner the same was paid. [Not answered.] (3) If you answer the first question in the negative, how much, if anything, was paid? A. \$1,500.00. (4) Was the note sued on in this action given in renewal and a part of the debt represented by the \$2,500.00 note? A. Yes. (5) Was the note sued on given for a balance due from Bell to the plaintiff after the payment of the \$2,500? A. No; it was given for a balance of \$2,500 and overdraft. (6) Was the deed in suit given to secure the pay-

ment of a then existing debt? If yes, what was the amount of the debt which it was given to secure? A. Amount of \$2,400.00. (7) At the time the note in suit was executed, was it agreed by the defendant Bell and the bank that the deed before executed should stand to secure the debt represented by the note in suit? A. Yes."

Section 266 of the Code of Civil Procedure provides: "Issues of law must be tried by the court, unless referred. Issues of fact arising on actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered as hereinafter provided." Section 236 provides: "In all cases, the jury shall render a general verdict, and the court shall in any case at the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon the particular questions of fact," etc. In the trial of this case, as we have said, neither a jury nor a general verdict was waived. No general verdict was submitted by the court to, or returned by, the jury. They found only upon particular questions of fact, submitted by the court upon its own motion,—evidently, upon the theory that by these special findings the general verdict was dispensed with. We think the language of the Code is too imperative to admit of this. The rule is laid down by our supreme court in *Henrie v. Buck*, 39 Kan. 382, 18 Pac. 228, in passing upon the identical question; and in construing the section of the Code we have given, Justice Johnson says: "Another matter, only, needs attention, and that is the refusal of the court to permit the return of a general verdict. We see no reason to except this case from the statutory rule, which provides that in any case which may be, and is, tried by a jury, a general verdict shall be rendered." The litigant is unquestionably entitled to the benefit the law confers. When it grants him the right to a trial by jury, the court has no power to deprive him of it; and when this court did virtually deprive him of a general verdict, it substantially deprived him of that right which the statute expressly gave. And this court has followed the rule laid down by the supreme court in *Henrie v. Buck*, *supra*, in *Taft v. Baker* (Kan. App.) 42 Pac. 502. It is the duty of the court to submit special questions upon request of either party, but it cannot properly dispense with a general verdict.

It is admitted that the deed executed by the plaintiffs in error was intended as a mortgage, and given to secure the note dated on the — day of May, A. D. 18—, for \$2,500; and the jury found that the note sued upon, of date August 18, 1890, for the sum of \$1,157.34, was made up of a balance due on the original note of \$2,500 and of certain overdrafts, and that it was agreed between the bank and Bell, when this last note was given, that this deed should stand to secure the debt represented by said note. Upon

these findings the trial court rendered judgment in favor of the plaintiff bank for the amount it claimed to be due thereon, and decreed that the judgment was a lien upon the real estate therein described for the full amount thereof. In this the court erred. The attempted extension of the deed as a security for the new debt was not in writing. Land cannot be conveyed by parol; nor can any person divest himself of any title thereto, or interest therein, by the mere use of oral declarations. Section 8 of the act concerning conveyances; sections 5 and 6 of the act relating to frauds and perjuries; and section 1 of the act concerning trusts and powers,—made void every parol agreement which attempts to create an interest in lands, with some exceptions; and this extension does not fall within the excepted clauses. The agreement in this respect, therefore, had no validity, and the deed never became a security for any of the subsequent indebtedness, and could only be a lien upon the land for the balance due (if any) upon the note of \$2,500. The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the judges concurring.

#### MURPHY et al. v. GOODLAND BUILDING & LOAN ASS'N.

(Court of Appeals of Kansas, Northern Department, W. D. Feb. 14, 1896.)

#### BUILDING AND LOAN ASSOCIATIONS—FORECLOSURE OF MORTGAGE.

In an action to foreclose a mortgage given to secure a loan (made by the share for premiums) by a building and loan association to one of its members, the amount of the recovery should be determined in accordance with the special statutory rule applicable to loans of that character, as provided by the latter portion of section 272, art. 17, c. 23, Gen. St. 1889.

(Syllabus by the Court.)

Error from district court, Sherman county; Charles W. Smith, Judge.

Action brought in the district court of Sherman county by the Goodland Building & Loan Association, as plaintiff, against E. M. Murphy and E. F. Murphy, as defendants, for a foreclosure of a mortgage given by defendants, as members of the plaintiff association, to secure a loan made to them. The facts necessary for an understanding in this case are as follows: That in October, 1888, the defendant Eva M. Murphy became a member of the association by the purchase of five shares of its capital stock. That in November, 1888, the said Eva M. Murphy borrowed from said association the sum of \$1,000, paying a premium therefor of \$370, or 37 per cent. on the face of the loan, receiving in cash from the association the sum of \$630; that is, that, at a regular meeting of the said association, the funds on hand subject to loan were put up at auction, and sold to the party who should offer the highest

price for the privilege of borrowing it. This bid was denominated the "premium," and in this case amounted to \$370, which was deducted from the amount of money bid for. Under the rules of the association, the borrower agreed to pay monthly dues on stock of \$1 per share, and, in addition thereto, a monthly payment of interest, which should equal 8 per cent. on the amount of the loan. In this case the interest was estimated on a basis of the face value upon the stock upon which the loan was made, being \$1,000, and the interest installments therefor were \$8.65 per month. That, in pursuance to this agreement, and as representing the obligation on the part of the defendant to make the payments, she and her codefendant, being husband and wife, executed their bond to the association, dated the 30th day of November, 1888, and containing the conditions mentioned. That, to secure the performance of the covenants of the said bond, the defendants executed and delivered to the association their mortgage of same date on certain real estate in the town of Goodland. That the defendants complied with the conditions of their bond, paid the monthly dues on stock and the monthly interest payments on loan and all fines assessed for delinquencies from November, 1888, up to and including July, 1893. That, at the last-mentioned date, they made default, which has continued up to the time of judgment rendered in the case. That on the 15th day of May, 1894, this action was commenced, and at the November term, 1894, was tried to the court, jury being waived. The court made special findings of fact and conclusions of law, rendering judgment thereon in favor of the association for the sum of \$290.00, with decree of foreclosure of mortgage and cancellation of the stock held by Eva M. Murphy. Both plaintiff and defendants filed motion to set aside findings of fact and conclusions of law, which were overruled by the court, and duly excepted to, and also filed their several motions for judgment on the findings of fact, which being overruled, they each presented their several motions for new trial, which being overruled and excepted to, both parties bring the case here for review upon petition and cross petition in error, with case made attached. Modified.

W. K. Brown and E. F. Murphy, for plaintiffs in error, defendants below. Hoyt Andrews and E. S. Knight, for defendant in error, plaintiff below.

GILKESON, P. J. (after stating the facts). Both parties to this action are dissatisfied with the judgment of the trial court, and ask its reversal. We think the judgment of the court below is correct as to the law governing the recovery in actions of this kind, and the only error we find is mathematically, the amount being too large.

The law governing corporations of this kind is found in article 17, c. 23, par. 1426, Gen.

St. 1889, being section 271 of said chapter, which sets forth the powers of such associations, among others: "That it may loan money to its members on the security of United States bonds, bonds of the state of Kansas, the stock of the association, or real estate, which loans shall be repaid in such stated installments as are described by the by-laws, and all contracts between such associations and their members shall be deemed valid and binding in law: provided, that the sums of all the repayments agreed to be made by the borrower, for the whole time for which he receives his loan, shall not exceed the actual amount of money borrowed, with interest thereon at 12 per cent. per annum for the whole time for which it is borrowed." Paragraph 1427 (section 272): "Whenever, by reason of default in the payment of loans or dues by members of such association, it becomes necessary, according to the by-laws, to bring suit on any mortgage for the purpose of collecting such loans or dues, no greater sum shall be recovered than that actually due at the time of judgment, and the amount so due may be ascertained by adding to the sum of arrears, the per cent. value of all future installments designated at the rate per cent., according to the times and period of payments established by the by-laws, not inconsistent with section 1, of this act. And whenever, by the constitution or by-laws of any such association, loans shall be made, or have heretofore been made, to its members by the share, for premiums, the amount for which judgment shall be rendered shall not be greater than the actual amount of money loaned, with interest to the time of judgment at 12 per cent. per annum, and all unpaid fines lawfully assessed against the borrower for nonpayment under such by-laws, not exceeding 2 per cent. per month, less the amount paid in on such shares with like interest from the time of payment, or payments." The latter portion of this section unquestionably applies only to such loans as have been made to a member by the share upon premiums; and the case at bar falls within its provisions, and the amount to be recovered in this action from Mrs. Murphy is governed by its terms. It is conceded that the amount loaned Mrs. Murphy was \$630. This, with 12 per cent. interest thereon, from the date of the loan to the date of the judgment, together with all fines legally assessed for nonpayment, establishes and limits the amount of recovery, and she is entitled to credit for all sums paid in on her shares of stock, with interest thereon at the same rate from the time they were paid.

We should first ascertain the amount (if any) due the association at the time default was made, viz. July 30, 1893, as this is the amount for which suit is brought. Under the terms of the contract, the interest began on November 30, 1888, and the first installment of interest then was due December 30, 1888. But it is admitted that she made a payment

of \$11.65 in November, and, both parties having allowed this as a legal credit, we will do so. This amount, then, should be deducted from the actual amount loaned, of \$630; making the principal upon which interest should be calculated from November 30, 1888, the date of loan, to July 30, 1893, the date of default. The interest on this loan should have been calculated on the amount actually loaned, and not on the amount bid for. As the payments made for interest in this case exceeded the amount of interest due at the time they were made, the interest should be calculated to the time of payment, added to the principal; and from this amount (interest and principal) the amount paid should be deducted, and the balance treated as a new capital, and so on until all the payments are accounted for; and, as the amount paid in on the shares draws the same interest from the time of said payment or payments, they should be treated in the same way. So, in making our computation, we have treated them in the aggregate as monthly payments of \$11.65 per month; and we find the amount due on the default to be \$190.14. To this amount we add the unpaid fines for August, September, October, November, and December, 1893, and January, February, March, and April, 1894 (they being all the months for which the association would have the right to charge, as the suit was commenced in May, before the fine for that month fell due, and, after the commencement of the action, no fines could be legally assessed); and, at 2 per cent. per month of the monthly installments, they would be 24 cents each, amounting to \$2.16; and upon the aggregate amount, viz. \$192.30, interest would be charged at the rate of 12 per cent. per annum from July 30, 1893, to the date of judgment, November 26, 1894, viz. \$32.42, making a total for which judgment should have been rendered of \$224.72.

The plaintiff in error complains of an overcharge of fines assessed and collected against her in the sum of \$20. The court below finds that she has paid as fines the sum of \$31. Upon what testimony the findings of the court or the complaint of the plaintiff in error is based we are unable to state, as none of the testimony in this case is preserved in the record; nor has the slightest attempt been made by the plaintiff in error to inform us as to the amount per month of fines charged, or for what months or number of months they were charged, and we can only say that, if the plaintiff in error has been charged fines to exceed 2 per cent. per month of the monthly installments, she is entitled to a credit therefor, together with interest thereon from the time they have been charged, and we base this upon the presumption that testimony was introduced upon this point, for we do not think that the learned trial judge would have made a finding unless it was sustained by evidence.

It will be noticed that in our calculations we have omitted therefrom the sum of five



dollars paid in October, 1888. We do not think this is a proper credit to be allowed against this loan. It was paid as dues on stock, it is true, but paid as a membership payment, and the plaintiff in error would have been liable for it even though she had never made this loan. This is equally true of the payment of five dollars made in November, but, as both parties have treated this as a legitimate credit, we have so allowed it.

The court, in its calculations, allowed monthly fines for each month from the date of default to the date of the rendition of the judgment, being 16 months. This, we think, is error. When the plaintiff below exercised its option to declare the debt due, the payment of fines unquestionably ceased; nor could they after the commencement of their action continue to legally assess fines against the defendant below.

The judgment in this case will be modified, and cause remanded for further proceedings in accordance with the views herein expressed. All the judges concurring.

#### NICOLAI BRO. CO. v. KRIMBLE.

(Supreme Court of Oregon. Feb. 24, 1896.)

PLEADING—AIDED BY VERDICT.

A complaint for goods sold, failing to allege the date of such sale, or the reasonable value or agreed price of such goods, or the terms of payment, is cured by verdict, where an itemized statement was furnished to defendant, and defendant admitted the delivery of the goods.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by the Nicolai Bro. Company against Jacob Krimble for goods sold and delivered. From a judgment in favor of defendant, notwithstanding a verdict of the jury adverse to him, plaintiff appeals. Reversed.

A. C. Emmons, for appellant. R. C. Wright, for respondent.

BEAN, O. J. This case comes here on an appeal from a judgment given in favor of defendant, notwithstanding a verdict of the jury adverse to him. The facts are that, on December 11, 1893, the plaintiff commenced an action against the defendant in the justice's court by filing a complaint which, *inter alia*, alleged: "That defendant is indebted to plaintiff in the sum of \$92.25, on account of certain goods, wares, and merchandise sold and delivered by plaintiff to defendant at the special instance and request of defendant amounting to the said sum of \$92.25. That the said sum of \$92.25 is now due and owing, and the same has not been paid, nor any part thereof." On the 14th day of December, as demanded by the defendant, plaintiff furnished him a copy of the account upon which the action was brought, which gave the items, date, character, and value thereof. On the next day the defendant, without objecting to the form or sufficiency of the com-

plaint, answered, denying the allegations therein contained, and for an affirmative defense averred, in substance, that on July 24, 1893, plaintiff and defendant entered into an agreement by which the plaintiff was to furnish to the defendant certain goods, wares, and merchandise including those referred to in the complaint, as shown by the itemized statement thereof, for use in the erection of a certain church building, for a gross sum of \$608, and that the same had been fully paid before the commencement of the action. The reply admits the contract referred to in the answer, but denies that the work and material for which the action was brought was included therein or as a part thereof, and alleges that the goods, wares, and merchandise referred to in the complaint were not included in said contract, but were furnished the defendant outside of the contract, and in addition to those to be furnished thereunder. After two trials in the justice's court, and two in the circuit court, a verdict was finally rendered for plaintiff for the amount sued for. Whereupon defendant filed a motion for judgment notwithstanding the verdict, upon the ground that the complaint did not state a cause of action. This motion was sustained, and plaintiff appeals.

That the complaint is defective, and would have been subject to a demurrer, may be conceded; but we think it must be held sufficient after verdict. The general rule in such case is "that, wherever facts which are so essential to a recovery that, without proof of them on the trial, a verdict could not have been rendered under the direction of the court, there the want of the express statement is cured by the verdict, provided the complaint contain terms sufficiently general to comprehend the facts in fair and reasonable intendment." Field, J., in *Garner v. Marshall*, 9 Cal. 269. The complaint in this case alleges the sale and delivery of the goods, wares, and merchandise out of which the indebtedness arose, by the plaintiff, to the defendant, at his special instance and request, and the failure to allege the date of such sale, or the reasonable value or agreed price of such goods, or the time or terms of payment, are mere defects of statement, and are, we think, cured by verdict. *Davidson v. Railroad Co.*, 11 Or. 136, 1 Pac. 705; *Aiken v. Coolidge*, 12 Or. 244, 6 Pac. 712. Courts are required to disregard defects in pleadings which do not affect the substantial rights of the adverse party. Code, § 106. In the case before us, we cannot say, from an inspection of the record, that any substantial right of defendant was or could have been affected by the defects in the complaint. He was fully advised, before answering, by the itemized statement furnished at his request, of the character and price of the goods for which the action was brought, and the date of the alleged sale. By his answer he admits their delivery and receipt, but avers that they were a part of, and included in, the

larger order. That was the only issue on the trial; and, it having been submitted, without objection, to the jury, it seems to us the objection that the complaint is defective came too late after verdict. The judgment of the court below must therefore be reversed, and the cause remanded, with directions to enter a judgment on the verdict.

### HEINTZ et al. v. BURKHARD.

(Supreme Court of Oregon. Feb. 24, 1896.)

STATUTE OF FRAUDS — AGREEMENT FOR SALE OF PERSONALTY — GOODS NOT IN EXISTENCE — CONTRACT FOR MANUFACTURE ACCORDING TO SPECIAL DESIGN.

1. An oral contract to manufacture and furnish the ironwork for a building is not an agreement relating to a sale of personalty, within the statute of frauds, where such ironwork is not in existence at the date of the contract.

2. An oral contract for the manufacture of ironwork for a building according to a particular design, not used in the ordinary course of business or manufactured for general trade, is not an agreement relating to the sale of personalty, within the statute of frauds.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by A. R. Heintz & Co. against Joseph Burkhard. From a judgment of nonsuit, plaintiffs appeal. Reversed.

W. T. Muir, for appellants. J. V. Beach, for respondent.

BEAN, C. J. This action was brought to recover damages for the breach of a contract to furnish the ironwork for defendant's building, and comes here on an appeal from a judgment of nonsuit. For the purposes of this appeal, it is sufficient to say that the evidence tended to show that in August, 1894, the plaintiff and defendant entered into an oral contract, by the terms of which the plaintiff was to manufacture, and furnish to the defendant, the ironwork for a brick building about to be erected by him, according to certain plans and specifications, for the sum of \$2,825, but that defendant subsequently, and before any work was performed, wrongfully refused to allow plaintiff to proceed with the execution of its contract. The ironwork referred to was not to be of the kind manufactured by the plaintiff in the usual course of business, or for the trade, but of special designs and measurements, suitable only for use in the construction of defendant's building. The court below ruled that the contract was "an agreement for the sale of personal property," within the meaning of subdivision 5, § 785, of Hill's Annotated Laws, and void because not in writing, and this ruling presents the only question to be determined on this appeal.

To determine whether a given contract concerning personal property, which does not exist in specie at the time it is entered into, but must be manufactured and brought

into being under the contract, comes within the statute of frauds, is not without difficulty, and the decisions are by no means reconcilable. The chief difficulty in all such cases is encountered in determining when the contract is substantially for the sale of personal property, to be executed in the future, and when for work and labor and material only. If the former, it is within the statute. If the latter, it is not. Thus far the authorities, except in the state of New York, are substantially agreed; but there have been numerous decisions, and much diversity and even conflict of opinion, in relation to a proper rule by which to determine whether a contract is in fact for the sale of personal property, and therefore within the statute, or for work and labor and material furnished, and so without the statute. There appear to be substantially three distinct views upon the statute, which, for convenience, are generally designated as the English, the New York, and the Massachusetts rules, as represented by the decisions of their respective courts. In England, after a long series of cases in which various tests have been suggested, the rule seems to have been settled in *Lee v. Griffin*, 1 Best & S. 272, that "if the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." In that case the action was brought by a dentist to recover £21 for two sets of artificial teeth made for the defendant's testatrix. The court held the contract to be for the sale of chattels, and within the statute. But this decision seems to stand alone, and is in direct conflict with the previous decisions of the English courts. *Towers v. Osborne*, 1 Strange, 506; *Clayton v. Andrews*, 4 Burrows, 2101; *Rondeau v. Wyatt*, 2 H. Bl. 63; *Cooper v. Elston*, 7 Term R. 14; *Groves v. Buck*, 3 Maule & S. 178; *Garbutt v. Watson*, 5 Barn. & Ald. 613; *Smith v. Surman*, 9 Barn. & C. 574. It is said to have been the result of Lord Tenterden's act, which expressly extended the statute to all contracts of sale, notwithstanding the goods "may not at the time of such contract be actually made, procured or produced or fit or ready for delivery, or some act may be required for the making or completing thereof to render the same fit for delivery." *Meincke v. Falk*, 55 Wis. 432, 13 N. W. 545; *Benj. Sales* (6th Ed.) 108. In this condition of the English authorities, we are not prepared to go to the full extent of *Lee v. Griffin*. It is an extreme case, and, unless the decision was made to conform to Lord Tenterden's act, it antagonizes the opinions of some of the most eminent jurists of England, and is open to the objection that it practically permits the fraud which theoretically the statute seeks

to prevent. To say that a contract of a dentist to manufacture and furnish a set of false teeth for his customer is "an agreement for the sale of personal property," within the meaning of the statute, is certainly giving it the widest possible operation, and has not found general recognition in this country, as a correct exposition of the doctrine, although the simplicity of the rule has commended it to many of the judges. In New York the rule prevails that a contract concerning personal property not existing in solido at the time of the contract, but which the vendor is to manufacture or put in condition for delivery, such as the woodwork for a wagon, or wheat not yet threshed, or nails to be made from iron belonging to the manufacturer, and the like, is not within the statute. *Crookshank v. Burrell*, 18 Johns. 58; *Downs v. Ross*, 23 Wend. 270; *Sewall v. Fitch*, 8 Cow. 215; *Parsons v. Loucks*, 48 N. Y. 17; *Cooke v. Millard*, 65 N. Y. 352; *Higgins v. Murray*, 73 N. Y. 352. But this rule seems to be peculiar to that state. By the Massachusetts rule the test is not the existence or nonexistence of the commodity at the time of the contract, as in New York, or whether the contract will ultimately result in the transfer of the title of a chattel from the vendor to the vendee, as in England, but whether the article is such as the manufacturer ordinarily produces in the course of business, and for the trade, or as the result of a special order, and for special purposes. If the former, it is regarded as a contract of sale, and within the statute. If the latter, it is held to be essentially a contract for labor and material, and therefore not within the statute. Thus, it is held that an agreement to build a carriage of a certain design is not within the statute (*Mixer v. Howarth*, 21 Pick. 205), but that a contract to buy a certain number of boxes of candles at a fixed price, which the vendor said he would thereafter finish and deliver, is a contract of sale, to which the statute applies. *Gardner v. Joy*, 9 Metc. (Mass.) 177. The result of the decisions in that state has recently been stated thus: "A contract for the sale of articles then existing, or such as the vendor, in the ordinary course of his business, manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute." *Ames, J.*, in *Goddard v. Dinney*, 115 Mass. 450. And this doctrine seems to be the one most widely adopted in this country. As to the latter part of the rule, relating to goods made on special orders, there is little if any conflict in the American cases. *Baker, Sales*, § 96; 2 *Schouler, Pers. Prop.* § 443; *Brown, St. Frauds*, § 308; 8 *Am. & Eng. Enc. Law*, 707;

note to *Flynn v. Dougherty*, 14 Lawy. Rep. Ann. 230 (Cal.) 27 Pac. 1080; *Melncke v. Falk*, 55 Wis. 427, 13 N. W. 545; *Finney v. Apgar*, 31 N. J. Law. 266; *Phipps v. McFarlane*, 3 Minn. 109 (Gil. 61); *Hight v. Ripley*, 19 Me. 137; *Cason v. Cheely*, 6 Ga. 554; *Abbott v. Gilchrist*, 38 Me. 260. Until legislation shall assert itself more positively, the courts are put to their election as between these three rules, which, though each has its own merits, are not to be reconciled with one another. In the absence of a statute substantially the same as Lord Tenterden's act, we are unwilling to go to the extent of the doctrine of *Lee v. Griffin*; and in this case it is unnecessary for us to give a preference to either the New York or Massachusetts rule, because the contract in question is valid under either. It would be excluded from the operation of the statute by the rule adopted in New York, because the subject-matter of the contract did not exist in solido, or at all, at the time it was made; and it is not within the statute under the Massachusetts rule and the generally accepted American doctrine, because the ironwork was to be manufactured especially for the defendant, and upon his special order, according to a particular design, and was not such as the plaintiffs, in the ordinary course of their business, manufactured for the general trade. It follows that under either view the court below was in error in holding that the contract was void because not in writing. The judgment must therefore be reversed, and a new trial ordered.

### MATLOCK v. WHEELER et al.<sup>1</sup>

(Supreme Court of Oregon. Feb. 24, 1896.)

ALTERATION OF NOTE—EVIDENCE—WITNESS—REBUTTING MATTER FIRST ELICITED ON CROSS-EXAMINATION—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

1. In an action on a note bearing interest from maturity, plaintiff testified that after its execution, and on defendants' suggestion that, by mistake, it had been given for too large a sum, he indorsed a payment thereon, and erased the word "maturity," but defendants denied consent to the erasure, and claimed that it was fraudulent. *Held*, that evidence that the amount of the note, after deducting the indorsed payment, included interest from the date of the note to maturity, calculated in advance, was admissible.

2. Where testimony that costs of actions on prior notes constituted part of the consideration of the note in suit was improperly brought out for the first time on cross-examination of plaintiff, who had not testified thereto in chief, a check which one of the defendants testified was given in payment of such costs was inadmissible.

3. On an issue as to whether the erasure of the word "maturity" from a note, whereby interest became payable from the date of the note, was ratified by the makers, a charge that if the attention of the makers, "or any of them," was called to the alteration, and they said that it was all right, there was a ratification, was not objectionable, as authorizing an inference that such action by any one of the makers would amount to a ratification by all, where other charges stated that

<sup>1</sup> Rehearing pending.

only the makers who consented to the change were bound thereby.

Appeal from circuit court, Lane county; J. C. Fullerton, Judge.

Action by J. D. Matlock against A. Wheeler and others on a promissory note. Judgment for plaintiff, and defendants appeal. Reversed.

J. M. Williams and L. Flinn, for appellants.  
L. Bilyeu and A. C. Woodcock, for respondent.

**WOLVERTON, J.** This action was instituted to recover on a promissory note calling for the sum of \$1,170 on or before September 9, 1893, with interest at 10 per cent. per annum from maturity, executed and delivered to plaintiff October 22, 1892, by the defendants A. Wheeler, E. J. Crawford, J. N. B. Fuller, and J. C. Goodale. The complaint, after setting out the note, contains this allegation: "That said note was executed for a prior indebtedness, and, subsequent to the execution of the same, it was claimed by the defendants that a mistake had been made in the amount of said indebtedness for which said note was given, and thereupon, at the request of defendants, and with their consent and knowledge, in order to correct said mistake, an indorsement of \$195 was placed on said note of the same date as the note, and the word 'maturity' in said note was erased, all of which defendants consented to, and ratified and confirmed." The defendants answered separately, except Crawford, who made no appearance. The answers are alike, and raise a material issue, by denying "that the word 'maturity' in said note was erased with the knowledge or consent of said defendants, or any of said defendants, or that said defendants, or any of them, consented to or ratified or confirmed said erasure." It is then affirmatively averred that plaintiff wrongfully and fraudulently, with intent to cheat, wrong, and defraud defendants, and without their knowledge or consent, erased the word "maturity" from said note, which being denied by the replies, the parties went to trial upon the issues thus joined. The plaintiff, testifying in his own behalf, gave evidence in chief tending to show that, a few days after the execution of the note, the defendant Wheeler came to his place of business, and stated that there was a mistake in the note; that it was given for too much money, and, to correct it, he wanted a credit of \$195 indorsed thereon, and to have the note draw interest from date, and, continuing, said: "He showed me some figures by which I saw he was right. I told Mr. Wheeler I would give the credit on the note, and make the change as soon as I could see the parties, if they were willing to do it, and I did so." Further testimony was then given by him tending to show that he subsequently saw all the makers of the note, obtained their consent, and made the change accordingly, by indorsing \$195 thereon, and erasing the

word "maturity." Without having testified in chief touching the consideration of the note, he was asked and permitted to answer, over objection, the following question, viz.: "What was the consideration of the \$1,170 note on which you recognized the overcharge of \$195, leaving the true principal \$975." Answer: "There were three notes given to Goodale and I for \$4,500. These notes were partly paid. \* \* \* Some time before that, some eight months probably, Mr. Goodale claimed to have collected something between \$800 and \$2,000 on the notes, leaving whatever balance there would be. The balance was figured up and put into four notes,—three notes for \$303, and this note for \$1,170. \* \* \* I had to commence a suit to collect my half of the money he [Goodale] had collected. In this suit there was some costs, and the note of \$1,170 and \$300 notes were for the same thing, and were to balance and adjust the debt between us with these costs. That was the consideration, and was a part of the consideration of the three notes, with accruing costs." After the plaintiff had rested, A. Wheeler, one of the defendants, was called as a witness, who gave evidence tending to show that in October, 1892, there existed two notes executed by Wheeler, Crawford, and Fuller to Matlock and Goodale; that Crawford had paid one-half of the notes, and Wheeler was to pay the remaining half. One of these notes, being for \$908.75, was due; and, in taking it up, three notes were given, for \$303 each. The other note was for \$1,500, one-half of which had been paid, and the balance, with three years' interest thereon, would become due in September, 1893. This note was to be renewed with J. C. Goodale as one of the makers, and, in pursuance of the arrangement, the \$1,170 note was executed to plaintiff, which was made to draw interest from maturity, because the interest was included in the principal sum. The witness discovered an error in his computation, and explained that "the principal was \$1,170 when it should have been \$975, which was the amount due on the note for which it was given." He was then asked the following question, "In the settlement that led up to the giving of this note, was there anything included for costs of some former litigation?" to which he replied: "Not anything. I paid them. I gave my check on the Lane County Bank for them." There appears to have been no objection made at this time to the question or answer. But the bill of exceptions, after reciting some intervening matter, shows that the witness, "after having been allowed to testify as above stated, also testified as follows." The same question then appears to have been propounded, to which the same answer is given as above, and thereupon plaintiff moved that the answer be taken from the jury, which was allowed. The witness was then asked to "state to the jury what, if any, costs were paid." He answered without objection: "The costs were paid by my check

on the Lane County Bank." The check was then offered in evidence, but, upon objection, it was excluded by the court. Subsequently, E. J. Crawford was called as a witness for defendants, and was asked, "What was the consideration of the \$1,170 note mentioned in plaintiff's third cause of action?" which question being objected to by plaintiff, the court sustained the objection. The purpose of the question, as disclosed by the record, was to corroborate Wheeler in the main as touching his statements concerning the consideration of the note. Counsel contends that the court erred in not permitting this testimony to go to the jury, because—First, the testimony of Wheeler and the check offered by him were pertinent to rebut the statement of the plaintiff touching the costs of the action as entering into and forming part of the consideration of the note sued on; and, second, the testimony of both Wheeler and Crawford was relevant as tending to establish the defendants' case. Wheeler denied that he ever consented to the change in the note, and, in support of his statement, related the circumstance, from his standpoint, that a mistake was simply made to the extent of \$195 against himself in ascertaining the amount for which the note should have been written, and that the indorsement alone would leave the amount as it was originally intended by the parties; the interest having been calculated in advance to September 9, 1893, the date upon which it was made to fall due, which, added to the principal, made \$975, instead of \$1,170. He said, in effect, that a change in striking out the word "maturity" would increase the liability by the amount of the interest on the true principal intended by the parties, to wit, \$975, from the date of the execution of the note to the date of its maturity, and therefore, for this reason, among others, he knew he did not consent to the change.

We will consider, first, whether this testimony was relevant. The issue was whether the note had been changed by striking out the word "maturity" with the consent of the makers, or, if without their consent, whether it was afterwards ratified by them. The rule is settled "that the evidence offered must correspond with the allegations, and be relevant to facts put in controversy by the pleadings." Bradner, Ev. 8. But, where the evidence is at all material and is relevant, it is error to exclude it. *Colglazier v. Colglazier*, 124 Ind. 196, 24 N. E. 95. It is said in *Olmsted v. Hoyt*, 11 Conn. 380, that "evidence ought never to be adjudged irrelevant which, according to ordinary experience and the common observation of the motives and conduct of men, may fairly be supposed to influence and persuade candid and intelligent minds." This doctrine is approved by *Copp v. Hardy*, 32 Mo. App. 588. Again, in *Railroad Co. v. Hart*, 2 Ind. App. 130, 28 N. E. 218, it is said: "A witness may be allowed to testify to the existence of any collateral

fact that may tend to enable him to remember the principal fact or strengthen his conviction in its truth." *Hunter v. Harris*, 131 Ill. 482, 23 N. E. 626, is a case wherein the issue was as to the execution of a promissory note. The proof as to the genuineness of the signatures being about equally balanced, it was held that evidence tending to show a reason for the execution of the note, and a reasonable probability or improbability that the defendant made and delivered the same, is not only competent, but highly important, for the consideration of the jury. With the case at bar there is a direct conflict between the witnesses touching the consent to and ratification by the makers of the note to the change. Now, it would seem that the fact—if it is a fact—that the \$975 included the interest calculated in advance to September 9, 1893 (the date upon which the note would fall due), would be relevant as tending to show that the makers of the note would less readily consent to the change, as it would increase their obligation. It is, at least, a circumstance surrounding the transaction, which ought to go to the jury for what it is worth. The reason for the doing or not doing of a thing if patent is usually indicative of the ultimate act of a rational being. So that a reason which is calculated to affect the actions of individuals is pertinent in determining whether or not they have acted at all. We think the testimony of both Wheeler and Matlock touching the consideration which formed the basis of the note in question was relevant to establish defendants' case, and the court was in error in not permitting the witness Crawford to testify thereto in corroboration of Wheeler.

Now, as touching the check which was offered and rejected: The defendants were not entitled to the testimony of plaintiff relating to the consideration of the note, while on the stand as a witness in his own behalf, as he made no allusion to it in his examination in chief. The orderly way for defendants to have proceeded would have been for them to have offered their evidence upon this subject. Then, if, in rebuttal, the plaintiff should have testified that the costs constituted a part of such consideration, the defendants might, in surrebuttal, have testified as to the payment of these costs, and the check would then have become competent in corroboration.

It is next contended that the court erred in giving to the jury instruction No. 8, which is as follows: "(8) Or if you find from the evidence that, at any time prior to the trial of this action, the attention of the defendants, or any of them, was especially called to the alteration in the note, and were told what the plaintiff had done in the matter of said alteration, and did not object thereto, or stated that it was all right, or words to that effect, such words would amount to a ratification of the act of the plaintiff, and such defendant cannot now be heard to dispute

the note as altered, and your verdict should be for the plaintiff." The objection made to this instruction is that it is susceptible of being construed into a declaration by the court that if the attention of any of the defendants, whether one or more, less than all, had been called to the alteration, and he or they had not objected thereto, those not so notified would be held to have ratified the change as well. Standing alone, the instruction is possibly susceptible of the construction suggested, but it must be read in connection with other instructions pertaining to consent and ratification. Numbers 7 and 11 are the most pertinent, and we quote such portions as are relevant: "(7) If you find from the evidence that, at the time the alteration in the note was made, the defendants, or any of them, was notified of the purpose of the plaintiff to make the alteration, \* \* \* and they agreed to the change, or any of them, the defendants who consented to such change" are bound, etc. And "(11) If you find from all the evidence that one or more of the defendants assented to the change, or ratified the act of the plaintiff in making the same, then the plaintiff can recover the whole of the amount due upon the note from such defendant or defendants; and, if you find from the evidence that any of the defendants did not assent to the change or ratify the same, then you cannot find against such defendants." When read in pari materia with these, we think instruction No. 8 is not subject to the objection suggested. It is further claimed that the instruction does not correctly state the law as to ratification,—that a mere failure to disavow the acts of an unauthorized agent or a volunteer, when brought to the knowledge of the principal, does not amount to ratification; but the instruction contemplates a case where the attention of the principal has been especially called to the change. In such a case, we think, he ought to disavow at once, or at least within a reasonable time, or he will be held to have ratified the transaction. *Ward v. Williams*, 79 Am. Dec. 385, and note found at pages 387 to 389. There was no error in giving the instruction, but, for error of the court in rejecting the evidence of Crawford, the judgment will be reversed, and the cause remanded for a new trial.

In re MILLER, Sheriff.

(Supreme Court of Idaho. Feb. 15, 1896.)

PARENT AND CHILD—CUSTODY OF CHILD—JURISDICTION—PROHIBITION.

1. By Rev. St. §§ 2473, 2483, 2534, jurisdiction of the care and custody of infant children is committed to the district courts and the judges thereof.

2. Under Rev. St. §§ 2483, 2534, a temporary order providing for the care and custody of an infant child may be issued by the judge of the district court at chambers.

3. A writ of prohibition to prevent proceedings before a district court, or the judge thereof,

will not be issued in any case unless it is so clear that such court or judge is acting outside of or beyond its jurisdiction that there is no reasonable doubt of the fact.

(Syllabus by the Court.)

Application of John Miller, sheriff of Lemhi county, for a writ of prohibition. Denied.

Ralph P. Quarles, for petitioner.

MORGAN, C. J. In the matter of the application of John Miller, sheriff of Lemhi county, for writ of prohibition restraining the Honorable D. W. Standrod from proceeding further in contempt proceedings. The court has had this matter under consideration, and has given it such attention as we were able to do under the circumstances. Upon examination of the provisions with reference to the writ of habeas corpus, we find the following sections, in addition to the other general sections. Section 8364, Rev. St. Idaho, is as follows: "When it appears to any court or judge authorized by law to issue the writ of habeas corpus, that any one is illegally held in custody, confinement or restraint, and that there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ of habeas corpus can be enforced, such court or judge may cause a warrant to be issued, reciting the facts and directed to the sheriff, coroner or constable of the county commanding such officer to take such person thus held in custody, confinement, or restraint, and forthwith bring him before such court or judge to be dealt with according to law." Then we have section 8370, which is as follows: "All writs, warrants, process, and subpoenas authorized by the provisions of this chapter must be issued by the clerk of the court, and, except subpoenas, must be sealed with the seal of such court, and served and returned forthwith, unless the court or judge shall specify a particular time for any such return." It appears that, under the general provisions for the issuing of the writ of habeas corpus, Mrs. Della Dowling made application to the judge of the district court for the issuance of this writ to procure the custody of her child about two years old. In her petition she alleges that this child was taken by force and threats from her, by her husband; that before this time they had separated, and were living apart. The petition states that she was obliged to leave her husband on account of cruel treatment; that the child is only two years of age, and in delicate health; that it was taken from its mother's house, across the river from Salmon City, to what is known as "Brooklyn," and there kept in a cabin with James Dowling, the father of the child, and William Neal, and that the said Neal was a saloon keeper; and that both were unfitted to have the care of such a child. These two men are taking care of this child. It is further represented that she is subject to fits of croup.

Under these conditions a writ of habeas corpus was applied for. If a writ of habeas corpus or a warrant was issued under section 8364, it would necessitate the bringing of this child before the district judge, at Pocatello, Idaho, which would be dangerous to the health of the child. It is stated in the petition that Salmon City is about 60 or 75 miles from a railroad station; that between the two places is the main range of the Rocky Mountains, which must be passed over in this inclement season of the year (January); and that the child, as stated, is in delicate health. The judge, therefore, thinking that it is impracticable to have it brought before him, issues what is known in law as the "order nisi," ordering this child to be transferred back to its mother, and to remain in her custody until the application for the writ of habeas corpus can be heard. The hearing was set for the 21st of January.

The authority of the judge of the district court for the issuance of this order is found in section 3925, Rev. St. Idaho, which is as follows: "When jurisdiction is, by this Code or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceedings be not specially pointed out by this Code, or by this statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." The care and custody of infant children is by statute given to the judges of the district court. Rev. St. §§ 2473, 2483, 2534. It will be noticed that section 3925 is very broad, indeed. It was intended to give the court power to issue any order that might seem necessary, under the particular circumstances of the case. It is objected on the part of the applicant, in this case, that section 8370 requires that all writs, warrants, process, and subpoenas authorized by the provisions of this chapter must be issued by the clerk of the court, etc. This order is issued under the provisions of section 3925, which seems to authorize the order without the seal of the court. It also appears that section 8361 would authorize the issuance of said order. If a warrant or writ of habeas corpus had been issued under authority of section 8364, it would require that the child be brought before the judge of the district court. Under all the circumstances, the court thinks that the judge of the district court is authorized to issue the order that the child be taken to its mother until an application of habeas corpus can be heard, which is set for the 21st of January. The court thinks that it is not proper for a sheriff or private parties to take upon themselves the responsibility of disobeying the order of the district court, with or without the aid of counsel. We think it better that the sheriff and private persons should obey all orders of the courts and the judges thereof. Such orders should be obeyed so far as practicable, and so

far as possible under the circumstances, until the matter can be properly brought to the hearing of the higher court. Any other practice would render the law and the courts powerless, and result in confusion and anarchy, and cannot be permitted. I wish to say further, also, that this court will hesitate to issue a writ of prohibition to prevent further proceedings before the district court in any case, unless it is so clear that it is acting outside of its jurisdiction that there is no reasonable doubt of the fact. We must refuse this writ, and, if further proceedings should seem necessary, this court will take cognizance of the matter, after the hearing before the district judge, by means of writ of review. The writ of prohibition is denied. In *Re Rafferty* (Wash.) 25 Pac. 465, an order nisi was issued by one of the justices of the supreme court, upon an application for writ of habeas corpus, similar to the one in case at bar; and in that case the court, in discussing this question, held that it was proper, under the circumstances, to issue such order. The discussion of the supreme court of Washington in the above case is instructive in this regard.

SULLIVAN and HUSTON, JJ., concur.

#### IN RE DOWLING.

(Supreme Court of Idaho. Feb. 22, 1896.)

JUDGE — POWERS — HABEAS CORPUS — CARE AND CUSTODY DURING PENDENCY OF PROCEEDING — SIGNATURE OF CLERK AND SEAL OF COURT — CONTEMPT.

1. The district judge at chambers has all the powers of a court, in habeas corpus proceedings.

2. Under the provisions of section 8361, Rev. St., the judge may issue an order for the temporary care and custody of the person alleged to be illegally restrained of his liberty, to continue until the hearing of the application for the writ of habeas corpus. Such order need not be issued by the clerk under the seal of the court. The signature of the judge is sufficient.

3. The statutes in regard to the writ of habeas corpus must be liberally construed, with a view to effect their object and promote justice.

(Syllabus by the Court.)

Application of James J. Dowling for a writ of habeas corpus. Denied.

R. P. Quarles, for applicant.

SULLIVAN, J. This is an application for a writ of habeas corpus. The facts are substantially as follows: Mrs. Della Dowling made application to Hon. D. W. Standrod, judge of the Fifth judicial district of Idaho, for a writ of habeas corpus to procure the custody of her two year old infant daughter, Eva Estella Dowling. She alleges in her petition for said writ that said child is the daughter and only child of the petitioner; that from the birth of said child to the 28th day of December, 1895, said infant had not been separated from the petitioner; that the mother's care was indispensably necessary

for the welfare of said infant, and that the separation from its mother greatly endangered its health; that the petitioner was married to James J. Dowling, the father of said infant, at Salmon City, Idaho, on the 5th day of October, 1892, and from that time until the 24th day of December, 1895, she lived and cohabited with said James J. Dowling; that on the last-mentioned date she was obliged to take said child, and leave her said husband, and go and reside with her mother, in said Salmon City, because of the cruel and barbarous treatment of her said husband; that he was abusive, insulting, and violent in his deportment towards the petitioner, and applied opprobrious epithets to her, charging her with infidelity and unfaithfulness, and threatened her life and that of said child; that her sufferings were so great while she remained in his society and under his control that her condition became intolerable and her life a burden, and she was compelled and forced thereby to withdraw from her said husband's home on the 24th day of December, 1895; that, by reason of such conduct on the part of her said husband, she would have, long prior to said date, separated from him, but was restrained, and submitted to all his cruelties because of womanly, wifely, and motherly reluctance to involve her said family in a public exposure of the distressing life she had led, and the abuse she had endured; that since leaving her husband she has been residing with her mother, and under her protection, apart from her said husband, in said Salmon City; that on the 26th day of December, 1895, her said husband came to the home of her said mother, Mrs. Melvina J. Nashold, and by force and violence, and against the wish, and in spite of the express prohibition, of the petitioner, carried away said infant, and now wrongfully and unlawfully restrains and keeps her in a house situated in the suburbs of said Salmon City; that said house is occupied by said James J. Dowling and one William Neal, a saloon keeper; that those two persons are the only occupants of said house, and in care of said infant; that said Neal is charged with a crime, and now under bail; that, during the absence of said Dowling from said house, said Neal has said child in his sole care and custody; that said Dowling is under bonds to keep the peace, and during the trial of that matter the said infant was kept in the town jail of Salmon City; that said infant is in delicate health, subject to fits of croup, and that its general welfare, its health, and its life depend upon the immediate care of a mother, "and that your petitioner is able to provide a suitable home for said child, to administer to its wants, and is willing to devote her time to its welfare"; that said James J. Dowling has threatened to kill said infant, and has threatened to remove said child from Lemhi county, and that the petitioner believes said child may suffer irreparable injury before compliance with a writ of habeas corpus can be en-

forced; that, by reason of sickness and infirmity incident to tender years of infancy, the said child could not be taken on a distant journey, in the winter season, without great danger. The petitioner then states facts tending to show illegal detention and confinement of said infant, and asks that the child be delivered to the petitioner.

On presentation of said petition to the Honorable D. W. Standrod, Judge of the Fifth judicial district, he made an order in writing setting forth substantially the facts contained in said petition, and directed that, upon the service of the same on said James J. Dowling, he deliver said child into the custody of the sheriff of said Lemhi county, and that said sheriff deliver said child into the custody of the petitioner. And it was further ordered that, upon the failure of said Dowling to deliver the said child to said sheriff, the sheriff was directed to immediately take said child from the custody of said Dowling, and deliver it to its mother, the petitioner, to be by her kept and maintained until the hearing of the said petition, which hearing was fixed for January 21, 1896. Said order was signed by the district judge, but not issued by the clerk under the seal of the court. Said order was placed in the hands of the sheriff of Lemhi county for service on the 18th day of January, 1896; and thereupon the said sheriff proceeded to and did serve the same upon the said James J. Dowling, and then and there demanded the possession of said child, which was refused by said Dowling. Thereafter said Dowling consulted his attorney, and after so doing served the following written notice on the sheriff: "To John Miller, Sheriff of Lemhi County, Idaho—Dear Sir: I hereby notify you that I fail and refuse to surrender to you the custody of my infant child, Eva Estella Dowling, under the order of the Hon. D. W. Standrod, judge, dated at chambers at Pocatello, Idaho, on January 11th, 1896. I also notify you that the said order is void, for the reason that the said judge at chambers has no jurisdiction or power to make said order, and for the further reason that the said order, which is, in effect, if anything, a process, is void for the reason that it is not issued in the name of the state of Idaho, nor in the name of the people of the state of Idaho, and for the further reason that it was not issued by the clerk of the court, under the seal of the court, as required by section 8370 of the Revised Statutes of Idaho. Said order is without authority; arbitrary, despotic; without warrant in law; made without the protestant being heard, or having a chance to be heard; was not made in any civil action then or now pending; and is in no sense a writ of habeas corpus, or authorized in a habeas corpus proceeding. I forbid you taking charge of my said child under said order, and warn you that if you do so, you will do so at your peril, and that I will hold you responsible



for any consequences that may result, and for all damages that may come to me, by reason of such unwarranted seizure, should same be made by you. I act in this matter advisedly, declining to obey the said order because it is a nullity, and with all due respect for the laws of my country, which I am ready to obey; but I claim the natural and inherent right to protect my own lawful possession of my own child against unlawful seizure by any power, or under any order of any judge that is or may be made without authority of law. Jan. 14, 1896. Jas. J. Dowling." Thereupon the sheriff failed and refused to execute said order by taking said child and delivering it to the petitioner. Thereafter the petitioner presented a supplemental petition to said district judge in said matter, setting forth numerous facts showing the failure of the sheriff to execute said order, and the failure and refusal of James J. Dowling to deliver said child as directed by said order. The judge thereupon issued an attachment against said Dowling, under which he was arrested and brought before said judge for contempt for disobeying said order. The defendant was represented by R. P. Quarles, Eden & Terrell, and Reeves, Esqs., his attorneys. A motion was made to quash said attachment, and submitted to the court. The judge thereupon asked counsel for the state if they desired to offer any proof as to the whereabouts of the child in question, and they replied that they did not have any proof to offer, and that they had been unable to obtain any. The judge then directed the defendant to be sworn, so that he might be interrogated as to the whereabouts of said child, to which the defendant objected on the ground that he was not required to testify against himself. The judge thereupon found the defendant guilty of contempt, for refusing to obey the order of said judge directing him to deliver said child to the sheriff, and, further, that said child is secreted by said defendant, and that it is in his power to produce said child and to perform the said order; and it was ordered that said Dowling be imprisoned in the county jail of Bannock county until he performs the said order by delivering, or causing to be delivered, said child to the custody of the sheriff of Lemhi county, and the sheriff was directed to enforce this order or judgment.

The contention of defendant is that the order of January 11, 1896, issued under the signature of the judge, directing the defendant, Dowling, to deliver the custody of said child to the sheriff, is void, because not issued by the clerk under the seal of the court; that the same was issued without jurisdiction, power, or authority on the part of the judge; and that said order was not authorized by any law of this state, and for those reasons the defendant is not guilty of contempt for refusing to obey it. Counsel for defendant would indicate by his argument

that the order in question was permanent, when such is not the case. The order was served on defendant on the 13th day of January, and the hearing to determine who should have possession and custody of the child was set for January 21st, following. The district judge, as contradistinguished from the court, may perform all acts required in proceedings under the provisions of the statute in regard to writs of habeas corpus as legally and effectually as the court itself.

1. We will consider the authority of the judge to make said order. Section 8361, Rev. St., provides, "Until judgment is given on the return, the court or judge before whom any party may be brought on such writ, may commit him to the custody of the sheriff of the county, or place him in such care and under such custody as his age or circumstances may require." I think this section was intended to provide for such cases as the one at bar. An infant child, two years of age, in poor health, is the subject of dispute. To take it before the judge would require taking it a distance of 70 miles, by stage, over a high range of mountains, and then some 225 miles, by rail, to Pocatello, Idaho, in the most inclement season of the year. In such a case said section 8361 authorizes the judge or court to look to the health and welfare of the person whose liberty is involved, and does not require that the body of such person shall be brought before the judge or court before the order therein provided for can be legally made.

2. Is said order void because it was not issued by the clerk of the court under the seal of the court? It is contended that said order is a writ, warrant, or process, within the meaning of these terms as used in the provisions of the chapter entitled "Of Writs of Habeas Corpus," and that section 8370 of said chapter requires that all writs, warrants, and process authorized by the provisions of said chapter must be issued by the clerk of the court under the seal thereof. We cannot concede this contention. An order made under section 8361, for the temporary care and custody of the person alleged to be illegally restrained of his liberty, until the hearing and determination of the application, does not necessarily need to be issued by the clerk under the seal of the court. The order complained of was passed upon by this court in *Re Miller* (decided at the January, 1896, term) 43 Pac. 870, which case was an application for a writ of prohibition. Mr. Justice Morgan, speaking for the court, in that case, said of said order, "The authority of the judge of the district court for the issuance of this order is found in section 3925, Rev. St." And again, "It also appears that section 8361, Rev. St., would authorize the issuance of said order." And further, "Under all the circumstances, the court thinks that the judge of the district court is authorized to issue the order that the child be taken to its mother until an application for habeas corpus can be heard, which is set

for the 21st day of Jan." We think said order did not require the signature of the clerk of said court, and the seal thereof. The language of section 3875, Rev. St., which section is a general provision respecting courts of justice, provides: "The seal of the court need not be affixed to any proceeding therein, or document except: (1) To a writ; (2) to the certificate of the probate of a will, or of the appointment of an executor, administrator or guardian; (3) to the authentication of a copy of a record or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the clerk." This clearly indicates that such an order as the one in question does not require the seal of the court. The circumstances of this case are peculiar, and the provisions of the statute are broad enough to enable the judge to do justice between the parties.

The application for the writ shows that the defendant had, by force and violence, taken the child from its mother, and that he and one Neal, a saloon keeper, were the only persons caring for it, and shows such facts as we think fully warranted the court in making said order. After having obtained the possession of the infant by force and violence, the defendant retains possession of it by resistance to an order of the judge, and has secreted the child; and it is alleged that he has transported it beyond the jurisdiction of the judge, and thus seeks to evade having justice done in the matter, and claims that he is innocent of the crime of contempt. The proceedings in habeas corpus under the Revised Statutes are for the promotion of justice, and the provisions of those statutes, and all proceedings under them, must be liberally construed, with a view to effect their objects and promote justice. See Rev. St. § 4. The defendant, in his letter or notice to the sheriff, above set out in full, shows that his main objection to said order was "that the said judge at chambers had no jurisdiction or power to make said order, and for that reason it was void." He thus put himself in open defiance to the order of the judge, without appearing before him and testing the jurisdiction there, and, if not satisfied with the decision of the judge, to, in a proper manner, have the same reviewed. The defense, at best, is but technical; but it seems that the delay gained by it was sufficient to enable the defendant to secrete the child, and transport it beyond the jurisdiction of the court. The conduct of the defendant clearly indicates that he was running a race with the court or judge, with the intent to defeat the ends of justice. Section 8236, Rev. St., which applies to the Penal Code, in which is found the chapter on "Habeas Corpus," provides as follows: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor any error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant or tended to his prejudice in respect to a substantial

right." Technical errors or defects should not be permitted to defeat justice in any case. His acts show that his whole intention was to defeat the action of the judge in said habeas corpus proceeding, provided the judgment should be against him. Such obstruction should not be tolerated by any court of justice or judge. The defendant was given the opportunity to purge himself of the contempt, but he refused so to do. He refused to inform the judge of the whereabouts of the child; thus showing that by his act in setting at defiance the order of the court, and subsequently secreting the child, he knowingly and willfully endeavored to thwart the lawful order of the judge, and thus committed the crime of contempt.

We have examined the authorities cited by counsel for defendant, and find many of them not in point, and those that are do not affect the question involved, as that question is controlled by the positive provisions of our statute.

As to the point that the writ of habeas corpus had not yet been issued, we will say that, as the defendant has been in continual contempt for refusing to obey said order, he will not be heard to complain of that fact until he purges himself of contempt, or until he is released therefrom by the judge of the Fifth judicial district.

After a careful consideration of the law, and all facts presented by the application for the writ of habeas corpus, we are of the opinion that the writ ought not to issue, and the proceedings of the judge of the district court herein are hereby approved and confirmed. The writ is denied.

MORGAN, C. J., and HUSTON, J., concur.

WINGATE v. CITY OF TACOMA et al.  
(Supreme Court of Washington. Feb. 4, 1896.)  
MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS  
—DEFECTIVE PROCEEDINGS—ESTOPPEL.

Though a city fails to obtain jurisdiction to make a special assessment for a street improvement, because of a defective notice, yet, if a property owner signs the petition for such improvement, and, at the time it is being made, personally inspects the work, and makes no objections thereto, or to the levying of the assessment, he and his successors in interest will be estopped from questioning the validity of the proceedings. *Barlow v. City of Tacoma* (Wash.) 40 Pac. 382, followed.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Robert Wingate, as receiver of the Merchants' National Bank of Tacoma, against the city of Tacoma and others, to have a special assessment declared void. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Doolittle & Fogg, for appellant. James Wickersham and Stacy W. Gibbs, for respondents.

DUNBAR, J. This was an action brought by the plaintiff and appellant in the superior court of Pierce county, asking that the special assessment levied against the property of the appellant be set aside and held for naught, and that the certificate of sale issued to the defendant John L. Farwell be decreed to be void, and of no force and effect, and further asking that the city treasurer be enjoined from delivering or issuing any deed upon said certificates, and that the city of Tacoma, its officers and agents, be properly enjoined from enforcing or attempting to enforce said assignment against the property of the defendant described in the complaint. The lower court found in favor of the defendant, and dismissed the action, and appeal is taken to this court.

It is conceded that this case falls within the rule announced by this court in the case of Buckley v. City of Tacoma, 9 Wash. 253, 37 Pac. 441, if the appellant is not estopped from pleading want of authority in the city. The tenth finding of fact is: "That one Henry Drum was the owner of the property in question at the time all proceedings relating to said improvement were had; and that he was one of the petitioners for said improvement; and that, at the time of making said improvement, he personally inspected the making thereof; and that he made no objections to the progress of said work at any time, or to the levying of said assessment." And, from said finding, the court, among other conclusions of law, announced that the plaintiff was "estopped from maintaining this action by reason of the petition, and acquiescence in the making of the improvement after it was ordered, by its then owner and his predecessor in interest." We think that this conclusion of law was justified, under the rule announced by this court in Barlow v. City of Tacoma (Wash.) 40 Pac. 382, where it was held that, notwithstanding the decision of this court in the case of Buckley v. City of Tacoma, supra, the city failed to obtain any jurisdiction in the premises under the notice given; that, where the record showed that Barlow saw fit to appear in said proceedings, and remonstrate against the prosecution of the work, on the sole ground that the same would involve the expenditure of a large amount of money and that it would considerably inconvenience the party remonstrating to pay his portion thereof, and that, subsequently, in consequence of an extension by the council of the time of payment, he withdrew his remonstrance, this action of Barlow supplied the defect aforesaid in the proceedings, and conferred jurisdiction upon the city to proceed as against him; and that he was estopped from raising the question presented. The foregoing opinion was not concurred in by the writer of this opinion, but, being a decision by the majority of this court, it must stand as the law of this state, governing cases which involve the principle of estoppel which was

involved in that case; and if the remonstrance and a subsequent withdrawal of that remonstrance will work an estoppel, it seems to us that a petition would equally work an estoppel. It is true that, in the case of Howell v. City of Tacoma, 3 Wash. St. 711, 29 Pac. 447, it was held that a petition could not be extended, so as to estop one from asserting rights, as against such assessment, when the common council had never had any jurisdiction of the proceeding, or had so far departed from proper methods as to oust it of jurisdiction. But the testimony in this case, it seems to us, carries the case beyond the facts proven in the case of Howell v. City of Tacoma, supra, for Mr. Drum testified that, at the time this improvement was made, he was the owner of the property described in the complaint, and that he signed the petition for the improvement of said street; that he saw the work being done, and thought it was a benefit to the property; that he made no objections to the work as it was being done or the manner in which it was being done; and that he was aware of the improvement. So that it seems to us that, if a person ever could waive a jurisdictional question, it was waived in this case, and that it does not fall within the reason of the case of Buckley v. City of Tacoma, where it was announced that "the people who pay for streets made the charter, and while they granted to the public authorities most liberal powers, by permitting the arbitrary improvement of streets, at local expense, they emphatically reserved to themselves the right to have three things distinctly brought to their knowledge, viz.: (1) What improvement it is proposed to make; (2) what the cost is to be; (3) what property is to be charged with the expense. This knowledge, they declared, must be afforded in a certain way, and after that they reserved the right to remonstrate, and to have a two-thirds vote of the council to overcome their objections." These rights, according to the testimony of Mr. Drum, were all accorded to him, and these three things were brought to his knowledge; and he testifies he made no objection to them, because he thought that it was a benefit to the property taxed. We think the appellant is estopped from raising an objection to the authority of the city to prosecute this work, and to make an assessment to pay for it, and the judgment will therefore be affirmed.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

STATE ex rel. GORDON HARDWARE CO.  
v. LANGLEY, Judge.

(Supreme Court of Washington. Feb. 7, 1896.)  
PRACTICE—NUNC PRO TUNC ORDERS—SUBSTITUTION  
OF ATTORNEYS.

A party who fails to apply for an order of substitution of attorneys at the proper time

will not thereafter be entitled to a nunc pro tunc order.

Application by the Gordon Hardware Company for a writ of mandamus to compel J. W. Langley, judge of the superior court of King county, to enter a nunc pro tunc order in a case pending in said court. Denied.

Isaac D. McCutcheon, for relator. Julius F. Hale, for respondent.

SCOTT, J. This is an application for a writ of mandamus to compel the respondent to enter a nunc pro tunc order substituting I. D. McCutcheon, Esq., as counsel for the plaintiff in a certain cause pending in the superior court of King county, wherein the relator is plaintiff and the Seattle National Bank Building Company et al. are defendants, in place of the firm of Turner & McCutcheon, the plaintiff's attorneys of record. It appears that said Turner & McCutcheon, at the time they were employed as attorneys for the plaintiff, were partners; that, on the 27th day of January, 1894, said partnership was dissolved; that, at the date of said dissolution, the relator fully paid and settled with said firm for all services by them theretofore performed in said action, and discharged them as its attorneys, and on said date employed said McCutcheon to carry on said cause, since which time said McCutcheon has acted as the sole attorney for the plaintiff therein; and that, on February 3, 1894, the relator gave to said McCutcheon a substitution in writing of himself as such attorney in place of said firm of Turner & McCutcheon. But it does not appear that any formal order of substitution was applied for at that time, nor until the 30th of December, 1895, at which time the relator applied for a nunc pro tunc order, to take effect as of the date of the discharge of said firm, which the court refused to grant; and the relator seeks, by this proceeding, to compel the entry of such an order.

From the authorities presented to us, we have found but two classes of cases where nunc pro tunc orders are entered,—one being where an order was in fact made, or some action upon the part of the court taken, which was not at the time formally entered of record; and the other being where the party litigant was entitled to have certain relief at a particular date, and the failure to grant it at that time was due to some delay or omission upon the part of the court. In such instances nunc pro tunc orders have been entered. From the showing made here, the relator would have been entitled to an order of substitution at the time it made its change of attorneys as aforesaid, if it had asked for it then, and it was entitled to it thereafter, when it did apply, but of that date only; and it does not appear that the court has refused to grant a substitution of attorneys as of the date when the application was made, but that the court refused to enter a nunc pro tunc order, to take effect

as of the prior date. No case has been called to our attention where such orders have been granted, where the failure to obtain the relief asked was due to an omission or neglect upon the part of the petitioner, and, consequently, we are of the opinion that the writ should be denied.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

#### GRISWOLD v. CASE et al.

(Supreme Court of Washington. Feb. 7, 1896.)  
FINDING—REVIEW—LIEN OF CHATTEL MORTGAGE  
—OF JUDGMENT—PRIORITY.

1. A finding to which no exception is taken will not be reviewed.

2. Where a chattel mortgagee does not assent to or accept the mortgage, and it is not delivered to her till after judgment liens of creditors of the mortgagor have attached, the judgment liens are superior to that of the mortgage.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Florence L. Griswold against A. B. and Fred E. Case comprising the firm of A. B. Case & Co., and others, to foreclose a mortgage made to plaintiff by A. B. and Fred E. Case. From a judgment foreclosing as to A. B. Case & Co., but declaring the lien of the mortgage inferior to the judgment liens of other defendants, plaintiff appeals. Affirmed.

John A. Parker, J. A. Williamson, and Judson Applegate, for appellant. Bogle & Richardson and Murray & Christian, for respondents.

PER CURIAM. No exceptions were taken by appellant to the findings of fact made by the court in this case, and the only question presented upon this appeal is as to whether the decree rendered by the court was antagonistic to the facts found, and to determine this it is necessary to examine only one of said findings. The court found that, at the time the chattel mortgage upon which the plaintiff's cause of action is based was executed, the plaintiff was not present, and did not assent to or accept such mortgage, and that it was never delivered to her before the levies of the executions issued upon the judgments obtained by certain of the defendants. This being so, the plaintiff was not entitled to priority; and, there being no exception to said finding, we cannot look into the evidence to see whether the same was warranted thereby. Affirmed.

#### STATE v. KROENERT.

(Supreme Court of Washington. Feb. 8, 1896.)  
CRIMINAL LAW—POLLUTION OF STREAMS FRE-  
QUENTED BY FISH—MILLS.

1. Where the trial court and jury have found the evidence sufficient to sustain the verdict, it will not be considered on appeal.

2. A mill that saws shingles is within the statute prohibiting mills from casting sawdust into streams where fish resort to spawn.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

A. J. Kroenert was convicted of permitting sawdust to be cast into the Chehalis river. From a judgment on the verdict, he appeals. Affirmed.

J. C. Cross, for appellant. J. B. Bridges, for the State.

**DUNBAR, J.** The appellant was convicted in the superior court of Chehalis county of permitting sawdust to be cast into the Chehalis river, said river being alleged to be a stream in the state of Washington where fish resorted to spawn. The contention of the appellant is that the evidence is not sufficient to justify the verdict. The evidence may not have been of the most convincing kind, but its sufficiency having been passed upon by the trial judge, who refused the appellant's motion for a nonsuit, and by the jury who were sworn to try the cause, we do not feel justified in setting aside the verdict, although the testimony might not be sufficient to convince the minds of the members of this court of the guilt of the defendant. There is nothing in the contention of the appellant that a shingle mill was not contemplated by the statute. The object was to protect fish against sawdust, and a mill that saws shingles, and thereby makes sawdust, cannot be distinguished, so far as the law for the protection of fish is concerned, from a mill that makes sawdust in sawing any other commodity. The judgment will be affirmed.

**GORDON and SCOTT, JJ., concur.**

**STATE ex rel. SCHWABACHER BROS. & CO. v. SUPERIOR COURT OF KING COUNTY et al.**

(Supreme Court of Washington. Feb. 7, 1896.)

**DEPOSIT IN COURT—WRIT OF PROHIBITION.**

1. Where, pending an action to determine adverse claims of a receiver and a sheriff to personality, the property is sold and the proceeds paid into court to abide the result of the suit, and from the judgment therein an appeal is taken and supersedeas bond filed, the court has no power to deplete the fund for the purpose of allowing the receiver to pay the expenses of the appeal.

2. An application for a writ prohibiting the superior court from making any order authorizing the clerk to pay out money from a fund deposited with him to await the determination of adverse claims thereto will be granted where it appears that one such order has already been made; that the court refused to grant a three hours' delay for the purpose of appealing therefrom; and that a motion for an order further depleting such fund is pending, which order the court has agreed to grant in case the circumstances are the same as those disclosed on the former motion.

Application by Schwabacher Bros. & Co. for a writ of prohibition against the superior court of King county. Granted.

Domvorth & Howe, for relator. Allen & Powell, for respondents.

**HOYT, C. J.** Prior to November 27, 1894, relator had recovered a judgment in an action in which it was plaintiff and the Abrahams Grocery Company was defendant. On that day it sued out an execution on said judgment, and caused the same to be levied on certain articles of personal property belonging to said Abrahams Grocery Company. On the same day it commenced another action against said company, and therein duly sued out a writ of attachment, and caused it to be levied upon the same property, and the sheriff went into full possession thereof under said execution and said writ of attachment. Thereafter, in an action instituted by parties other than the relator, and to which it was not a party, one Wesley Compton was appointed receiver of said Abrahams Grocery Company, and thereafter, as such receiver, commenced an action against the relator and the sheriff, by which it was sought, among other things, to have the judgment under which the levy upon execution had been made declared null and void, and the attachment issued in the other action dissolved. Before the issues had been made up in this action, the court made an order that the property should be turned over to the receiver, and by him sold, and the proceeds thereof paid to the clerk, and remain in his custody to abide the determination of the issues thereafter to be joined in the cause. Acting under this order, the receiver took possession of the property, sold it, and paid the proceeds to the clerk, by whom it was deposited in the action brought by the receiver against the relator and the sheriff. Thereafter said cause was tried upon issues duly joined, and a judgment and decree substantially as prayed for rendered in favor of plaintiff. From this judgment relator appealed to this court, and gave a supersedeas bond, the sufficiency of which has not been questioned.

In said action the claim upon the part of the receiver was that he was entitled to the possession of the property or its proceeds. On the part of the relator, it was claimed that it was entitled to have the property retained in the hands of the sheriff, and sold by him, and the proceeds applied in satisfaction of the judgment already rendered in the one action, and of any that might be rendered in the action in which the writ of attachment had been issued. From this it will appear that the subject-matter of the controversy between the parties was as to which one was entitled to the property and its proceeds. If the claim of the plaintiff was substantiated, he was entitled to it; and, if that of the relator was sustained, the judgment would be such that all of the proceeds of the property would be applied upon judgments in its favor. The controversy admitted of no compromise. From its very nature, one or the other of the parties was entitled to the property or its proceeds; and the fact that the court, pending the action, made an order placing the property in the hands of the re-

ceiver for the purpose of having it converted into money, and such money deposited in the action to abide the result, could have no influence upon the questions to be decided. Hence it must be held that, until the action had been decided in the lower court, it was beyond its power to make an order in the action which would in any manner deplete the fund derived from the sale of the property. If it was within the power of the court to materially interfere with a subject-matter about which parties were litigating before the determination of such litigation, there would be little use in attempting to wage any litigation to a successful issue, for the reason that, when such issue had been reached, it might be found that the court had so disposed of the subject-matter of the suit as to make the successful determination of the litigation of no value. The proceeds of this property, when deposited with the clerk in this action, could not be interfered with by the court until the final determination of the rights of the parties in regard thereto. It must follow that the right which the court had to interfere with this fund, if any, was derived from the judgment and decree rendered in the action. But from this judgment and decree an appeal had been taken and a supersedeas bond filed; and, after that was done, neither of the parties nor the court could found any action upon such judgment until determination of the appeal. Notwithstanding these facts, it was made to appear by the application for the writ of prohibition and by the answer to the alternative writ that pending such appeal the court had assumed the right to deplete, and had depleted, said fund, and was threatening to still further deplete it. What we have said is sufficient to show that in doing so it was proceeding without jurisdiction. It is true that it is alleged in said answer that it was not the intention of the respondent to interfere with such fund further than was necessary to enable the receiver to properly present the cases which he was prosecuting or defending at the instance of the court. But the amount to which the fund was to be depleted was immaterial. If the court had the right to deplete it at all, it was because it had jurisdiction over it; and, if it had such jurisdiction, it could authorize it all to be disbursed, and the appellant thus be deprived of the fruits of its appeal should it result favorably to it.

There is a suggestion in the answer that the receiver could not properly present his case on appeal unless he was allowed to use some of this fund. If the law had reached such a stage that the court could require a party possessed of means to pay the necessary expenses of his adversary, if he had no means of his own, there would be force in this suggestion. But the law has not reached that advanced stage.

There is also a suggestion that in the determination of a former proceeding in this

court, by which it was sought to prohibit the superior court from carrying into effect the order to turn over the property to the receiver, the question here presented had been determined adversely to the claim of relator. But we do not so understand the decision in that proceeding. All that was therein decided was that the writ would be denied for the reason that relators had an adequate remedy by appeal, which reason for denial was an insufficient one if the claim of the respondent to jurisdiction over the fund should be sustained. We are compelled to hold that the court had no jurisdiction to make any order which would authorize the clerk to pay out any of this fund until the determination on appeal of the cause in which it was deposited.

The only other question presented is as to whether or not the action of the court was such that the relator had a right to presume that such orders would be made if not prohibited. Upon this question it was made to appear from the application, and not denied in the answer, that the court had made one order authorizing a certain amount to be paid out of this fund, and that a motion was pending which asked for another order, and that the court had stated that, if the circumstances were the same as disclosed upon the former application, it would be granted, and an order made further depleting the fund. It also appeared that, at the time the first order was made, relator asked for sufficient time before it was carried into effect to perfect an appeal therefrom and give a bond to supersede it; that its request for the short period of three hours in which to do this was denied. Under all these circumstances, we think the relator was justified in coming to this court, and asking it to prevent, by its writ, any further orders being made by which this fund might be depleted before the determination of the appeal in the action. The alternative writ heretofore granted will be made permanent.

DUNBAR, ANDERS, and SCOTT, JJ., concur.

REITMEIR et al v. SIEGMUND et al.  
(Supreme Court of Washington. Feb. 7, 1896.)  
APPEALABLE ORDER.

An order setting aside a default, and granting leave to answer, whether the proceeding be by motion in the original case or by petition in a new one, is not appealable.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by John Reitmeir and others against Lizzie Siegmund and others to set aside a judgment by default. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

John A. Pierce and Franklin W. Knight, for appellants. Adolph Munter, for respondents.

HOYT, C. J. This appeal was from an order which set aside a default, and gave the defendants leave to answer. Respondents moved to dismiss on the ground that an appeal would not lie from such order. We held in *Freeman v. Ambrose* (Wash.) 40 Pac. 381, that an order of this kind, when made upon motion in the original action, was not appealable. But it is claimed by the appellants that, from the fact that this order was made in an original proceeding instituted for the purpose of having the judgment vacated, it does not come within the rule announced in that case. No good reason can be given for the distinction thus sought to be made. The object is the same whether the proceeding be by motion in the original case or by petition in a new one, and the effect of the order, whether made in one proceeding or the other, is the same. But it is not necessary for us to decide at this time whether or not an appeal would lie from the order in question, for the reason that we are satisfied that the showing was such that the superior court was entirely justified in making the order. The facts disclosed by the record are such as not only to show that there was no abuse of discretion in granting the order, but that it would have been a great abuse of such discretion to have denied it. The order will be affirmed.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

#### POWELL et al. v. PUGH, Sheriff.

(Supreme Court of Washington. Feb. 1, 1896.)

HUSBAND AND WIFE—COMMUNITY PERSONAL PROPERTY—LIABILITY FOR HUSBAND'S DEBTS.

Hill's Ann. St. § 1399, having given the husband control and management of the community personal property of the husband and wife, "with a like power of disposition as he has of his separate personal property," such property is subject to seizure on execution for his individual debts. Gordon, J., dissenting.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by Dora E. and E. L. Powell against F. M. Pugh, sheriff. Judgment for plaintiffs, and defendant appeals. Reversed.

Samuel R. Stern, for appellant. Blake & Post, for respondents.

SCOTT, J. The respondents were husband and wife, and the husband was engaged in the grocery business in this state; the stock of groceries being the community property of the parties. The appellant, as sheriff of Spokane county, levied upon said stock under an execution issued upon a judgment which was the separate debt of the husband, and this action was instituted by the respondents to enjoin the sale of the property. Judgment was rendered in their favor, permanently enjoining the sale thereof, and this appeal was taken therefrom.

The question to be decided is as to whether the community personal property can be sold to satisfy the husband's separate debt. Under our law, the husband has the absolute control, management, and disposition of the community personal property, as much so as of his separate property, excepting that he cannot devise more than one-half thereof. He has no such control or right of disposition as to the community real estate, and for that reason we have held that the community real estate cannot be sold for his individual debts. In this particular the laws of this state are different from those of the other states where community property laws relating to husband and wife are in force. With respect to personal property, however, our laws are substantially the same, and for that reason there is no ground for laying down a different rule as to the disposition of the community personal property. The husband, having the absolute power to dispose of it, may sell it to satisfy his individual debt, and pass a good title. This being so, we see no reason why it may not be sold under an execution issued to enforce collection of that individual debt. If the title may pass by his act, there is no reason why it should not pass by operation of law under similar conditions. See *Andrews v. Andrews*, 3 Wash. T. 289, 14 Pac. 68.

It is further contended that the judgment of the lower court ought to be affirmed on the ground that it appears there is not enough of the community personal property to satisfy the community debts, but we do not think the respondents are in a position to raise this point. None of the community creditors are questioning the transaction, and we are not called upon to express an opinion as to what rights or claims, if any, they could maintain in the premises. Reversed.

HOYT, C. J., and DUNBAR and ANDERS, JJ., concur.

GORDON, J. I am unable to bring my mind to the conclusion reached by the majority, and will state as briefly as I can the reasons for my dissent. The reason advanced in the foregoing opinion for holding that the community personal property is liable for the individual debt of the husband is that, by statute, he is given the management and control of such property, "with a like power of disposition as he has of his separate personal property." 1 Hill's Ann. St. § 1399. I am aware that there have been decisions in some of the states in which the "community system" obtains which seem to fully support the reasoning and conclusion arrived at by the majority in this case. I think, however, in view of the difference that exists in the statutory provisions of those states and our own upon this subject, and the fact that this court, in many cases involving other questions arising under the community laws of this state, has been constrained to adopt con-

clusions differing widely from those reached in such other states upon kindred propositions, that the holdings of such states upon the question arising in this case ought not to be considered of much binding authority. It has been held, in Texas, that, upon the death of the wife, the husband occupies the relation of a surviving partner in an ordinary partnership. *Moody v. Smoot*, 78 Tex. 119, 14 S. W. 285. At page 179 of his very excellent work on Community Property, Judge Ballinger says: "In Texas, the liability of the community for the separate debts of either spouse contracted before marriage seems to be placed upon the theory that, because the income of the separate property falls into the community, so, also, the charges against the owners thereof become community debts." In this state the interest of the wife in the property acquired by the combined energies of herself and husband during the existence of the marriage is something more than a mere expectancy, and therein we differ from California and Louisiana. *Packard v. Arellanes*, 17 Cal. 525; *Succession of McLean*, 12 La. Ann. 222. Indeed, I am satisfied that there are many other essential points of difference between our "community system," as it exists by statute and as interpreted by the decisions of this court, and the system existing in any other state. It seems to me illogical to hold that, because the husband has the authority to manage and dispose of such property, there is "no reason why it may not be sold under an execution issued to enforce collection of his individual debt." The husband is, in my view of the law, merely the statutory agent of the community. It would, of course, be nonsense to assert that, because an agent has authority to sell the property of his principal, such property could be subjected to the payment of the agent's debt. Why, then, should a mere statutory agent be held to have such authority? Again, one member of a trading partnership has the lawful right to sell and dispose of the assets of the firm, even to the extent of giving a bill of sale of the entire personal property; but the case has yet to arise wherein it shall be held that, because he possesses such power of disposition, he could sell or mortgage the same to satisfy his individual debt, nor has it ever been held to be the right of a creditor to enforce the individual debt of such partner against the assets of the firm.

Still further, conceding that, with reference to community personal property, the husband is the statutory agent of the community, with authority to dispose of such property, that authority is to be voluntarily exercised. It presupposes the exercise of discretion and assent, and hence such a sale or disposition of the property is to be distinguished from an involuntary execution sale, wherein the consent of the debtor is wholly immaterial. The statute confers authority, but does not couple with it any liability. Section 1408 (1 Hill's Ann. St.) of the

chapter on "The Property Rights of the Husband and Wife," provides that: "The rule of common law, that statutes in derogation thereof are to be strictly construed, has no application to this chapter. This chapter establishes the law of this state respecting the subject to which it relates and its provisions and all proceedings under it shall be liberally construed with a view to effect its object." It seems to me to be anything but a "liberal construction" of the provisions of that chapter to hold that a debt contracted before the community existed may be enforced against the property of the "community," when, in fact and in law, the "community" as a separate legal entity was a stranger to the contract out of which the debt arose. In an action upon such contract, neither the "community" nor its members, as such, would be proper parties; and yet the spectacle is presented of a judgment being enforced against the property of a "legal entity," based upon a debt to which it was a stranger, and in the action in which such judgment was recovered it was not a party. It seems to me that our law in relation to the property rights of husband and wife is based upon the theory of equality, and proceeds upon the idea of keeping the community estate separate from the individual estate of the spouses. The rule announced by the majority, however, destroys, as it seems to me, the idea of the equality of the spouses. The logic of the holding is that a husband can use the personal property of the community to improve and enhance his separate individual real property, in which the wife, as the other member of the community, has no vested right or interest. He may thus impoverish the community estate to enrich his individual estate. The entire community personal property becomes pledged (involuntarily) to the payment of any debt which the husband may see fit to contract, notwithstanding he may be improvident or profligate, and notwithstanding, further, that such debt is contracted for the exclusive benefit of his own separate estate.

In *Holyoke v. Jackson*, 3 Wash. T. 235, 3 Pac. 841, Judge Greene, in speaking of the community system as it exists under our law, and of the powers and liabilities of its members, says, at page 239 3 Wash. T., and page 841. 3 Pac.: "In it [the community], the proprietary interests of husband and wife are equal. \* \* \* It is *sui generis*,—a creature of the statute. By virtue of the statute, this husband and wife creature acquires property. That property must be procurable, manageable, convertible, and transferable, in some way. In somebody must be vested a power, in behalf of the community, to deal with and dispose of it. \* \* \* Its exemptions and liabilities as to indebtedness must be defined. \* \* \* Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than



the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community." In *Brotton v. Langert*, 1 Wash. St. 73, 23 Pac. 688, this court, construing section 1899, supra, which gives to the husband the management and control of the community personal property, says: "This section discriminates in favor of one spouse only so far as is actually necessary for the transaction of ordinary business." Argument is unnecessary to demonstrate that the holding in the present case is antagonistic to the construction given to this section in *Brotton v. Langert*. And, further on in the opinion in that case, the court says: "Construing all the provisions of the chapter together, we cannot escape the conclusion that the object of the law was to absolutely protect (so far as is consistent with the transaction of ordinary business, as we before observed) one spouse from the misdeeds, improvidence, or mismanagement of the other, concerning property which is the product of their joint labors. It is in the nature of an exemption, and, as has been well said, 'exemption laws are upheld upon principles of justice and humanity.'" With deference to my brethren, I think that the judgment should be affirmed.

#### STATE v. YOUNG.

(Supreme Court of Washington. Feb. 1, 1896.)

LARCENY OF CATTLE—INDICTMENT—SUFFICIENCY—CRIMINAL LAW—APPEAL—OBJECTIONS WAIVED—HARMLESS ERROR.

1. Pen. Code, § 52, provides that if any person steal certain animals named, "of any value," he shall be imprisoned in the penitentiary not more than 10 nor less than 1 year, or, in the discretion of the court, be imprisoned in the county jail not exceeding 1 year, or fined not exceeding \$100, or both. *Held*, that an indictment under such statute need not state the value of the cattle alleged to have been stolen. *Anders and Gordon, JJ., dissenting.*

2. Questions arising on the fact that defendant was not present at certain times during the trial cannot be raised for the first time on appeal.

3. On appeal the record recited that the prosecuting attorney, while addressing the jury, was permitted, over the objection of the defendant, to explain the reason why he did not testify as to a conversation held by himself and defendant prior to the trial. *Held*, that the supreme court could not say the conduct of the attorney constituted prejudicial error, in the absence of anything in the record to show what reason was advanced by him, or under what circumstances he tendered such explanation.

Appeal from superior court, Columbia county; R. F. Sturdevant, Judge.

G. S. Young was convicted of stealing one or more head of neat cattle, and appeals. *Affirmed.*

J. R. Boarman and F. Ganahl, for appellant. Will H. Fouts, for the State.

DUNBAR, J. The appellant was convicted by the superior court of Columbia county of the crime of stealing one or more head of neat cattle, and sentenced to the penitenti-

ary for a term of 10 years. From such judgment of sentence an appeal was taken to this court.

The information is under section 52 of the Penal Code of Washington, which provides that if any person shall steal certain animals (naming them), of any value, he shall be deemed guilty of an offense against the laws of the state of Washington, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than 10 nor less than 1 year, or, in the discretion of the court, the offender may be imprisoned in the county jail not exceeding 1 year, or fined not exceeding \$100, or both. The information in the case at bar is as follows: "G. S. Young is accused by the prosecuting attorney of Columbia county, state of Washington, by this information, of the crime of stealing one or more head of neat cattle, committed as follows, to wit: The said G. S. Young, on the 1st day of August, A. D. 1894, within the county of Columbia, state of Washington, did then and there, unlawfully and feloniously, steal one head of neat cattle, the property of Richard Walsh, contrary to the form of the statute in such cases made and provided," etc. The alleged objection to this information is that it does not state the value of the cattle alleged to have been stolen. It is stoutly contended by the appellant that a lack of the allegation of the value renders the indictment bad, and it is urged that, without value, there can be no larceny, unless made so expressly by statute. We think this is true, and no doubt the old rule of the common law required the allegation of value, but there was a reason for the rule, and that was that the value determined the punishment and the grade of the crime; and, when the reason for the rule no longer exists, the rule itself will not be binding. Under our statute, it makes no difference what the value of the animal stolen is. The statute has made the stealing of cattle a distinct offense, and the defendant could as well be sentenced to a term in the penitentiary for stealing 1 animal as he could for stealing 100; nor could he receive any benefit by an allegation of value, nor would it avail him anything to contest the value alleged, if it were alleged, and prove that the value was less than the value alleged. If the value were alleged at \$1, and the proof was that the actual value was \$1,000, or if the value was alleged at \$1,000, and the proof was that the actual value was \$1, the punishment would still be the same, for the crime is the stealing of cattle of any value. It is true that, in the discretion of the court, the offender may be imprisoned in the penitentiary or in the county jail, or he may be fined; but it is not at all likely that it was the intention of the legislature to have that discretion exercised with reference to the value or the number of the cattle stolen, but with reference to the circumstances surrounding the commission of the crime. This

crime is, by the statute, directly taken out of the provisions of the law with reference to grand and petit larceny, and is made a separate and distinct offense; and the language of the statute is that if he shall steal, take, or drive away these cattle, of any value, he shall be deemed guilty of an offense. We think the idea intended to be expressed by the legislature was, "without reference to value." Nor do we think that any distinction can be made between our statute and the statute of Montana, which declares a theft of certain animals, "whatever their value," to be grand larceny. The two expressions, "of any value," and "whatever their value," evidently mean practically the same thing; the legislature resting on the presumption that cattle are of some value, and that when they are stolen the party stealing them should be punished, without reference to any particular value of the cattle. This statute was construed by the supreme court of Montana in *Territory v. Pendry*, 22 Pac. 761, where the court held that it was unnecessary to allege or prove any particular value for stolen animals; that the value might be inferred from any facts or circumstances that might be proven, in the absence of any direct evidence upon that point. In fact, such is now the almost universal holding of the courts under statutes similar to ours, and this principle is well recognized by all the writers on criminal law. Archbold, in his work on Criminal Practice and Pleadings (volume 2, p. 1181), says: "Formerly, the stealing of goods, etc., of the value of twelve pence, or under, was only petty larceny. Above that value was deemed grand larceny. And in the indictment, therefore, it was necessary and material to show the value of the articles stolen; and the value of each article alleged to be stolen was stated, that, in case the jury should find the defendant guilty of stealing one of them only, the offense might appear upon the record to be grand larceny. But the distinction between grand and petty larceny was abolished by St. 7 & 8 Geo. IV. c. 29, § 2, since which it does not appear to have been necessary to state or prove the value of the article stolen;" referring by note to the indictment on page 357, where it was held that no indictment should be held insufficient for want of the statement of value in any case where the value or price is not of the essence of the offense; adding that since the distinction between grand and petit larceny was abolished by St. 7 & 8 Geo. IV. c. 29, § 2, it seems to have been no longer necessary to insert the value of the article stolen. Bishop on Statutory Crimes (2d Ed., § 427) says: "A rule pervading the entire procedure in larceny is that the value of the thing stolen must be alleged and proved when the punishment, or its degree, depends on value, but, when it does not, it need not be." Bishop on Criminal Procedure (3d Ed., vol. 1, § 541), after discussing the general

rule, says: "But, as we have seen, the proof of value will be adequate if it simply shows to which of the two or more classes meriting corresponding punishments the offense belongs. And if the statute makes it a distinct offense to steal a horse, or any other specified article, irrespective of its value, \* \* \* the value need not be alleged in the indictment, but it must be alleged wherever it is an element in the punishment. \* \* \* And again, in section 567: "We have seen that in many cases the punishment depends on value. Therefore in these cases it must be alleged. But, for purposes of identity, it is not generally required, though in special circumstances it may be. When not affecting the punishment, or the identity of the transaction, the indictment may be silent concerning it." And that is now the universal rule, founded in good sense. As we have seen, under our statute, the value could in no possible way affect the punishment, and it was therefore unnecessary to aver it.

It is contended by the appellant that the record in this case does not show that the defendant was present during the trial, and does not show that he consented to the separation of the jury, nor that he was present at the time the court gave additional instructions to the jury, nor that he was present when the verdict was rendered. The record does show, however, that these questions were not brought to the attention of the lower court on the motion for a new trial, and, in accordance with the universal and oft-expressed opinion of this court, the appellant will not be allowed to raise them here for the first time. We think the instructions complained of were substantially correct.

The following, which is claimed by appellant to be reversible error, appears in the record: "The jury being impaneled, and the prosecuting and county attorney, Mr. Will H. Fouts, Esq., while addressing the jury on the testimony introduced on the trial, was permitted by the court, over the objection of the defendant, to explain to the jury the reason that he did not go on the witness stand in this case, and testify to a conversation held by himself and defendant, in his office, prior to beginning of this trial." This seems rather a strange proceeding, and if there was enough in the record which was brought up here to show to the court that this statement was made in the first instance by the prosecuting attorney, and that there had been nothing preceding to call it forth, we should be constrained to hold that it was a reversible error; but the record does not disclose what reason was advanced by the attorney, or under what circumstances he tendered this explanation. If in reply to a criticism by the counsel for the defense concerning this lack of testimony on the part of the attorney, it might have been legitimate for him to have replied to it by stating that

he was not a competent witness, or for many other reasons which we might conjecture; but we are unable to say from this fragmentary record that the rights of the defendant were in any way jeopardized by the statement set forth in the record, and therefore do not feel justified in reversing the case for this alleged error. Finding no substantial errors in the record, the judgment will be affirmed.

HOYT, C. J., and SCOTT, J., concur.

(Feb. 8, 1896.)

ANDERS, J. (dissenting). I am unable to yield assent to the proposition announced by the majority of my associates, that the legislature, in enacting section 52 of the Penal Code, intended to express the idea that larceny may be committed of the animals therein mentioned, without reference to value. By that statute the legislature made it larceny to steal certain domestic animals, "of any value," but it does not seem to me that by the use of those words they intended to convey the idea that it would be larceny if the animals taken were of no value whatever. On the contrary, I think the phrase "of any value" clearly indicates that the animals mentioned must be of some value; and, if that is so, then we must entirely ignore this portion of the statute, in order to say that it was the intention of the legislature to create this distinct offense of larceny without reference to value. To constitute petit larceny, the value of the property stolen may be any sum less than \$30. *Id.* § 49. To constitute grand larceny, the value must be \$30 or more. *Id.* § 48. But, to constitute this distinct crime of larceny of animals, the value may be any sum whatever, but it must be some appreciable amount. It cannot be nothing. It is said, however, that the only reason that ever existed for alleging and proving value was that the value determined the punishment and the grade of the offense, and that, as the reason no longer exists, the rule itself is not binding. That would seem to be the view of Archbold, but I have seen no other authority, save the Montana case, to which I shall hereafter more particularly refer, which, in my opinion, goes so far as to justify the conclusion reached by the majority of the court in this case. It seems to me that the quotations from Bishop on Statutory Crimes and Criminal Procedure do not admit of the broad construction placed upon them. In the section referred to in his work on Statutory Crimes, that learned author says that the value of the thing stolen must be alleged and proved when the punishment, or its degree, depends on value, but, when it does not, in need not be. But the question is, when does the punishment depend on value? It appears clear to my mind that it depends, in some measure, at least, on value in every case of larceny, ex-

cept where the legislature has expressed a contrary intention, for the reason that "an indictment cannot be sustained for stealing a thing of no intrinsic or artificial value." *Whart. Cr. Pl.* (9th Ed.) § 213. See, also, *Russ. Crimes*, p. 125; *Rosc. Cr. Ev.* p. 684. The language quoted from section 541 of 1 *Bish. Cr. Proc.* viz., that "if the statute makes it a distinct offense to steal a horse, or any other specific article, irrespective of its value, \* \* \* the value need not be alleged in the indictment," is not applicable to cases arising under our statute. This is clearly shown, not only by the cases cited (*Lopez v. State*, 20 Tex. 780; *People v. Townsley*, 39 Cal. 405; *Davis v. State*, 40 Tex. 134), but by what the author says in section 713 of volume 2 of that treatise. In this last-mentioned section he says: "There are, in some of our states, statutes against the stealing of horses, cattle, and other specific things, making no mention of value. Under them, therefore, value need not be averred, or, if averred, it need not be proved." And in support of the text he refers to section 541 of the first volume, and to section 427 of *Statutory Crimes*, both of which, it has been observed, are quoted in the majority opinion. It will thus be seen that Mr. Bishop did not intend to convey the idea that value need not be alleged under such statutes as ours, but only under those in which value is not mentioned at all. And, besides, it is a well-settled rule of criminal pleading that an indictment or information for a statutory crime must allege every element entering into the definition of the offense charged. This may be done, in this state, by using either the language of the statute, or words of equivalent import, but not by omitting or disregarding any portion of the statute. Of course, the precise value alleged need not be proved; but it must be shown that the animal or animals stolen are of some value, or else the words "of any value" must be deemed forceless and meaningless. And this latter alternative finds no recognition in any known rule of statutory construction. In the case of *Territory v. Pendry*, 22 Pac. 760, cited in the majority opinion in this case, the supreme court of Montana held, on the trial of an indictment for stealing a steer, under a statute making it grand larceny to steal certain designated animals, whatever may be their value, that it was not necessary to allege or prove that the animal was of any particular value. But, while I fully recognize and appreciate the ability and learning of that court, I am constrained to say that in my judgment the decision in that particular case is not only wrong in principle, but is not sustained by the cases cited. In support of its ruling the court refers to the following cases: *Houston v. State*, 13 Ark. 66; *Lopez v. State*, 20 Tex. 781; *People v. Townsley*, 39 Cal. 405; *State v. Wells*, 25 La. Ann. 372; *State v. Thomas*, 28 La. Ann. 827. As already shown, some of these cases

are referred to by Mr. Bishop in discussing the point here in question, but they are based on statutes materially different from ours, and in which no mention whatever is made of value. In the Arkansas case the value of the horse alleged to have been stolen was specifically set forth in the indictment, but no particular value was proved on the trial, and the court held that value might be inferred from certain facts and circumstances in evidence. If the value had been deemed unimportant, it is obvious that there would have been no need of discussing that question at all. Under the California statute, "to feloniously steal, take and carry away any horse," etc., is grand larceny; and hence the court held, in the case cited, that the element of value did not enter into the definition of the offense, and that the indictment was sufficient, inasmuch as the offense charged was described substantially in the language of the statute, though no value was stated. St. 1867-68, p. 461. The statute under which the Texas case was decided reads as follows: "If any person shall steal, take or carry away any horse, mule, ass, cattle, sheep or goat, the property of another, he shall be punished by confinement to hard labor in the penitentiary, not less than one nor more than seven years." Hart. Dig. art. 322. And the Louisiana statute upon which the decisions cited from that state were predicated declares that "whoever shall steal any horse, ass, or mule shall suffer imprisonment at hard labor not less than one year nor more than five years." Rev. St. La. § 814. It is manifest, therefore, that the decision in the case of *Territory v. Pendry*, supra, should not be accepted as an expression of the law of this state. If our statute were like that of California, Texas, or Louisiana, there would be good reason for holding this information sufficient, though Mr. Wharton seems to think that even the decisions under those statutes are doubtful law. Whart. Cr. Pl. (9th Ed.) § 215. For the foregoing reasons, I think the judgment of the court below should be reversed.

GORDON, J., concurs.

ALLEN et al. v. STALLCUP, Judge.

(Supreme Court of Washington. Feb. 7, 1896.)

EXECUTION — SUPPLEMENTARY PROCEEDINGS — JUDGMENT AGAINST INSOLVENT CORPORATION.

The act of March 15, 1893 (Laws 1893, p. 435), providing for the citing and examination of judgment debtors in aid of execution, does not authorize such proceeding in an action against an insolvent corporation for which a receiver has been appointed, there being no authority for the issuance and enforcement of an execution against the property of such corporation in behalf of a single creditor.

Application by W. B. Allen and others for a writ of prohibition to John C. Stallcup, J. Granted.

R. S. Jones and Crowley, Sullivan & Grosscup, for petitioners. A. N. Jordan and Boyle & Richardson, for respondent.

SCOTT, J. One Isaac Olsen commenced an action against the Bank of Tacoma and the Tacoma Trust & Savings Bank, corporations, et al., alleging that they were insolvent, and obtained the appointment of a receiver therein. He subsequently, in said suit, obtained a judgment for a sum of money against said banks, and had an execution issued thereon; whereupon he caused a citation to be issued to W. B. Allen and Frank Carpenter, the petitioners herein, requiring them to appear and answer concerning the property of said defendant banking corporations (they having been officers thereof), and to discover and produce the same. Said parties appeared, and moved the court to dismiss the proceeding, on the ground that the court had no jurisdiction thereof, which motion was overruled, and this application for a writ of prohibition was made.

It is contended by the petitioners that the court had no jurisdiction to require them to appear and testify in said proceeding, the same having been brought under an act of the legislature approved March 15, 1893 (Laws 1893, p. 435). The contention of petitioners is based upon the ground that the act does not provide for proceedings of this kind in the cases of insolvent corporations where receivers have been appointed, it being contended that, as a basis for such proceedings, there must have been an execution issued upon a judgment obtained in the principal action, and it being further contended that the issue of the execution in this case was unwarranted and unauthorized, on the ground that the plaintiff in said action was not entitled to an execution against the property of said insolvent corporations, as the effect thereof, if sustained, would be to give him a preference lien upon the property levied upon or obtained by virtue thereof; and this court has decided in *Thompson v. Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, that the assets of insolvent corporations constitute a trust fund for the benefit of all the creditors, and that no one creditor is entitled to or can obtain a preference lien. The respondent contends that the act in question can be so construed as to extend its provisions to cases of this kind, and, if otherwise, that the law was technically complied with by the issuance of the execution as aforesaid. We are of the opinion, however, that the respondent can claim no benefit upon the ground of the execution having been issued, as the same was clearly unauthorized; and while it may be that there should be a remedy of this kind in cases like this, as well as in those where no receiver has been appointed, it seems that the legislature has failed to provide it. We have held in *Timm v. Steg-*

man, 6 Wash. 13, 32 Pac. 1004, that the issuance of an execution is one of the jurisdictional steps necessary to sustain proceedings of this character. The act itself is entitled "Proceedings Supplemental to Execution," and the whole proceedings thereunder are based upon the proposition that a judgment has been obtained and an execution issued thereon. Such being the case, we are of the opinion that the superior court had no jurisdiction to make the order and compel the petitioners to appear and testify, as was attempted, and consequently the writ should issue as prayed for.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

#### POLLOCK v. HORN et al.

(Supreme Court of Washington. Feb. 7, 1896.)

##### INSANE SURETY—JUDGMENT—EXECUTION.

1. A judgment rendered against an insane surety on an attachment bond, who was sane at the time the bond was executed, is valid.

2. The land of an insane ward is subject to execution, and the creditor is not obliged to file his claim for settlement in due course of the administration of the estate.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Robert Pollock, as the guardian of William Pollock, an incompetent person, against Andrew Horn and others, to set aside a sale of land, and to have the judgment under which the sale was made declared null and void. There was a judgment for defendants, and plaintiff appeals. Affirmed.

E. W. Taylor, for appellant. A. C. Arntson and R. F. Laffoon, for respondents.

DUNBAR, J. On the 19th day of November, 1890, in an attachment case of Wandell v. Miller, the latter furnished an undertaking signed by W. Pollock; the affidavit to the bond showing that the bondsman was William Pollock. In February, 1892, William Pollock was adjudged insane, and committed to the Western Washington Hospital for the Insane, and a guardian, Robert Pollock, was duly appointed. In the case of Wandell v. Miller the attachment was released, and judgment was entered against Miller and his bondsmen, including William Pollock, on May 20, 1892. Execution was issued June 18, 1892. On September 10, 1892, the real estate in controversy, being the property of William Pollock, was sold. The sale was afterwards confirmed, and this action was brought, in April, 1894, to set aside the sale, and to have the judgment under which the sale was made declared null and void. The cause was tried by the court, who found in favor of the respondents, the defendants in the action, and dismissed plaintiff's action. From such judgment of dismissal this appeal is taken.

It is contended by the appellant that the judgment under which the property in ques-

tion was sold was absolutely void, for the reason that Pollock was insane at the time of the rendition of said judgment. This contention cannot be sustained, under the authorities. There is no claim that he was insane at the time the bond was given. By giving the bond he subjected himself to the jurisdiction of the court; and we held, in the case of Park v. Mighell, 3 Wash. St. 737, 29 Pac. 556, that the court had jurisdiction to render judgment against the surety on a forthcoming bond in an attachment proceeding without notice to such surety. It would not have been necessary, then, to have given Pollock notice had he remained sane; and the rule of law is, in any event, that a judgment is not void when taken against a lunatic. Whatever may be said of the justice or injustice of this rule, the rule itself is so well established by the authorities that it cannot be gainsaid. In Freeman on Judgments (4th Ed., § 152) the author says: "While an occasional difference of opinion manifests itself in regard to the propriety and possibility of binding femes covert and infants by judicial proceedings in which they were not represented by some competent authority, no such difference has been made apparent in relation to a more unfortunate and more defenseless class of persons; but, by a concurrence of judicial authority, lunatics are held to be within the jurisdiction of the courts. Judgments against them, it is said, are neither void nor voidable; \* \* \* the proper remedy in favor of a lunatic being to apply to chancery to restrain proceedings, and to compel plaintiff to go there for justice. In a suit against a lunatic, the judgment is properly entered against him, and not against his guardian. A lunatic has capacity to appear in court by attorney. The legal title to his estate remains in him, and does not pass to his guardian,"—citing a great many cases to sustain the text. See, also, Freeman, Ex'ns, § 22; Withrow v. Smithson (W. Va.) 17 S. E. 316. In the last-mentioned case it was decided that a judgment against a person insane at its rendition is not for that cause void, and is a lien on land. The judgment, therefore, not being void, and no appeal having been taken from it, mere questions of irregularity in the proceedings in that case cannot be raised in this collateral attack. Belles v. Miller, 10 Wash. 259, 38 Pac. 1050. Therefore we shall not discuss the many errors assigned by the appellant which go to the irregularities of the former case.

The question, however, which has given us more trouble, is whether or not this judgment, having been rendered subsequent to the establishment of William Pollock's insanity, would have the effect, simply, of establishing the claim of the judgment creditor, to be settled in due course of the administration of the estate, under chapter 15 of the Code of Procedure, entitled "Of the Guardianship of Idiots and Insane Persons." Section 1154 of that chapter provides that "the several superior courts shall have power to appoint guard-

lans to take the care, custody and management of all idiots, insane persons, and all who are incapable of conducting their own affairs; and of their estates," etc. It is contended by the appellant that this act, and the succeeding section, would be meaningless, if the estate of the ward could be sold on execution. But a perusal of the whole chapter, especially of section 1170, which seems to provide for the running of an execution against the property of a ward, leads us to conclude that it was not the intention of the legislature to exempt the property of a lunatic from the operations of an execution flowing from a legal judgment. It is not to be concluded that the lunatic or his estate is without remedy; but the remedy is an action in equity to set aside a judgment, if the judgment has been fraudulently obtained. If the judgment has not been fraudulently or wrongfully obtained, then no harm is worked upon him; and, if it has, the courts will set it aside. The complaint in this case falling to allege any fraud, and none appearing in the trial of the cause, we think the ruling of the court was correct, and the judgment will therefore be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

#### BACON v. O'KEEFE et al.

(Supreme Court of Washington. Feb. 8, 1896.)  
MORTGAGES—INTEREST COUPONS—FORECLOSURE—PARTIES.

Under Code Proc. § 143, providing that all persons interested in the cause of action must be made parties, an assignor, in an action to foreclose a mortgage as to interest coupons which he has taken up as guarantor, must make the holder of the principal bond a party.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Kate I. Bacon against Dennis O'Keefe, administrator, etc., and others, to foreclose a mortgage as to interest coupons. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Million & Houser, for appellant. Moore & Pittman, for respondents.

DUNBAR, J. The essential allegations of the complaint, so far as this case is concerned, are to the effect that a certain principal note for the sum of \$3,000, bearing interest at the rate of 7 per cent. per annum, was executed and delivered to the appellant by the respondent O'Keefe's intestate on the 1st day of March, 1892, payable five years after date, interest payable annually, and that said interest was represented by five coupon notes for the sum of \$210 each, which were attached to the principal note; that on the same date, to secure said evidence of indebtedness, a certain real-estate mortgage was executed; that thereafter, and before said coupons became due, appellant sold,

assigned, and transferred to one Grandin said principal note and all said coupons, and guarantied the payment thereof; that the first two coupons are past due; that payment was refused; and that by virtue of said guaranty appellant was compelled to, and did, take up and pay said coupons. And the prayer is that judgment be given on said coupon notes, and that the mortgage be foreclosed, etc. The mortgage contains the following clause, to wit: "It is further agreed that, if default be made, and continue for 10 days, in the payment of said bond or any of said coupons, or any part thereof, when due, \* \* \* then said bond shall, at the option of the owner, become at once due and collectible, \* \* \* and suit may be commenced at once in foreclosure of this indenture." To this complaint the respondents interposed a demurrer to the effect that there was a defect of parties plaintiff, and that there was a defect of parties defendant, and that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and the plaintiff, resting upon her complaint, appeals to this court.

There is only one question discussed by the appellant, and that is that it was not necessary, to sustain this foreclosure, that all parties in interest should be made parties to the foreclosure suit; but she insists that each holder should be permitted to handle his holdings and resort to his security without hindrance or delay from any one else. We have examined the cases cited by the appellant, but we think they do not sustain his contention, with the possible exception of the case of *Burnett v. Hoffman*, 58 N. W. 1134, a Nebraska case, where it was held that the mortgagee of real property, who has sold and guarantied payment of the bond secured by the mortgage, and who afterwards, on account of his guaranty, has taken up some of the overdue coupons attached to and evidencing the interest to be paid on such bond, may avail himself, as to such coupons, subject only to the rights of the holder of the notes guarantied, of such remedies as, before the sale, had been available to the original mortgagee, and that the holder of the bond to which the coupons were originally attached was not a necessary party to the proceedings. This is a very meager case, and no authority is cited to sustain it excepting prior Nebraska decisions. It seems, however, from the opinion in that case, that the mortgage provided that, in case of failure to pay several sums secured thereby as they fell due, the mortgagee or its assigns might sell the property mortgaged for the satisfaction of the amount due. Under this special provision of the mortgage itself, it may have been that the court was justified in making the ruling that it did; but no such provision appears in the mortgage under consideration. On the other hand, the provision is that, upon the failure to pay any portion of the con-

tract debt, the whole amount shall become due, and at once collectible, at the option of the holder. It would seem, however, that our statute puts this question at rest. Section 143 of the Code of Procedure provides that "all persons interested in the cause of action, or necessary to the complete determination of the question involved, shall, unless otherwise provided by law, be joined as plaintiffs when their interest is in common with the party making the complaint, and as defendants when their interest is adverse to the plaintiff: provided, that where good cause exists, which shall be made to appear in the complaint, why a party who should be a plaintiff cannot, from a want of consent on his part or otherwise, be made such plaintiff, he shall be made a defendant." The object of this statute is to prevent a multiplicity of suits, and it is a worthy object, and there seems to be no good reason why its provisions should not be enforced. If different holders of notes, coupon or otherwise, which were secured by one mortgage, were permitted independently to bring their actions, and foreclose their mortgage, and sell the mortgaged premises, one of two conditions must be brought about,—either the party who first brings his action becomes preferred in case the mortgaged premises are not a sufficient security for all the notes, or the parties who are not served are not bound by the proceedings instituted, and can bring their actions at will, thereby rendering uncertain the title which passes under the foreclosure sales, and absorbing the security in costs, and so imposing an unnecessary burden upon the mortgagor. But the authorities as we have read them are almost, if not entirely, uniform upon this proposition, even in the absence of statutes as express as ours. There are, it is true, certain exceptions to this general rule which grow out of the necessities of the case; but this case does not present any such exception. The rule is thus laid down in section 1378 of Jones on Mortgages: "The holder of one of several notes secured by the same mortgage may proceed in the first instance to foreclose by suit in equity without suing at law, but all the other mortgagees or holders of notes secured by it must be brought before the court as defendants before a decree is made." And Wiltse on Mortgage Foreclosures (section 84) sums up the law as follows: "As a general result, it may be stated that an action at law may be maintained by the holder of any note as upon an ordinary promissory note, or the holder of any one of a number of the notes may proceed in the first instance by a suit in equity, as in an ordinary foreclosure; but he must bring all the other mortgagees and holders of notes secured by the mortgage into court, before a decree can be made." And it is said, in Daniell's Chancery Pleading and Practice (section 192), that "where a party comes to a court of equity to seek for that relief which the principles

there acted upon entitle him to receive, he should bring before the court all such parties as are necessary to enable it to do complete justice, and that he should so far bind the rights of all persons interested in the subject as to render the performance of the decree which he seeks safe to the party called upon to perform it, by preventing his being sued or molested again, respecting the same matter, either at law or in equity." It is plain that, within the contemplation of our statute above referred to, Grandin, the owner of the mortgage, is a party in interest, that his rights cannot be adjudicated in the cause instituted by the appellant, and that, under the authorities cited, which are fully sustained by judicial decisions, he was a proper and necessary party to this action. The judgment will be affirmed.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

STATE ex rel. MEEKER et al. v. SUPERIOR COURT OF KING COUNTY et al.

(Supreme Court of Washington. Feb. 5, 1896.)

VENUE — LOCAL ACTION — FORECLOSURE OF COLLATERALS.

Under Code Proc. § 158, providing that actions "involving the right to the possession or title to any specific article of personal property" shall be commenced where the subject of the action, or some part thereof, is situated, the fact that a complaint, in addition to judgment on a note, asks the foreclosure of a pledge of collaterals securing such note, consisting of notes and certificates of corporate stock, does not render the action a local one, and it must follow the person of the defendant.

Application, on relation of Ezra and Fred S. Meeker, for a writ of prohibition to the superior court of King county, Richard Osborn, judge, and the Puget Sound National Bank of Seattle. Granted.

A. R. Hellig, for relators. Carr & Preston, for respondents.

DUNBAR, J. The complaint in the case sought to be transferred alleges that the plaintiff was a national bank, located and doing business at Seattle; that the defendants made and delivered to plaintiff several promissory notes; that, at the time of the delivery of the notes, the defendants delivered and pledged to the plaintiff, as collateral security for the payment of said promissory notes, certain securities, consisting of promissory notes and a large number of shares of stock in different corporations, evidenced by stock certificates. The prayer is for judgment against the defendants on the promissory notes, and for a decree foreclosing the pledge of the said collaterals and directing the sale thereof. The action was brought in the superior court of King county. The defendants appeared, made affidavit under the statute governing change of venue, and asked for the transfer of the case to the superior

court of Pierce county. It is conceded that both the defendants are residents of Pierce county. The question is whether the action is a transitory or local one. Section 158, Code Proc., provides that actions "for the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title or for any injuries to real property," and that "all questions involving the right to the possession or title to any specific article of personal property" shall be commenced in the county in which the subject of the action, or some part thereof, is situated. Section 161 provides that "in all other cases the action must be tried in the county in which the defendants, or some of them, reside at the time of the commencement of the action, or may be served with process." If this action was properly brought in King county, it was because it involved the right to the possession of or title to a specific article of personal property. We think there is no question here involving the right to the possession of or title to these pledges set forth in the complaint. It is not claimed that the securities, consisting of promissory notes, fall within this rule; and it is well settled that stocks are not goods and chattels, within the meaning of the act concerning chattel mortgages. See Jones, Chat. Mortg. § 278. But they are choses in action, having no situs or local position. *Bank v. Huth*, 4 B. Mon. 423. We think there is nothing to prevent the plaintiff from obtaining full relief from the superior court of Pierce county. The permanent writ of prohibition, asked for, will therefore issue, and the court will be prohibited from proceeding further in the case than to transfer the cause to the superior court of Pierce county, as prayed for by the defendants.

HOYT, C. J., and ANDERS and SCOTT, JJ., concur.

#### In re HENSE.

SNELL, HEITSCHU & WOODARD CO. v. MURDOCH.

(Supreme Court of Washington. Feb. 7, 1896.)

INSOLVENCY—PETITION FOR APPOINTMENT OF ASSIGNEE—INTEREST OF PETITIONER—TRIAL OF ISSUE.

A petition by persons representing themselves to be creditors of an insolvent, praying for the appointment of an assignee on the ground that the person named as assignee in the insolvent's deed of assignment failed to file a bond or inventory as required by 1 Hill's Code, § 2754, should not be dismissed merely upon the insolvent's affidavit that the petitioners were not creditors, as the issue as to the interest of petitioners as creditors should be regularly tried, if at all, upon issues formed as though an action had been brought upon the creditors' claim.

Appeal from superior court, Lewis county; W. W. Langhorne, Judge.

In the matter of the assignment of Frank Hense, insolvent. Petition by Snell, Heitschu

& Woodard Company to have an assignee appointed for said insolvent, on the ground that Miller Murdoch, the assignee named in the deed of assignment, failed to file a bond or inventory or valuation as required by section 2754 of 1 Hill's Code. The petition was dismissed, and the petitioners appeal. Reversed.

C. B. Reynolds and B. H. Rhodes, for appellants. G. T. Swasey, for respondent.

SCOTT, J. The assignor, Frank Hense, made a general assignment of his property to one Miller Murdoch, for the benefit of all of his creditors, and placed him in possession thereof. After more than 30 days had elapsed since the conveyance of the property to said assignee, the assignee having filed no bond or inventory or valuation as required by section 2754, vol. 1, of Hill's Code, the appellants, Snell, Heitschu & Woodard Company, petitioned the court for the appointment of an assignee to take charge of said estate, in order that the same might be administered for the benefit of the creditors of said assignor, and in said petition represented that they were creditors, and had a claim against said estate. A citation was issued to the respondent, requiring him to appear, and show cause why the prayer of said petition should not be granted. The respondent appeared, and moved to dismiss the petition, and in support thereof filed an affidavit of said Frank Hense, alleging that the petitioners were not creditors, and that he was not indebted to them, whereupon the court dismissed the petition, and this appeal was prosecuted therefrom.

It is contended by the respondent that the court had no jurisdiction in the premises, on the ground that the petitioners were not creditors of said Frank Hense, and that the court had a right to find this from the showing made. But we are unable to agree with this contention, for, whatever may have been the rights of respondent to have had the matter of the claim of the petitioners against said assignor judicially determined preliminary to, and as a basis for, authorizing them to petition the court to appoint an assignee, it is evident, it seems to us, that the court could not try the same in this arbitrary manner. The petition represented that the petitioners were creditors. The affidavit of Frank Hense denied it. We think this affidavit was entitled to no consideration. In making the assignment, said assignor represented that he was indebted beyond his ability to pay. The person named by him as assignee having failed to comply with the law, it was for the interests of all parties that another person should be appointed to administer the estate. It mattered not upon whose application such proceeding should be had, except the law provides that it may be made by any person interested. A creditor, of course, is an interested party; and we think that upon the presentation of the petition showing the fact of the assignment, and the failure of the person



named as assignee to comply with the law, and that the party presenting the petition was a creditor, it was the duty of the court to entertain the petition, and to proceed to a hearing. Although it may be the court would have the power to determine the question in advance as to the petitioner's being an interested party, it could not be tried in an arbitrary way, upon affidavits, but should be regularly tried, if at all, upon issues formed as though an action had been brought upon the claim. Reversed and remanded.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

WILKESON COAL & COKE CO. v.  
DRIVER et ux.

(Supreme Court of Washington. Feb. 7, 1896.)

SURVEY—LOST MONUMENT—EVIDENCE.

Where defendant was entitled to recover land only upon proof that the place where a quarter post had been originally set had been identified so that it was not lost within the rule relating to relocation, a verdict for defendant was not sustained by evidence which failed to fix the point more definitely than that it was somewhere within a space covered by a circle, the radius of which was 50 feet or more. Gordon, J., dissenting.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Action by Wilkeson Coal & Coke Company against Arthur Driver and wife to determine the title to certain land. There was a judgment for defendants, and plaintiff appeals. Reversed.

Remington & Reynolds and Ashton & Chapman, for appellant. John P. Judson, for respondents.

HOYT, C. J. The briefs in this case are somewhat voluminous, and the argument at the hearing extended over a wide range, but the questions which it is necessary to pass upon can be reduced to a very small compass. The suit was in ejectment, and the title to the land, the recovery of the possession of which was sought, depended upon the location of the quarter post on the line between sections 27 and 28. On the part of the plaintiff, it was contended that it was impossible to determine the place upon the ground where the original post had been set by the government surveyor; that the post itself had been destroyed, and the ground at and in the vicinity of its location so burnt over and changed that there was nothing to indicate the original location of the post; that, by reason of these facts, the quarter section corners had been so lost that they had to be relocated in accordance with the statutes of the United States and the regulations thereunder; that they had been so relocated under the direction of the county surveyor; that, when so relocated, the position of the quarter stake upon the ground was such that the land in question constituted a part of section 27, to

which the plaintiff had title. The defendants contended—First, that it was possible to determine where the original quarter post had been located when the land was surveyed; and, second, that it had been relocated by one Hall in accordance with the regulations providing therefor; that in either case its location upon the ground was such that the land in controversy was part of section 28, to which they had title. The court gave such instructions to the jury that it could have rightfully found in favor of the defendants only upon proof that the place where the quarter post had been originally set had been identified and proven so that it was not lost within the rule relating to relocation. If there was proof which tended to show where the post was originally located, it was within the province of the jury to find as it did; but, if there was no such proof, it could not have rightfully so found. We have carefully examined the evidence upon this question, and have been unable to find anything which tended to show (with any degree of exactness) where the post was originally located. None of the evidence fixed the point more definitely than that it was somewhere within a space covered by a circle, the radius of which was 50 feet or more. This being so, it seemed to us that the original location had not been definitely shown; that it was a lost corner within the rule for the relocation of such corners. But to so hold would work a hardship upon the defendants, to avoid which we directed a reargument upon that single question, hoping that they might be able to produce some authority which would justify us in holding that a corner post, the definite location of which could be so nearly ascertained, was not lost. Upon such reargument the defendants failed to produce any such authority. On the other hand, the plaintiff, while producing no authority directly in point, brought to our attention several cases which tended strongly to show that a corner post was lost unless it could be much more definitely located than was this one. We therefore feel compelled to hold that the original location of this quarter post could not be identified, and that the corners which it marked were lost within the rule providing for the relocation of lost corners. It follows that there was no evidence upon which the jury, under the instructions of the court, could have properly found for the defendants.

The question as to whether or not the relocation by Surveyor Hall had been made in accordance with the regulations for relocating lost corners was taken from the jury by the trial court. Hence the verdict could not be sustained upon that ground, for the reason that it was directly opposed to the instructions of the court. In our opinion, the undisputed evidence as to such relocation made it the duty of the court to do as it did. There was no proof tending to show that, in so relocating such quarter post, the rules prescribed by the United States statutes and

regulations adopted thereunder had been complied with, and, until they had, any attempted relocation would be without effect. It follows that the plaintiff is entitled to have the judgment reversed, and the cause remanded for retrial. But it claimed that, at the time the cause was submitted, it was entitled to a directed verdict in its favor, and that the judgment of this court should give it the benefit of the situation as it then existed. There is force in this claim, but we are not entirely satisfied that there were not disputed questions of fact as to the relocation of the quarter post by the county surveyor, the decision of which should have been left to the jury. Such relocation was based upon the alleged discovery of the original corner post at the northeast corner of section 28, and a great preponderance of proof tended to show that its location had been definitely ascertained before making use of it for the purpose of relocating the quarter post, but there was some proof tending to show that such location could not have been ascertained by anything upon the ground at the time when it was claimed to have been located; and it is possible that the jury would have been warranted, under proper instructions, in coming to the conclusion that neither of the relocations had been made as provided for in the statutes and regulations governing United States surveys. For these reasons, the ends of justice will be best subserved by a retrial.

DUNBAR, ANDERS, and SCOTT, JJ., concur. GORDON, J., dissents.

**CARL et al. v. WEST ABERDEEN LAND & IMPROVEMENT CO. et al.**

(Supreme Court of Washington. Feb. 7, 1896.)

**OBSTRUCTION OF NAVIGABLE STREAM—NUISANCE—EQUITABLE JURISDICTION—BOOM COMPANIES—TRIAL.**

1. Code Proc. §§ 664, 665, providing for actions at law to recover damages for, and to abate as nuisances, obstructions in navigable streams, do not exclude the jurisdiction of courts of equity to protect the rights of persons that may be infringed upon by such obstructions, where the remedy at law is inadequate.

2. The fact that an obstruction in a navigable stream is a matter of public concern does not prevent the maintenance of an action by a person whose private interests are affected thereby, to protect such interests.

3. On a trial in equity, the admission of evidence bearing on a question which the court finally holds cannot be determined in the action is without prejudice.

4. No right to obstruct a navigable stream is given by Act March 18, 1895, to boom companies organized thereunder, section 4 providing that nothing in the act shall authorize interference with navigation.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by A. W. Carl, J. H. Harper, W. H. Honser, W. J. Thompson, E. Hansen, F. Davidson, M. Gradi, G. M. Powell, and J. H. Hastings against the West Aberdeen Land

& Improvement Company and the Gray's Harbor & Neuskah Boom Company. Decree for plaintiffs, and defendants appeal. Affirmed.

Hogan & McGerry, for appellants. J. C. Cross, for respondents.

HOYT, C. J. The complainants were in lawful possession of lands situated on or near the river Neuskah in Chehalis county. From such lands they had cut and put into said river a large amount of saw logs. The only means of taking them to market was by way of said river, which was of such a character as to make it easily practicable to float the logs down it. Near the mouth of said river defendants had erected a dam which entirely closed the channel. In the middle thereof was a gate, through which logs could be passed, one or two at a time. The logs in question were in the river at the time of the passage of the act relating to boom companies, approved March 18, 1895, and before the commencement of this action the defendant the Gray's Harbor & Neuskah Boom Company had placed its booms in the vicinity of said dam, and was engaged in the booming and rafting of logs, under the provisions of said act. These conditions were conceded to exist, and it was claimed by the plaintiffs that they were denied the right to pass their logs through the gate in this dam, and were prevented by said boom company and the other defendant, or their employes, from in any manner making use of the channel of the river for the purpose of floating their logs to market. On account of these alleged actions on the part of the defendants, it was sought by the plaintiffs to have the obstructions in the river abated as a nuisance, and also to procure a mandatory injunction compelling the defendants to allow the plaintiffs to make use of the channel of the river for the purpose of floating their logs to market. The superior court treated the action as one in equity, and granted the injunctive relief prayed for, but refused to pass upon the question as to whether or not the obstructions were such that they should be abated as a nuisance; holding that the determination of that question should be in an action at law, where the right to a trial by jury was available.

The first claim for reversal is that the court erred in thus treating the action as one in equity. To sustain this claim it would be necessary not only to hold that sections 664, 665, Code Proc., made an action at law the only one available for the abatement of a nuisance, but also to hold that the fact that a nuisance could be so abated would prevent a court of equity from protecting the rights of a party which were infringed by conditions that might constitute a nuisance, however inadequate might be the remedy of an action at law for the abatement of such nuisance. Such cannot be the construction which should be placed upon these sections; for, while it

is probable that they furnish the only authority for the abatement of a nuisance at the suit of a private party, yet it should not be held that, by their enactment, a court of equity had been deprived of its jurisdiction to interfere when there is a remedy at law, when such remedy is entirely inadequate. Such facts were made to appear by the complaint and proofs that there could be no doubt as to the inadequacy of a suit at law to protect the rights of the plaintiffs. A large number of their logs were in the river ready to be taken to market, and their value would be greatly decreased before a suit at law for the abatement of the nuisance could be prosecuted to final determination. The river was a navigable one, and the right of the plaintiffs to make use of it in floating their logs to market was clear, and a clear right of this nature is entitled to the protection of a court of equity, unless the protection afforded by a court of law is clearly adequate. Under this assignment of error, it is further contended that the obstruction was a public one, but, even if it was, the plaintiffs showed that they were so situated that they had a special private interest in having it removed, so that they could pass their logs down the river, and for that reason were entitled to maintain their action for that purpose.

The next suggestion in the brief of appellants grows out of the alleged fact that the court, during the trial of the cause, admitted evidence which would have been competent only in a suit to abate the obstruction as a nuisance, and in its final determination held that that question could only be decided in an action at law. But we are unable to see how the appellants were injured by the action of the court in that regard. If the pleadings and proofs were sufficient to warrant the granting of equitable relief, the right to have it awarded could not be taken from the plaintiffs by reason of the fact that the court, at some time during the progress of the trial, was of the opinion that they were also entitled in that action to other relief than that which they finally obtained.

The third objection is founded upon the claim of rights by the appellant boom company, under the act above referred to, and a large number of authorities have been cited to show that it is competent for the legislature to provide that such boom companies may interfere with the navigation of navigable streams. But such authorities are not in point, for the reason that the legislature, in the act in question, have not attempted to confer upon the boom companies organized thereunder any such right. In section 4 of the act, after providing what such companies may do, it is provided: "Nothing shall be constructed that shall in any way interfere with the navigation of such river or stream, or the use of its waters for any purpose." From which it will be seen that the legislature not only did not intend to give to such companies the right to interfere with naviga-

tion, but took pains, by express provision, to provide that they should have no such right. One of the authorities cited by appellants in this connection has no tendency to support their contention. On the contrary, it seems to fully sustain the action of the superior court, not only in regard to the question now under consideration, but as to others involved in the action. In that case (*Middleton v. Booming Co.*, 27 Mich. 533) the headnotes of the reporter fairly interpret the opinion, and are in the following language: "An injunction bill, brought by a number of owners of mills and factories along a stream, to enjoin various acts which are alleged to have rendered the water power by which their machinery is operated of little value to them, and which does not ask for an accounting, is not demurrable on the ground that the complainants have no common interest. Such a bill may be filed, either by one alone, or by any number who feel the grievance." "A demurrer to such a bill, because it does not show that complainants have no adequate remedy at law, cannot be sustained, as it is apparent that only an injunction can be an adequate remedy." "Where the bill sets forth facts showing a direct and unquestionable injury, a demurrer to it cannot be sustained on the ground that the acts complained of were authorized by the act under which the defendant corporation was organized, since the incorporation act cannot be understood as intending to authorize the destruction of vested rights of property." "On a stream which is valuable for floatage, but not for navigation in the more enlarged sense, the right of floatage is not so far paramount to the use of the water for machinery as to authorize the sacrifice of the latter to the former interest. Each right should be enjoyed with due regard to the existence and protection of the other." "Such a bill, which avers that the water is detained by dams above complainants' mills, so as virtually to amount to a drying up of the stream, and to destroy its value as a means of furnishing water power while the water is thus detained, and that very much is thereby lost by percolation and evaporation, is not demurrable for want of sufficient allegation of damage." "The objection that the location and description of the dams complained of are not given in such a bill is not well taken." From which it will be seen that the supreme court of Michigan, speaking by that distinguished jurist, Judge Cooley, announced principles which fully sustain the decree of the superior court in the case at bar.

The next objection to the decree is that the finding as to the interference of the defendants with the running of logs by the plaintiffs was not sustained by the evidence; but, after a careful examination of all the proofs upon that question, we are satisfied that the finding of the trial court was what it should have been. The only other objection was to the effect that the interference shown was too trifling to warrant the interposition of a

court of equity; but, from the findings of the trial court, which were fully sustained by the evidence, we cannot agree with the contention of the appellants that the interference was a trifling one. On the contrary, the acts of the defendants materially interfered with the rights of the plaintiffs.

It is also objected, by the appellants, that the form of the decree was such that it in fact abated the obstruction as a nuisance. There may be some force in this objection, but it is not claimed, on the part of the respondents, that they were entitled to the execution of the decree as thus interpreted, and we think that the rights of all the parties can be protected by an interpretation of the decree in the light of the findings of the court upon the question of its right to abate the obstruction as a nuisance. The court, having decided that it was not within its province in this action to determine as to whether or not the obstruction should be abated as a nuisance, should have confined its decree to awarding such relief as was necessary to protect the rights of the plaintiffs, and this would have been done by requiring the defendants to allow the plaintiffs to pass their logs through the opening in the dam; and the mandatory injunction should not have been so extended as to require the defendants to do more than to open the gates in the dam, so that the logs of the plaintiffs could be passed through, and to so arrange their booms as not to interfere with such logs being rafted and floated to market. The decree might be so interpreted as to require more than this of the defendants. It will therefore be affirmed, with the qualification that it is only to be so enforced as to require of the defendants that they allow the logs of the plaintiffs to be passed through their dam and booms without any interference on their part. The respondents will recover their costs on appeal.

DUNBAR, ANDERS, SCOTT, and GORDON, JJ., concur.

STATE ex rel. ALASKA PACKERS' ASS'N  
et al v. CRAWFORD, Fish Commissioner.

(Supreme Court of Washington. Feb. 7, 1896.)

FISHERIES—LICENSE TO FISH IN GULF OF GEORGIA  
—INCLUDED IN PUGET SOUND.

The fishing license act of February 10, 1893 (Laws 1893, p. 15), is intended to apply to all the salmon waters of the state; and Puget Sound, as designated in the act, includes the portion of the Gulf of Georgia within the state, it having been so defined in former laws on the same subject.

Application, on the relation of the Alaska Packers' Association and others, for a writ of mandamus to James Crawford, state fish commissioner. Granted.

Dorr, Hadley & Hadley, for relators. W. C. Jones, Atty. Gen., for respondent.

ANDERS, J. The respective relators herein applied to the respondent, who is the duly-qualified and acting fish commissioner for this state, for licenses to catch salmon in the Gulf of Georgia, near Point Roberts, in Whatcom county, Wash., pursuant to an act of the legislature entitled "An act regulating fish traps, pound nets, weirs, set nets, fish wheels, or other fixed appliances for catching salmon on the waters of the Columbia river and its tributaries, and Puget Sound; for providing for the licensing thereof, and the disposition of the funds arising therefrom, and declaring an emergency," approved February 10, 1893. The commissioner, notwithstanding the fact that the legal license fees were tendered to him, declined to issue the licenses applied for, or any of them; whereupon an alternative writ of mandamus was issued out of this court, commanding him to issue said licenses, or to show cause before this court, at a time therein designated, why he had not done so. The respondent filed an answer to the writ and the petition of the relators, in which he alleges that the superior court of Whatcom county, in an action therein pending, has heretofore held and decided that the locality described in the petition was not, and is not, included within the waters specified in said act of February 10, 1893, as Puget Sound; and that he is advised that the waters of the Gulf of Georgia are not included within said act; and that he has no authority to issue licenses to the persons specified in the petition for the maintenance of permanent appliances for fishing therein. To this answer the relators have interposed a general demurrer, and therefore the only question to be determined is whether the license act of February 10, 1893 (Laws 1893, p. 15), applies to that portion of the Gulf of Georgia lying within the territorial limits of this state. That act empowers the fish commissioner to issue licenses to residents and citizens of this state to construct and operate certain designated appliances for catching salmon in the waters of the Columbia river and its tributaries, and Puget Sound, in the state of Washington; and it is conceded that if the particular waters in question are not a portion of Puget Sound, within the contemplation of that act, the action of the commissioner in refusing the licenses applied for was right.

In the act of February 11, 1890, relating to the protection of fish, the legislature defined Puget Sound as being "all that portion of the tide waters emptying into the straits of Fuca, and the bays, inlets, streams and estuaries thereof"; and it is contended on behalf of the relators that it is shown by that act, and by the act of March 3, 1891 (Laws 1891, p. 134), and the act of March 6, 1891 (Laws 1891, p. 171), as well as by prior acts, that it was the intention of the legislature to provide a uniform license system for fixed appliances for catching salmon in the waters

of this state, and the waters over which this state has concurrent jurisdiction, by which residents of the state may have protection from unreasonable interference, and the state may have the means of protecting and regulating its fisheries, and of providing a fund for the maintaining of hatcheries. We think there is much force in this contention. It cannot be inferred from any expression found in this license act that the legislature intended to exclude from its provisions a considerable body of tide water which is included in the acts concerning the protection of fish; and as Puget Sound as designated and defined in the act of February 11, 1890, and the prior act of November 9, 1877, may reasonably be said to include the waters in question, we are of the opinion that the fish commissioner is fully authorized by law to grant licenses to proper persons to catch salmon therein.

A peremptory writ of mandamus will therefore be issued, commanding the respondent, as fish commissioner of the state of Washington, to issue to the relators, provided they are residents and citizens of this state, the licenses applied for, on payment of the legal fees therefor.

HOYT, C. J., and DUNBAR, J., concur.

MCQUILLAN v. CITY OF SEATTLE.  
(Supreme Court of Washington. Feb. 4, 1896.)  
INSTRUCTIONS—REQUEST.

The giving of an incomplete and ambiguous instruction is not error, unless the court is requested to make it more full and complete, and refuses.

Appeal from superior court, King county; R. Osborn, Judge.

Action by John McQuillan against the city of Seattle. Judgment for plaintiff. Defendant appeals. Affirmed.

W. T. Scott, for appellant. Byers & Byers, for respondent.

GORDON, J. This action was brought to recover for injuries sustained from a fall through a defective sidewalk, and the case comes to this court for the second time. On the first appeal this court reversed the order of the lower court sustaining a nonsuit. *McQuillan v. City of Seattle*, 10 Wash. 464, 38 Pac. 1119. Upon the trial which followed, the respondent recovered a verdict for \$1,000; and its motion for a new trial having been overruled, and judgment entered upon the verdict, the city has appealed. The errors assigned are: (1) Failure to grant a nonsuit; (2) that the evidence is insufficient to entitle respondent to a recovery because of contributory negligence shown; and (3) certain instructions of the court to the jury, and a failure to give others as requested by appellant.

We have examined the record, and think

that there is no substantial difference between the case of respondent as made on the last trial and that heretofore reviewed by us. Therefore, the law as declared by this court upon the former appeal (*McQuillan v. City of Seattle*, supra) fully covers all of the assignments of error in the present case, excepting only as to the alleged errors arising out of the court's charge.

The first instruction complained of is as follows: "The court instructs the jury that when the sidewalk of a city is out of repair, and remains so for such a length of time that the public authorities of a city, in the exercise of reasonable care and prudence, ought to have discovered the fact, then actual notice to such authorities of the condition of the walk will not be necessary to hold the city liable for injuries sustained by a person in consequence of the dangerous condition of the street or walk, if he is himself using reasonable care to avoid such injury." It is objected that this instruction is inconsistent and misleading. On the contrary, we think that it fairly states the law.

The court also, in the course of his charge, gave the following instruction: "The burden of proof is on the plaintiff to establish the negligence of the defendant and the extent to which he was injured, and the burden of proof is on the defendant to prove that the plaintiff was guilty of contributory negligence." To this instruction the court added the following explanation: "I desire to explain that instruction to this extent. It is true that the burden of proof is upon the plaintiff to establish all the material allegations of his complaint, and that the burden of proof is upon the defendant to establish contributory negligence. The testimony must not necessarily be limited to any particular side. In other words, it means this: that to enable the plaintiff, to recover, it must be shown from all the evidence in this case—a preponderance of the evidence—that the allegations of his complaint as to the negligence of the city, and the nature and extent of his injury, is true, and also as to the contributory negligence. Of course, before a verdict for the defendant can be given, there must appear, and must be shown and proven, that the plaintiff was guilty of contributory negligence. The duty of proving contributory negligence is on the defendant, as this instruction charges you; but, in determining whether there was or was not contributory negligence, you have a right to look at all the testimony, regardless of which side it may come from, either from the plaintiff or from the defendant." Appellant's counsel insist that the explanation of the court had a tendency to confuse the jury, and that it was ambiguous and misleading. We are unable to see that the jury could have been misled by anything therein stated, and this court, in *Box v. Kelso*, 5 Wash. 360, 31 Pac. 973, has said that: "The giving of incomplete and ambiguous instructions is not error, unless the court has been requested to make his

instructions more full and complete, and has refused." No such request was made of the lower court by appellant in this case.

The court did not err in modifying appellant's request for instructions numbered 1 and 2, nor in giving said instructions as so modified. The charge, as a whole, fairly stated the law of the case, and this is sufficient. *Seattle Gas & Electric Light & Motor Co. v. City of Seattle*, 6 Wash. 101, 32 Pac. 1058; *Duggan v. Boom Co.*, 6 Wash. 593, 34 Pac. 157. The judgment is affirmed.

ANDERS, DUNBAR, and SCOTT, JJ., concur.

#### DILLON v. DILLON et al.

(Supreme Court of Washington. Feb. 4, 1896.)

##### CHattel Mortgages—Description of Property—Application of Proceeds—Community.

1. A chattel mortgage sufficiently describes the property as the entire stock of merchandise in a certain store, giving the lines of goods, it appearing that nothing was added to the stock after the giving of the mortgage.

2. A chattel mortgage of a stock of goods is not invalid because making no provision for application of proceeds, it appearing that they were applied in payment of the ordinary expenses of the business, and in reduction of claims against the mortgagor, for which the mortgagee was liable as surety, and that no goods were added to the stock after the giving of the mortgage.

3. A married man may give a mortgage to his wife on community personal property in consideration of a loan from her separate estate.

Appeal from superior court, Cowlitz county; A. L. Miller, Judge.

Action by Elizabeth Dillon against W. F. Dillon and others. Judgment for plaintiff. Defendants, other than W. F. Dillon, appeal. Affirmed.

Durham, Platt & Platt and G. G. Gammons, for appellant Commercial Nat. Bank. J. B. Thompson and W. F. Magill, for appellant Sweet, Dempster & Co. Geo. W. Rowan and G. G. Gammons, for appellant Hibbard. E. W. Ross and Thos. N. Strong, for respondent.

GORDON, J. The respondent brought suit in the lower court to foreclose a chattel mortgage given by the defendant, W. F. Dillon, her husband, on a stock of merchandise and store fixtures, to secure the payment of his promissory note for the sum of \$3,500, said note bearing even date with said mortgage, and payable six months thereafter. The Commercial National Bank, one of the appellants, was made a party defendant because of its being a judgment creditor of the said mortgagor, and having, prior to the institution of this suit, levied upon the mortgaged property. The appellant Sweet, Dempster & Co., a corporation, having levied a writ of attachment upon said mortgaged goods, was also made a party defendant. The appellant Hibbard, being the purchaser of the property upon the execution sale based upon the judgment ob-

tained by the appellant Commercial National Bank, was also a party defendant. The defendant Dillon made default. Each of the other appellants appeared and answered, and in their several answers put the respondent upon proof of all of the material allegations of her complaint, and further set up fraud, and that the property covered by the mortgage was community personal property. The trial below was to the court without a jury. We adopt, as a further statement, the following findings of the court, which are not questioned by either party, viz.: "The plaintiff and the defendant W. F. Dillon are husband and wife, and during all times in the complaint mentioned resided and cohabited together as such in the town of Castle Rock, Cowlitz county, state of Washington. That on and prior to the 10th day of March, 1893, the defendant W. F. Dillon was conducting and carrying on business as a merchant at said Castle Rock, and on said day said defendant owned and was in possession of the personal property described in the mortgage in the complaint set forth. That on March 10, 1893, W. F. Dillon gave his wife, the plaintiff, his promissory note for \$3,500, payable six months after date, with interest at 6 per cent. per annum from maturity, with a provision for reasonable attorney's fee in case of suit to collect the same, and interest to draw interest, the same as the principal, at the end of every three months. That at the time of giving said note, he executed to his wife a chattel mortgage upon the following described personal property, situated in Cowlitz county, state of Washington, to wit: 'The entire stock of merchandise, wares, and goods now in, and thereafter to be kept in, the store and storeroom on Cowlitz avenue in the town of Castle Rock, owned and kept by said W. F. Dillon, under the firm name and style of W. F. Dillon & Co., consisting of clothing, gents' furnishing goods, boots and shoes, hats, caps, oil clothing, rubber boots and shoes, cigars, and tobacco, together with all the store fixtures and articles therein kept of every description.' And said mortgage was duly acknowledged and witnessed, and had indorsed thereon the affidavit of good faith required by law, and was, on March 13, 1893, recorded in the office of the auditor of said Cowlitz county. That on May 3, 1894, the Commercial National Bank of Portland, Or., defendant herein, commenced an action against defendant W. F. Dillon in the above-entitled court, and caused a writ of attachment to issue, and levied thereunder upon certain goods, wares, and merchandise, and thereafter recovered judgment against the said W. F. Dillon, and caused execution thereon to issue, and by virtue thereof the said goods, wares, and merchandise were on August 31, 1894, sold to the defendant George L. Hibbard, subject to the mortgage of plaintiff. And that, on July 6, 1894, the defendant Sweet, Dempster & Co. commenced an action against said W. F. Dillon in said

court, and caused a writ of attachment to issue, and the said goods, wares, and merchandise to be levied upon subsequent to the levy and the action of the Commercial National Bank aforesaid." The trial court found for the respondent, and from the decree of foreclosure and sale appellants bring the case to this court upon appeal. The principal contentions relied upon to secure a reversal may be stated to be as follows: (1) That respondent's mortgage was without consideration; (2) that the mortgage was fraudulent in fact, and was made to hinder, delay, and defraud the creditors of W. F. Dillon (the mortgagor); (3) that the subsequent conduct of the respondent and her husband made the mortgage operate as a fraud upon his creditors rather than a security to plaintiff; (4) that the mortgage is void for uncertainty in the description of the property, and also for the reason that the mortgage shows that the property intended to be covered thereby is a stock of goods, and no provision is made for the application of the proceeds of sales thereof; (5) that a mortgage of community personal property by the husband to his wife is of no effect and is void.

The first and second of these contentions are to be determined solely from a consideration of the evidence, which we have examined, and, while too voluminous to be given detailed notice in this opinion, we think that it overwhelmingly sustains the following findings of the trial judge, viz.: "That, at the time of the execution of said note and mortgage, the plaintiff was the owner of valuable property in the city of Portland, state of Oregon, inherited from her father, and also money inherited as aforesaid, to the amount of \$2,200 in her own right as her separate property, and received from the rents and profits of her said separate property the sum of \$78 per month from March 1, 1892, from which she loaned to defendant W. F. Dillon, prior to the execution and delivery of the note and mortgage, the sum of \$1,700, \$700 of which was repaid, and by writing signed by her, prior to the execution of said note and mortgage, she bound herself, as surety for the said defendant, to Charles P. Kellogg, one Mr. Wells of Chicago, and the Eagle Woolen Mills of Oregon, and during the month of March, 1893, loaned to said defendant the further sum of \$500, and during the month of February, 1894, was compelled to and did pay upon the written securities aforesaid, for the said defendant, the sum of \$2,000, all from her separate property, and the rents, profits, and proceeds thereof, making a total sum of \$3,500, no part of which has been paid. That said note and mortgage were given in good faith, and without any design to hinder, delay, or defraud any creditor or creditors, and for full consideration. That the goods, wares, and merchandise described in said mortgage are now in a store building in the town of Castle

Rock, in possession of defendant George L. Hibbard."

The third proposition above noticed is based upon certain testimony and conduct of the respondent and her husband, but we think there is nothing in the record which would have justified the court in reaching the conclusion in this regard for which appellants' counsel contend. On the contrary, we think that the conduct of the parties, as evidenced by the record, was entirely consistent with the presumption that the mortgage was executed in good faith, for the purpose of securing a valid existing indebtedness, and we find nothing in the evidence tending to impeach or discredit the validity of the mortgage.

We think the description of the mortgaged property sufficient. It appears from the evidence, and the court found, that the proceeds of all the goods sold by the mortgagor, after the execution of the mortgage, were applied in payment of the ordinary expenses of the business, and in the reduction of the claims for which the respondent was a surety (as noticed in the finding hereinbefore set out). It also appeared, from the evidence, that no goods were purchased by the mortgagor, or added to the stock, after the execution of the mortgage. Hence, the identity of the mortgaged property was in no wise rendered difficult or uncertain.

The appellants claim that the mortgaged goods were the personal property of the community consisting of the respondent and her husband, and that the husband had no authority, under our law, to execute a valid mortgage to his wife upon property of that character, and that the mortgage, if valid, would convey to the wife a greater interest in such community personal property than that remaining in the husband. It is not contended, nor could it, under our law, well be claimed, that the husband could not mortgage or sell his separate personal property to his wife; and we see no reason in holding that he could not do likewise with the community personal property. The consideration for this mortgage was personal funds of the wife, over which the husband had no dominion or control. Why, under such circumstances, should the law prevent his executing to her the same security for such advances as he manifestly might give a stranger?

In our opinion the law does not prevent the wife from protecting the community property by loaning to it, from her separate estate, and in a time of peril, and her interest in such community property might well be promoted by so doing. The individual estates of the spouses and the community estate are so closely related as to render it necessary that the right of the members of the "community" to come to its aid and assistance should be recognized, and that they may do so neither the letter nor the spirit of the statute forbids. Without special ref-

erence to the other errors assigned, we may say that, upon examination, we are satisfied that no reversible error was committed by the trial court, and its decree is affirmed.

HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, JJ., concur.

**LORBEER v. HUTCHINSON et al.**  
(L. A. 98.)

(Supreme Court of California. Feb. 20, 1896.)

**CERTIORARI—REMOVAL AND APPOINTMENT OF OFFICER.**

Certiorari does not lie to review the action of the board of trustees of a city declaring vacant the office of city marshal, and appointing a person to fill the same.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Certiorari by J. W. Lorbeer against E. H. Hutchinson and others to set aside and annul the action of the board of trustees of the city of Pomona declaring vacant the office of city marshal, and in appointing to the vacancy Thomas B. Atkinson. From the judgment rendered, defendants appeal. Reversed.

Edwin A. Meserve and C. E. Sumner, for appellants. Tonner & Fleming and A. W. Hutton, for respondent.

TEMPLE, J. This appeal is from a judgment of the superior court of Los Angeles county in a proceeding by certiorari to set aside and annul the action of the board of trustees of the city of Pomona declaring vacant the office of city marshal on the 18th day of June, 1895, and in electing and appointing to the vacancy Thomas B. Atkinson. The writ may be issued when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer (section 1068, Code Civ. Proc.); and the review cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer (section 1074, Id.). The appointment of a city marshal by the council of Pomona was not a judicial act, and cannot be reviewed by certiorari. *People v. Bush*, 40 Cal. 344. If Lorbeer was lawfully in office, the trustees could not, by declaring the office vacant, deprive him of his office. They have no power to remove from office or by any judicial inquiry to declare a vacancy. If Lorbeer failed to qualify, the office was vacant; and the trustees, on being informed of the fact, could appoint some one to fill the office. They got such information just as the governor and other executive officers obtain similar information. The failure to qualify—if he did so fall—ipso facto created a vacancy. *People v. Shorb*, 100 Cal. 537, 35 Pac. 163. In such case the board could fill the

vacancy without declaring a vacancy. So declaring was a part of the order appointing, and does not indicate a judicial inquiry and determination. The superior court, therefore, erroneously issued the writ, and its judgment vacating and setting aside the order of the trustees of Pomona was without jurisdiction and void. The judgment is reversed, and the court directed to dismiss the proceeding.

We concur: McFARLAND, J.; HENSHAW, J.

**JOOST et al. v. SULLIVAN et ux.** (No. 16,035.)

(Supreme Court of California. Feb. 20, 1896.)

**MECHANICS' LIENS—FORECLOSURE—EVIDENCE OF COMPLETION—MEMORANDUM OF CONTRACT—SUFFICIENCY—WITNESS—COMPETENCY.**

1. In an action to foreclose subcontractors' liens, the architect, the defendant, and her daughter testified that the building was completed as early as October 10th. One of such contractors testified that he did not know whether it was completed before October 14th or not. The other completed his contract October 3d. There was evidence that, on the 12th, repairs were made on one of the closets; that at that time there was a door knob not on in the upper story, and a rim to a bath on the lower story had not been put on; and that the contractor removed his tools, etc., on the 12th or 14th. It appeared that the building was occupied by the owner and by a tenant before the 11th. *Held*, that a finding that the building was not completed until the 14th was not supported by the evidence.

2. Code Civ. Proc. § 1183, relating to mechanics' liens, provides that all contracts shall be in writing when the amount exceeds \$1,000, and shall be subscribed by the parties thereto, and such contract, or a memorandum thereof, shall, before the work is commenced, be filed in the county recorder's office, etc. *Held*, that such memorandum need not be signed or subscribed by the parties.

3. Under such statute, where the memorandum does not disclose that there were any plans or specifications, such memorandum cannot be held insufficient, because plans and specifications are not filed therewith.

4. A memorandum of a building contract, filed in the recorder's office, recited that the general character of the work to be done was raising, and making alterations, additions, and repairs to, a two-story frame building, to be used for two tenements, etc. *Held*, that such memorandum sufficiently showed the general character of the work to be done.

5. Where an action to foreclose subcontractors' liens, on death of the owner, is revived against his administratrix, plaintiffs are competent witnesses.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by F. Joost and B. Joost, copartners as Joost Bros., W. E. Byron, and G. W. Bayreuther, against Eugene Sullivan and Kate Sullivan, his wife, to foreclose subcontractors' liens. Pending the action, Eugene Sullivan died, and Kate Sullivan, as administratrix of his estate, was substituted in his stead. From a judgment for plaintiffs, defendants appeal. Reversed.



Stafford & Stafford, for appellants. John Heenan, for respondents.

**HAYNES, C.** Action to foreclose subcontractors' liens. Pending the litigation the claim of Joost Bros. was paid, and the only defendants served were Eugene and Kate Sullivan. The claims of Byron and Bayreuther were sustained by the court; and from the judgment enforcing their liens, and from an order denying a new trial, this appeal is prosecuted. Eugene Sullivan was the owner, and his wife, Kate Sullivan, was made a party; the complaint alleging that she claimed some interest in the property. Eugene Sullivan died before the trial, and Kate Sullivan, having been duly appointed administratrix of his estate, was substituted as such administratrix, in his stead, and as such, and as an individual, has taken this appeal.

A contract was made by Eugene Sullivan with one Westcott to raise, and make alterations, additions, and repairs to, a two-story frame building upon a lot situate at No. 625 Natoma street, city of San Francisco. Plaintiffs alleged that neither said contract nor any memorandum thereof was ever filed in the recorder's office, "that said building was completed on or about the 14th day of October, 1891, and further alleged the filing of their respective liens before the expiration of 30 days from and after the completion of the building." The answer denied each of these allegations, and alleged that the building was completed on October 10, 1891. Bayreuther's notice of lien was filed November 11, 1891, and Byron's on November 12th; and therefore, if the building was completed on October 10th, both claims were filed too late. The court found that neither the contract nor any memorandum thereof was filed, and that the building was completed on October 14th; and appellant contends that these findings are not justified by the evidence.

Byron's subcontract was for the brick work, for which he was to receive \$235, and his work was finished September 24, 1891. He testified that he was at the house (the building in question) on October 14th; that it was then completed; that he did not know how long before that it had been completed; that he could not say when, prior to October 14th, was the last time he had been there; and that he did not know whether it was completed before October 14th or not. Mr. Bayreuther testified: That he furnished the material for four closets, two bath tubs, the kitchen sinks, etc. That he furnished the materials and completed the work, which included all the plumbing in the building, according to the specifications, and did some extra work, which consisted of tinning in gutters and one extra gas fitting in the two lower flats, and that he completed his work on October 8d. That he saw the building on October 11th and 14th. That the contractor

took his tools away on the 14th. That he was called there on Sunday morning, October 11th, by Miss Sullivan, because one of the closets in the building made a rattling noise, and he sent a man there on the 12th to repair it. That he went the next day to see if everything was all right, and saw the contractor moving his tools away. That "the building was completed that day. The alterations consisted of raising an old house, making three flats of it,—two upper and one lower flat. The defendants were living at that time in the upper flat." He further testified that, when he called there, Sunday morning, October 11th, there was a door knob not on in the upper flat, and a rim to a bath on the lower flat had not been put on, and did not observe anything else unfinished; that putting on the door knob and rim of the bath tub was not his work; that the closet was not broken, but made a noise; that he had an agreement that, in case anything was wrong with the closets, he would repair them, and make them in good order; and that he formed the conclusion that the building was completed on the 14th from what others told him, and from seeing the contractor moving his tools away. Mr. Westcott, the contractor, was not subpoenaed by the plaintiffs, and was not at the trial. M. J. Welch, the architect in charge of the work, was called by plaintiff, and testified as to other matters, but was not examined as to the date of the completion of the work; and plaintiffs thereupon rested. Mr. Welch was then called for defendants, and testified that the building was completed on the 8th or 9th of October. Upon cross-examination, he testified that he was sure it was the 8th or 9th, because it took him several days to straighten out the business affairs before he issued the certificate for the payment which was to be made upon completion of the work; that he delayed because there was a doubt about the contractor paying his bills; that he wished to find out how his bills stood, and see that things were straightened out before the certificate was issued; that he was fully a week going to the bondsmen and seeing the creditors; and that it was fully a week after the building was completed before he issued the certificate, and the certificate was dated and issued October 15, 1891. He further testified that the building was partly occupied by the defendant and his family the first week of October, 1891. Miss Ella Sullivan testified that she was living with her parents in the house when she sent for Mr. Bayreuther on October 11th; that Westcott was there when Bayreuther called; that the house was then completed, and the men had all gone away, except Westcott; that they were then living on the upper floor; that the locks mentioned were on the old work, and not on the new; and that Westcott did not take his tools away until the 14th, because he was waiting for some one to lend him a horse and wagon for that

purpose. Mrs. Kate Sullivan, one of the defendants, testified that the house was completed before Bayreuther was called to fix the closet, and she was then occupying the upper floor, and the ground floor was also rented and occupied. Upon cross-examination, she testified that it was completed a week before Bayreuther called, but afterwards changed the time to a week, or maybe more, before she paid the third payment, which was on October 15th.

The foregoing is the substance of all the evidence relating to the date at which the building was completed. The finding that the date of completion was October 14th is not justified by the evidence. Byron testified that he did not know whether it was completed before that date or not. Bayreuther completed his contract on October 3d, and there is no evidence that any work was done on the building after that date, except fixing a closet which "made a noise," and which was, confessedly, the "repair" of his completed work. Under these circumstances, the testimony of the plaintiffs could only be regarded as showing that the building was in a completed state or condition on the 14th, and not that the work ended on that day, and therefore does not conflict with the positive testimony of the architect, and of Mrs. Sullivan and her daughter, that it was completed at least as early as the 10th. Besides, the putting on of a door knob which appears to have been mislaid, and of the rim of a bath tub, were in themselves, "trivial imperfections," which would not have invalidated plaintiffs' liens if they had filed them on Monday, the 12th. *Harlan v. Stuffelbeem*, 87 Cal. 508, 25 Pac. 686. Not only so, but the building was actually occupied by the owner and by a tenant before the 11th, and this was evidence of the completion of the work under Westcott's contract, and its acceptance by the owner, which is conclusive upon the plaintiffs, when not explained, and would also, under the like condition, have been conclusive upon the owner, if necessary to sustain the plaintiffs' liens filed upon the strength of such occupancy. *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal., at page 196, 20 Pac. 419. If it be conceded that the contract between the owner and Westcott was void, because not recorded, it would, nevertheless, furnish a test of completion. *Barker v. Doherty*, 97 Cal. 10, 12, 31 Pac. 1117. If, however, it had been shown that, notwithstanding the trivial character of the uncompleted work described by Bayreuther, work actually continued thereon, and was completed on the 14th, the finding would have been sustained.

Appellants also contend that the third finding, to the effect that neither the contract between the owner and contractor, nor a memorandum of it containing the matters required to be stated therein, was ever filed. A memorandum of the contract was filed, and the only question is as to its sufficiency. The memorandum having been put in evidence, the finding should have set it out, leaving its

sufficiency to be found as a conclusion of law. It is contended by respondents that it is insufficient, in that it was not signed; that neither plans nor specifications, nor their equivalent, were filed; and that it does not show the general character of the work. So much of the memorandum as is material to the objections made is as follows: "Know all men by these presents, that a contract has been entered into for raising, making alterations, additions, and repairs to, the two-story frame house building, to be used for tenements, situate, etc. [describing the lot]. That the names of all parties to said contract are as follows: Eugene Sullivan and C. W. Westcott. That the following is a statement of the general character of the work to be done under said contract, to wit: raising, and making alterations, additions, and repairs to, a two-story frame building, to be used for two tenements, situated as above stated, and prosecuted under the direction of M. J. Welch, architect." Then follows a perfect statement of the total amount to be paid, the amount of each of the partial payments, and when they are to be made, and attached thereto was a bond, executed by two sureties, that Westcott would perform his contract. That part of section 1183, Code Civ. Proc., necessary to be considered is as follows: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder of," etc. It was not necessary that the memorandum should have been signed or subscribed by the parties. The statute requires that the contract "shall be subscribed by the parties thereto," but only requires that the memorandum shall "set forth the names of all the parties to the contract." The names of the parties are stated, and it is further stated that they are all the parties to the contract. This follows the statute, and is sufficient in that respect.

It is said, however, that neither plans nor specifications were filed. The memorandum does not disclose that there were any, and therefore this case is distinguishable from the cases where the memorandum was held insufficient, because plans and specifications were referred to as part of the statement of the general character of the work to be done, and yet were not filed with the memorandum in which the reference was made. This was the case in *Willamette Steam Mills Lumbering & Manufacturing Co. v. Los Angeles College Co.*, 94 Cal. 235, 236, 29 Pac. 629, and

in *Butterworth v. Levy*, 104 Cal. 509, 38 Pac. 897, and in *Wood v. Transit Co.*, 107 Cal. 508, 40 Pac. 806. The question, therefore, is whether the memorandum states "the general character of the work to be done." If the statute had omitted the words last above quoted, and had simply said that the contract, or a memorandum of it, should be filed, it would have been understood that the word "memorandum," *ex vi termini*, implied that it need not contain a full and particular statement of the contract. Webster defines it thus: "(Law.) A brief note, in writing, of some transaction, or an outline of some intended instrument; an instrument drawn up in brief and compendious form." Before the amendment of 1887 the statute imperatively required that the "contract be filed"; and, as the plans and specifications—whenever referred to, at least—were part of the contract, it was properly held that the plans and specifications must also be filed. It is apparent that the design of the amendment was to require less than was required before; how much less must be determined from the language used, construed in the light of the purpose to be effected by the filing of anything giving information of the contract between the owner and the original contractor. The words "general character" do not mean a special, particular, minute, or detailed description of the work to be done. The adjective "general," as defined in Webster's Dictionary, means: "(1) Relating to a genus or kind; pertaining to a whole class or order; belonging to a whole rather than to a part. \* \* \* (3) Not restrained or limited to a precise or detailed import; not specific; lax in signification." And, of the noun "character," he gives, as applicable here: "(9) Account; description." The definition given of the word "general" in Black's Law Dictionary, so far as pertinent, is: "Universal, not particularized; as opposed to special." The same author defines the word "character," only as applied to individuals, but it is nevertheless pertinent here: "The aggregate of the moral qualities which belong to and distinguish an individual person; the general result of one's distinguishing attributes."

Other cases are cited, by respondent, where the memorandum was held insufficient because it did not state for what purpose the building was intended, or did not state the kind of building, as "frame," or "brick," or "stone." Here the size of the lot, 25x75 feet, is given, and it is stated that a frame building already thereon is to be raised, repaired, and additions made thereto, and converted into flats for the purpose of being used as tenements. This is quite sufficient, as a statement of "the general character of the work to be done." It is not claimed that the memorandum was fraudulently made, or that plaintiffs, as subcontractors, were misled or deceived or injured because of any imperfection in it. It must therefore be assumed that the owner intended, in good faith, to comply with the

statute, and believed that he had done so. The statute, imposing as it does a liability upon the owner beyond the price he contracted to pay, in favor of a subcontractor with whom he has no contract relations, is penal as well as remedial, and therefore, while it must have such construction as will reasonably effectuate its remedial purposes, must be strictly confined to such purpose. No merely technical construction can be indulged, for the purpose of visiting a penalty upon the owner, unless there has been a substantial failure to comply with the law, such as, if continued, would defeat the remedial purposes of the statute; but, if there be a reasonable doubt as to the construction of the statute, or as to whether the defendants complied with it, they should have the benefit of it. *Suth. St. Const.* p. 444; *Chase v. Railway*, 26 N. Y. 523, 525; *Shanklin v. Gray*, 43 Pac. 399. The memorandum in this case was a substantial and sufficient compliance with the statute.

As the case must be remanded, one or two other questions should be noticed. Appellant claims that there was no evidence of the reasonable value of the work done by the plaintiffs. As the memorandum of the contract between Westcott and the owner is sufficient, the contracts between the contractor and the subcontractors are conclusive, both as to their principal contracts, and as to contracts for extra work, so far as they fixed the value. Where the value was not fixed by contract, other proof of value must be made. To prevent misapprehension, it may be added that, if the memorandum filed was not compliance with the statute, the contract price agreed by the contractor to be paid to the subcontractors is evidence of value; but such evidence may be rebutted. See *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, and 25 Pac. 1101.

Plaintiffs were competent witnesses, notwithstanding the death of Sullivan. *Booth v. Pendola*, *supra*. No other questions discussed by counsel need be noticed. The judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

ROGERS v. SCHULENBURG et al.  
(L. A. 7.)

(Supreme Court of California. Feb. 20, 1896.)  
JOINT DEMURRER — NONNEGOTIABLE INSTRUMENTS  
— GUARANTOR.

1. A joint demurrer by defendants is properly overruled if the complaint is good against any of them.

2. A third person, writing his name on the back of a nonnegotiable note, either before or after delivery, becomes a guarantor.

3. Statements by defendant in the absence of plaintiff are inadmissible in his own behalf.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by W. R. Rogers against A. R. Schulenburg and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

E. W. Britt and Works & Works, for appellants. Jas. E. Wadham, for respondent.

BELCHER, C. This is an action upon a nonnegotiable promissory note for \$340 made by the defendants Schulenburg and Chadwick to one Thompson, and by him assigned to the plaintiff before maturity. The complaint avers the making, delivery, and assignment of the note, in the usual form, but the only averment connecting the defendant Daley therewith is "that thereafter, and before the maturity of said note, the said defendant T. J. Daley duly indorsed said promissory note by writing on the back thereof as follows, to wit: 'Protest waived. T. J. Daley.'" Defendant Chadwick suffered his default to be entered. Defendants Schulenburg and Daley filed a joint demurrer to the complaint, which was overruled. They then answered, setting up, in substance, that, prior to the assignment of the note to the plaintiff, Thompson, the payee, had offered to accept from them, in full satisfaction and payment thereof, the sum of \$125; that after such offer, and with notice thereof, plaintiff and defendants entered into an agreement whereby he was to advance and pay to Thompson, for the said note, the sum of \$125, and take an assignment thereof to himself, and they were to repay him therefor the sum so advanced, with interest thereon at the rate of 10 per cent. per annum from the time of his payment to Thompson, and the further sum of \$15 as a bonus to him for taking up the note in the manner agreed upon; that accordingly the plaintiff paid to Thompson the sum of \$125, and no more, for the note, and received the transfer thereof; and that the assignment of the note to plaintiff was accomplished and made in virtue of and pursuant to the said agreement, and not otherwise. To this answer a demurrer was interposed by the plaintiff, and overruled. The case was then tried, and upon all the issues raised the court found against the defendants, and rendered judgment against them as prayed for in the complaint. From this judgment and an order denying their motion for a new trial the defendants Schulenburg and Daley have appealed.

1. Appellants contend that as against Daley the complaint does not state facts sufficient to constitute a cause of action, and hence that the court erred in overruling their demurrer. This contention is rested upon the fact that it does not appear when

Daley indorsed the note,—whether before or after delivery,—and that no consideration for the indorsement is expressed in writing. There are two sufficient answers to the contention: (1) It is not claimed that the complaint was not sufficient as against the makers of the note. Conceding, therefore, that it was not sufficient as against Daley, still, as only a joint demurrer was filed, it was properly overruled. "A joint demurrer by all of the defendants to an action is properly overruled if the complaint is good as against either of them." *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777; *Work, Prac.* § 531; *Pom. Rem.* § 577. (2) When Daley wrote his name on the back of the note, whether it was before or after its delivery, he became a guarantor for its payment. *Bank v. Babcock*, 94 Cal. 96, 29 Pac. 415. And it was not necessary that the consideration be expressed in writing. *Civ. Code*, § 2793. "A written instrument is presumptive evidence of a consideration," and "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." *Id.* §§ 1614, 1615. *Crooks v. Tully*, 50 Cal. 254, cited by appellants, is not in point. That case arose before the adoption of the Codes, when the statute required that a contract to answer for the debt, default, or miscarriage of another should express the consideration. That requirement is not now found in the Codes. *Civ. Code*, § 1624, and *Code Civ. Proc.* § 1973.

2. It is further contended that the findings were not justified by the evidence. The evidence is brief, and may be epitomized as follows: Schulenburg testified that he made the contract with the plaintiff as alleged in the answer, and he detailed the conversations that took place between them. Daley testified to certain conversations which he had with the plaintiff, and then, on cross-examination, was asked, "Was there ever any contract made between you and Rogers relative to your paying him \$125 and the \$15 bonus on his taking up the note?" And he answered, "No, sir." Rogers testified that he had some conversation with Schulenburg about the note; that he went to him, and inquired whether there were any set-offs against it, and was told that there were none, and that it would soon be adjusted. He was then asked, "Was there any agreement between you and Schulenburg that you would take less than the face of the note in payment thereof at the time the note was purchased?" and he answered, "No." The above is, in substance, all the evidence, and we think it shows a substantial conflict as to whether the agreement relied upon was made between the parties or not. The findings and judgment cannot therefore, be disturbed on this ground.

3. While giving his testimony, Daley stated that Schulenburg had informed him of the terms of the arrangement he made with

the plaintiff about the purchase of the note. Schulenburg was afterwards recalled, and was asked by his counsel, "What did you tell Mr. Daley as to the arrangement you had made with Mr. Rogers relative to Rogers' taking up the note?" The question was objected to by counsel for plaintiff upon the ground that it was immaterial, irrelevant, and incompetent, and the communication was not shown to have been made in the presence of, or communicated to, the plaintiff. The objection was sustained, and the ruling is assigned as error. We think the ruling was clearly right. The statements of a party, made without the hearing or knowledge of his adversary, are never competent evidence in his own behalf to prove the facts stated. The judgment and order should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

PEOPLE v. BENDIT. (Cr. 46.)

(Supreme Court of California. Feb. 20, 1896.)

FORGERY—WHAT CONSTITUTES SIGNATURE AS AGENT.

When one without authority executes a receipt for money, purporting on its face to be executed by him as agent for the person whose name he signs, he is not guilty of forgery at common law, or under Pen. Code, § 470, which enumerates the kinds of writing which may be the subject of forgery.

Department 2. Appeal from superior court, city and county of San Francisco.

Simon Bendit was convicted of forgery, and appeals. Reversed.

Walter S. Hinkle, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was convicted of forgery, and appeals from the judgment and an order denying a new trial. The information charges that appellant on July 30, 1894, did unlawfully, feloniously, falsely, etc., and with intent to defraud, "make and forge a certain instrument in writing, in words and figures following, to wit:

"San Francisco, July 30, 1894. G. W. Hume & Co.—William Cluff Company, wholesale grocers and provision dealers, 18 to 22 Front St., corner Pine. Telephone 1819.

To balance .....	
July 23. To bill rendered.....	\$15 50
Discount .....	30

\$15 20

"Wm. Cluff & Co., A. B."

It further charges, in brief, that on said July 30th he willfully, fraudulently, etc., passed the said instrument, "as true and genuine," to one J. Deming, with intent to defraud G. W. Hume and J. Deming, doing business under the firm name of G. W. Hume & Co. The instrument is admitted by appellant to be a receipt for money, although there

is nothing on its face which acknowledges such receipt.

We do not deem it necessary to consider the points made by appellant that the information is insufficient, and that material errors were committed by the court in rulings upon the admissibility of evidence, for in our opinion there was no evidence sufficient to establish the crime of forgery. There was a conflict of evidence as to whether appellant was the person who did the acts testified to by the witnesses for the prosecution; but, assuming that appellant was identified as the person who did those acts, the acts themselves do not constitute the crime charged. The facts testified to were, in brief, these: The writing alleged to have been forged was sent by William Cluff & Co. to Hume & Co. the day before July 30, 1894, so that the latter might examine it, and be ready to pay when the collector of the former should call for payment. It was then simply an unreceipted account, with no name signed to it. On July 30th, according to the people's testimony, appellant went to the business place of Hume & Co., and asked J. Deming, one of the partners, for the payment of this account. Deming asked him the amount, and, as he did not give the correct amount, Deming refused to pay. Appellant said there must be some mistake, and that he would see about it, and went out. Deming testified, "I naturally thought he was a collector for them." Deming afterwards went out himself, leaving Fannie A. Berry as acting cashier. Afterwards appellant returned, and Miss Berry paid him the amount of the account, and appellant receipted it, by writing, in the presence of Miss Berry, "Wm. Cluff & Co., A. B." She testified: "I saw him sign, 'William Cluff & Company, per A. B.' I understood him to be the collector in the employ of the William Cluff Company, who came there to collect, and was authorized to collect, the bill." It is quite clear that the facts above stated do not constitute forgery. When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely purports to be the writing of another. The falsity must be in the writing itself,—in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not. And there was nothing of the kind in the case at bar. There was no pretense that "Wm. Cluff & Co." was the genuine signature of that firm. It was written by appellant himself, in the presence of the party who paid the money. He added the initials "A. B." to it, and he was understood to be acting as the agent of the firm, and to have

written the name "Cluff & Co." by himself as such agent. By these acts he may have committed some other crime, but he did not commit forgery. We have been referred to no authorities to the point that the signing of another's name as his agent is forgery, while there is a multitude of authorities to the contrary in text-books and adjudicated cases. "If a man accept or indorse a bill of exchange in the name of another, without his authority, it is a forgery. But if he sign it with his own name, per procuration of the party whom he intends to represent, it is no forgery; it is no false making of the instrument, but merely a false assumption of authority." 2 Archb. Cr. Prac. p. 819. The doctrine is fully discussed, and the views hereinbefore stated declared, in Reg. v. White, 2 Car. & K. 404. In that case the defendant brought a bill to a banker as from Tomlinson. The bill was not indorsed, but the defendant said he would indorse it. The banker wrote, "per procuration Tomlinson," beneath which the defendant signed his own name. It was held that this false assumption of authority was not forgery, as there was no false making. It has frequently been held that "the false instrument should carry on the face of it the semblance of that for which it is counterfeited," although it is not necessary that the semblance should be exact. 2 Archb. Cr. Prac. 866. This rule illustrates the nature of forgery. How, in the case at bar, could there be any question about "semblance"?

The American authorities are as pronounced on the subject as the English. In *Re Hell-bonn*, 1 Parker, Cr. R. 434, the court, after having referred to other cases, say: "It might not be necessary to refer to these authorities, for it is the essence of forgery that one signs the name of another to pass it off as the signature or counterfeit of that other. This cannot be when the party openly, and on the face of the paper, declares that he signs for that other. There he does not counterfeit the name of the other, nor attempt to pass the signature as the signature of that other. The offense belongs to an entirely different class of crimes." In *Mann v. People*, 15 Hun, 155, the court, in an elaborate opinion, in which the authorities and the arguments for an opposite view are fully reviewed and discussed, holds that, "where one executes and issues an instrument purporting on its face to be executed by him as the agent of a principal therein named, he is not guilty of forgery, either at common law, or under the statutes of this state, even though he has in fact no authority for such principal to execute the same." (We quote from the syllabus, which is a correct condensation of the opinion.) In *Com. v. Baldwin*, 11 Gray, 190, the supreme judicial court of Massachusetts say: "It is not, says Sergeant Hawkins, the bare writing of an instrument in another's name without the privity, but the giving it a false appearance of having been executed by

him, which makes a man guilty of forgery. If the defendant had written upon the note, 'William Schouler, by his agent, Henry W. Baldwin,' the act, plainly, would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon the signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature." In *Com. v. Foster*, 114 Mass. 311, the court say: "The falsity of the instrument consists in its purporting to be the note of some party other than the one actually making the signature. The falsity of the act consists in the intent that it shall pass as the note of some other party." In *State v. Young*, 46 N. H. 266, the supreme court of that state say: "To forge or counterfeit is to falsely make; and an alteration of a writing must be falsely made, to make it forgery at common law, or by our statute. The term 'falsely,' as applied to making or altering a writing in order to make it forgery, has reference, not to the contents or tenor of the writing, or to the fact stated in the writing, because a writing containing a true statement may be forged or counterfeited as well as any other, but it implies that the paper or writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains,—a writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a genuine writing or instrument when it is not." In *State v. Willson*, 28 Minn. 52, 9 N. W. 28, the court, referring approvingly to *Mann v. People*, supra, say: "The court decided that this did not constitute forgery, and held, in substance, that, when one executes and issues an instrument purporting on its face to be executed by him as agent of a principal therein named, he is not guilty of forgery, although he has in fact no authority from such principal to execute or issue the same. In fact, we found no authority to the contrary, and the text writers uniformly lay down or approve of the same rule." There are numerous other authorities to the same point, but further citation is unnecessary. Of course, the averment in the information that the appellant uttered and passed the said instrument "as true and genuine" is also, under the above views, unsupported by the evidence.

It is contended that the definition of "forgery" in section 470 of the Penal Code makes the crime different from forgery at common law, but, with respect to the question here under discussion, there is no such difference. At common law there were frequent embarrassing questions as to what kinds of writings were the subjects of forgery, while our Code, to avoid those questions, enumerates a very large number of writings as subjects of

forgery. But, as to what constitutes forgery of instruments which are subjects of forgery, the definitions at common law and by our Code are the same. "Forgery, at common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bish. Cr. Law (8th Ed.) § 523. In the notes to the section of Bishop just quoted, many other definitions are given, and it will be noticed that the leading descriptive words are "false making," or altering. In our Code the words are, "every person who with intent to defraud another, falsely makes, alters," etc., any of the written instruments enumerated. The definition is therefore essentially the same in both instances, and it is the same in the statutes of all the other states to which our attention has been called. But the meaning of the words "false making," when applied to forgery, is that hereinbefore stated. The broad and well-established distinction above set forth cannot be ignored by courts or jurors, even when, in their opinion, a more severe punishment should be imposed on a defendant than the one which the law prescribes for the offense of which he is guilty. As was said in *Mann v. People*, supra, "whatever his misdeeds, he must not suffer for a crime which he has not committed." Forgery is a grave and exceedingly dangerous crime. A very large part of the business of civilized countries is done by means of negotiable instruments. These are rarely presented by the makers, but are paid to others on the faith that the signatures and the bodies of the instruments are genuine. The business of a bank would come to a standstill, if the paying teller would not pay any check until he could communicate with the drawer. Hence, if there were many successful forgeries, there would be the utmost confusion in business circles. Consequently forgery, no matter how small the amount involved, is made a felony. But obtaining money or other property by false pretenses, where the party defrauded gives credit, not to the genuineness of a writing, but to the person who deceives him, is made a misdemeanor, or felony, according to the amount of money obtained by the false representation. For the foregoing reasons the judgment must be reversed, and, of course, another trial upon the theory on which the first trial was conducted would be useless. The judgment and order appealed from are reversed.

We concur: TEMPLE, J.; HENSHAW, J.

# HAMILL et al. v. BANK OF CLEAR CREEK COUNTY.

(Court of Appeals of Colorado. Feb. 10, 1896.)

APPEAL—PRACTICE—DISMISSAL—TIME OF TAKING APPEAL.

1. Where appellant has acquired no rights under his appeal, on account of its having been

irregularly taken, appellee may, before the record is returnable into the supreme court, file a transcript thereof, and move for a dismissal of the appeal.

2. Where, on entry of judgment, a stay of execution is ordered pending the determination of a motion for a new trial, an appeal from the judgment must be taken within the required five days after entry, though the motion for new trial is undecided.

Appeal from Arapahoe county court.

Forcible entry and detainer by the Bank of Clear Creek County against William A. Hamill and others. There was a judgment for plaintiff, and defendants appeal. Heard on motion by appellee to dismiss. Dismissed.

J. B. Belford and T. J. Galloway, for appellants. Thos. Mitchell, for appellee.

PER CURIAM. This matter comes before the court on motion to dismiss the appeal,—very much out of the usual course, and according to a practice which has seldom been resorted to in the state. The procedure commends itself to our judgment. That the practice may be thoroughly settled, we are inclined to express our views respecting it.

This was a proceeding in forcible entry and detainer, wherein the county court rendered a judgment and decree on the 18th day of November, 1895. The defendants filed a motion for a new trial, and on the date of the entry of the judgment the court ordered the execution to be stayed pending the determination of the motion. On the 17th of December, following, this motion was overruled, an appeal prayed to this court, and the bond fixed, which was given. Had the judgment been entered on the 17th of December, and the appeal then regularly taken, the case would not be returnable until the April term. The appellants proceed on the hypothesis that their record is due in April, and have taken no further steps with reference to bringing the case into this court. The appellee, conceiving the appeal not to have been regularly taken under the statute, nor any rights acquired by what the appellants did, tendered a transcript of the judgment, with all the orders and proceedings in the case, and thereupon filed a motion, based on that record, to dismiss the appeal. The appellants resist because the motion was made before the return day, and also because of the alleged effect of the order respecting the stay of the execution. We do not think either position tenable. There seems to be no speedy or adequate remedy for the appellee, in cases of this description, unless he is permitted to file a record in the appellate tribunal, and therein attack the regularity of the proceedings, and dismiss the appeal, if it has been improperly or insufficiently taken or perfected. No other court has jurisdiction. The lower courts always refuse to interfere by ordering process to issue, and any other procedure will, as in this case, frequently result in tying a case up, without right, for several months. This may be to the very great prejudice and injury of the

party who has succeeded in recovering a judgment. The practice suggested has been very generally followed of late years in the supreme court of the United States, and, as we are advised, though there has been no opinion promulgated respecting it, has been sanctioned by the supreme court of this state. *Ex parte Russell*, 13 Wall. 664; *Thomas v. Wooldridge*, 23 Wall. 283; *Clark v. Hancock*, 94 U. S. 493. The contention respecting the effect of the order which stayed the execution is without force. The record shows the judgment was actually entered on the 18th day of November. The order in no wise affected it, set it aside, or vacated it, but left it to stand, with a limitation respecting the enforcement of the judgment by means of an execution. It would have been quite as easy to have stayed the entry of judgment pending the motion for a new trial, whereby the appellants' rights would have been preserved, and the appeal would then have dated from the final entry. The necessity to pray an appeal within the five days prescribed by the statute has been often recognized by the appellate courts, and, if a party fails to proceed according to this statutory requirement, he cannot preserve to himself the right to have a review of his cause on appeal. The motion for leave to file the transcript will therefore be granted, and the appeal will be dismissed.

#### WINSHIP v. MAY.<sup>1</sup>

(Court of Appeals of Colorado. Jan. 13, 1896.)

INTERVENTION — APPEAL IN — ACTION ON LOST NOTE — INDEMNITY — EVIDENCE.

1. Where, in an action in a justice's court, aided by attachment, a third person claims the attached property, on appeal to the county court by defendant alone the intervener cannot question the correctness of the decision of the justice against his claim.

2. Where, pending an appeal from the judgment of a justice's court in an action on a note past due by an indorsee, the note is lost while in the hands of the justice, so that it cannot be produced on trial in the county court, plaintiff need not, to entitle him to judgment, indemnify defendant from further liability on the note.

3. In such an action, testimony of plaintiff's counsel that he, together with the justice, searched the files and records of the justice, and places where such papers were kept, and were unable to find the note, is sufficient to sustain a finding of the trial court that it had been lost.

Appeal from county court, Arapahoe county.

Action by Charles D. May against William A. Winship in which Hannah Winship intervened. From a judgment of the county court for plaintiff on appeal from the justice court, defendant appeals. Affirmed.

E. H. Park and Wm. Knapp, for appellant. McIntyre, Bray & Jarvis, for appellee.

BISSELL, J. May brought suit against William A. Winship before a justice, on a

promissory note for \$100, dated in August, 1890, payable to the order of Benjamin & Co., and by that firm indorsed to May, before maturity. He procured a writ of attachment in aid of his suit, and caused it to be levied on certain property. The action was defended by Winship, and a claim of title to the property was put in by Hannah Winship, the defendant's wife, by a petition of intervention, which she filed under the statute. On the trial, judgment was entered for the amount of the note against Winship, and the justice found against the intervener on her petition. Winship ultimately appealed the case to the county court. Mrs. Winship took no steps to reverse the judgment against her. When the case came on for trial in the county court, it was heard on the main issue, and the intervener then attempted to assert her rights and obtain an adjudication respecting the claim which she had set up. This application was denied, and the court neld the proceedings in intervention were not before it, because the intervener had failed to take any steps to appeal from the adverse finding. The note was not produced. The justice had failed to transmit it with the papers, and much search was made for it in his office, but the search was unsuccessful. Considerable evidence was offered respecting the loss, and testimony was offered as to its contents. The abstract does not contain the testimony on this subject. There is a very brief recital of it, which in no manner conveys the substance of the proof or expresses the effect of the evidence. On examination of the record, we find several witnesses were produced who were able to state substantially the contents of the paper, its production at the time of the trial before the justice, and a search through the files and papers in that office to find it. The justice was not produced, and the evidence was confined to that of the attorneys who with him unsuccessfully searched the files, the records, and the places where such papers were kept. The only thing left at all in doubt was the exact date of the note, which was given the 20th and 24th of August, 1890. The defendant admitted on examination that the note which was sued on before the justice and offered in evidence there, and on which the judgment was rendered, was signed by him, although he claimed to have paid it.

On this statement of facts, but two matters are presented to our attention. The first concerns the review of the proceedings respecting the title of the intervener. It is insisted that the appeal of the main case from the justice to the county court, and thence here, brings that matter before us, and entitles the intervener to a review of the regularity and rightfulness of the judgment in the county court concerning her claim. In this matter we must disagree with counsel. The question has been entirely set at rest by several decisions in the supreme court, where similar questions, if not the exact issue, have been under consideration. It has been adjudged

<sup>1</sup> Rehearing denied February 10, 1896.



that proceedings in intervention are independent of the main suit, and a right conferred on the claimant of property which has been taken under the process of attachment to assert his title relatively to the same extent as he might in a suit in replevin against the officer to recover the identical chattels. It is treated as an independent suit by the intervener, who is entitled to all the remedies afforded by an appeal, if the judgment is against him. *Wike v. Campbell*, 5 Colo. 126; *McRobbie v. Higginbotham*, 11 Colo. 312, 18 Pac. 31; *Kinnear v. Flanders*, 17 Colo. 11, 28 Pac. 327. Under these circumstances, it is manifest that the present appeal presents no question respecting the sufficiency of the petition, or the rightfulness of the judgment which the justice entered against the intervener. She failed to appeal the case to the county court, was without the right of appeal from that to this, and, although the record may contain much information respecting it, we are under no obligations to express any opinion about it. For this reason, the error which Winship assigns as based on that part of the record will be totally disregarded.

There is but one other error open to consideration. This is based on the sufficiency of the proof that the note was lost. There are several reasons why the error is not well laid. In the first place, the facts were found against the appellant by the trial court, and we are at liberty to accept that finding as conclusive on his rights. He has failed to print the testimony in the abstract, and what has been preserved for our examination in no manner demonstrates any error as to this issue. Disregarding the last suggestion, the record was examined, and the testimony read; and on it, as it stands in the bill of exceptions, we are quite of the opinion the court did not err in finding that the note was lost, and in assuming the proof to be entirely ample and satisfactory to permit a recovery on the instrument. In some of its features the case is vastly different from other actions which have been brought on lost commercial paper. The original judgment was rendered in the justice's court on the note, which was there produced. If the note was lost, it was the fault of the tribunal wherein the case was tried, for which the plaintiff was in no manner responsible, and no possible injury can ever come to the defendant therefrom. The note is long since due, and was at the time of the trial before the justice, and no person could acquire title as against the judgment creditor; nor could the defendant, under any circumstances, be forced to respond in an action brought on it. These circumstances take the case out of the operation of the rule which would compel the plaintiff to indemnify the defendants as against an action by any other person on the paper. *Mackey v. Mackey*, 16 Colo. 134, 26 Pac. 554. The case was tried without error. The evidence fully justifies the judgment, which will accordingly be affirmed. Affirmed.

SPANGLER v. WEST (SANBORN, Intervener).<sup>1</sup>

(Court of Appeals of Colorado. Nov. 11, 1895.)  
ASSIGNMENT FOR CREDITORS—FILING NOTICE—  
TITLE OF ASSIGNEE—ATTACHMENT  
LIEN—PRIORITY.

1. Sess. Laws 1885, p. 43, § 1, provides that a deed of general assignment, when filed in the county where the assignor resides, or, if a nonresident, where his principal place of business is, shall vest in the assignee title to all the property. *Id.* § 6, provides that, where such deed includes any interest in land, the assignee shall file a notice in each county where the real estate is situated, and makes the filing thereof constructive notice to a purchaser or incumbrancer of the transfer. *Held*, that where an assignee of a firm filed notice of the assignment in the county of their principal place of business, but failed to file it in a county in which land owned individually by one of the partners was situated, until an individual creditor of such partner had, without notice of the assignment, attached the land for his debt, the lien of the attachment was superior to the title of the assignee.

2. An attachment lien is an incumbrance, within Sess. Laws 1885, p. 43, making the filing of a deed of general assignment in a county where real estate conveyed by the deed is situated constructive notice to a purchaser or incumbrancer of the transfer.

3. The presumption of assent of creditors to a general assignment, which Laws 1885, p. 43, § 4, declares, arises when the notice to creditors required by Laws 1885, p. 43, § 7, has been given.

Error to district court, Arapahoe county.

Action by Michael Spangler against George H. West, partner of an insolvent firm, on his individual debt. Plaintiff, in aid of his action, attached individual property of defendant; and Burton D. Sanborn, assignee of the firm, intervened, claiming the property free of the attachment lien. From a judgment for the intervener, plaintiff brings error. Reversed.

Cranston, Pitkin & Moore, for plaintiff in error. H. N. Haynes, for defendant in error.

THOMSON, J. On the 26th day of December, 1890, Hunter & West made a general assignment of all their property, joint and individual, by deed, to Burton D. Sanborn, in trust for the use and benefit of all their creditors, and of all the creditors of each of them. The deed was filed for record in the office of the clerk and recorder of Weld county—being the county where the principal place of business of the assignors was—on December 27, 1890, at 8 o'clock a. m. The assignment included a tract of land in Logan county, belonging to George H. West, one of the assignors. On the 26th day of December, 1890, Michael Spangler commenced his action in the district court of Arapahoe county against George H. West, upon certain promissory notes executed by West and transferred to Spangler, and procured a writ of attachment to be issued in the cause, which was on the 27th day of December, 1890, at 8:30 o'clock a. m., duly

<sup>1</sup> Rehearing denied February 24, 1896.

levied upon the tract of land in Logan county belonging to West. At the time of the levy no notice of the assignment had been filed with the clerk and recorder of Logan county. Sanborn filed his petition in intervention in the cause, setting forth the assignment, the time of the record of the deed, and the levy of the attachment, with the time when it was made, and praying that the property attached be adjudged the property of the petitioner, unaffected by the attachment levy, and that the costs occasioned by the attachment be taxed to the plaintiff in the cause. The answer of the plaintiff to the petition in intervention set forth the facts of the commencement of his action and the levy of his attachment, and averred that at the time of the levy he had no notice or knowledge of the execution of the deed of assignment, or of its record in Weld county, and that notice of the assignment had not been filed with the clerk and recorder of Logan county, and prayed the dismissal of the intervention. A demurrer to the answer was sustained, and it was adjudged that the property described in the petition was the property of Sanborn, as assignee, unincumbered by the attachment. The plaintiff brings error.

In this state, assignments for the benefit of creditors are regulated by statute. *Sess. Laws 1885, p. 43.* The difference between counsel is chiefly concerning the meaning of the following portions of the act:

"Section 1. Any person may make a general assignment of all his property for the benefit of his creditors, by deed, duly acknowledged, which, when filed for record in the office of the clerk and recorder of the county where the assignor resides, or, if a non-resident, where his principal place of business is, in this state, shall vest in the assignee the title to all the property, real and personal, of the assignor, in trust, for the use and benefit of such creditors."

"Sec. 4. In case of the assignment of property for the benefit of all the creditors of the assignor, the assent of the creditors shall be presumed."

"Sec. 6. Where real property, or any interest therein, is, by such deed, conveyed to the assignee, the assignee shall forthwith file with the clerk and recorder of each county where the real estate is situated, a notice of the assignment, containing the names of the assignor and assignee, the date of the deed of assignment, when and where recorded, and a description of the property in that county affected thereby, and the same shall be constructive notice to a purchaser or incumbrancer of the transfer of the property in said county, described in such notice."

According to the construction given to these sections in behalf of the intervenor, the instant the deed was filed in the office of the recorder of Weld county the title to all the assignor's property, wherever situate, vested absolutely in the assignee. Upon the

filing of the deed the assent of the creditors to the assignment was conclusively presumed; and, having assented to it, they were concluded by it, and debarred from independent proceedings to subject the assigned property to the payment of their claims. They could not become incumbrancers, or acquire any lien or security upon the assigned property for the payment of their individual claims; and it was not in their power to place themselves in a position where the term "incumbrancer," as used in the sixth section, could have any reference or applicability to them.

The word "vest," as used in the first section, seems to possess a significance in the mind of counsel which we do not attach to it. Ordinarily, as against the grantor, title is said to vest in the grantee upon the delivery of the deed to him; but, by this special provision, in the case of assignments for the benefit of creditors, it does not vest until the filing of the deed for record in the office of the recorder of the proper county. The intention was to fix the time when the title should vest, and not to enlarge the meaning of the word. In other cases the title vested by the deed may be defeated by that of a subsequent innocent purchaser, or diminished in value by the lien of a subsequent innocent incumbrancer, and there is nothing in the language of the section to warrant the assumption that in cases of assignment any different rule should obtain. And certainly there is no need of perplexity as to the meaning which the word "vest" was intended to convey, when this section and section 6 are read together.

Neither do we agree with counsel in the effect which he gives to the fourth section. That section is simply declaratory of pre-existing law. Without it there would be the same presumption of the assent of the creditors. But the presumption would not be conclusive. Any act of positive dissent would overthrow it. It would exist merely in the absence of evidence to the contrary. The property might be beyond the reach of attachment, and a creditor, by dissenting, might deprive himself of any benefit from the assigned estate, but his assent would not be compulsory. *Halsey v. Fairbanks*, 4 Mason, 206, Fed. Cas. No. 5,964; *Tompkins v. Wheeler*, 16 Pet. 106; *Brevard v. Neely*, 2 Sneed, 164; *Stewart v. Hall*, 3 B. Mon. 218; *Belfeld v. Martin* (Colo. App.) 37 Pac. 32. Apparently, the rule is not altered by the statute; but we do not see that in this case the question of the conclusiveness or nonconclusiveness of the presumption is important. The real question is whether, as to the plaintiff, it attached at all. Under our statute, when does the presumption of the assent of creditors to an assignment for their benefit arise? Generally speaking, the term "assent" implies knowledge of some kind, in the party assenting, of that to which he assents. A party cannot very well be said to assent to or

dissent from something of which he is supposed to be in ignorance. Section 4 is not definite upon the subject. It merely declares that in cases of assignment the assent shall be presumed. This language alone does not enlighten us, but, by reading the section in connection with section 7, we think its interpretation is not a matter of difficulty. The latter section makes it the duty of the assignee forthwith to give notice of the assignment by publication in some newspaper in the county, if any, and, if none, then in the nearest county thereto, which publication shall be continued four weeks, and provides that proof of the notice by publication shall be made by the affidavit of the printer or publisher. The only provision in the law for notifying creditors of the fact of the assignment is contained in this section. It is mandatory upon the assignee, and particularly specifies the manner of giving the notice, and of its proof. Section 1 does not make the record of the deed of assignment constructive notice to creditors, and the fact that notice is specifically provided for elsewhere is evidence that it was not intended to be such. Mr. Burrill says that the object of giving notice of the assignment is, among other things, to apprise the creditors of the transfer, and his language is quoted with approval by the supreme court of Indiana. Burrill, Assignm. (6th Ed.) 466; *Switzer v. Miller*, 58 Ind. 561. We have, therefore, in section 7, a condition upon which the presumption of assent may be predicated. The published notice of the assignment may never fall under a particular creditor's observation, and he may therefore be without actual information of the fact; but the presumption is otherwise, and upon this presumptive or constructive notice presumption of assent is based. It was obviously impossible that the required notice should have been given between the time of filing the deed for record and the time of the levy of the attachment; and the answer, upon whose allegations the case must at present be determined, avers that at the time of the levy the plaintiff had no knowledge or notice of the assignment. There was then, on his part, no assent in fact, and nothing had yet been done from which the law would presume his assent. His levy upon the land was therefore not attended by the impediment of a presumptive assent, and was not invalidated by anything contained in section 4.

It remains to ascertain in what manner, if at all, the levy was affected by the terms of section 6. The assignee is required by this section, forthwith, to file with the recorder of each county in which the real estate conveyed is situated a notice of the assignment, containing, among other things, a description of the land in such county affected by it; and it is provided that this notice, when so filed, shall be constructive notice to purchasers and incumbrancers of the transfer of the property in that county, described in the notice. This is the only method provided by the law for

affecting persons who might otherwise purchase the property from the assignor, or secure themselves upon it for debts owing to them by him, with constructive notice that the property had been conveyed, and the notice must be filed in each county in which land conveyed is situated. This would include the county in which the assignment is made, and the deed recorded, if the assignment embraces land in that county. From these special and particular provisions, it would seem that the mere recording of the deed is not constructive notice of the conveyance of land, even in the home county. As to all matters pertaining to assignments, the statute is full and complete within itself, and the general law concerning conveyances has no application. In order that purchasers and incumbrancers may be affected with notice, other than actual notice, the prescribed method must be pursued; and it follows that, in the absence of the statutory notice, bona fide purchasers and incumbrancers will be protected. Counsel concedes that this is the rule in the case of a purchaser or mortgagee who parts with his money in good faith, relying on the records of the county where the land is situated; but he contends that it is not the rule in the case of prior creditors, and gives as his reason that the record of the deed of assignment is constructive notice to them of the execution of the deed, that the law thereupon compels their assent, and that by their assent they become parties to the transaction. But, as has been shown, the record of the deed of assignment is not constructive notice; and, in the case of the plaintiff, the condition upon which the law presumes—but does not compel—the assent of creditors had no existence. The words "purchaser" and "incumbrancer" are used without qualification of any kind; and, leaving purchasers out of the discussion,—for there is no question of purchase in the case,—the word "incumbrancer" is employed in the section in its broad and general sense, and embraces every class of incumbrancers, and every class of incumbrances. A lien or charge upon land, which binds it for the payment of a debt, is an incumbrance, and the holder of the lien is an incumbrancer. The incumbrance may be created by contract, or it may be acquired in pursuance of some statute. The lien of an attaching creditor is an incumbrance, equally with a mortgage. *Kelsey v. Remer*, 43 Conn. 129; *Johnson v. Collins*, 116 Mass. 392. See, also, *Bank v. Campbell*, 2 Colo. App. 271, 30 Pac. 357.

The plaintiff having caused his attachment to be made without notice, actual or constructive, of the assignment, or of the conveyance of the property upon which he levied, his lien is entitled to precedence over the deed, and the demurrer to the answer was therefore erroneously sustained. The judgment will be reversed and remanded, with leave to the intervenor to reply to the plaintiff's answer. Reversed.

**AUTREY, Sheriff, v. BOWEN.**

(Court of Appeals of Colorado. Feb. 10, 1896.)

**FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—NATURE OF CHATTELS SOLD—FACTS EXCUSING DELIVERY—REPLEVIN—AMENDMENT OF COMPLAINT.**

1. Where the goods remained with the seller, the sale was fraudulent, as against his existing creditors, though, prior to a levy by them, the buyer removed a portion of the goods.

2. A bill of sale of 210 sacks of concentrates, each sack weighing 100 pounds, will not confer constructive possession on the buyer, in the absence of actual possession, as against prior creditors of the seller, on the ground that actual delivery was impossible, on a mere showing that the stuff was bulky, and that the roads were so bad that "little or no hauling was done."

3. Plaintiff in replevin against an officer for goods attached as the property of plaintiff's vendor, on an agreed statement, may amend his complaint prior to the hearing by changing the allegation as to the value of the property, on a showing that it was made on information furnished by such vendor, and that it called for a sum greater than the actual value.

Error to district court, Boulder county.

Action of replevin by Albert E. Bowen against Edward Autrey, sheriff. Judgment for plaintiff, and defendant brings error. Reversed.

S. A. Giffin and Geo. S. Adams, for plaintiff in error. H. C. Henderson and Geo. B. Campbell, for defendant in error.

**BISSELL, J.** This suit grew out of a controversy between the creditors of one W. M. Wolcott and Albert E. Bowen, who claimed to be the owner of the property which the creditors sought to subject to the payment of their debts. In February, 1891, Wolcott was the owner of 210 sacks of concentrates, which were in a mill he was operating in Boulder county, called the "Corning Tunnel Mill." The mill was located about 12 miles from Boulder, and about the same distance from the hotel, which was carried on by Bowen. On the 28th, Wolcott was indebted to Bowen, for board for himself and family, in the sum of about \$128. In order to pay that debt, and to secure Bowen for the indebtedness which might accrue from his continued stay in the hotel, to the extent of the balance of the assumed value of the concentrates, to wit, \$162, Wolcott executed a bill of sale, reciting a consideration of \$300, whereby he attempted to sell and transfer to Bowen all his title to the concentrates which were at the mill. At the date of the execution of the transfer, Wolcott was indebted to one Pierson, who commenced a suit on the 27th of February, by attachment, which process was subsequently levied on the concentrates. At the same time Wolcott was indebted to one Feeny in the sum of \$216.60, and on that day Feeny commenced a suit in the county court against his debtor, and got judgment on the 14th of March, following, on which date an execution was placed in the hands of the sheriff for service. There is no controversy whatever about any of the facts on which judgment was entered.

The parties filed a stipulation and an agreement concerning them, and on this statement of facts the court rendered judgment in favor of the appellee, Bowen. What has been stated is an extract from the statement, and the other facts which will be referred to are compiled from the same source. Bowen made no attempt whatever to reduce the concentrates to possession, but they were left at the mill, which was in the custody and control of Wolcott, who owned or run it. On the 16th and 17th of March the sheriff levied this attachment and the execution on the concentrates, and took them into his possession. At that time part of them had been hauled from the mill, and placed in a car at Boulder, and a part of them were in the process of transit, though at the date of the delivery of the process to the sheriff, to wit, the 14th, most of them were still at the mill. Thirty-five sacks had been hauled on that date. At the time of the transaction between Bowen and Wolcott, when the bill of sale was executed, Bowen made an agreement with the teamster who had been hauling stuff from the mill to take the concentrates, and deliver them at the railroad when the road should get in good condition. No attempt to reduce the chattels to possession, other than what might be said to result from the execution of the transfer and the making of the contract with the teamster, was ever made by Bowen prior to the commencement of the hauling, on the 14th of March. The only excuse which the statement of facts exhibits for the failure to reduce the chattels to possession is in the second paragraph, and is "that the roads, by reason of the snow and mud, between Boulder and said mill, were in very bad condition, and little or no hauling was done." After the sheriff had made his levies, Bowen demanded possession, which was refused, and he thereupon brought replevin. According to the averments of his original complaint, the value of the ore was put at \$350. The defendants took issue on all material allegations of the complaint, and the cause ultimately went to trial on the agreed statement. Prior to the hearing the plaintiff asked leave to amend the ad damnum, and supported his application by an affidavit which substantially set up that his information as to value was derived from the vendor, and he supposed it would be as put. He also stated a subsequent shipment to the smelter, showed the gross value to be only \$106.16, and the actual value, after deducting freight and smelter charges, to be \$45. This leave was refused him, and when the case was tried the plaintiff had judgment that he retain possession of the property and recover his costs.

We are entirely relieved from any difficulty as to the matters of fact involved because the court did not render its judgment on any conclusions of its own respecting them, nor was the question at issue submitted to a jury. The judgment is simply the court's conclusion of law respecting the

rights of the parties, and the only thing for our determination is whether, on the facts as stated, the plaintiff was entitled to judgment. We do not agree with the trial court. Under our statute of frauds, any sale of chattels which is not accompanied by an immediate change and transfer of possession is absolutely void, as against any creditors of the vendor then existing. This has been again and again declared by both the appellate courts of this state. It is likewise settled by repeated adjudications that the rights of the parties are not at all affected by any transfer which may be made subsequent to the time of the sale, even though it may occur before any actual levy on the goods by creditors who have sued out attachments or have issued executions. A long line of cases in this state and in other jurisdictions settle both propositions adversely to the appellee. *Cook v. Mann*, 6 Colo. 21; *Ray v. Raymond*, 8 Colo. 467, 9 Pac. 15; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809; *Sweeney v. Coe*, 12 Colo. 483, 21 Pac. 705; *Atchison v. Graham*, 14 Colo. 217, 23 Pac. 876; *Allen v. Steiger*, 17 Colo. 552, 31 Pac. 226; *Felt v. Cleghorn*, 2 Colo. App. 4, 29 Pac. 813; *Burchinell v. Weinberger*, 4 Colo. App. 6, 34 Pac. 911; *Chenery v. Palmer*, 6 Cal. 119; *Watson v. Rodgers*, 53 Cal. 401; *Edwards v. Bank*, 59 Cal. 148; *Dean v. Walkenhorst*, 64 Cal. 78, 28 Pac. 60; *Woods v. Bugbey*, 29 Cal. 466; *Gardenier v. Tubbs*, 21 Wend. 169. These authorities dispose of the entire controversy, and their complete application to the facts of this case renders any restatement or analysis of the doctrine totally unnecessary. The only possible question about the matter is whether the goods were of the character and in the situation which rendered the technical implication of a transfer by reason of an execution of a bill of sale sufficient to take the case out of the statute. We are unable to find in the statement of facts any matters which would establish an implied possession because of the execution and delivery of the bill of sale. It is true, the articles were bulky; but they only consisted of 210 sacks of ore, of the weight of 100 pounds each. There is no sort of a physical impossibility to take that number of sacks of ore into possession within a very reasonable time after the transfer. There was no attempt to prove they could not have been removed from the mill, and put into another warehouse or another place for storage which was not under the control and management of the vendor. There is likewise nothing to show that the sacks of ore were segregated from any other sacks in the mill, but, so far as can be discovered, Wolcott remained in absolute possession after the sale. Under the evidence, the ore might have been hauled from the mill to the railroad immediately on the execution of the transfer. It is true, the statement is, "the roads were bad, and little or no hauling was done." From this we have a right to infer

some hauling was done, and that it was not impossible. It is this element of insuperable difficulty or impracticability which renders the situation an excuse for a failure to reduce chattels to possession. No impossibility is shown, nor does any impracticability appear; but, so far as we are advised by what the parties agree, it would have been entirely feasible for the vendee to have taken immediate possession, removed them from Wolcott's custody, and assumed the actual control which the statute requires. Unless some other facts be shown than what appear from the present agreement, the appellee, Bowen, was not entitled to a judgment for the return of the property.

Since this case must go back for another trial, and the judgment must ultimately be against the appellee, for the return of the property or its value, we must express our opinion concerning the action of the court in refusing the plaintiff the right to amend his ad damnum, and show the actual value of the property. Had the case been tried in the usual way, on proof, a judgment would necessarily have been entered according to the established value of the property, and Bowen would have been adjudged to return it, or to pay what the jury might find was the true and actual value. Since it was heard on the agreed statement, no evidence was introduced concerning it, and the plaintiff was apparently bound by what he had alleged in his pleadings. If he was unadvised, as would appear from his affidavit respecting the matter, he should not be concluded by his allegations, but should have the opportunity to amend his complaint in that particular, or to offer proof on the subject, so that the ultimate judgment against him should not exceed the proved value of the mineral. Evidence should either be taken on that question, or he should be allowed to amend his complaint so that injustice might not be done him in this particular. Since the conclusions of the trial court do not concur with our views of the law, this case must be reversed, and remanded for further proceedings in conformity with this opinion. Reversed.

#### McGARVEY v. HALL.

(Court of Appeals of Colorado. Feb. 10, 1896.)

ATTORNEY AS JUDGE—AGREEMENT OF PARTIES—JUDICIAL AUTHORITY.

An attorney cannot be empowered by the district court or by the parties to preside as judge at a trial, or exercise judicial authority in the case.

Appeal from district court, San Miguel county.

Action between W. T. McGarvey and H. O. Hall. From a judgment entered by an attorney presiding as judge, McGarvey appeals. Dismissed.

S. D. Crump, for appellant. John Gray, Lou R. Smith, and George T. Sumner, for appellee.

THOMSON, J. The record in this case discloses the following facts: The trial was commenced before Hon. T. A. Rucker, judge of the Ninth judicial district, who presided at the request of Hon. W. H. Gabbert, judge of the court in which the cause was pending; the latter being disqualified by reason of his having been the defendant's counsel in the case. After a jury had been impaneled, and a portion of the testimony heard, sickness in Judge Rucker's family compelled him to leave; and it was agreed by the parties that H. M. Hogg, Esq., an attorney at law, should act as judge, and that the remainder of the testimony should be heard, and the trial concluded, before him. Mr. Hogg accordingly took charge of the trial at the point where Judge Rucker left it, heard the evidence, instructed the jury, received their verdict, overruled a motion for a new trial, and rendered final judgment. We are asked to review this judgment on error.

The judgment is an absolute nullity. It is not a judgment. Mr. Hogg could not act as judge. He could not be empowered either by the court itself or by the parties to preside as judge at the trial, or exercise judicial authority in the case. *Mining Co. v. Howcutt*, 6 Colo. 574. There was no trial and no judgment, and there is nothing for us to review. The appeal will be dismissed, and the cause remanded for trial. Dismissed.

#### CANFIELD v. CITY OF LEADVILLE.

(Court of Appeals of Colorado. Feb. 10, 1896.)

INTOXICATING LIQUORS — STATUTES — REPEAL BY IMPLICATION — ILLLEGAL SALE — CONVICTION — REVERSAL.

1. Laws 1889, p. 228, regulating the licensing of "tippling houses," and which, by section 1, provided that the "license" for the sale of liquors in less quantities than one gallon should not be less than \$600, did not, by implication, repeal Mills' Ann. St. § 4403, subd. 18, which gave cities and towns the right to grant "permits" to druggists to sell liquors for "medicinal, mechanical, sacramental and chemical purposes only," under certain restrictions.

2. A complaint under a valid ordinance prohibiting druggists from selling liquors without a permit averred that defendant sold "spirituous liquors" in a manner other than provided by ordinance, "without averring that it was sold without a permit. The stipulation of facts on which the case was tried contained no admission that defendant did not have a permit. *Held*, that a conviction must be reversed, though the only error urged for reversal was the 'invalidity of the ordinance.

Error to Lake county court.

S. G. Canfield was convicted of selling liquor in violation of a city ordinance, and brings error. Reversed.

John A. Ewing, for plaintiff in error. R. D. McLeod, for defendant in error.

REED, P. J. The following complaint was filed in the police court of the city of Leadville against appellant:

"State of Colorado, County of Lake, City of Leadville—ss.: City of Leadville vs. S. G. Canfield. T. J. Cash, being duly sworn, on his oath, says that sections 1 and 3, Ordinance 310, an ordinance of the city of Leadville, being an ordinance entitled 'An ordinance regulating the sale of liquor by drug stores,' passed and approved the 16th day of May, A. D. 1892, has been violated, and that this affiant has good reason to believe that S. G. Canfield is guilty thereof, in this: That said S. G. Canfield, on or about the 13th day of June, A. D. 1892, at the city of Leadville, in the county of Lake and state of Colorado, did sell, by himself, his agent or clerk, spirituous liquors, in a manner other than provided by said ordinance, against the peace and dignity of the people of the state of Colorado. T. J. Cash.

"Subscribed and sworn to before me this 14th day of June, A. D. 1892. J. W. Moore, Police Magistrate."

Upon which a warrant was issued, a trial had, the defendant found guilty, and a fine imposed of five dollars and costs. An appeal was taken to the county court.

The ordinance under which the prosecution was brought is as follows:

"Section 1. That any person who keeps or owns a drug store in this city, wherein the sale of drugs and medicines constitutes the principal business, may obtain from the city clerk, a permit to sell in such drug store and in connection with such business, spirituous and vinous liquors (but not to include beer or ale), either pure or compounded with drugs or medicines, in prescriptions or otherwise, but in quantities in no case greater than one gallon, and if unmixed, not less than one-half pint; but such permit shall only be granted upon payment to the city clerk or city collector of the sum of one hundred and fifty dollars for a permit for one year; seventy-five dollars for a permit for six months or less.

"Sec. 2. Under the permit mentioned in section one of this ordinance, no spirituous or vinous liquor shall be sold, bartered or given away by or for the owner or keeper of such drug store, in quantities other than as expressed in said section one, and then only for medicinal, mechanical, sacramental, chemical and culinary purposes.

"Sec. 3. Any person keeping or owning a drug store within the city of Leadville, who shall, by himself, or his agent, or clerk, sell, barter or give away, in or connected with such drug store, any spirituous or vinous liquors, in any manner other than as provided in this ordinance; or shall sell, barter or give away any beer or ale under any circumstances, or who shall permit any liquors so sold, bartered or given away to be drunk in such drug store, or in any room connected therewith; or shall knowingly sell, barter or give

away any such liquor to be drunk as a beverage, or who shall sell, barter or give away any such liquor when he has good reason to believe, or does believe that the same is being so bought, or received to be drunk or used as a beverage; or who shall exhibit or display any such liquor in bottles, or otherwise, in any show window, show case, or other conspicuous place in such drug store, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not less than five dollars, nor more than one hundred dollars; and every such sale, barter or gift, and every day of such exhibit or display shall be deemed a separate offense, and punishable as such, and upon any such conviction, such permit may by the city council be revoked."

The following stipulation of facts was filed: "In the above-entitled cause, it is hereby stipulated and agreed by and between the plaintiff and the defendant, by their respective attorneys, that at the time stated in the complaint herein the defendant owned and kept at the corner of East Sixth street and Poplar street, in the city of Leadville, in said Lake county, Colorado, a drug store, wherein the sale of drugs and medicines constituted the principal business; that on the day stated in said complaint, and at said drug store, the defendant did sell and deliver to Herman Steffen, the party named in said complaint, one pint of whisky, it being then and there stated that said whisky was wanted for medicinal purposes; that said whisky was then and there sold by defendant in connection with his said drug business; that said whisky was clear, and unmixed with any other substance, and was spirituous liquor. This stipulation is made for the purpose of obviating the trouble, delay, and expense of calling witness to prove said fact. It is further stipulated that the formal introduction in evidence of the ordinance of the city of Leadville, approved May 17, A. D. 1892, and numbered 310, is hereby waived, and that the same may be considered by the court as if formally introduced. N. Rollins, Attorney for Plaintiff. J. A. Ewing, Attorney for Defendant." Upon which, after admitting the ordinance in evidence, it being the only evidence introduced, the court found, and caused to be entered, the following judgment: "It is therefore, by the court, considered, ordered, and adjudged that the defendant herein is guilty as charged in the complaint, and that the plaintiff do have and recover of and from this defendant a fine of ten dollars, together with his costs, hereafter to be taxed, incurred herein." From which an appeal was prosecuted to this court.

Counsel contends that the ordinance in question was invalid, being in conflict with section 1 of the act of 1889 (Sess. Laws 1889, p. 228), the first clause of which is, "In all cities, whether incorporated under the general laws or by special charter, the licence fee for the privilege of selling spirituous, vinous and malt

liquors, in less quantities than one gallon, shall not be less than six hundred dollars per annum," and that such act, being later, repealed the eighteenth subdivision of section 4408, Mills' St., which contains the following proviso: "Provided, that the city council in cities or board of trustees in towns may grant permits to druggists for the sale of liquors for medicinal, mechanical, sacramental and chemical purposes only, subject to forfeiture and under such restrictions and regulations as may be provided by ordinance." If such provision was repealed, it was by implication, not by direct enactment. Repeals by implication are not favored, and only occur where there is such incompatibility as to prevent both from being operative. In this case we can see no such conflict as to abrogate the provision cited. The act of 1889 is evidently, by its language, confined to dramshops,—"tippling houses,"—where liquor is sold as a beverage, to be consumed on the premises, and embraces spirituous, vinous, and malt liquors, and the authority to maintain and operate a place of that kind is made dependent upon a license. The business of a druggist is other and different. His right to sell at all is called a "permit," and, when obtained, allows no sale as a beverage, but only for the purpose named. To those he is restricted. Counsel appears to confound the right to keep a dramshop, and the license required, with the permit of the druggist to sell for designated and specific purposes. Nothing can be found in the act extending it to druggists, or evincing an intention on the part of the legislature to repeal or impair the power of the city council to regulate the sale by druggists of liquor for the purposes designated in the former statute. Hence we do not consider the position assumed by counsel tenable.

The assignment of errors and the argument of counsel being based upon the supposed invalidity of the city ordinance, for the reasons above given, if there were no other grounds for reversal, the judgment would be affirmed; but in our view of the record, as presented, there are other and fundamental reasons why the judgment cannot be affirmed, which appear to have been overlooked by counsel. We are averse to making suggestions, and reversing judgments on grounds not urged nor relied upon by counsel, but there are cases where it becomes the duty of the court to do so. An examination of the complaint will show that it charges no specific offense whatever,—a vague, indefinite charge that on a given date "he did sell \* \* \* spirituous liquors in a manner other than provided by said ordinance." No allegation that he had sold liquor without having obtained a permit. The inference is—and it is only inference—that plaintiff in error was convicted of selling liquor without a permit. In the police court the document is characterized as a complaint, charging defendant with selling spirituous liquors without a license, "but no such charge is made in the complaint." It may be in-

ferred that he was convicted of that offense in that court, but when we come to the judgment of the county court there is nothing to show of what he was convicted. The judgment is as vague and indefinite as the complaint, and it could not well have been otherwise. It was not stipulated that he had no permit. That being the very basis of the case, no conviction could have been had without such admission. For all that appears, he may have had the permit, and the sale of one pint of whisky to Herman Steffen for medicinal purposes may have been legitimate. In the stipulation it is admitted that the druggist did sell to "Herman Steffen, the party named in said complaint," the pint of whisky; but, by reference to the complaint, it will be seen that no charge is made, nor the name of Steffen mentioned at all. For reasons given the judgment will be reversed, and cause remanded. Reversed.

#### MOSCONI v. BURCHINELL.

(Court of Appeals of Colorado. Feb. 10, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—INVALIDITY—RIGHTS OF ASSIGNEE.

An assignee for benefit of creditors under a void assignment has no title to the property assigned, and cannot maintain replevin against the sheriff seizing it under attachment.

Appeal from district court, Arapahoe county.

Replevin by Louis Mosconi, as assignee of Antonio and Joseph Sarcone, against William K. Burchinell. Judgment for defendant, and plaintiff appeals. Affirmed.

G. Q. Richmond, for appellant. Bicksler, McLean & Pershing, for appellee.

REED, P. J. Appellant claimed a stock of goods by an alleged assignment claimed to have been made by Antonio and Joseph Sarcone. Appellee, as sheriff, levied an attachment upon the goods, at the suit of creditors, after appellant, as assignee, had taken possession. Appellant sued out a writ of replevin. A trial was had, resulting in a judgment for the plaintiff (appellant). An appeal was taken to this court, where the judgment was reversed, and cause remanded. See *Burchinell v. Mosconi*, 4 Colo. App. 401, 38 Pac. 307. The case was retried, and is again here on appeal.

On the former appeal, for reasons stated in the opinion, and on the authorities cited, the attempted assignment to appellant, as assignee, was held void and inoperative. Nothing has subsequently occurred to change the conclusion then reached, and on a second examination we are fully satisfied with its correctness; nor is such conclusion in any manner attacked on this appeal. If not acquiesced in, it is regarded as conclusive of the question. Appellant, by his counsel, now urges a reversal on the following grounds:

(1) That the assignee was an officer of the court, and that the sheriff had not obtained permission of the court to levy attachments; (2) that the want of such permission was made the basis of a motion to dismiss, which was overruled, and is claimed to have been error.

The attempted assignment was under the act of 1885. Sess. Laws 1885, p. 43. The claim of counsel is based upon section 11, in which is the provision that the assignee shall at all times be subject to the order and supervision of the court or judge, etc. The mistake or error of the learned counsel was in assuming that appellant was an assignee. To invest him with that character, and the title and control of the property, a deed of assignment complying with the law was necessary. It is the origin, the foundation, by which he becomes assignee. The deed having been declared void and inoperative, he was not vested with the position or title to the property, was a mere volunteer, and any interference on his part was unwarranted. Further discussion of the position seems unnecessary.

Counsel insist in argument that, to insure an equal pro rata division of the proceeds of the property among the creditors, he should be regarded as assignee; otherwise, as in this case, one creditor could absorb the estate. It is an equitable view, but not in harmony with well-established principles. The intention of the statute was to allow an insolvent debtor, by complying with its requirements, to provide for an equitable pro rata distribution of all property for the benefit of all of his creditors and be discharged. Failing to comply with the statute, the law has always been that the first creditor in point of time had the prior right to even the whole estate, if necessary to satisfy his claim, leaving the party still liable to all other creditors, and unable to obtain a discharge. We fail to find any serious error in the findings of the district court, and the judgment will be affirmed. Affirmed.

#### BESHOAR v. BOARD OF COM'RS OF LAS ANIMAS COUNTY.

(Court of Appeals of Colorado. Feb. 10, 1896.)

COUNTIES—CONTRACTS—INDEFINITE APPROPRIATION.

An act of 1891 (Sess. Laws 1891, p. 111, § 1) requires the county commissioners, by resolution, to appropriate such sums as are necessary for the county expenses for the ensuing year; the resolution to specify the purposes for which the several appropriations are made. The resolution adopted provided that certain amounts were appropriated for the different purposes, one of which was "for ordinary county revenues, 6 mills, \$40.-446.23." Held, that such appropriation was not so defective as to enable the county to defend an action for the contract price for the publication of the delinquent tax list for the year for which the appropriation was made on the ground that no appropriation was made for such purpose.

Error to district court, Las Animas county.



Action by A. E. M. Beshoar against the board of county commissioners of Las Animas county. There was a judgment for defendant, and plaintiff brings error. Reversed.

The proprietor of the Daily and Weekly Advertiser, a paper published in Las Animas county, made a contract with the board of county commissioners to publish all advertisements of the county for the year 1893 at the legal rate prescribed by the statute. The agreement was the result of a bid which was put in by the manager of the paper on the 13th of January, 1893, offering to do the work at a specified rate. Three days afterwards, on the 16th, the full board met, and opened the bids. There were bids from three publishers of three different papers. On examination the board concluded the bid of the Advertiser the most advantageous for the county, and it was accepted by a vote of 4 to 1 of the commissioners. The bid and the proceedings of the board were made matters of record, and everything was done to make the bid and its acceptance a binding agreement on the parties. During the year, according to the general provision of the statute, the county treasurer furnished the Advertiser the delinquent tax list, which was published in accordance with the terms of the agreement. In the ensuing January the paper presented its claim for \$2,139.15 for adjustment and allowance. The board refused to either pay or allow it, or any part of it. The refusal was based on what the board claimed was the illegality of the letting. In the preceding year the board had attempted to comply with the requirements of the act of 1891, respecting the methods by which counties should contract, and the steps which the governing authorities must pursue in order to enter into binding obligations. This act will be commented on in the opinion. On the 18th day of October, 1892, at a regular session of the board of county commissioners of Las Animas county, they passed a resolution in the following terms:

"Whereas, under and by virtue of an act of the general assembly of the state of Colorado (page 111, section 1, Session Laws of 1891 of the State of Colorado), we, the board of county commissioners, are required, in the last quarter of each fiscal year, to pass a resolution, to be termed the 'Annual Appropriation Resolution for the Next Fiscal Year': Now, therefore, be it remembered that on the 18th day of October, 1892, the same being one of the days of the regular October term of the board of county commissioners of Las Animas county, in regular session assembled, and in pursuance of the act above referred to, be it resolved, that we, the said board of county commissioners, do make, levy, and appropriate the following various amounts for the different purposes for the next fiscal year, beginning January the 1st, 1893, and base our appropriation and levy upon a total assessed valuation of all the real and personal property in said Las Animas county, which is valued

at six million, seven hundred and forty-one thousand and thirty-nine dollars, and we here-by levy and appropriate as follows, to wit:

For ordinary county revenue, 6 mills	\$40,448 23
For interest on county bonds, 1 mill	6,741 00
For road fund, 1½ mills.....	10,111 51
For general county school fund, 3 mills.....	20,223 11
For unforeseen contingencies, ½ mill.....	3,370 50
For outstanding indebtedness, 2.9 mills.....	14,156 10
For the support of the poor, 1 mill..	6,741 00
For World's Fair exhibit, 0.1 mill..	674 10
For state tax, 4 mills.....	26,964 00

"The above and foregoing resolution being duly submitted to said board at their regular session as aforesaid, voted as follows, to wit: For said resolution—Ayes, 4; nays, none.

"In witness whereof, we, the said board of county commissioners, each for himself, has hereunto set his hand and seal at Trinidad, Colorado, this 18th day of October, A. D. 1892. [Signed] Thomas Cook, Chairman. W. A. Collins. Sol H. Jaffa. J. Ramon Aguilar."

The resolution was recorded in the records of the board, and the bid and agreement, which have been before referred to, were supposed to have been made by virtue of the authority found in the resolution. When the board refused to pay, the proprietor of the paper brought suit, and in his complaint set up these various matters. The suit was contested, but in the answer no defense was put in, save what resulted, if at all, from an averment of a failure to appropriate any moneys for the payment of the ordinary expenses of the county. The levy for the year 1893 was a little upward of \$40,000. The court found, as a matter of fact, that only about \$30,000 was applied to the payment of the ordinary current expenses for the fiscal year of 1893. In the month of January, 1894, a good many claims were presented to the board, and at the same time with the claim put in by the Advertiser, and a very considerable sum, amounting to nearly \$10,000, was ordered to be paid out of the current revenues of the county. On these facts the county had judgment, and the plaintiff prosecutes error.

W. M. Mahin and J. M. John, for plaintiff in error. John A. Gordon, for defendant in error.

BISSELL, J. (after stating the facts). The act of 1891 (Sess. Laws 1891, p. 111) was, in its purpose, a very substantial departure from the general plan of the revenue legislation which affects counties. Up to that time the board of county commissioners, which is the governing body, was intrusted generally with full power and discretion to manage, control, and regulate the funds of the county, and their disbursement. Generally speaking, there was very little restraint put upon them, other than what was found in the general enactments which conferred their powers and defined their duties. The

laxity of the system resulted in the creation of very large county debts, and this act was evidently passed to restrain and control these bodies in the disbursement of county funds. It is wholly unnecessary to state the act in detail, even though it consists of only five sections. The only portion with which we are directly concerned is a part of the first section: "The board of county commissioners of each county in this state shall, within the last quarter of each fiscal year, and at the same time that the annual levy of taxes is made, pass a resolution to be termed the annual appropriation resolution for the next fiscal year, in which said board shall appropriate such sum, or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such county for the next fiscal year, and in such resolution shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriation shall be made at any other time within such fiscal year, nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year." The evident purpose of this legislation was to compel the board, in the last quarter of the fiscal year, to consider and decide with great care the levy which should be made, and the objects to which the moneys which might be realized from it should be put. In other words, the legislature intended to compel the board of county commissioners to particularize the purposes to which the moneys should be applied. By this means all subsequent diversion of the public funds to illegal uses, because of personal, political, or other considerations, was substantially prevented. The contention in the present case is that this resolution which the board passed in October, 1892, did not amount to an appropriation, within the scope and purview of that act. We do not believe the necessary legal construction of the statute compels any such conclusion. In order to determine what construction must be adopted, regard must be had both to the evils which were aimed at, and the objects sought to be accomplished. We are likewise entitled to consider the persons to be affected, and the general character of these governing bodies, as they exist in the various counties in the state. One purpose was to limit the levy to the ordinary and necessary expenses of the county, and the other to secure an antecedent separation of the total revenues to be derived from taxation into the various sums necessary for the different purposes of county government. Another object was to compel the antecedent determination of the exact amount which should be used for the general expenses of the county, as well as the sums which might be applied to other purposes. In arriving at our conclusion we have a right, also, to consider the impossibility to determine in advance all

the different uses to which the money in the general fund of the county can legitimately be put. Many expenditures are entirely legitimate, even under the act of 1891, and must be paid out of the general revenues of the county, and out of what is known as the "General County Fund," which can neither be anticipated, determined, nor provided for by any specific antecedent appropriation. As suggested, we likewise have a right to consider that the boards are made up many times of men who are not accustomed to legal forms, or usages of legislative bodies, and who can hardly be expected to use the accuracy and precision which usually characterize the work of trained persons in either of those departments. We shall therefore, on these lines, consider the sufficiency of this appropriation under the act of 1891.

There is another matter to which attention should probably be called before any citation of authorities, or any more general discussion. The general revenue laws of the state provide for the collection of taxes, and the enforcement of penalties, on well-defined lines. If the taxes are not paid at the time they become due, the statute has provided means by which the collection can be enforced, through a sale of the property. To effect this, the delinquent tax list must be advertised, and the treasurer is directed to prepare the list of delinquents each year, and furnish them to a paper for publication, and thereby give notice to the delinquent, and an opportunity to other persons to pay the taxes and secure title to the land. It would be impossible otherwise to enforce the collection of taxes. In addition to this general scheme, Gen. St. 1883, § 2872, provides that the board shall allow the amount agreed on, or, if there has been no agreement, shall make a reasonable allowance to the publisher, for printing the delinquent tax list. Under these circumstances, we cannot conclude the publication of this list, and the payment of the requisite sum therefor, to be one of the evils aimed at, though it may possibly be within the scope of the enactment. We may rightfully consider this general legislation, and regard it as of considerable force in supporting the very liberal construction which we put on the proceedings of the board.

As a general proposition, no specific words are essential to an appropriation. This liberal rule of construction has been many times applied where the constitutional provisions are that every law which provides for the imposition of a tax shall distinctly state the object to which it is to be applied. If this rule prevails with reference to a constitutional provision which has undertaken to restrict the power of the legislature in imposing taxes, it certainly is not inapt to use it in construing an act which has for its general purpose the regulation and control of county expenditures. *People v. Supervisors of Orange Co.*, 17 N. Y. 235; *People v.*

Home Ins. Co., 92 N. Y. 328; McCauley v. Brooks, 16 Cal. 11; Carr v. State, 127 Ind. 204, 26 N. E. 778. The same rule has been substantially adopted in this state, and has received the sanction of the supreme court. *City of Leadville v. Matthews*, 10 Colo. 125, 14 Pac. 112; *In re Continuing Appropriations*, 18 Colo. 192, 32 Pac. 272; *Lithographing Co. v. Henderson*, 18 Colo. 259, 32 Pac. 417. According to these authorities, no precise form need be used, in order to make the resolution effective within the terms of such an act. If we look to the list alone, undoubtedly, we do not find, in terms, an appropriation for ordinary county purposes. The phraseology adopted by the board is unhappy and inexact, in that it says, "for ordinary county revenue, 6 mills, \$40,000." Taken by itself, it would look as though the object and purpose of the resolution was simply the settlement of the levy which should be made, and a statement of the probable amount to be derived from one of that size and description. The other items mentioned are more specific, and, of themselves, would necessarily be taken to be both a levy and an appropriation. This is true as to the road fund, interest on bonds, the support of the poor, the World's Fair exhibit, and the other items. No one could be misled as to these, because the purpose to which the money was to be put is plainly expressed in the phraseology of the resolution. If the first item had read, "For ordinary county purposes, six mills, and \$40,000," there would be very little hesitation on the part of anybody to conclude the board intended both to fix the amount of the levy, and designate the sum which might be used for general county purposes. The intent and purpose of the board are so plainly manifest from the terms of the resolution, we must conclude it was their intention to appropriate \$40,000 for general county purposes, and to make the levy 6 mills. This does no violence to any recognized canon of construction. It effectuates the evident purpose of the board. It does equity as between these parties, and certainly as between the board and all others to whom they may have paid money for the year 1893. How the board can expend \$40,000 for general county purposes, on the basis of this appropriation, and then insist, because they are disposed to contest this bill, that they have violated the law, and have failed to make any appropriation which can be used for such purposes, is not readily apprehended. The board has either violated the law in every instance where they have paid out a single dollar of that \$40,000 for general county purposes, because they made no appropriation whatever, or, if it is to be taken as an appropriation within the terms of the statute, they are certainly obligated to pay this bill, if in its amount, and by the performance of the contract, the account is genuine. The general language of the resolution likewise leads to this conclusion. The

act of 1891 is specifically referred to. The words "appropriation" and "levy" are likewise used, and the board evidently intended to comply with the law, and to appropriate \$40,000 to general county purposes. The bill in suit was undoubtedly a general county purpose, and a legitimate and lawful expenditure authorized by the General Statutes, which likewise directed the board to pay the sum agreed on for its publication, or to make a reasonable allowance to the printer therefor. If it were at all necessary, we should be inclined to conclude the act of 1891 did not repeal section 2872, and, in the absence of an appropriation, that the board of county commissioners would be compelled, under the law, to pay for the printing of the delinquent tax list. The act of 1891 contains no repealing clause, and there is nothing in its terms or in its provisions which would operate, by implication or otherwise, to repeal the provision of the General Statutes.

We might possibly, also, be inclined to hold, if it were necessary, that this defense of ultra vires was not open to the county. The contract has been performed, the county had the benefit and accepted the results, and there is some question, under the authorities, whether it is open to the county to dispute the claim. *Insurance Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771; *Hitchcock v. Galveston*, 96 U. S. 341. The other conclusions furnish a way to dispose of the case which is so entirely satisfactory that we are disinclined to put the decision on the last-named ground, or to enter on an argument in support of its accuracy or its applicability. It is simply suggested to show that, as a general proposition, it is not open to counties to accept results, and refuse to pay for what has been done for them. The practice does not accord with that spirit of commercial honesty which ordinarily characterizes bodies of this description.

We are therefore of the opinion the court erred in holding the defense good, and its decision adjudging the resolution insufficient as an appropriation not in accord with the law. The case will therefore be reversed, and remanded for a new trial in conformity with this opinion. The county should be permitted to amend its answer, and put in such defense to the claim as it may be advised, except as controlled by this opinion. Reversed and remanded.

#### SADLER v. STATE. (No. 1,426.)

(Supreme Court of Nevada. March 2, 1896.)

#### PRESUMPTIONS ON APPEAL—INSUFFICIENT RECORD.

The plaintiff, as lieutenant governor, sued to recover compensation for 17 days' services, during which time he alleged he had acted as governor of the state. The answer denied that he had acted in that capacity for more than four days. Judgment was rendered in the plaintiff's favor, and without statement on appeal or mo-

tion for new trial the defendant appealed. *Held*, that the presumption is that the court found that he had acted as governor for the time alleged, and that the evidence was sufficient to support the finding.

(Syllabus by Bigelow, C. J.)

Appeal from district court, Ormsby county; C. E. Mack, Judge.

Action by Reinhold Sadler against the state of Nevada. Judgment for plaintiff, and the state appeals. Affirmed.

Robt. M. Beatty, Atty. Gen., for the State.  
James R. Judge, for respondent.

BIGELOW, C. J. The plaintiff, as lieutenant governor, brought his action in the district court to recover \$136 as compensation due him for 17 days' services rendered by him during the month of November, 1895, as acting governor of the state of Nevada, and for mileage in connection with those services. The statute provides (St. 1891, p. 104) that "the lieutenant governor shall receive ten dollars per day when acting as president of the senate, and eight dollars per day when acting as governor, and such mileage as is paid to members of the legislature." As no objection has been made to the complaint, we shall treat the allegation that he was "acting governor" during the time mentioned as it was treated in the court below, as equivalent to an allegation that he was then "acting as governor." The answer denies that the plaintiff acted as governor for more than four days during the month of November, 1895, and contains an allegation that for the four days he has been fully paid. It will thus be seen that a square issue of fact was made by the pleadings as to the length of time he had acted as governor, for clearly he is only entitled to compensation during the time he had so acted. Judgment was rendered in the plaintiff's favor for the full amount of his demand for services, less four days, for which he had been paid; but he was allowed no mileage. From this judgment the state appeals.

There was no motion for new trial, nor is there any statement on appeal. It follows that there is nothing before this court except the judgment roll, which consists of only the complaint, the answer, and the judgment. *McCausland v. Lamb*, 7 Nev. 233. Under these circumstances we must presume that the court's findings were such as to support the judgment (*Welland v. Williams*, 21 Nev. 230, 29 Pac. 403), and, consequently, that it was found that plaintiff had acted as governor during the time alleged. In the absence of a motion for new trial, the question of whether this finding was correct is not before us. *James v. Goode-nough*, 7 Nev. 324; *Burbank v. Rivers*, 20 Nev. 81, 18 Pac. 753. We must presume the evidence was sufficient to support it, or that otherwise the defendant would have moved for a new trial on that ground. The ques-

tion, therefore, principally argued, as to when the lieutenant governor acts as governor, is not so presented that it can be decided. Judgment affirmed.

BELKNAP and BONNIFIELD, JJ., con-cur.

ORR v. ULYATT et al. (No. 1,450.)  
(Supreme Court of Nevada. March 2, 1896.)  
MORTGAGES—HOMESTEAD ENTRY—INCUMBRANCE—ALIENATION.

1. Rev. St. U. S. § 2296, providing that no lands acquired under the homestead act "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of a patent therefor," does not prohibit a voluntary incumbrance by mortgage.

2. Under Gen. St. § 3284, providing that a mortgage of real property shall not be deemed a conveyance, a mortgage is a mere security for a debt, and is not an alienation.

Appeal from district court, Washoe county; A. E. Cheney, Judge.

Suit by Thomas Orr against George C. Ulyatt and others to foreclose a mortgage. From a judgment exempting a homestead from the operation of the mortgage lien, and from an order denying a motion for a new trial, plaintiff appeals. Reversed.

R. M. Clarke, for appellant. T. E. Haydon, for respondents.

BELKNAP, J. This is a suit of foreclosure. The mortgaged property consists in part of a homestead entered March 26, 1885, under the law of congress. The mortgage was made April 10, 1891, and before final proof. Patent was issued January 30, 1892. Defenses were interposed by answer, but the court, in its written findings, found in favor of appellant upon all issues, and ordered judgment in his favor except as to so much of the mortgaged premises as are embraced by the homestead claim. The property was originally mortgaged by respondents in the year 1883, and the present debt is a renewal of the former debt. These transactions do not influence the matter. The question is whether the homestead property is liable on this suit. Section 2296, Rev. St. U. S., provides "that no lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of a patent therefor." This provision has frequently been a subject of judicial construction. *Nycum v. McAllister*, 33 Iowa, 374, was a suit to foreclose a mortgage given upon a homestead under the law of congress. The defense was that under the provisions of section 2296, above quoted, the mortgage could not be enforced. The court in that case said: "The question presented for our decision is whether a homestead taken under the act of congress may be conveyed by mortgage executed by the homestead settler to secure a debt contracted prior to the

issuing of the patent for the land. \* \* \* Does the provision of the act of congress just referred to render invalid a mortgage upon the homestead settler's interest, in case no patent has been issued to him? The provision is clearly intended for the protection of the settler. It is not a limit or restriction upon the right he acquires to the land. Neither does it operate as a disability forbidding the sale or transfer of his interest in the land. This view is certainly correct, in case the settler has done all the law requires him to do in order to obtain a patent, when he has a right to the patent, and it has not been withheld through his fault. In such a case his right to the land would be full and complete. Now, the provision in question is not a restriction upon his right—it is not a limit upon his right—to dispose of the land in a manner recognized by the law. The law recognizes his right to convey his land by mortgage. Such an instrument, when executed in a valid form upon his homestead, must be enforced. The provision is intended as a shield for his protection, and is not a weapon for the destruction of any of his rights." Again, in *Fuller v. Hunt*, 48 Iowa, 163, the question was presented whether one who had entered a homestead claim could mortgage it prior to the time he was entitled to make final proof. It was claimed that under the provisions of section 2296, above quoted, the homestead was not liable for a mortgage made prior to the issuance of the patent. Said the court: "If the land is liable at all, it is by notice of the act by which the debtor undertook to create a special lien upon it, and we have to say that we think the debtor's act had that effect. Mere exemptions from execution do not prevent the debtor from creating such lien. Exemptions are provided merely for the debtor's protection. Such is the general rule, and such, it appears to us, is the intention of the homestead act. The only reason suggested why the claimant under the homestead act should not be allowed to mortgage his homestead is that it would be against public interest. But the fact that the act provides against alienation by the claimant, and does not provide against mortgaging, unless alienation includes mortgaging (a point which will be hereafter considered), indicates that it was not deemed to be against the public interest that the claimant should mortgage his homestead." In *Lang v. Morey*, 40 Minn. 396, 42 N. W. 88, it was decided that a person making a homestead entry may mortgage it prior to submitting final proof. In deciding the case the court called attention to its previous decisions upon the same subject: *Townsend v. Fenton*, 30 Minn. 523, 16 N. W. 421; *Railroad Co. v. Sture*, 32 Minn. 95, 20 N. W. 229; and *Lewis v. Wetherell*, 36 Minn. 386, 31 N. W. 356,—and said: "In the first of these cases it was held that an agreement made after the entry, but before final proof, to convey lands held under the homestead act, when the patent should be issued, is valid.

In the second it was decided that the entry by the homesteader is a contract of purchase; that thereupon he has an inchoate title to the land, which is property,—a vested right,—which can only be defeated by his failure to perform the conditions affixed; that if these are performed, he becomes invested with full ownership, and an absolute right to a patent, which, when issued, relates back to the time of the entry,—while in the last it was determined that section 2296, Rev. St. U. S., which prescribes 'that no lands acquired under the provisions' of the homestead act 'shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor,' upon which plaintiff seems to rest her case, was manifestly intended for the protection of the entryman, to prevent the appropriation of the land in invitum to the satisfaction of debts incurred anterior to the issuance of the patent, and that a mortgage given upon a government homestead, so called, after a final certificate has been issued, but before the reception of the patent, is efficacious. As the section depended upon, above quoted, applies to proceedings against an unwilling party only, and there is no provision of the law expressly prohibiting the act which the plaintiff seeks to avoid, we are unable, in view of the effect attributed to the making and filing of the affidavit of entry in *Townsend v. Fenton*, supra, to distinguish between mortgages executed prior and those executed subsequent to final proof and delivery of the final certificate." In *Cheney v. White*, 5 Neb. 261, and in *Jones v. Yoakam*, Id. 265, it was decided that a homestead settler, under United States laws, after making final proof, may mortgage the homestead, notwithstanding the patent has not been issued. In *Jones v. Yoakam* the court said: "All that congress could have intended by this section [2296] was that the owner of such homestead should not be deprived of the land by virtue of legal process founded on a debt contracted before the patent has issued. It is not intended to do more than protect him against the compulsory payment of such a debt. Mark the language employed: 'No land \* \* \* shall be liable,' etc., that is, bound or answerable, in law or equity. It was intended simply as a protection and benefit to the owner of the homestead, and not as a prohibition upon his right of alienation by deed or mortgage, and for any valuable consideration which he may choose to accept. It is a benefit which he may waive or claim at his own option." See, also, *Spless v. Neuberger*, 71 Wis. 279, 37 N. W. 417; *Kirkaldie v. Larrabee*, 31 Cal. 456; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693.

In this state it is provided by statute that a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the land without a foreclosure and sale. Gen. St. § 3284. Under the provision a mortgage is not an alienation,

but a mere security for a debt. In *Fuller v. Hunt* this objection was considered as follows: "The giving of a mortgage may result in alienation, but it is not such of itself, nor can it be said that the mortgage is given with such purpose. Land is often mortgaged with the view of obviating the necessity of alienation. The office of a mortgage is simply to create a lien. Under our statute the legal title remains in the mortgagor, though the case would not probably be different if it passed to the mortgagee. A conveyance made merely to create a lien lacks the essential element of alienation." The order of the district court denying a new trial must be reversed, and an order made directing that court to enter a decree in conformity with the views herein expressed. And it is so ordered.

BIGELOW, C. J., and BONNIFIELD, J., concur.

STATE v. O'KEEFE. (No. 1,455.)

(Supreme Court of Nevada. Feb. 29, 1896.)

ROBBERY — AIDER AND ABETTOR — TRIAL — REMARKS OF COUNSEL — APPEAL — HARMLESS ERROR.

1. That defendant, with other boys, invaded prosecutor's premises, drove prosecutor's companion to the rear of the house, and detained him there while two others robbed prosecutor, is sufficient to show that defendant aided in the robbery, so as to warrant his conviction therefor.

2. Argument of the prosecuting attorney, that defendant's failure to call as witnesses his alleged accomplices was evidence of his guilt, is not ground for reversal, where defendant failed to request the court to instruct the jury to disregard such argument, though, at the time, he objected thereto, and excepted to denial of his motion to strike out the same.

3. Where the evidence shows that defendant was guilty of robbery, he cannot complain that he was convicted of an attempt to commit the crime.

Appeal from district court, Storey county; C. E. Mack, Judge.

John O'Keefe was convicted of a crime, and appeals. Affirmed.

George D. Pyne and F. M. Huffaker, for appellant. Langan & Knight and Robt. M. Beatty, Atty. Gen., for the State.

BELKNAP, J. Appellant was tried, separately, upon an indictment charging him, jointly with Charles Martin and Frank Conlan, of the crime of robbery, perpetrated upon the person of Jonathan Lees. It was shown that Lees and McDonald, during the daytime, were in the front portion of a house occupied by McDonald, when a party of boys, among whom was the defendant, invaded the premises, separated the men, by driving McDonald to the rear, and detaining him there while the others robbed Lees of an inconsiderable sum of money. It was not definitely shown that defendant participated in the robbery, other than he came with the robbers, and left when they left, was present at the robbery, and apparently acquiesced

therein. A verdict of "attempt to rob one Jonathan Lees" was returned. A motion for new trial was made, and denied, and upon the judgment and order this appeal is taken. The exceptions will be considered seriatim.

1. It is urged that the verdict is not responsive to the indictment. It must be admitted that the defendant could not be convicted of the offense charged unless he actually or constructively committed it. If his liability arise from the act of another, it must appear that the act done was in furtherance of a common purpose. The common purpose of robbery is shown by the acts of the defendant. It was not necessary to have shown that the defendant took any money from the person of Lees by his own hands, or that he actually participated in the assault. If he was present, under the circumstances, the evidence would have justified the jury in finding him guilty of the robbery. Bishop states the law as follows: "If persons combining in intent perform a criminal act jointly, the guilt of each is the same as if he had done it alone; and it is the same if, the act being divided into parts, each proceeds with his part unaided." Again: "All who are present at a riot, prize fight, or any other crime, if lending it countenance and encouragement, and especially if ready to help, should necessarily require, are liable as principal actors." Bish. New Cr. Law, §§ 630, 632. "There can be no doubt of the general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable criminaliter for the acts of each and all who participate with him in the execution of the unlawful design. As they all act in concert, for a common object, each is the agent of all the others, and the acts done are, therefore, the acts of each and all." *Com. v. Campbell*, 7 Allen, 541. The doctrine, as applied to cases of homicide, is stated in 1 Hale, P. C. p. 441, as follows: "If divers persons come in one company to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or do any other trespass, and one of them, in doing thereof, kill a man, this shall be adjudged murder in them all that are present of that party abetting him, and consenting to the act, or ready to aid him, although they did but look on." The court instructed the jury, in effect, that, under the circumstances, if the defendant stood by, and by his presence aided or abetted those who committed the robbery, it was sufficient. The matter was properly submitted to the jury. It was not necessary to have shown any other physical act. The statute (Gen. St. § 4292) provides that the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged, or an attempt to com-

mit the offense. Upon the evidence, as we have seen, the jury could have found the defendant guilty of the robbery. As they have found him guilty of a lesser offense, he cannot complain.

2. At the commencement of the trial, counsel for appellant announced, in open court, that they would introduce the codefendants as witnesses. They were not sworn, and the district attorney in summing up, among other things, said: "From the fact that the defense did not place upon the witness stand the parties jointly indicted with this defendant, who were present at the commission of this robbery, and whom they had announced in court as their witnesses, and have had an opportunity to produce, the inference, I claim, is that this defendant either aided, abetted, assisted, or encouraged the commission of said robbery; and you are at liberty to infer his guilt from this circumstance, and the failure of the defense, by such witnesses, to explain the defendant's connection with the robbery." Appellant moved to strike out the above statement, and, upon denial of the motion, excepted to the ruling. It will be observed that the inference drawn by the district attorney was one for which he alone, and not the court, was responsible. The most that can be said against it is that it is a misstatement of the law. If so, the error could have been corrected by an instruction, and not, as in this case, by a motion to strike out. Such motion affords no adequate relief. In *Proctor v. De Camp*, 83 Ind. 559, a similar question arose. The court said: "Errors in logic, or in law, occurring in the address to the jury, cannot be made a cause for overturning the verdict. If the error is of logic,—if illogical conclusions are drawn or illicit inferences made,—the courts cannot correct these by directing counsel to reason logically. If, however, counsel state the law incorrectly in their address to the jury, the adverse party can secure a correction. The correction is not to be obtained by objecting to the statements of counsel during the argument, but by asking the court to give the law to the jury in its instructions." Again, if error were committed, it was corrected by the instructions. In charging the jury, the court, among other things, said: "In determining questions of fact presented in the case, you should be governed solely by the evidence introduced before you. \* \* \* You have entered upon your duties as jurors in this case by taking a solemn oath that you would render a true verdict according to the evidence. That duty and obligation are performed only when a verdict is rendered which is in accordance with the evidence. While you have a right to use your knowledge and experience as men in arriving at a decision as to weight and credibility of witnesses, yet your finding and decision must rest alone upon the evidence admitted in this trial. You cannot act upon the opinions and statements of counsel as to the truth of any

evidence given, or as to the guilt or innocence of the defendant."

3. Exception was taken to the admission of evidence illustrating the manner in which Martin committed his part of the robbery. At the time the exception was taken, the complicity between the defendants had not been as fully established as it afterwards was, but the witness Lees, then under examination, had testified to the assault made upon him by several persons, in whose company the defendant was. This was a sufficient foundation for the admission of the evidence.

4. Exception was taken to evidence given by the witness Lees touching a colloquy between himself and McDonald. After the exception had been taken, McDonald testified, fully corroborating Lees' statement, without objection, and no attempt was made to disprove the fact. Under the circumstances the defendant was not prejudiced. The judgment and order denying a new trial are affirmed.

BIGELOW, C. J., and BONNIFIELD, J., concur.

SMITH et al. v. SALT LAKE CITY R. CO.  
(Supreme Court of Utah. Feb. 6, 1896.)

CONSTITUTIONAL LAW—JURY TRIAL—VERDICT BY NINE JURORS.

*Held* that, by the constitution and laws of the United States and by the laws of the territory of Utah, a verdict found by 9 out of 12 jurors in a civil case was good, affirming the decision of the territorial supreme court in the case of *Hess v. White*, 33 Pac. 243, 9 Utah, 61.

(Syllabus by the Court.)

Appeal from district court, Third district; before Justice S. A. Merritt.

Action by Mary E. Smith and others against the Salt Lake City Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Rawlins & Oritchlow, for appellant. Pence & Allen, for respondents.

ZANE, C. J. This is an appeal from a judgment of the district court of the Third district and from an order refusing a new trial. The case was tried under the territorial government. The sole question submitted for our decision is whether a verdict of 9 out of 12 jurors was legal, under the constitution and laws of the United States and the laws of the territory of Utah. In the case of *Hess v. White*, 9 Utah, 61, 33 Pac. 243, the supreme court of the late territory held that the statute of the territory, authorizing a verdict by 9 or more jurors, was valid. That decision has been affirmed by the same court in other cases, and this court affirms the same decision. The judgment and order appealed from are affirmed. Costs are awarded against defendant.

BARTCH and MINER, JJ., concur.

**STATE ex rel. BISHOP, Attorney General, v. McNALLY.**

(Supreme Court of Utah. Feb. 4, 1896.)

**TERRITORIAL PROBATE JUDGE—TERM OF OFFICE.**

1. The president of the United States appointed defendant probate judge of Salt Lake county on the 13th day of February, 1895, for a term of two years. The state of Utah was admitted to the Union on the 4th day of January, 1896. The defendant contended that by section 9, art. 24, of the constitution of Utah, he was entitled to hold his office as probate judge until the end of the term for which he was appointed. *Held*, that the government of the state was not a continuation of the territory, and that it was competent for the people of the new state, in their sovereign capacity, to continue in force, or not, the probate courts, or to extend the power and authority of the officers thereof.

2. The provision of section 9, art. 24, "And until the expiration of the term of office of the probate judges, such probate judges shall perform the duties now imposed upon them by the laws of the territory," must be interpreted by the other provisions of the same section, and by those of sections 1 and 7 of article 8, in which the intent to abolish probate courts is clearly shown.

3. This manifest intention to dispense with the probate courts, and to give to the district courts jurisdiction in probate matters, leaves the incumbent without an office, and therefore without any authority under the constitution of the new state, after the expiration of the term fixed by the constitution (section 9, art. 24) for the cessation of authority under the territorial government, viz. January 13, 1896.

(Syllabus by the Court.)

Action by the state of Utah, on the relation of Alexander O. Bishop, attorney general, against James C. McNally. Demurrer overruled.

Alexander C. Bishop and C. S. Varian, for plaintiff. J. G. Sutherland, C. C. Dey, H. P. Henderson, and John M. Zane, for defendant.

**ZANE, C. J.** This suit was instituted by the attorney general to oust the defendant from the office of probate judge of Salt Lake county. To the complaint the defendant interposed a demurrer on the ground that it does not state facts sufficient to constitute a cause of action. The facts averred, so far as it is necessary to state them, are that the president of the United States appointed the defendant probate judge of Salt Lake county on the 13th day of February, 1895, for the term of two years; that the state of Utah was admitted to the Union on the 4th of January, 1896. The relator insists that the defendant's term ended on the 13th day of January, 1896, while the defendant insists that it will not expire until February 13, 1897. The determination of the question depends upon the meaning to be given to section 9 of article 24 of the state constitution, and, as the intent of that section is not clearly expressed, we will consider it in the light of other provisions of the same instrument or such propositions of law as we may think shed light upon it.

The defendant is a probate judge under the late territory, and the dispute is as to his

term under the state government. The latter government is not a continuation of the former. They are separate and distinct. The territorial government derives its authority from congress, and congress derives its authority from the people of the United States, while the state government derives its authority from the people of the state. The latter is a sovereignty. The territory was not. While such is their nature and relationship, section 2 of article 24 of the constitution of this state provides that all laws of the territory in force when the constitution should be adopted should remain in force until they should expire by their own limitations, or until altered or repealed by the state legislature. In effect, this was the adoption by the state of territorial laws. This the convention had the power to do, for the people of the state were in the possession of all the powers of government not delegated by the constitution of the United States to the federal government, or prohibited by it to the states. The people exercised sovereign power in adopting their state government. Subject to the ratification by the people, the convention had the power to continue under the state the laws of the territory creating and defining the office of probate judge. They also had the power to continue in office the incumbents of those offices, or to provide that such incumbents might fill similar offices created by the state. Section 10 of the same article declares that "all officers, civil and military, now holding their offices and appointments in this territory by authority of law, shall continue to hold and exercise their respective offices and appointments, until superseded under this constitution." While there may be an office without an incumbent, there cannot be an incumbent without an office. Some of the offices under the territorial government, such as the sheriffs, the county attorneys, the justices of the peace, and the constables, were continued under the state government, and their incumbents were also continued in them. Other offices expired with the territorial government, and the authority of their incumbents went with them. The office of judge of the supreme court of the territory expired with that organization. Some of the functions, both as judges and as courts, went to the circuit and district courts of the United States; others, to the district and supreme courts of the state. Their offices were not continued, and they were not made incumbents of offices created by the state constitution. The same may be said of the clerks of such courts. Section 1 of article 8 of the constitution declares that "the judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, in district courts, in justices of the peace, and such other courts inferior to the supreme court as may be established by law." In this section the courts which the constitution established are



mentioned, and the probate court is not named. It is true that the legislature may establish other courts inferior to the supreme court. Section 7 of the same article provides that "the district courts shall have original jurisdiction, in all matters, civil and criminal, not excepted in this constitution, and not prohibited by law." The term, "all matters, civil and criminal," would include matters within the jurisdiction of the probate court. This section, and section 4 of the same article, give the supreme and district courts concurrent original jurisdiction of mandamus, certiorari, prohibition, quo warranto, and habeas corpus. Section 8 of the same article, in effect, gives justices of the peace such original jurisdiction as they had at law under the territorial government. Whether the original jurisdiction of the district court is exclusive as to all other matters, civil and criminal, is a question. If the legislature were to establish other courts than those named in section 1, above quoted, we incline to the opinion that original concurrent jurisdiction with the district courts might be conferred upon them, in matters civil and criminal, but not exclusive. Until such courts shall be created by the legislature, all the judicial power of the state will be in the courts mentioned in section 1, above quoted; and the district courts of the state, except as above stated, have exclusive original jurisdiction of all matters, civil and criminal. Under the constitution, as the law now stands, there is no room for a probate court or a probate judge, except as provided in section 9 of article 24 of the constitution, which is as follows: "When the state is admitted into the Union, and the district courts in the respective districts are organized, the books, records, papers and proceedings of the probate court in each county, and all causes and matters of administration pending therein, upon the expiration of the term of office of the probate judge, on the second Monday in January, 1896, shall pass into the jurisdiction and possession of the district court, which shall proceed to final judgment or decree, order or other determination in the several matters and causes, as the territorial probate court might have done, if this constitution had not been adopted. And until the expiration of the term of office of the probate judges, such probate judges shall perform the duties now imposed upon them by the laws of the territory. The district court shall have appellate jurisdiction over the decisions of the probate court, as now provided by law, until such latter courts expire by limitation." A clear intention is expressed in the first clause of this section, when considered apart from the rest of the section, to transfer all matters pending in the probate courts to the jurisdiction of the district courts on the second Monday of January, 1896, while an intention may be inferred, from the language of the second and third clauses of the same section, if con-

sidered apart from the first clause, to permit probate judges to hold their terms as limited by the territorial law. We must consider the whole section with other provisions of the same instrument throwing light upon it. The terms of service of those judges under the territory expired with that government. Their authority went out with it. Afterwards they held by state authority, and for the term fixed by it. The constitution manifests a general intent to dispense with probate courts, and to give the district courts jurisdiction of probate matters.

From the foregoing considerations, we are disposed to hold that the framers of the constitution intended, by section 8, under consideration, to extend the term of probate judges under the state government to the second Monday in January, 1896, and no further. The demurrer of the defendant to the plaintiff's complaint is overruled.

BARTCH and MINER, JJ., concur.

#### MATHIAS v. WHITE SULPHUR SPRINGS ASS'N.

(Supreme Court of Montana. Feb. 24, 1896.)

##### CORPORATIONS—SUMMONS—SERVICE—RETURN.

A return on a summons in an action against a corporation, reciting a service upon C., "a trustee, being the defendant named in said summons," by delivering to C., trustee, a copy of the summons, for the defendant, is fatally defective, for failure to show that C. was a trustee of the defendant corporation.

Appeal from district court, Lewis and Clarke county; H. W. Blake, Judge.

Action by T. F. Mathias against the White Sulphur Springs Association. There was a judgment by default for plaintiff, and, on denial of a motion by defendant to vacate such judgment, it appeals. Reversed.

Judgment by default in this case was entered in favor of plaintiff. No appearance was made by the defendant, but after default and judgment the defendant appeared specially, and only for the purpose of moving to set aside the default and judgment. The motion was based upon the summons, and return of the sheriff. No objection was made to the summons itself, but defendant claimed that it was not served as the law directs. The defendant is a corporation organized under the laws of this state. The return of the sheriff was as follows: "State of Montana, County of Lewis and Clarke. Office of the Sheriff. I hereby certify that I received the within summons on the 7th day of Jan., A. D. 1895, and personally served the same on the 7th day of January, A. D. 1895, upon T. E. Collins, a trustee, being the defendant named in said summons, by delivering to said T. E. Collins, trustee, personally, for said defendant, in the said county of Lewis & Clarke, a copy of said summons, having been unable to find any other officer of said company or corporation within this

county. J. Henry Jurgens, Sheriff, by C. H. Martien, Deputy Sheriff. Dated Helena, Montana, January 7th, 1895. [Indorsed] Filed Jan. 7th, 1895. John Bean, Clerk."

The court having denied the motion to set aside the default and judgment, the defendant appeals.

McConnell, Clayberg & Gunn, for appellant.  
F. N. McIntire, for respondent.

DE WITT, J. (after stating the facts). There has been a contention between counsel as to whether service of the summons in this case should have been made under the provisions of section 72 or section 75, Code Civ. Proc. 1887. *Congdon v. Railway Co.*, 43 Pac. 629. It was also contended that, if service were made under section 75, that section did not authorize service to be made upon a trustee. But these questions may be passed, for the reason that we are of opinion that the return is wholly insufficient. Our statutes for the service of summons upon a corporation are extremely liberal. Service may very readily be obtained upon any corporation. With this liberality in the statute, certainly a fair compliance with the terms of the statute should be required. In this case the sheriff returns that he served the summons upon T. E. Collins, a trustee. The return does not state of what corporation Collins was a trustee. The return further states that Collins was the defendant named in the summons. This is not true. The corporation was the defendant. In *Blodgett v. Schaffer*, 94 Mo. 652, 7 S. W. 436, the action was against the Union National Bank of St. Louis. The sheriff returned that he had made service by delivering a copy of the writ "to T. H. Larkin, the within-named defendant." Held, that service was not made upon the bank. In *Chicago Planing-Mill Co. v. Merchants' Nat. Bank*, 86 Ill. 587, the sheriff made return upon the writ that he had "served the writ by reading and delivering a copy thereof to William H. Jenkins, by direction, as secretary." Held to be bad, in that it was not shown that the person served was secretary of the company. In *Railway Co. v. Pillsbury*, 29 Kan. 652, the return of the summons showed that it was served by delivering a copy thereof to "D. W. March, agent of said U. P. R. R. Co., Manhattan, Kansas." The return was held to be bad. Brewer, J., says, "Where this was served, or what kind of an agent of said defendant said D. W. March was, is not shown." This case was approved and followed in *Dickerson v. Railroad Co.*, 43 Kan. 702, 23 Pac. 936. These authorities uphold the view that the return upon this summons was insufficient. We concur in the views expressed in these cases, and are of opinion that the return of the sheriff in the case at bar was wholly insufficient to show service upon the corporation. The judgment of the district court, and the order refusing to set

aside the default and judgment, are therefore reversed, and the case is remanded, with directions to set aside the default and judgment and give the defendant leave to demur or answer.

PEMBERTON, C. J., and HUNT, J., concur.

# HOME BUILDING & LOAN ASS'N OF HELENA v. ROTWITT, Secretary of State.

(Supreme Court of Montana. Feb. 24, 1896.)  
MANDAMUS TO STATE OFFICERS — MINISTERIAL DUTY—CORPORATION—INCREASE OF STOCK —FILING CERTIFICATE.

Under Pol. Code 1895, § 410, requiring the secretary of state to charge and collect as a fee (subdivision 12) "for filing certificate of increase or decrease of capital stock, five dollars," the duty is ministerial, and he must file such a certificate, regular on its face, though the increase was made, immediately after incorporation, from \$5,000 to \$1,000,000, and was done to avoid the fee of 50 cents per \$1,000 imposed by statute on original capital stock.

Application, on the relation of the Home Building & Loan Association of Helena, against Louis Rotwitt, secretary of state, for writ of mandamus to compel defendant to file relator's certificate of increase of stock. Writ issued.

Toole & Wallace, for appellant. H. J. Haskell, for respondent.

PEMBERTON, C. J. This is an application for a writ of mandamus. The relator is a corporation, organized pursuant to the provisions of article 2, tit. 6, pt. 4, div. 1, of the Civil Code of Montana. It was organized with a capital stock of \$5,000. The affidavit alleges a full compliance with the statute in relation to the organization of such corporations. After due organization of the corporation, the trustees met, in pursuance of the provisions of section 807 of the Civil Code, and unanimously passed a resolution increasing the capital stock thereof to \$1,000,000, divided into 10,000 shares of \$100 each. One copy of the resolution increasing the capital stock of the corporation was presented to the clerk and recorder of Lewis and Clarke county, and by him received and filed. A duly-certified copy of said resolution was presented to the respondent, together with a fee of \$5, with a request that he, as secretary of state, file the same in his office, in accordance with the provisions of subdivision 12, § 410, of the Political Code.<sup>1</sup> The respondent, as secretary of state, refused to receive and file in his office said resolution increasing the capital stock of the corporation.

<sup>1</sup> Pol. Code Mont. 1895, § 410: "The secretary of state for services performed in his office, must charge and collect the following fees: \* \* \* (12) For filing certificate of increase or decrease of capital stock, five dollars."

The respondent refused to receive and file said resolution, increasing the capital stock of the corporation, because, he says, the corporation "was incorporated with a capital stock of \$5,000 in the month of November, 1893, and immediately thereafter said corporation, by their trustees only, voted to increase the capital stock to \$1,000,000, all of which was done for the purpose of evading the provisions of section 410 of the Political Code, thereby saving to such corporation the payment of the fee of 50 cents on each \$1,000 of the capital stock of said company or corporation over and above the payment of the fee of 50 cents on the original capital stock." The evidence taken by the referee shows that all the stockholders of the corporation, at a meeting regularly called, voted for the resolution. The only question to be considered is whether the respondent, as secretary of state, had any discretionary power to look beyond the face of the paper presented, and to determine, from matters outside of the paper itself, whether he would file it or not. It is not denied that the paper presented for filing contained the matter required to be stated in it by section 808 of the Civil Code, and was regular on its face. The proper fee was tendered with it. We think the respondent's duty in the premises was simply ministerial. To go beyond the face of the paper, and inquire into and determine the motives of the relator, or its trustees or stockholders, would be to act judicially. The respondent, we think, had no authority to do so. We think these matters could only be inquired into, and determined by quo warranto proceedings, instituted by the state, to determine the right of the corporation to use and enjoy its enlarged capital. It is ordered that the writ of mandate issue as prayed for.

DE WITT and HUNT, JJ., concur.

#### STATE ex rel. YOUNG v. YATES.

(Supreme Court of Montana. Feb. 24, 1896.)

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by the state, on the relation of David H. Young, against Sol. Yates. Judgment for defendant, and plaintiff appeals. Reargument ordered.

Largent & Huntoon, Ransom Cooper, and Douglas Martin, for appellant. Leslie & Downing, for respondent.

PER CURIAM. This case was placed upon the short-cause docket by virtue of a stipulation filed by counsel. The stipulation complied with court rule 7, subd. 4a. Counsel stipulated that they would argue the case in 15 minutes to the side, and that, in their opinion, the case could be fully and fairly presented in said time. The case was argued February 18, 1896; and, upon consultation after the argument, it appears to the court that a decision of the case involves an extremely important and interesting legal and political question. It is the opinion of the court that the importance of the question as

presented is such that it could not be, and, indeed, was not, fairly presented on the argument. It is therefore ordered, under rule 7, subd. 4c, that the case be reargued, and that it take its regular place upon the calendar.

#### AMERICAN SAVINGS & LOAN ASS'N v. BURGHARDT et al.

(Supreme Court of Montana. Feb. 24, 1896.)

APPEAL—SHORT-CAUSE CALENDAR—STIPULATION.

A stipulation stating that a case can be argued in 15 minutes to the side is insufficient to bring it within Sup. Ct. rule 7, subd. 4a, providing that cases shall be placed on the short-cause docket on stipulation of counsel that the cause "will be argued in fifteen minutes to the side, and that, in their opinion, the cause can be fully presented in such time."

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by the American Savings & Loan Association against Harry D. Burghardt and others. From a judgment entered, plaintiff appeals. Placed on short-cause docket by stipulation. Remanded to regular place on calendar.

F. C. Park, for appellant. Stanton & Stanton, for respondents.

PER CURIAM. This case was placed upon the short-cause docket under the following stipulation of counsel: "It is hereby stipulated and agreed by and between F. C. Park, attorney for appellant herein, and Stanton & Stanton, attorneys for respondents herein, that the above-entitled action can be argued before this court in fifteen minutes a side, and the attorneys therefore ask that the same be placed on the short-cause calendar of this court. It is further stipulated and agreed that, on such day as this court may set this case for argument, the same be, and it is hereby, submitted to the court for determination on the briefs of the respective parties hereto, without oral argument. Dated this 24th day of January, 1896. F. C. Park, Applnt.'s Atty. Stanton & Stanton, Respn'ts'. Attys." This stipulation does bring this case within the short-cause rule. The rule which counsel seem to have endeavored to invoke is subdivision 4a of rule 7, which is as follows: "(4) Short Causes. There will be placed upon the short-cause docket: (a) Cases in which counsel stipulate that the cause will be argued in fifteen minutes to the side, and that in their opinion the cause can be fully presented in such time." It is observed that the stipulation states only that the case can be argued in 15 minutes to the side. Counsel do not state "that, in their opinion, the cause can be fully presented in such time." In accordance with the stipulation, the case was set on the short-cause calendar for February 18, 1896. On the call, the clerk called our attention to the stipulation that the case was to be submitted without argument. Upon examination of the rec-

ord and briefs, the court finds that this is not properly a short cause. Some very important propositions are presented by counsel, and the court has not had the advantage of an oral argument. The result of taking this case under consideration and determining it at this time would be to advance it at the expense of other appeals, which precede it in time of filing. It is not the intention of the short-cause rule that difficult cases should be placed upon the short-cause docket by stipulation, without the professional statement by counsel that they are in fact short causes, and then submitted without argument. The object of the rule is to summarily dispose of cases involving only a very short consideration, and also frivolous appeals, apparently taken for delay. If we were to allow the practice adopted by counsel in this case, it would result in many important and difficult cases gaining an advancement by the indirect method of stipulating that they were "short causes," and then submitting them without argument. Under rule 7, subd. 4c, it is directed that the cause be remanded to its regular place on the calendar.

#### McGUIRE v. SWEENEY.

(Supreme Court of Montana. Feb. 24, 1896.)

##### FRIVOLOUS APPEAL—COSTS.

An appeal from a judgment of the district court, entered on appeal from a justice court taken to review an order of the district court refusing to tax in favor of appellant a docket fee on retaxing the costs, will be held frivolous where the record fails to show the items of costs, and no argument is made.

Appeal from district court, Lewis and Clarke county; Henry W. Blake, Judge.

Action by Asa E. McGuire against Joseph Sweeney for the price of a horse. From a judgment for plaintiff, defendant appeals. Affirmed.

C. W. Fleischer and F. N. & S. H. McIntire, for appellant. F. E. Stranahan, for appellee.

**PER CURIAM.** This action was commenced in a justice's court, and judgment rendered for plaintiff. On appeal to the district court, judgment was again rendered for the plaintiff. The subject of the action is a \$50 horse. Defendant appeals from the judgment. He asks the court to review the order made by the district court refusing to tax in his favor a docket fee of \$25 upon retaxing and reducing the costs. This is the only point which it is pretended is before this court. Counsel did not even argue this proposition, and stated that he would leave it for the consideration of the court. There is nothing whatever in the record to show upon what the court acted. The \$25 docket fee provided for in section 509, Code Civ. Proc. 1887, may be as against either party, or an officer, such as a sheriff, clerk, or referee.

**First Nat. Bank v. Neffl**, 13 Mont. 382, 34 Pac. 180. The record in this case does not disclose the items of the costs which were taxed or retaxed. Appellant has left us wholly in the dark as to the action of the district court. This appeal is wholly frivolous. The judgment will therefore be affirmed, and a penalty of \$25 added to the judgment, for the purpose of discouraging frivolous appeals.

#### ANACONDA COPPER-MIN. CO. v. BUTTE & B. MIN. CO.

(Supreme Court of Montana. Feb. 24, 1896.)

##### INJUNCTION—MINING PARTNERSHIP—TENANTS IN COMMON—REMEDIES INTER SE—CONSTRUCTION OF STATUTE—ASSUMING EXCLUSIVE OWNERSHIP.

1. The granting of an injunction pendente lite is largely discretionary, and will not be interfered with on appeal, where based on a reasonable showing.

2. To constitute a mining partnership, under the provisions of Civ. Code 1895, §§ 3350-3359, two or more persons must not only own or acquire a mining claim for the purpose of working it, but must actually engage in working the same; and the fact that one part owner of a claim is charged by another with wrongfully extracting ore from a portion of a vein, the apex of which is alleged to be within the claim, does not create the relationship of mining partners between the parties.

3. Code Civ. Proc. 1895, § 592, having provided that, for certain trespasses upon or injuries to property held in joint tenancy or tenancy in common, the party aggrieved shall "have his action for the injury" in the same manner as though such joint tenancy or tenancy in common did not exist, whereas the former statute provided in such case that he should "have his action of trespass or trover for the injury," the later statute must be construed as an enlargement of the remedies given, to include any appropriate action for the injury.

4. Under Code Civ. Proc. 1895, § 592, providing that, if any person shall assume and exercise exclusive ownership over any property held by tenancy in common, the party aggrieved shall have his action for the injury, the same as though such tenancy in common did not exist, where a mining company, which is part owner of a mining claim, from its own shaft on another claim is extracting ore from a vein on the claim owned in common, though in a proper manner, not constituting waste, such action is an assumption and exercise of exclusive ownership, by which its cotenant is aggrieved; and the cotenant may maintain an action to enjoin such use, that being an appropriate remedy for the injury.

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Action by the Anaconda Copper-Mining Company against the Butte & Boston Mining Company. From the granting of a preliminary injunction, the defendant appeals. Affirmed.

This is an appeal from an order of the district court, granting a temporary injunction in favor of plaintiff and against defendant pending the final determination of the case. Each party is a mining company operating in the Butte district. The plaintiff owns an undivided three-fourths interest in the Wild Bill mining claim. The defendant owns the other one-fourth in that claim, and also owns

the Grey Rock claim. The Wild Bill lies north of the Grey Rock, and its south side line is the north side line of the Grey Rock, as far as the contentions of this case are concerned. Plaintiff brought this action against defendant, claiming that defendant had, by deep underground workings, extracted ore to the value of \$500,000 from a portion of a vein, the apex of which portion was within the Wild Bill location. Plaintiff claimed damages for three-fourths of this sum, to wit, \$375,000. It also prayed for a perpetual injunction restraining the defendant from extracting ore from the portion of the vein above mentioned, and also asked, as above noted, for a temporary injunction. A hearing was had on the application for a temporary injunction. Evidence was taken, and maps and plats introduced, indicating the situation existing between the two claims. The injunction was granted. Defendant appeals.

Forbis & Forbis, for appellant. W. W. Dixon and Wm. Scallon, for respondent.

DE WITT, J. (after stating the facts). There was very little testimony taken upon the hearing of the motion. The court, in its order, found, as best it could from what testimony there was, the point where the vein crossed the common side line between the claims, and enjoined the defendant from working on the dip of the vein westerly from the point so found. The controversy of fact in this case appears from the pleadings to be whether the vein from which the defendant is alleged to have taken the ore has its apex in the Wild Bill or the Grey Rock ground. Of course, this question of fact could not be, and was not expected to be, fully determined upon such preliminary hearing. Each party made its own claims, and set forth by testimony of witnesses its reasons for holding that the apex was in its own ground. The granting and refusing of preliminary injunctions pendente lite is a matter so largely in the discretion of the lower court (*Klein v. Davis*, 11 Mont. 155, 27 Pac. 511; *Mining Co. v. Murray*, 9 Mont. 475, 23 Pac. 1022; *Nelson v. O'Neal*, 1 Mont. 284; *Atchison v. Peterson*, Id. 561) that we feel satisfied in this case that there was sufficient testimony offered in the district court to sustain the granting of this preliminary injunction. It was not to be expected that the court, upon such a hearing, could determine with any degree of finality the course, strike, or dip of the vein; and we are of opinion that a reasonable showing in the judgment of the district court, to support plaintiff's contention, should be sufficient. In fact, but little point is made by the appellant upon this branch of the case. Its principal contention is upon the question of cotenancy; that is to say, the cotenancy in the portion of the vein from which the ore was extracted, if it be

the fact, as plaintiff contends, that that portion of the vein has its apex in the Wild Bill ground. Of course, if the apex is in the Grey Rock ground, plaintiff has no interest in this ore, and there is no cotenancy. But at the present stage of proceedings we feel obliged to temporarily adopt the preliminary view of the district court,—that the apex of the disputed portion of the vein is in the Wild Bill ground. Then the parties are cotenants of that portion of the vein from which the ore was extracted. The plaintiff owns an undivided three-fourths of the premises; and the defendant, the other one-fourth.

There was some argument on the hearing in this court, and apparently considerable on the hearing below, upon the question of a mining partnership. The statute upon mining partnerships (sections 3350-3359, Civ. Code 1895) is new in this state, although practically the same statute has been in force in California for many years. The sections in that statute which are important in this consideration are as follows:

"Sec. 3350. A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same.

"Sec. 3351. An express agreement to become partners or to share the profits and losses of mining, is not necessary to the formation and existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom."

"Sec. 3359. The decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business."

Some contention is made by respondent that it, owning three undivided fourths of the mine, should control its operation, under the law of mining partnerships. Section 3359. But we will say at the outset that in our opinion a mining partnership did not exist between plaintiff and defendant in this case. An analysis of sections 3350 and 3351 makes this clear. A mining partnership, under the statute, is very different from an ordinary partnership. There is usually, practically, in a statutory mining partnership, no *delectus personarum* (*Dougherty v. Creary*, 30 Cal. 300), as there is in ordinary partnerships. An ordinary partnership is formed by contract between the partners. A mining partnership is formed by reason of the existence of certain facts described in the statute. Those facts are: (1) That two or more persons shall own or acquire a mining claim for the purpose of working it, and extracting the minerals therefrom (section 3350, Civ. Code); that is to say, the relation arises from the ownership of the shares or interests in the mine. This is the first fact as a foundation for a mining partnership. (2)

The second fact required to exist is that such owners actually engage in working the mine. Do these two conditions exist in the case at bar? The first condition is a fact. Plaintiff and defendant own, and have acquired for mining purposes, the ground in controversy. The second fact does not exist. The plaintiff and defendant were not actually engaged in working the mine. This is clear from the pleadings and the testimony. The defendant was working the disputed portion alone, and excluding the plaintiff therefrom. Therefore the partnership did not exist. *Dougherty v. Creary*, 30 Cal. 291; *Henderson v. Allen*, 23 Cal. 519; *Duryea v. Burt*, 28 Cal. 569; *Hawkins v. Mining Co.*, 2 Idaho, 970, 28 Pac. 433. The same views were expressed in *Nolan v. Lovelock*, 1 Mont. 224, without the existence of the statute. In the Idaho case last cited, there is one remark tending to indicate that the court held a different view; but the court stated that a partnership was admitted by the defendant in that case, and in the opinion, further on, cites with approval *Dougherty v. Creary* and *Duryea v. Burt*, supra. We therefore consider the question of a mining partnership as not in this case.

We are also of opinion that the question of waste need not be considered in this decision. It is alleged that the defendant is taking the ore from the mine. Taking ore from a mine in a skillful, careful, and miner-like manner has been held, in states where mining litigation has been most frequent, not to be waste, but, upon the other hand, to be use. The reasons for so holding are well set forth in *McCord v. Mining Co.*, 64 Cal. 134, 27 Pac. 863, and in the cases cited in the opinion in that case. We note particularly the Pennsylvania cases cited therein, as coming from a state possessing not only an able judiciary, but also one having had a wide experience in the subject under consideration. But we need not consider the question of waste, in this decision, for the reason that we are of opinion that this injunction order must be sustained under the provisions of section 592, Code Civ. Proc. 1895, without regard to the question of waste. That section is as follows: "Sec. 592. If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist." This statute, in its present form, is absolutely new in this jurisdiction, and we have not been referred to any other state where it exists. It came in with the Code of Civil Procedure, July 1, 1895. It is not construed in the case of *McCord v. Mining Co.*, 64 Cal. 134, 27 Pac. 863; nor *Murray v. Haverly*, 70 Ill. 319; nor *Hawkins v. Mining Co.*, 2 Idaho, 970, 28 Pac. 433, —all cases which were called to our attention upon the argument. Mr. Freeman remarks,

in his work on Cotenancy and Partition (section 249a): "The right to occupy and use mining property has been so rarely the subject of judicial discussion and decision that it cannot yet be regarded as settled." It is apparent, and, indeed, it is conceded by counsel, that section 592, Code Civ. Proc., above quoted, works a change in the common law, upon the question of joint tenancy and tenancy in common. The contention has been as to what, and how great, the change is. For many years before the enactment of this statute we had the following law: "Sec. 1295. If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy, tenancy in common, or copartenary, the party aggrieved shall have his action of trespass or trover for the injury in the same manner as he would have if such joint tenancy, tenancy in common or copartenary did not exist." Comp. St. 1887. This law existed long before the compilation of 1887. The difference in the statutes is this: From the later statute are omitted the word "copartenary" and the words "trespass or trover." Therefore the old statute provided that a party aggrieved, under the provisions of the above section, should "have his action of trespass or trover." The later statute provides that "he shall have his action," and does not limit it to "trespass or trover," or any other particular action, but states simply that the party aggrieved shall have his action for the injury. Is it not perfectly apparent that the legislature considered that the remedy given by "trespass or trover" was too narrow and too restricted, and that it intended to extend the remedies of the party aggrieved? The legislature seems to have deliberately said that a party aggrieved is not confined, for his remedy, to trespass or trover, but may have his action; that is, any appropriate action for the injury. Section 592 names several causes for which the party aggrieved may have his action. They are stated in the disjunctive. If one of them exists, he may have his action. The causes are, "if any person shall assume and exercise exclusive ownership over any property held in joint tenancy," etc., or "take away," etc., or "destroy," etc., or "lessen in value," etc., or "otherwise injure or abuse," etc. As noted, these causes are stated in the disjunctive. Certain of them are immaterial to consider in this case; that is to say, as far as this decision is concerned, we may strike out from the statute the words, "or take away, destroy, lessen in value, or otherwise injure or abuse." Then the statute, as applicable here, would read: "Sec. 592. If any person shall assume and exercise exclusive ownership over any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist." It must be

remembered, again, at this point, that we are treating the case now, at this preliminary stage, under the view that it is the fact of the case, as now before us and as found by the district court, that these parties are cotenants of the disputed ground. We think it is clear, from the pleadings and the evidence, that the defendant has assumed and exercised exclusive ownership over the property thus held in cotenancy. Defendant was working on the disputed portion of the vein, 1,000, 1,100, and 1,200 feet underground, and claiming it as its own. It was working it from its own shaft and approaches, which were on its own Grey Rock claim. It certainly was excluding the plaintiff from any exercise of ownership over this disputed portion, and was exclusively assuming and exercising such ownership. Therefore the first cause named in section 592 for giving the action to the cotenant existed. The next matter for construction in the statute is the language, "the party aggrieved." In one of the briefs submitted in this case it is contended that there is no party aggrieved; that the defendant is not aggrieved unless waste or injury is committed. But we are of opinion that the grievance is the assuming and exercising exclusive ownership over the property. That is one of the grievances named by the statute. Waste, injury, and destruction are other and separate grievances. All the grievances need not exist. One is sufficient. One here exists, and it is one of those grievances named in the language of the statute itself. Therefore we are of opinion that the plaintiff here is the party aggrieved, and that it is aggrieved by the defendant's assumption and exercise of exclusive ownership. The next language of the statute for consideration is the words, "shall have his action." This matter we treated above, and expressed the opinion that the change made in the statute by the Code of 1895 extended the right of action by the party aggrieved; that he is no longer confined to trespass and trover, but that he has any appropriate action for the injury. The next question is this: How does he have this action, and what action may he have? He has it "in the same manner as he would have if such joint tenancy or tenancy in common did not exist." Now, exclude from the mind the idea and the fact of joint tenancy or tenancy in common. The statute puts them out of the way, and says, "the party shall have his action," as if they did not exist. Therefore we come to this situation: The defendant in this case, with no joint relations to the plaintiff, goes upon the plaintiff's property, and assumes and exercises exclusive ownership over it, works it in its own manner, subject to its own approval only, takes the ore from the same by its own methods, and plaintiff sees its own property being used and consumed against its will and consent. Having, by reason of the statute, gotten the question of joint tenancy and tenancy in common out of the

way, we are of opinion that it cannot be questioned that the injunction would lie; and we are of opinion that the statute intended that it should, and that for a plaintiff in the position of this one, having any appropriate remedy to enforce its rights, injunction is an appropriate remedy. Counsel argued that plaintiff would have an ample remedy in an action for accounting or for damages. It occurs to us that such remedy would be very inadequate, and such defense to an injunction would not successfully be urged if the action were between parties other than cotenants. An accounting would be a remedy exceedingly difficult of application. A defendant would be in possession of the property; could mine as it saw fit, could keep books, or not, as it chose; and the burden of proving a great mass of facts and figures and accounts would be thrown upon the plaintiff, when the knowledge of them all would be peculiarly with the defendant. We do not hold that taking out the ore would be waste, but we do hold that at least it would be a use which consumes, and the only adequate remedy against the dangers to plaintiff of such a use, under an exercise of exclusive ownership, would be injunction. We are of opinion that the intent of the statute is plain. We know of no other logical construction which we can give, if, indeed, what we have said may be called a construction. We are rather of opinion that the statute speaks plainly, and that our construction is little more than a verbose statement of what the statute sets forth.

The argument of public policy has been made with some force. It is said that if a co-owner of  $\frac{3}{4}$  may enjoin his co-owner of  $\frac{1}{4}$ , as in this case, the owner of  $\frac{1}{100}$  may enjoin the owner of  $\frac{99}{100}$  under the facts existing in this case. This is probably true. This may be good policy, or bad, but it is the declaration of the legislature, and to that body appeal must be made upon questions of policy. But there is an argument of policy on the other side, and in favor of the statute; for if the injunction be granted, the property is preserved, and is in sight, in kind and quantity, when the litigation is over. It is much simpler to do complete justice upon the determination of a lawsuit, if the property has been preserved in its integrity, than it would be to ascertain value and damages after the ore had been mined, reduced, and disposed of exclusively by one party. There are some expressions in the California Reports, that it is the policy of the state to encourage mining, and that, if one cotenant wishes to work the mine, he should be allowed to do so. It is true that it is the policy of this state to encourage mining. It is also its policy to encourage many other industries. But, as noted above, the question of what policy will best preserve mining rights and interests is a matter for the legislature to determine, and in our opinion that department of the government has spoken very clearly in section 592,

Code Civ. Proc. 1895. The result of our inquiry is that the order of the district court granting the preliminary injunction must be affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

**STATE ex rel. BICKFORD v. COOK, State Auditor.**

(Supreme Court of Montana. Feb. 24, 1896.)

**STATE CAPITOL COMMISSION—COMPENSATION—MANDAMUS.**

1. The members of the state capitol commission created by Act March 7, 1895, whose compensation is fixed at five dollars per day for each day they are engaged in official duties, which, together with their expenses, shall be certified to the state auditor with vouchers, such warrants to be drawn on the state capitol fund, which is to be derived from the sale of lands granted the state by the federal government for the erection of state buildings, are officers whose compensation is fixed by law, and therefore the state board of examiners are not required to pass on their claims for services.

2. Const. art. 12, § 12, prohibiting appropriations or expenditures by the legislature whereby the expenditures by the state for any fiscal year shall exceed the total tax then provided by law, does not apply to appropriations for the state capitol building, which is to be erected exclusively from moneys received from the sale of lands granted the state by the federal government for such purpose, so as to prohibit the drawing of warrants on the capitol fund in excess of the funds on hand, for compensation of the capitol commissioners.

3. In mandamus to compel the state auditor to draw warrants on the state capitol fund for payment of the services rendered by the capitol commission, the validity of the commission, which is acting under a known appointment from competent authority, cannot be questioned.

Application on the relation of Walter M. Bickford for a writ of mandamus to compel A. B. Cook, state auditor, to draw warrants on the state capitol fund for the value of his services and expenses as a state capitol commissioner.

Walter M. Bickford prayed for an alternative writ of mandate, commanding the defendant, state auditor, to issue a warrant in payment of the account filed by said Bickford for services rendered by him as a member of the state capitol commission. The relator alleges: "That under and by virtue of an act of the legislative assembly of the state of Montana approved March 7, 1895, designated as 'chapter 4, art. 2, of part 3, tit. 5, of the Political Code,' there was created a board to be known as and called the 'State Capitol Commission,' to consist of five members, to wit, the governor and four qualified electors of the state, said members to be appointed by the governor by and with the consent of the senate. That in pursuance of said act the governor of said state did, on the said 7th day of March, 1895, appoint as members of said board Charles K. Cole, of Lewis and Clarke county, Charles F. Lloyd, of Silver Bow county, William K. Floweree, of Teton county, and this affiant,

of Missoula county, and said appointments so made as aforesaid were made by and with the advice and consent of the senate, and were approved by said senate, and in all respects in accordance with said law. That thereafter the said persons so appointed filed their oaths of office and bonds as required by law, and entered upon the discharge of the duties of their office as members of said board. That on the 16th day of March, 1895, A. B. Keith was duly elected by said board as its acting secretary, and qualified by filing his bond as required by law. That between the 15th day of March, 1895, and the 19th day of December, 1895, this affiant performed services as a member of said board, expended moneys for traveling expenses and mileage while engaged in the duties of said board, which said services, mileage, and traveling expenses amounted to the sum of \$87.90; and on the 6th day of November, 1895, this affiant presented an itemized account in duplicate of said per diem, moneys expended for traveling expenses, etc., to the said board, and the same was duly audited, allowed, and approved for the sum of \$87.60, and the said audited bill was certified to the state auditor, with vouchers therefore, and this affiant thereupon presented the same to said state auditor, and requested that said auditor issue a warrant drawn upon the state capitol building fund in favor of this affiant for the sum named therein, but that said auditor failed and refused, and still fails and refuses, to issue said warrant, as he is required to do by the provisions of the said act approved March 7, 1895." The auditor, in his return, alleges: That he refused because the warrant for the claim presented was not a claim for the salary and compensation of an officer which was fixed by law. That the said claim had not been presented, examined, and approved by the state board of examiners, as required by section 20, art. 7, of the constitution. "That at the time said claim was allowed, Charles F. Lloyd, one of the members of said board, was, and now is, adjutant general of the state of Montana, and receives an annual salary of one thousand dollars, and is required to give a bond to said state in the sum of two thousand dollars for the faithful performance of his duties of such office which are inconsistent with the duties which he is required to perform as a member of the state capitol commission. That William K. Floweree, one of the members of that board, was, at the time this bill was allowed, a member of said board, and now is a state senator, duly elected and qualified, and that the said William K. Floweree represents the county of Teton in the state senate of the state of Montana, and that the duties imposed by the constitution and the law upon the said William K. Floweree, senator, as aforesaid, are wholly inconsistent with the duties required of him as a member



of the state capitol commission." That the said capitol commission has never been legally organized. "That all moneys derived from the sale of all lands granted to the state for the construction of public buildings are state funds, and are moneys belonging to the state, and that such moneys cannot be drawn out of the state treasury unless claims therefor have been presented to the state board of examiners, and by such board approved. That the appropriation by the legislature of the sum of two hundred and twenty-five thousand dollars for the fiscal year ending December 3, 1895, is largely in excess of the money on hand which has been received from the sale and rental of lands granted to the state for the purpose of constructing public buildings at the state capitol." That the moneys received for the rental and sale of the lands granted to the state for the construction of public buildings, and now in the hands of the state treasurer, does not exceed the sum of \$8,089.10. "That warrants issued in accordance with article 2, c. 4, tit. 5, pt. 3, of the Political Code, are to be drawn and registered the same as other warrants are drawn and registered by the proper officer of the state. Said warrants, when drawn and registered, are state warrants, and create an indebtedness against the state, and the state is liable for the payment of the same. That said lands, and all thereof, so granted to the state of Montana for public buildings at the capital of the state, are held in trust for the people of the state of Montana, and that no part or portion of said lands can be disposed of at a price less than ten dollars per acre. That the state has selected, and there have been approved by the secretary of the interior, lands to the amount of 36,164.90 acres for public buildings at the capital of said state, and that, if all of said lands were sold, they would not bring the state the sum of five hundred thousand dollars, which is the appropriation made for the years 1895 and 1896. That said lands so selected by the state and approved by the secretary of the interior are not worth in value the sum of three hundred and sixty thousand dollars, and when sold would not bring or realize in money to the state of Montana the sum of three hundred thousand dollars. Respondent further says, upon information and belief, that the lands so selected and approved cannot be sold at the rate of ten dollars per acre, and that the appropriation for the years 1895 and 1896, in the sum of five hundred thousand dollars for the erection of a state capitol building at the state capital is wholly in excess of the value of said lands, and that the drawing of warrants in such sum would be illegal, and contrary to law. Respondent further says, upon information and belief, that such warrants are claims against the state, for which the state of Montana would be responsible for the payment and for the interest thereon, and that he has no authori-

ty under the law to draw warrants in favor of such capitol commission, except the amount now in the hands of the state treasurer." The relator moved to strike out portions of the respondent's answer, and at the same time filed a general demurrer.

B. P. Carpenter and Toole & Wallace, for relator. Henri J. Haskell, for respondent.

HUNT, J. (after stating the facts). In order to erect and complete a state capitol, the legislature, by the act of March 7, 1895, created a board to be known as the "State Capitol Commission," defining its duties, fixing the compensation of its members, and prescribing their terms of service. Five members compose the commission, relator being one. The members are appointed by the governor, by and with the advice of the senate. The term of office is until the completion of the capitol, and the acceptance thereof by the state. Each commissioner shall give bond, conditioned for the faithful performance of the duties imposed by law. These duties are of a very important nature. They exact a high degree of intelligence and care due to the public in the selection of proper architectural designs, plans, and specifications for a statehouse, to cost, when completed, a million dollars. The selection of an architect and a superintendent of construction devolves upon the commission. All disbursements on account of the construction of the capitol shall be made pursuant to certificates issued by the board, and all claims shall be passed upon after careful examination of every item thereof. The statute creating the commission contemplated that the construction of the capitol would last several years; and, in order that the people may be kept fully advised of how the commissioners are fulfilling their duties, the secretary of the board is obliged to prepare full financial reports each year, which shall be published in two newspapers, and a copy shall be transmitted to the legislature. The compensation of each commissioner is five dollars a day for each and every day he is actually engaged in the performance of his official duties. Clearly, the members of the commission are public agents, with tenure, duration, emolument, powers, and duties under the statute referred to. *U. S. v. Hartwell*, 6 Wall. 385; *Throop*, Pub. Off. §§ 3, 4, et seq.; *Com. v. Evans*, 74 Pa. St. 124; *State v. Burke*, 8 Wash. 412, 36 Pac. 281.

Having determined that capitol commissioners are officers, we find their compensation is fixed by the law above referred to, and that the services of the commissioners and their expenses shall be "certified to the state auditor with vouchers therefor, such warrants to be drawn on the state capitol fund." Pol. Code, § 2442. Under section 20, art. 7, of the constitution, the state board of examiners has nothing to do with the compensation of "officers fixed by law." Where the rate of com-

pensation, and the kind of service to be paid for, are established and provided for by statute, and the amount of compensation for every act of service is definitely fixed by law, and the sum to be paid to the officer is out of a particular fund, and is to be ascertained and certified, as in this case, by the board of capitol commissioners, the state board of examiners is not required to pass upon such claim. The computation and allowance of the commissioners' mileage is but an incident to the compensation. It is to be certified to the state auditor, with vouchers and warrants, then to be drawn on the state capitol building fund. In no event is the compensation of the commissioners, under the law creating the board, a claim against the state. When congress made a grant of land to the state for public buildings at the capital of the state, by act of congress approved February 22, 1889, providing for the admission of the state into the Union, it was enacted that the lands so granted should be held, appropriated, and disposed of exclusively for the purposes mentioned in the act, in such manner as the legislature of the state might provide. The state, by Ordinance No. 1, § 7, has accepted these lands for the purposes specified, and by legislation has provided for the erection of a capitol exclusively out of moneys from a fund to be created from the disposition of the lands so granted by congress. The state is an agent to carry out the objects of the donation. The fund created by the statute is a trust fund established by law in pursuance of the act of congress. It is not a state fund in the sense that moneys realized from taxes, for instance, and in the public treasury, are state funds. Nor is the disbursement of this capitol fund an expenditure of the state, within the meaning of expenditures generally referred to in the constitution. The restrictions of section 12, art. 12, of the constitution, forbidding appropriations or expenditures by the legislature whereby the expenditures of the state during any fiscal year shall exceed the total tax then provided by law, unless provision is made for levying a special tax, not exceeding the rate allowed by the constitution, are therefore not applicable to this trust fund. The state cannot use the fund created by this act for any purpose except as provided for by the act of congress. The state officers have no control over it, except to carry out the trust relation; and the treasurer is merely an agent for receiving and disbursing the fund under the act of congress, and in manner provided by the law of the state. So, too, the auditor is but one of the agents or subagents designated by the law of the state in the execution of the trust. All this seems very clear to us from the law. It is also in full accord with the decision of the supreme court of Washington, where, under the same act of congress above referred to, a similar grant of lands was made by the United States to that state for state buildings at

the state capital, and a like question to this at bar was before the court. *Allen v. Grimes* (Wash.) 37 Pac. 662. In the execution of the trust no state debt is created, for the law (section 2454, Pol. Code) especially prohibits the appropriation of any moneys except the funds derived from the sale or rental of lands granted for erecting public buildings at the state capital, and known as the "State Capitol Building Fund." As was said by Justice Stiles in Washington: "There is, under the law, absolutely no obligation resting upon the state to pay any sum whatever, and those who may receive the auditor's warrants will be limited in their rights to the requirement of the proper officers to perform their duties as prescribed by the statute." *Allen v. Grimes*, supra. As no indebtedness against the state can be created by the issuance of warrants drawn against the specific fund, the provisions of section 12, art. 12, of the constitution, restricting the powers of the legislature to create debts within certain limitations, do not obtain. Nor has the board of examiners any duty to perform in passing upon the claims against the capitol fund. The legislature had the power to control the fund and its disposition for the specific purposes for which the lands are granted. It therefore had the right, unless otherwise restricted by the act of congress or the law of the state, to appropriate amounts in anticipation of moneys to be realized from the sales of the lands granted, and by sections 2442, 2454, Pol. Code, warrants upon such fund may be drawn and registered by the officers mentioned in the statute as agents of the state, whether there are moneys on hand to meet the warrants or not. We know of no constitutional limitation upon the price for which lands granted by congress to the state may be disposed of for the erection of public buildings at the capital. The limitation created by the enabling act relates to lands granted for educational purposes. Sections 12, 17, and 11 of the act of congress "to provide for the division of Dakota into two states, and to enable the people of \* \* \* Montana \* \* \* to form a state constitution," etc. (section 1, art. 17, Const.), are not pertinent.

The only other material point raised by the answer is the alleged ineligibility of Charles F. Lloyd and William K. Flowerree to the office of capitol commissioner. This being a collateral question, it cannot be tried in this proceeding. *Carland v. Custer Co.*, 5 Mont. 579, 6 Pac. 24; *Read v. City of Buffalo*, 4 Abb. Dec. 22. Even if the persons named were ineligible upon principles of policy and justice, the law holds the acts of an officer de facto valid, so far as the public are concerned in the exercise of the duties of the office, where he acts under color of a known appointment from competent authority. *State v. Carroll*, 38 Conn. 449; *Conover v. Devilb*, 15 How. Prac. 470. The demurrer to the answer is well taken, and must be sustained.

The relator is entitled to the relief prayed for, and a writ will be issued accordingly.

PEMBERTON, C. J., and DE WITT, J.,  
concur.

**BRYANT v. STETSON & POST MILL CO.**  
et al.

(Supreme Court of Washington. Feb. 14, 1896.)

**SALE ON EXECUTION—ACTION TO REDEEM—HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTIONS AS TO COMMUNITY DEBTS—PLEADING.**

1. An action to redeem from a sale on execution after the time for redemption has expired cannot be sustained where no facts are alleged tending to show that the proceedings in obtaining the judgment and making the sale were irregular, and there is no averment of an offer or attempt to redeem within the statutory period.

2. A debt contracted by the husband during the existence of the community is prima facie a community debt.

3. The fact that the community has been in existence for more than seven years prior to the rendition of a judgment against the husband raises a presumption that the debt for which it was rendered was contracted while the community existed.

4. A wife who seeks to vacate a sale of community property on an execution issued in an action in which it did not appear whether or not the debt sued on was that of the community must affirmatively allege that the judgment was not rendered on a community debt.

Appeal from superior court, Whatcom county; John B. Wynn, Judge.

Action by Fannie E. Bryant against the Stetson & Post Mill Company and others. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Fairchild & Rawson and Stratton, Lewis & Gilman, for appellant. Kerr & McCord and John Wiley, for respondents.

HOYT, C. J. The superior court sustained a demurrer to the complaint of appellant, and, she electing to stand thereon, judgment of dismissal was rendered. The appellant claims that the following allegations of fact were contained in the complaint: That the real property in controversy was community property; that it was sold on a judgment against W. J. Bryant, husband of appellant; that the sheriff's deed under this sale was made before the right of redemption had expired; that at the time of the sale said W. J. Bryant had property in King county sufficient to satisfy the judgment; that plaintiff was ignorant of the judgment and proceedings thereunder until too late to object thereto except in the way she is now objecting; and that she was ready and willing to pay the judgment, and redeem the property, if permitted so to do. Upon this claim was based her contention that the complaint stated a cause of action against the defendants. It cannot be gathered from the complaint alone as to whether or not the sheriff's deed was prematurely made. The only fact

stated in the complaint upon that subject is to the effect that the deed was made within six months after the confirmation of the sale. It is nowhere alleged how long after the sale itself, nor is there any sufficient allegation as to any offer to redeem within the time provided by statute after the confirmation of sale. By the act of 1886 (Laws 1885-86, p. 116) it was provided that the right to redeem shall date from the day of sale, and, if it repealed the section upon the same subject in the Code of 1881, so that the date of confirmation was no longer material in determining the time in which property could be redeemed, there was no fact stated in the complaint tending to show that at the date the deed was made the time for redemption had not expired. And even if the section in the Code of 1881 was in force, there were no facts alleged from which it sufficiently appeared that plaintiff had been deprived of her right to redeem the property. There was no attempt to allege any other fact which tended to show that the proceedings in obtaining the judgment and making sale of the property in question under an execution issued thereon were not in all respects regular. Hence, if the judgment was such that the property in question was liable to be sold for its satisfaction, the title of the defendants thereunder was superior to any claim of the plaintiff. It appeared from the complaint that the property when sold was that of the community composed of plaintiff and her husband. It follows that the defendants who hold under the sale have a good title if the claim upon which the judgment was rendered was one that could be enforced against the property of the community. It was alleged in the complaint that the community composed of plaintiff and her husband had been in existence from a date prior to 1884, and that the judgment upon which the property was sold was not rendered until 1891. Under the rule established by this court in *Improvement Co. v. Sagmeister*, 4 Wash. 710, 30 Pac. 1058, the debt upon which this judgment was rendered was prima facie that of the community if incurred during its existence, and the fact that the community had been in existence for seven years or more before the rendition of the judgment raised at least a prima facie presumption that the debt upon which it was rendered was incurred while it existed. Hence facts were alleged in the complaint from which it could be inferred that the debt upon which the judgment was rendered was that of the community, and, if it was, it could be enforced against the community property. Such has been the holding of this court in numerous cases. See *Andrews v. Andrews*, 3 Wash. T. 286, 14 Pac. 68; *Improvement Co. v. Sagmeister*, supra; *Calhoun v. Leary*, 6 Wash. 17, 32 Pac. 1070; *Curry v. Catlin*, 9 Wash. 495, 37 Pac. 678, 39 Pac. 101. But it is not necessary for

us to hold that facts were alleged in the complaint from which the community character of the indebtedness could be presumed. The property had been regularly sold upon an execution issued in an action in which it was not made to appear whether or not the indebtedness was that of the community. Hence, the community character of the property being conceded, the proceedings under which it was sold might or might not have been sufficient to pass title. This being so, it was incumbent upon one who sought to set aside the title attempted to be conveyed under such proceedings to show by affirmative allegation that the facts were such that no title passed by virtue of the proceedings. See *Andrews v. Andrews*, supra. In other words, under the circumstances disclosed by the complaint, the plaintiff was entitled to no relief as to this property unless the indebtedness upon which the judgment was rendered was that of the husband alone, and not of the community; and it is familiar law that the facts necessary to show a cause of action must affirmatively appear from the complaint. It must follow that the complaint of plaintiff, which contained no allegation as to the character of the indebtedness upon which the judgment was rendered, failed to state a cause of action. She was only entitled to relief if in fact the indebtedness was such that it could only be enforced against the separate estate of the husband. Hence her complaint would only state a cause of action when facts were alleged which showed that such was the nature of the indebtedness. It is not claimed that there was any allegation to that effect in the complaint. Hence the superior court was right in holding that it did not state a cause of action. The judgment will be affirmed.

DUNBAR, ANDERS, and GORDON, JJ.,  
concur.

#### HEILBRON et al. v. GUARANTEE LOAN & TRUST CO.

(Supreme Court of Washington. Feb. 8, 1896.)

##### PLEDGE—COLLATERAL SECURITY—DELIVERY— DEATH OF DEBTOR.

The fact that a debtor authorizes his creditor, in case of his death, to take certain life insurance policies from among his private papers, and hold the same as collateral, where such policies are neither actually delivered nor authorized to be taken in his lifetime, does not constitute a pledge of the policies as collateral, entitling the creditor to their possession after the death of the debtor.

Appeal from superior court, King county;  
T. J. Humes, Judge.

Action by Abram Heilbron and others, executors, against the Guarantee Loan & Trust Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Preston & Albertson, for appellant. R. C. Strudwick, for respondents.

GORDON, J. Respondents (plaintiffs in the court below), as executors of the last will and testament of George H. Heilbron, deceased, brought this action against the appellant, a banking corporation of the city of Seattle, to recover possession of two certain policies of insurance written by the Equitable Life Assurance Society, in the sum of \$5,000 each, insuring the life of the said George H. Heilbron. At the time of his death the deceased was the active manager of the appellant bank, and one of its trustees. The defendant, in its answer, admitted having possession of the policies, and, for an affirmative defense, alleged "that on or about the 8th day of February, 1895, said George H. Heilbron, since deceased, was indebted to said defendant in a sum exceeding the sum of ten thousand dollars (\$10,000), and that of said sum there still remains, and now is, wholly due and unpaid to defendant, a sum exceeding \$10,000; that on or about said 8th day of February, 1895, said George H. Heilbron, in his lifetime, and while he was indebted to said defendant as aforesaid, delivered to, assigned to, and deposited with said defendant said policies of insurance mentioned in said complaint herein, and each of them, as collateral security for the payment of said indebtedness of said George H. Heilbron. \* \* \* A jury was waived, and, the court having made its findings and conclusions, judgment was entered thereon in favor of respondents, from which judgment appellant has appealed.

The question presented for determination is, were the policies in fact pledged to the appellant? The following finding was made by the trial court, and duly excepted to by the appellant: "That the said George H. Heilbron did not, in his lifetime, deliver the possession of said policies to defendant (appellant), as a pledge or otherwise." In support of its claim to the possession of said policies, the appellant produced as a witness upon the trial below one E. B. Downing, its secretary, and an active officer in said corporation. It appears from his testimony that at a meeting of the directors of the appellant bank held in February, 1895, the question of Heilbron's indebtedness to the bank was considered by said directors, and additional security for such indebtedness was requested. The witness then proceeded as follows: "A. After this meeting I was speaking about Mr. Heilbron said to me that he had, amongst his private papers, two five thousand dollar policies in the Equitable Life Assurance Company, and in case anything happened to him he wanted me to get those policies, and put them in amongst his other collateral. Q. Well where did this conversation take place.—in what part of the bank? A. In the manager's office. Q. Well, what did you do when that was said by Mr. Heilbron? A. I

said to him that I didn't know exactly where those papers were, and that, in case anything happened, it would be better if I knew exactly where to find them, and he said that he would show me. He says, 'Why, you know where my private papers are.' I said, 'Well, I have seen a pouch in there, with your name on them;' and I said I would rather he would show me, so I would be positive, and he went in with me, and opened the drawer, and showed me the pouch, and said that they were in there. Q. Well, state what he said. A. Well, I have stated that he said, in case anything happened to him, that he wanted me to get those policies, and put them in with this other collateral." Upon cross-examination, the witness testified as follows: "Q. Where was the pouch of papers to which Mr. Heilbron, in this conversation, referred? A. It was in the drawer in the other vault,—in the general vault of the bank. Q. Was it in the drawer in which Mr. Heilbron kept his private papers, and so forth? A. He kept this pouch, that is all the papers he had in there. There was other papers in there belonging to the bank, and I don't know of any papers he had,—private papers,—outside of this pouch. This pouch was in there, and other papers belonging to the bank,—abstracts, and so forth. Q. Who had access to this pouch of Mr. Heilbron's? A. Who had access to the pouch? Q. This private pouch of Mr. Heilbron's? A. Why, Mr. Heilbron had access to it, and I presume that I had, under his direction. I considered it so. Q. Did you have any right to go into this pouch, except as he might direct you to do so? A. I considered I had authority to go in there, in case of his death, and get those policies. Q. That was about how long before Mr. Heilbron died? A. That was about two months, I think, as near as I can recollect. Q. Now, did you see that pouch from the time of this conversation until the time of Mr. Heilbron's death? A. Oh, yes. Q. What occasion did you have to see it? A. When I would go into that drawer to get out a pouch that contained warrants and some other papers that I might be looking for, looking in the drawers—There were three drawers there, all about the same size. Q. You would see it on those occasions? A. Yes, sir. Q. Did you ever go into it? A. Never. Q. Mr. Heilbron had access to it at all times? A. Yes, sir. Q. Now, you had other collateral of Mr. Heilbron's for the same debts did you not? A. Yes; we had general collateral. Q. Where was that? A. That was in the file,—in the collateral file. Q. That was in a different place? A. That was in a different place; yes, sir. Q. Now, did you have memorandum of this collateral that you had in the collateral case on the books of the bank? A. We had it on the books of the bank. We had on the memorandum that was made at the time we went over the bills receivable. Q. Were those policies ever entered on that memorandum? A. I think not. Q. Now, when Mr. Heilbron

died, acting on what you have stated that he told you, you went, I believe you said, and got these policies out of that pouch, and put them with the other collateral? A. Yes, sir. Q. Where did you find them? A. I found them in the pouch,—his private papers. Q. Did you find them loose, or in an envelope? A. They were in an envelope." Further on in the course of the cross-examination the following question was propounded: "Q. There was nothing done by you or by any one representing the bank, so far as you know, concerning these policies, between the time of this conversation with Mr. Heilbron, which you have detailed, and the time of Mr. Heilbron's death? A. They remained in the pouch. Q. There was nothing done, I say, by any one, concerning those policies, as far as you know? A. No. Q. When you found these policies in this envelope which has been marked 'Exhibit A,' what did you do with them? A. I put them in with his other collateral."

We think that the evidence was sufficient to warrant the lower court in finding that the appellant was not entitled to the possession of the policies in dispute. We think that it clearly shows that the policies were not pledged by the deceased. His conduct and conversation were not sufficient for that purpose. There was neither possession, nor right of possession, in the appellant, during the lifetime of the deceased; and, as possession was lacking, no pledge resulted. It seems very plain that it was not intended by the testator that the bank should be entitled to the possession of the policies during his lifetime. It is equally clear that its secretary, from whose testimony we have quoted at length, did not consider that his bank was entitled to the policies at any time prior to Mr. Heilbron's death. It was only "in case anything happened to him [Heilbron] that he wanted [witness] to get the policies, and put them in amongst his other collateral" of the bank; clearly showing that it was the intention of both parties that during the lifetime of the testator they should remain, as they theretofore had been, "amongst the private papers" of the testator. It is also significant that, although the books of the bank contained full memoranda of the other collateral which it held as security for the debt owing to it by Heilbron, no reference was made in said books or records touching or concerning these policies. The bank, therefore, never, during the lifetime of George H. Heilbron, had possession of the policies in dispute. His death revoked the authority upon which appellant relied when thereafter it went, by its secretary, Mr. Downing, to his private papers, and took said policies therefrom. "To constitute a pledge, the pledgee must take possession; and, to preserve it, he must retain possession. An actual delivery of property capable of personal possession is essential. The delivery must be such as would be requisite to transfer the property in the same

chattels in case of a sale of them." Jones, Pledges, § 23. "Possession is of the essence of a pledge. \* \* \*" *Casey v. Cavaroc*, 96 U. S. 467; *Davenport v. Bank*, 9 Paige, 12; *Christian v. Railroad Co.*, 133 U. S. 241, 10 Sup. Ct. 260. Of course, a symbolical delivery is sufficient, where the property is incapable of manual delivery, and that is the extent to which the cases of *Jewett v. Warren*, 12 Mass. 309; *Whitney v. Tibbetts*, 17 Wis. 369; and *Nevan v. Roup*, 8 Iowa, 207,—go. In the first of these cases the property in question was a lot of saw logs in a boom, and a constructive delivery was upheld. In *Whitney v. Tibbetts*, supra, the property in question was a quantity of flour stored in a warehouse, and delivery was made by the pledgor of the warehouse receipt, and this was held sufficient. In *Nevan v. Roup* the question arose as to a quantity of oats in bins, and, as in the preceding cases, the court held that, while delivery and possession are essential to a pledge, the delivery may be symbolical, and the possession according to the nature of the thing. The cases cited by the appellant bearing upon the question of what is essential to the delivery of a deed are not analogous to the present case, and require no special notice. An examination of the record satisfies us that the court below rightly found "that the claim of the defendant of the right to retain the possession of said policies as a pledge is invalid by reason of the nondelivery of said policies to the defendant by the said George H. Helbron in his lifetime, \* \* \*" and the judgment appealed from is affirmed.

ANDERS, DUNBAR, and SCOTT, JJ., concur.

#### RAWSON v. ELLSWORTH.

(Supreme Court of Washington. Feb. 10, 1896.)

##### APPEAL—FORM OF VERDICT—OBJECTION—INSTRUCTIONS.

1. Objection to the form of a verdict will not be first heard on appeal.

2. Possible error in giving an instruction is without prejudice, where it concerns a matter about which there was no contention.

Appeal from superior court, Whitman county; E. H. Sullivan, Judge.

Action by Ed. Rawson against F. M. Ellsworth to obtain possession of a sawmill. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Trimble & Pattison and Frank H. Brown, for appellant. F. M. Ellsworth, Matt B. Kelley, and Charles M. Wyman, for respondent.

DUNBAR, J. This is an action in replevin to obtain possession of certain sawmill machinery. The first contention of the appellant is as to the form of the verdict. Assuming, without deciding, that the verdict was wrong in form, the form of the verdict

was not objected to or brought to the attention of the court below, and such objection will not be heard here for the first time. It is also objected that the court erred in admitting certain testimony. We have examined this record from beginning to end, and we are satisfied that no substantial error was committed in this respect. There was some immaterial evidence admitted, but it was in answer to evidence of the same character offered in behalf of the plaintiff. If such evidence was material, it was right that the defendant should be permitted to controvert it. If immaterial, it could have done no harm to controvert it. So far as the instructions of the court are concerned, we think they were right, with the possible exception of the instruction on page 58 of the statement of facts, to the effect that the statute requires that three copies of the notice shall be posted in the most public places in the county. This was not called to the attention of the court until two days after the trial, and after the verdict had been rendered; and, even if it had been, the instruction was concerning a matter over which there was no contention, the appellant's witnesses having testified that the notices of sale were regularly posted, and there having been no contradiction of such testimony. The appellant, in any event, based his title upon the foreclosure of a certain mortgage, which was alleged to have been foreclosed under the statute by the sheriff. It conclusively appears that the notice of such sale, required by the statute, was not given to the defendant, who was then in possession; and, under the testimony in this case, it would have been impossible for the plaintiff to have prevailed. In any event, we think no substantial error was committed by the court; that the jury was not misled by any instruction of the court, or by any refusal of the court to reject testimony, but that they arrived at their verdict by reason of the overwhelming weight of testimony in favor of the defendant's contention. It is conceded, however, by the respondent, that he was not entitled to the sum of damages awarded by the jury, viz. \$14.40, but that, notwithstanding no objection was raised to the verdict, he offers to remit that amount. The judgment will therefore be modified to the extent of deducting the said sum of \$14.40 therefrom, and, as so modified, will be affirmed. Respondent to recover costs, both in this court and the court below.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

In re BALDWIN'S ESTATE.  
(Supreme Court of Washington. Feb. 10, 1896.)

##### PROBATE OF WILL—SUFFICIENCY OF EVIDENCE.

The general rule that all persons are presumed sane until the contrary appears does not

apply in the case of the probate of a will; and it is error to admit a will to probate in the absence of any proof to show that deceased was of sound mind when the will was made. Hoyt, C. J., dissenting.

Appeal from superior court, King county; T. J. Humes, Judge.

Proceeding by A. K. Shay and Jennie Shay for the probate of the will of Lena Shay Baldwin, deceased, in which Aaron Baldwin, executor of the estate, filed objections. From a judgment admitting the will to probate, the executor appeals. Reversed.

Richard Saxe Jones, for appellant.

**PER CURIAM.** The respondents offered the purported will of Lena Shay Baldwin to probate, and moved its admission. The appellant objected on the ground of lack of jurisdiction. Formal proof was made by the proponents, excepting no proof was offered to show the deceased was of sound mind when the will was made, and appellant moved the rejection of the will for this reason. The court denied the motion, and admitted the will. The general rule that all persons are presumed sane until the contrary appears, upon which the court evidently based its ruling, does not apply in matters of this kind. There must be sufficient proof to make out a prima facie case of the sanity of the testator at the time the will was made as one of the jurisdictional facts. Reversed.

**HOYT, C. J. (dissenting).** I agree to the principles of law announced, but am of the opinion that enough appeared to prima facie show the sanity of the testator.

#### FURTH v. SNELL et al.

(Supreme Court of Washington. Feb. 10, 1896.)

**APPEAL—DETERMINATION OF FACTS BY APPELLATE COURT—WHEN BINDING ON TRIAL COURT.**

Where the facts of an action are passed upon on an appeal, and a judgment reversed because not sustained by the evidence, and on a retrial the evidence is substantially the same, the determination of the reviewing court is conclusive on the trial court, and it is not error for such court to direct a verdict in accordance therewith. Dunbar, J., dissenting.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by Jacob Furth against George H. Snell and others, partners under the name of Snell, Heltschu & Woodard, and James H. Woolery, sheriff. Judgment for plaintiff, and defendants appeal. Affirmed.

Stratton, Lewis & Gilman, for appellants. Carr & Preston and W. R. Bell, for respondents.

**ANDERS, J.** On April 9, 1891, one Isaac Korn was the owner and in possession of a certain stock of drugs, medicines, druggist's

articles, and store fixtures in the city of Seattle, and was engaged in business as a druggist. At that time he was indebted to the respondent in the sum of \$500 for money previously loaned to him, which indebtedness was evidenced by a promissory note. Respondent was also the owner and holder of two other notes made by said Korn, one for \$250, payable to the order of one Borles, and the other for \$2,708, payable to the order of M. Korn, both of which had been indorsed and delivered to respondent by the payees, in part payment of debts due from them, respectively, to him. On said day the said Isaac Korn executed and delivered to the respondent a bill of sale of said stock of goods and store fixtures, and the latter thereupon canceled and delivered to the former the notes above mentioned, and took possession of the property so conveyed to him, and retained the possession thereof until dispossessed in the manner hereinafter stated. At the time this property was transferred to the respondent, Isaac Korn was indebted to the firm of Snell, Heltschu & Woodard, appellants, in the sum of \$2,877.43, on an account for merchandise sold and delivered to him by them. Thereafter, and on April 11, 1891, the said firm commenced an action in the superior court of King county against said Isaac Korn to recover the amount due them, and caused a writ of attachment to be issued and placed in the hands of appellant Woolery, the then sheriff of King county, who, by virtue of said writ, seized and took into his possession the above-mentioned stock of goods and fixtures as the property of the said Isaac Korn. Under and by virtue of an execution issued upon a judgment for plaintiffs in that action, the attached property was sold by the sheriff, and the proceeds applied towards the satisfaction of the judgment. After the levy, but before the sale, the respondent notified the sheriff, in writing, that he was the owner of the property so levied upon, and demanded its return to him, which demand was refused. To recover the value of the property so taken and sold, the respondent instituted this action. The complaint alleges facts sufficient to entitle the plaintiff to recover the value of the property therein described. The defendants, in their answer, denied that plaintiff was the owner of the property described in the complaint, or entitled to the possession thereof, and that it was of any greater value than \$1,800, and alleged, affirmatively, among other things, that the bill of sale by which the property was transferred to the respondent was made by Isaac Korn for the purpose of placing his property beyond the reach of his creditors, and for the purpose of hindering, delaying, and defrauding his creditors, and especially the defendants Snell, Heltschu & Woodard; that the plaintiff accepted the bill of sale, knowing that it was made for the purposes aforesaid, with the intention and for the purpose of aiding said Korn to so hinder, delay,

and defraud his creditors; that, after executing the bill of sale, the said Korn remained in possession of the property, and continued to sell the same, and apply the proceeds thereof to his own use and benefit; and that the bill of sale was and is fraudulent and void as against the defendants. The plaintiff replied, admitting the execution of the bill of sale, as alleged in the answer, but denying all other new matter therein contained. Upon the issues presented by the pleadings, a trial was had to a jury, and at the close of the evidence the plaintiff presented to the court, as conclusions of fact from the evidence, that the plaintiff was, on the 11th day of April, 1891, the owner, in possession, and entitled to the possession of the goods and chattels described in the complaint (less the soda fountain, safe, chandeliers, and gas fixtures); that plaintiff had theretofore purchased the same from I. Korn, the then owner thereof, in good faith, paying therefor a consideration not less than the value thereof; that the defendants wrongfully, and without right, and tortiously, took the same from plaintiff's possession, on the 11th day of April, 1891, and then converted the same to their own use,—and, as a conclusion of law, that the plaintiff is entitled, upon the evidence, to a verdict in his favor, in the amount of the value of the property taken, at the time of the taking, with interest thereon from April 11, 1891, to date, at the rate of 8 per cent. per annum, said value to be determined by the jury from the evidence, and requested the judge to find and sign the same, and that the court instruct the jury to return a verdict for the plaintiff in accordance with said conclusion of law. The court signed the conclusions of law and of fact so submitted, and instructed the jury as requested by the plaintiff. The jury returned a verdict in favor of the plaintiff, and against the defendants, for \$3,348, upon which verdict judgment was subsequently entered for that sum. To reverse this judgment, this appeal is prosecuted.

It is insisted, with much earnestness, by the learned counsel for appellants, that there was some evidence properly presented to the jury which tended to support the allegations of fraud set forth in defendants' answer, and that the court, therefore, erred in taking the question of the bona fides of the sale by Korn to the respondent from the jury. In support of this contention, it is urged that the action of the court was in contravention of section 21 of article 1 and section 16 of article 4 of the state constitution, which, respectively, provide that the right of trial by jury shall remain inviolate, and that judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law. But we fail to perceive wherein the court violated those provisions of the constitution. There is nothing in the record showing that the judge either charged the jury upon the facts of the case, or deprived the appellants of the right to a jury

trial. The only question here is whether there was any evidence upon which the jury could properly have found a verdict in favor of appellants, who necessarily assumed the burden of proof upon the issue tendered by their answer. *Commissioners v. Clark*, 94 U. S. 278-284. And, in determining that question, it is necessary to bear in mind a fact which is not, strictly speaking, a matter of record, but which, nevertheless, cannot be overlooked or disregarded. It is this: This cause was before this court on a former occasion on appeal from a judgment in favor of the present appellants, and the judgment of the trial court was then reversed, and the cause remanded, for the reason that it appeared to us that the evidence was entirely insufficient to sustain the verdict of the jury. The case was retried in the court below, and we are again called upon to determine practically the same question which was determined on the first appeal. The facts appearing in the record on the first appeal are quite fully set forth in the opinion of this court, reported in 6 Wash., at page 542, 33 Pac. 830. Now, if the facts disclosed by the record now before us are substantially the same as those presented by the record on the first appeal, the former decision of this court established the law governing this case, and was a final adjudication and determination of the question now under consideration. *Wilkes v. Davies*, 8 Wash. 112, 35 Pac. 611; *Brusie v. Gates* (Cal.) 31 Pac. 111; *Thatcher v. Gottlieb*, 8 C. C. A. 334, 59 Fed. 872; *Frankland v. Cassaday*, 62 Tex. 418; *Railroad Co. v. Reed*, 83 Ind. 9; *Lassing v. Paige*, 56 Cal. 139; *Heinlen v. Martin*, 59 Cal. 181; *Chaffin v. Taylor*, 116 U. S. 567, 6 Sup. Ct. 518.

A careful examination of the evidence adduced upon the first trial discloses the fact that it was essentially the same as that given on the second, and therefore the court committed no error in declining to submit to the jury the question of the bona fides of the respondent in purchasing the property in controversy. That question had been previously determined, under a substantially similar state of facts, by this court, and that decision was conclusive upon the trial court. It is claimed, however, by appellants, that the notes which were surrendered by respondent to Isaac Korn upon the execution of the bill of sale, and which were introduced in evidence on the second trial, but not on the first, supplied the "missing link in the chain of evidence of fraud." But we cannot assent to this proposition. These notes, we think, in no way contradicted the oral testimony in the case, though it is urged that the fact that the Bories and M. Korn notes were dated but three days before the execution of the bill of sale tends strongly to contradict the statement of the respondent that, when he received them, he had not conceived the idea of obtaining the stock of goods from Korn. But whether he had or had not such an idea at that time seems to us quite immaterial. The



point is, did he purchase in good faith and for a sufficient consideration? And we think the evidence shows that he did. All that was said upon this point in the former opinion of this court is equally pertinent and applicable to the facts now before us, and nothing further, therefore, need be said concerning it. Even if this cause were now here for the first time, we would be constrained to hold that the ruling of the trial court was fully justified by the law and the evidence. The judgment will therefore be affirmed.

HOYT, C. J., and SCOTT, J., concur.

DUNBAR, J. I am compelled to dissent from the conclusion announced by the majority. I think the introduction of the notes mentioned in the majority opinion relieved the case of the objection urged by this court in 6 Wash. 542, 33 Pac. 830. My own opinion is that the appellants made out a case of fraud; but, whether they did or not, they certainly introduced competent testimony tending to prove fraud, and the province of the jury to weigh the testimony should not have been interfered with by the court.

#### NIAGARA FIRE INS. CO. et al. v. HART et al.

(Supreme Court of Washington. Feb. 8, 1896.)

CONTRACTS—CONSTRUCTION—ATTORNEY'S LIEN—ESTOPPEL TO CLAIM.

1. An offer by an attorney to his client, in regard to contemplated actions against certain insurance companies, provided for certain fees, and recited that "these respective sums \* \* \* are to be full compensation for all services growing out of or rendered in the insurance matter." Held, that such offer covered all work performed by the attorneys not only in the trial court, but also in the appellate court, on appeal by the insurance companies.

2. That an attorney knew of the assignment by his client pending the action of his claims in suit, and that the client had agreed to prosecute the actions without cost to the assignee, does not preclude the attorney, on recovery of judgment, from claiming a lien thereon for his fees.

Gordon, J., dissenting.

Appeal from superior court, King county; R. Osborn, Judge.

Interpleader by the Niagara Fire Insurance Company and others against George E. Hart and others, in which John F. Hart and another intervened. From a judgment for Marshall K. Snell and Harry H. Johnston, George E. and John F. Hart appeal. Reversed.

Hagerman & Carroll, for appellants George E. Hart and J. F. Hart. Bausman, Kelleher & Emory, for appellant Washington Nat. Bank. Doolittle & Fogg, C. O. Bates, Marshall K. Snell, and Hugh Farley, for respondents.

SCOTT, J. Several technical motions to strike the statement of facts and certain of the briefs and to dismiss the appeal herein were denied at the hearing. As no new points were de-

cided, a fuller statement will not be given. The substantial points presented upon this appeal involve the amount of attorneys' fees and the right of respondents to a lien therefor upon certain judgments recovered by the firm of Hart & Jewell against several insurance companies. One suit was made a test case, by the result of which it was agreed the others should abide. As to the amount recoverable, it appears that the respondents Snell & Johnston made a written proposition to George E. Hart, who was a member of said firm of Hart & Jewell, which is as follows: "Tacoma, Wash., Feb. 21, 1893. George E. Hart, Esq., Everett, Wash.—Dear Sir: We have carefully considered all the matters presented to us for consideration in your last interview with us, and particularly with respect to your anticipated trouble with the insurance companies, their present attitude towards payment of your losses, and your request that we represent you. We write this formal acceptance of your retainer, and hereby undertake, in your behalf, to prosecute or defend any and all matters relating to the said insurance, upon the following terms and understanding: For services rendered in the past we have a small account against you, which you can settle at your convenience. With respect to the litigation impending, you can, at your convenience, pay us a retainer of \$150, and a balance to make up an even \$500 as full payment of our services, whether we gain or lose the case, upon its final determination. Should we be successful, and obtain judgment against the companies, you will pay an additional \$500; making in all \$1,000. These respective sums, in either event, are to be full compensation for all services growing out of or rendered in the insurance matter; you to pay all taxable costs and fees of clerks, sheriff, and witnesses, and traveling and hotel expenses if necessarily incurred. Please advise us if these terms meet with your approbation. Snell & Johnston." This proposition was accepted by said Hart, and the respondents entered upon the prosecution of said claims. It was subsequently contended by the respondents that said agreement related only to work in the superior court, and did not cover their services in the supreme court, and it was claimed by them that they had a further understanding with said Hart that they were to have additional recompense for their services in the supreme court; and the lower court found in their favor, and also found that they had a lien upon the amounts recovered therefor, and this appeal was taken.

A great deal of evidence was introduced upon the trial, which we shall not undertake to set forth, even in substance, in this opinion, as we deem that it would serve no good purpose to do so. After an examination thereof, and a consideration of the argument presented thereon, we are satisfied that the respondents did not make a case sufficient to overcome the effect of said written contract, and we are also of the opinion that the same, by

its terms, covered all of the work of the respondents in all the courts, and that the superior court erred in allowing them to recover a greater sum than therein provided for.

As to the remaining contention, with reference to the right of the respondents to a lien upon the amounts recovered, it is contended by appellants that the respondents waived their right to a lien in consequence of said George E. Hart having assigned said claims to other parties while the actions to recover them were pending, said Hart thereby agreeing to continue the prosecution of said suits for the benefit of the assignees, and without expense to them, of which assignment the respondents had notice. There was no formal waiver by the respondents of the right to a lien for the amount due them or to become due them for their services, and we do not think the mere fact of their having knowledge of said assignment precludes them from a right to a lien upon the judgments. At the time the assignment was made the suits were undetermined, and the assignees knew that further legal services would be required to terminate them, and, while George E. Hart agreed to conduct said suits, or cause them to be prosecuted, without cost to the assignees, we think they had only his individual responsibility to rely upon. He had a right to make this assignment, and the respondents could not have prevented him from so doing, and the fact of their knowledge of the terms thereof is not sufficient to estop them from claiming a lien upon the judgments in case Hart failed to pay them, there having been no express waiver by them of such a right. **Reversed.**

**ANDERS and DUNBAR, JJ., concur.**

**GORDON, J.** I dissent from so much of the foregoing as holds that "the respondents did not make a case sufficient to overcome the effect of said written contract," and from the conclusion. I think the evidence was legally sufficient, and that the judgment should be affirmed.

**GREENE et al. v. WILLIAMS et al.**

(Supreme Court of Washington. Feb. 11, 1896.)

**ORDERS—MODIFICATION—SHERIFF'S SALES.**

1. 2 Hill's Code, § 1393, authorizing a court to vacate or modify an order after the term at which it was rendered, does not authorize the court to vacate an order denying the confirmation of a sheriff's sale on petition which does not show any reason therefor, which was not considered by the court, and which did not exist at the time when the previous order was made.

2. Under 2 Hill's Code, § 1394, requiring a motion for modification or vacation of an order to be served on the adverse party within a year, applies to a motion to vacate an order denying the confirmation of a sheriff's sale.

**Appeal from superior court, Clallam county; James G. McChinton, Judge.**

Action by William H. Greene and another against Louis Williams. From an order on

motion of G. H. Randalls and others vacating a previous order denying movant's motion for the confirmation of a sheriff's sale, plaintiffs appeal. **Reversed.**

**R. C. Wilson, for appellants.**

**GORDON, J.** This case comes here upon an appeal from an order of the superior court made on March 15, 1894, which order confirmed a sheriff's sale of real estate, and vacated and set aside a previous order of said court entered on March 25, 1892, denying respondents' motion to confirm said sale. The order appealed from was based upon respondents' petition, which was presented to the lower court on the 15th of March, 1894, nearly two years after the order which it sought to have vacated and set aside had been made and entered by the court. The right to the relief prayed for in said petition is based entirely upon the record, and it does not appear from an inspection of said petition that any reason existed for granting the same that was not considered by the court, and which did not exist at the time when the previous order of the court denying the confirmation of the sheriff's sale was made. We think that the petition was wholly insufficient, under section 1393, 2 Hill's Code, which authorizes the court " \* \* in which a judgment has been rendered, or by which or the judge of which a final order has been made, \* \* to vacate or modify such judgment or order." We also think that the court erred in entertaining the application, inasmuch as a petition to vacate such an order is by section 1394 of said Code required to be instituted within one year from the date of such order or judgment. For these reasons the order appealed from will be reversed.

**HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, JJ., concur.**

**BALLARD et ux. v. FIRST NAT. BANK OF SLAUGHTER et al.**

(Supreme Court of Washington. Feb. 11, 1896.)

**APPEAL—EXCEPTIONS TO FINDINGS—DELAY IN TAKING.**

Where no exceptions are taken to the findings of a trial court until nearly a year after such findings are made and filed, and nine months after judgment was entered thereon, they will not be considered on appeal.

**Appeal from superior court, King county; J. W. Langley, Judge.**

Action by L. W. and Mary E. Ballard, against the First National Bank of Slaughter and J. H. Woolery, sheriff. Decree for plaintiffs, and defendants, appeal. **Affirmed.**

**Irving B. Knickerbocker and Stratton, Lewis & Gilman, for appellants. Smith & Littell, for respondents.**

**PER CURIAM.** Findings of fact were regularly made and filed in this cause on

July 13, 1894, and on October 9th following a decree was rendered in favor of the plaintiffs. The defendants took this appeal April 8, 1895. Up to this time, and until July 2d, no exceptions were taken to the findings. On said last date appellants filed exceptions. The respondents object to a consideration of the questions sought to be raised by such exceptions on the ground that the same were not filed in time, which we deem well taken, and, the decree being in harmony with the facts found, and there being no other point left for our consideration, the judgment is affirmed.

# WILSON et al. v. BOOK et al.

(Supreme Court of Washington. Feb. 11, 1896.)

BANKS—STOCKHOLDERS' LIABILITY—ENFORCEMENT—INSOLVENCY—RECEIVERS.

1. Under Const. art. 12, § 11, providing that stockholders "of any banking \* \* \* corporations \* \* \* shall be individually and personally liable \* \* \* for all contracts, debts or engagement of such corporations accruing while they remain stockholders, to the extent of the amount of their stock, \* \* \* in addition to the amount invested in such shares," a stockholder's liability is secondary, and cannot be enforced by the corporate creditors, independent of any action against the corporation.

2. On the insolvency of a corporation and appointment of a receiver therefor, the liability of stockholders is to be enforced at the suit of the receiver for the benefit of the creditors, and not at the suit of creditors.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by C. R. Wilson and others, copartners, against William P. Book and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Austin E. Griffiths, for appellants. J. B. Bridges and Ben Sheeks, for respondents.

HOYT, C. J. Two principal questions are involved in this appeal. The first is as to the nature of the liability of a stockholder for the obligation of a banking corporation over and above the amount of his stock. The constitutional provisions and statutes covering the subject of additional liability of stockholders have been expressed in various terms, some expressly and others by implication, giving the creditors an immediate right of action against the stockholders. Some provide the mode of enforcing the right; others leave it for the judiciary to work out the method. It is admitted by respondents that, by following one line of decisions, this court could construe our constitutional provision as contended for by the appellants. It is claimed, however, that a more satisfactory result will be reached by refusing to follow such decisions, and holding with others, which have established a method which, while giving full force and effect to the constitutional or statutory provisions, have been more in harmony with the fundamental principles of law and equity. Our

constitutional provision is in the following language: "Each stockholder of any banking \* \* \* corporation \* \* \* shall be individually and personally liable equally and ratably, and not one for another for all contracts, debts and engagements of such corporation \* \* \* accruing while they remain such stockholders, to the extent of the amount of their stock therein, \* \* \* in addition to the amount invested in such shares." Const. art. 12, § 11. It will be seen that there is no language which in express terms gives the creditors the immediate or any right of action. The liability is not on, but for, the contract, debt, or agreement. That the liability so provided is in addition to that flowing directly from the holding of stock which has not been fully paid for. The latter, in event of the insolvency of the corporation, is held to be a trust fund for creditors, and there is no good reason why the same should not be held as to the former. No satisfactory reason can be given for holding one to be a trust fund and the other not to be. There is no principle by which the two classes of liability can be distinguished farther than that one is primary and the other secondary; for while it is true that one can be enforced by the corporation itself, and the other only by creditors, yet they were both created for the benefit of the corporation in carrying on its business, and to secure to creditors the payment of its obligations. If the liability which is clearly primary must be treated as a trust fund for the benefit of all of the creditors of the corporation, greater reason exists why a liability which is secondary only, and created entirely for the benefit of the creditors, should likewise be treated as such trust fund. There is nothing in our constitution which defines the method by which this liability shall be made available. Hence the method must be determined by the courts, and their aim should be to prescribe one which will accomplish the object of the provision with the least inconvenience to the creditors, without unnecessary annoyance to the stockholders. A method which would allow a single creditor to maintain an action at law against one or more of the stockholders for his own benefit would be so unjust to other creditors, and might result in such annoyance to the stockholders, that only the most positive language would justify the courts in holding that the liability might be thus enforced. So to hold would enable one creditor to obtain more than his share of the fund which should be derived from this liability. Not only would such a holding allow a creditor to do this, but under it a stockholder could be subjected to a separate suit at the instance of each one of the creditors of the corporation. If this action can be maintained without the bank being made a party, it must be for the reason that such stockholder was in law a party to the contract between the creditor and the bank, and is liable to such creditor upon

such contract. If this be so, every stockholder of a banking corporation must, at his peril, keep fully advised as to the exact day when every obligation of the bank will mature. In other words, to hold that such an action can be maintained is to hold that every stockholder is, so far as the rights of the creditors are concerned, an active participant in every contract made by the bank, and, at the option of such creditors, may be at once proceeded against if for any reason the bank fails to meet its obligations the day they are due. Under such a rule, a creditor whose claim was not met the day it was due could greatly annoy any or all of the stockholders of a bank which might be entirely solvent and ready to discharge its liability to the creditor upon demand. The object of this provision was to furnish to creditors of certain corporations security which those of other kinds did not have. Stockholders of such corporations assumed a liability not imposed upon those of other kinds. But there is no good reason for holding that this liability made them active parties to the contracts of the corporations. The creditors as a body will be as well, if not better, protected if it is held that the stockholders are only sureties, and have a right to demand that the creditors shall first attempt to enforce their claims against the principal.

The courts of comparatively few of the states have gone to the extent of holding that the liability was a primary one, and could be enforced by an action against the stockholder, independent of any proceeding against the corporation; and in those states the constitutional or statutory provisions were unlike ours. In some states where the constitutional or statutory provisions are so like ours that no logical distinction can be drawn, it may have been held that the liability is primary; but this fact, if fact it be, is not of sufficient force to justify us in adopting a rule which will work hardship upon the stockholders, without increasing the security of the creditors; especially in view of the fact that courts of the highest repute have adopted a more equitable rule. Cook, in his work on Stock and Stockholders, in speaking of this liability, makes use, in section 219, of the following language: "Even when not expressly provided by statute, it is the rule, according to the weight of authority, that corporate creditors, before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets. This rule arises from the fact that the liability of the stockholders is not the usual fund for the payment of corporate debts, but that the corporate treasury is the primary resource. Accordingly, the statutory liability of the stockholders is not to be resorted to, if the assets of the corporation, including the unpaid subscriptions for stock, will suffice to pay the debts,"—and, in support of the rule so announced, cites a

large number of cases. This rule has been recognized by the supreme court of the state of Illinois. See *Low v. Buchanan*, 94 Ill. 76; *Harper v. Manufacturing Co.*, 100 Ill. 225. Decisions founded upon this rule have been rendered in the highest courts of many of the states. Most of the courts which have held that the liability was primary have held that an action at law could be maintained by any creditor against one or more of the stockholders, and such would seem to be the necessary result of such holding. But the complaint in this action shows that the plaintiffs were not willing to rest their claim upon such a construction of the provision. Their complaint was in equity, and sought to subject the liability of the stockholders to the claims of all of the creditors who might intervene in the action. That such a proceeding would bring about more equitable results than an action at law by a single creditor is clear. But even such an action could only be maintained without first having exhausted the remedy against the bank, upon the theory that the liability was primary, and not secondary. In our opinion, both reason and authority require us to hold that the additional liability of stockholders under our constitutional provision is secondary, and not primary.

This conclusion makes it necessary for us to consider the other question involved in the appeal. It is claimed on the part of the appellants that, even if the liability is secondary, the facts alleged in the complaint, that the bank was insolvent and in the hands of a receiver, showed that any attempt to enforce their claims against the bank or its property would have been ineffectual; and that for that reason they could resort to the secondary fund. But if this fund is secondary, and for the benefit of all the creditors of the corporation, it can be reached only by a proceeding in equity for the benefit of such creditors; and since, under our statute, the receiver of an insolvent corporation represents its creditors as well as the corporation itself, and can reach all the assets of the corporation for the purpose of satisfying the claims of creditors, there is no reason why the additional liability of stockholders should not, under the direction of the court, be enforced by such receiver for the benefit of such creditors, and the expense and annoyance incident to the prosecution of another action avoided. If the liability is secondary and for the benefit of all the creditors, it is a trust fund for the purpose of satisfying their claims. All the other property of an insolvent corporation is a trust fund for the same purpose, and there is no reason why trust funds for a single purpose, though derived from different sources, should not be collected and administered in the same proceeding. It is conceded that the appointment of a receiver for an insolvent corporation is the commencement of a proceeding to enforce liabilities of one kind,

the proceeds of which will constitute a trust fund for the benefit of creditors, and there is no good reason why another should be commenced to accomplish the same purpose as to liabilities of another kind. The receiver, when appointed, takes possession of all the property of the corporation for the benefit of all its creditors; and it should be held that he has the right, under the direction of the court, to enforce every liability, of whatever nature, which the court may find necessary to fully protect the rights of the creditors. In this way all creditors will share alike, and the entire affairs of the corporation, including the adjustment of the liabilities of its stockholders, will be subject to the control of the court in a single action, and unnecessary delay and expense prevented. The judgment will be affirmed.

SCOTT, DUNBAR, and GORDON, JJ., concur. ANDERS, J., concurs in the result.

**PENNSYLVANIA MORTG. INV. CO. v.  
GILBERT et al.**

(Supreme Court of Washington. Feb. 13, 1896.)

APPEAL—APPEALABLE ORDER—JUDICIAL SALE—RELATION OF TITLE—JUDGMENT.

1. An order dismissing an action as to some of the defendants, though not all, is appealable.

2. Two attachments had been issued in an action, and an order of dissolution entered, but whether it applied to both or only one of the attachments was disputed, and not clearly shown by the record. Judgment was rendered in the action, execution issued, realty which had been covered by one of the attachments sold thereon, and the sale confirmed. Neither the judgment nor any subsequent proceeding contained any reference to the attachments. *Held*, that the title acquired under the sale related only to the time when lien was acquired under the judgment.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by the Pennsylvania Mortgage Investment Company against Harry Gilbert and others. From an order of dismissal as to some of the defendants, plaintiff appeals. Reversed.

Jones, Voorhees & Stephens, for appellant. W. A. Lewis and Peacock & Bushnell, for respondents.

SCOTT, J. This action was brought by the plaintiff to foreclose a mortgage on certain real estate situate in the city of Spokane, executed by Harry Gilbert and Mary Gilbert to the plaintiff, January 18, 1891. The respondents W. A. Lewis and his wife, Fannie B. Lewis, Jacob Hoover and his wife, Ella A. Hoover, were made defendants on the ground that they claimed some interest in the premises, which interest was alleged to be subsequent and subject to the plaintiff's mortgage. The respondents Lewis and wife and Hoover and wife appeared and answered, alleging that they were owners of the premises in dispute, and that their title

was prior and paramount to plaintiff's claim. A trial was had, and upon a motion of said respondents the court dismissed the action as to them, and the plaintiff appealed. The respondents moved to dismiss the appeal on the ground that the same was not an appealable order, as there had been no final judgment rendered in said action against the other defendants. But we do not think this contention can be sustained, for, if the claim of said respondents was subject to the claim of the plaintiff, the plaintiff had a right to have the same foreclosed in the final judgment, and should not be compelled to take a decree solely against the other defendants who made no defense, as the judgment against them would leave the issues as between the plaintiff and said respondents undetermined. We held the order appealable, and for that reason the motion to dismiss was denied at the hearing.

The respondents' contention upon the merits as to the judgment dismissing them from the action is based upon the proceedings in a certain action brought against the mortgagor, Harry Gilbert, on November 26, 1888, to recover a sum of money. In this action an attachment was issued and levied upon certain real estate, and there is a contention between the parties as to whether the description of the property attached included the property in controversy in this action. A motion to dissolve this attachment was filed, and on May 20, 1889, while said motion was undisposed of, a second attachment was issued in said action, which it is conceded was levied upon the property in controversy. It is contended by appellant that another motion to dissolve this second attachment was also filed, together with a notice that the same would be called up for hearing on October 26, 1889. This motion and notice were missing from the files in said cause, and one of the grounds of error alleged by the appellant is that the court erred in refusing to permit appellant to make proof of the filing of said motion and notice, and the contents thereof. But we do not find it necessary to pass upon this point. On the 26th day of October the court made an order relating to the dissolution of said attachment or attachments, and over this order the main controversy arises, it being contended by appellant that said order dissolved both attachments, and by the respondents that it dissolved only the first attachment issued, and that no action was taken upon the second attachment. Several copies of said order appear in the records, which seem to be contradictory, one of them mentioning that the attachment was dissolved, and the other that the attachments were dissolved. The respondents have submitted a photographic copy of the order as on file, showing that the order read "attachments," as it then appeared, but it is contended that the same had been altered and changed by some person without authority, after the

same had been signed by the judge, to make it read in the plural, instead of the singular; and it is contended that this claim is supported by certain entries made in other records by the clerk of the court relating to the filing of papers, etc., and also by the fact that no motion to dissolve the second attachment appears in the files. The records of the court in this respect are in an uncertain and unsatisfactory condition. The judgment rendered in said suit contained no reference to any property of the defendants as being under attachment; nor did the execution, the levy and sale, the confirmation thereof, and the deed issued thereunder purport to relate back to any prior time or make any reference to any attachment lien, but simply purported to convey a title as under an ordinary execution sale. When the cause was called for trial said respondents moved the court to dismiss the action as to them on the ground that they were asserting a title which was prior, paramount, and adverse to the plaintiff's claim, but the court ruled that, as the allegations of the respondents' answer in that respect were controverted by the plaintiff's reply, the court was of the opinion that it ought to go far enough into the evidence to ascertain the bona fides of the defendants' contention, and would not pass upon the motion at that time, and the trial of that matter was entered upon. No complaint is made by the respondents as to the action of the court in this respect, and the motion was renewed after the proofs were in. It is contended by the respondents that all their evidence as to the question of priority was not submitted to the court, but that they offered enough to show that they in good faith asserted such a claim, and that that was all the lower court passed upon, and in rendering its judgment of dismissal the court indicated that it only considered it necessary to examine into said claim sufficiently to see whether it was asserted in good faith. The evidence introduced was the record of the proceedings in said prior action, and there is nothing before us to indicate that the respondents had any further or other proof to submit. In fact it would appear that said matter had been fully litigated upon the merits. But, however this may be, we are satisfied that the findings of the court upon the proofs introduced were wrong, and that there was no foundation for the assertion by the respondents of a prior and paramount title to the premises in controversy. The judgment in said action was rendered in May, 1891, some months after the appellant's mortgage claim originated. While it may not be necessary in such a judgment to direct a sale of property under attachment, if there is any, it would be a better practice to do so. Also the subsequent proceedings should regularly relate back by direct reference to the time of the attachment, if it is desired and intended to convey a title

as of that date. We do not, however, hold in this case that such a reference was necessary in order to transfer a title which would relate back to the lien obtained by an attachment, but, under all the circumstances of this case, we are satisfied from the proofs that there were no attachment liens in force at the time the judgment was taken. The order of dissolution was made months after both attachments were levied, and, as this order was not in terms confined to the prior attachment, we think that the fair scope of it included both of the attachments issued in that same cause, and both of which, according to the contention of the respondents, covered the property in controversy. There is nothing upon the face of the order that condemns it, in our opinion. The plaintiff in that case, by using ordinary care, could have made the matter certain beyond controversy if the order of the court was not designed to affect the subsequent attachment. This could have been done when the order was entered, and should have been, if it was limited to a part of the property only,—that part which had been seized upon the first writ issued; and as affected by that seizure only, all of the property had been attached in that action, and, in the absence of anything to the contrary, it should be presumed that the proceedings to dissolve were directed against all of the property seized, whether it was seized under one or more writs. It could also have been made certain in the judgment which was entered finally in that action, or in the subsequent proceedings relating to the execution sale and its confirmation and the deed thereunder, but the plaintiff in that action made no attempt to do so, and we think the proofs clearly indicate that there were no such liens in existence when the judgment was rendered. This being so, the claims of the defendants were subsequent to the appellant's mortgage, and the court erred in dismissing them from the action. Reversed.

ANDERS and GORDON, JJ., concur.

HOYT, C. J., did not sit at the hearing.

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DONOHUE-KELLY BANKING CO. v.  
PUGET SOUND SAV. BANK et al.  
(Supreme Court of Washington. Feb. 14, 1896.)  
On rehearing. Modified.  
For former opinion, see 43 Pac. 359.

PER CURIAM. The attention of the court is called by the petition for rehearing in this case to the fact that the appellants alleged as error the assessment of the amount of recovery, the same being too large. In the interest of the discussion of the main question involved in this case, this matter was overlooked. It is claimed by the appellants that

the verdict exceeded the amount due on the note by \$37.51. As this claim was made in the brief of the appellants, and not controverted by the brief of the respondent, we will treat it as an accepted fact, without entering into a computation of the interest due on the note sued on. The original opinion will therefore be modified, to the extent that the judgment will be affirmed upon the remittance by the respondent of \$37.51.

### COGGINS v. CITY OF SEATTLE.

(Supreme Court of Washington. Feb. 11, 1896.)

#### CONTRACT—INTERPRETATION.

A contract with a city for hauling water pipes from the cars provided that the contractor was to haul such amounts as he was directed to the city wharf, or to other points, and afterwards to haul such amounts as directed where they were needed for the city water system, and that for those hauled from the cars to the wharf, and piled there, he was to receive 40 cents per ton; for those from the cars to any other point, as directed, including delivery at or along the designated point, 85 cents per ton; and for those from the wharf to any point in the city, including distribution along the designated point, as directed, 80 cents per ton. *Held* that, the wharf proving insecure, the contractor was entitled to receive 85 cents per ton for pipe hauled from the cars to places in lieu of the wharf, and for piling it there. Hoyt, C. J., dissenting.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Peter Coggins against the city of Seattle on contract for hauling water pipes. From an order directing a verdict for defendant, plaintiff appeals. Reversed.

Allen & Powell, for appellant. W. T. Scott and Frank A. Steele, for respondent.

SCOTT, J. Appellant brought this action to recover the sum of \$202.79, alleged to be due him from the city for hauling water pipe under a written contract, the material parts of which are as follows: "Whereas, it is desired, on the part of said city, that said pipe be hauled from said cars to the wharf occupied by the city near the foot of Spring street, or to other points of the city as may hereafter be determined upon: Now, therefore, it is hereby agreed as follows: Said party of the second part [Coggins] agrees that, upon the arrival of said pipe, he will, with reasonable diligence and promptness, haul such quantities and amounts thereof as the superintendent of waterworks shall direct, to the said wharf, occupied by the city, near the foot of Spring street, in said city, and with like diligence and promptness will haul such quantity and amount of such pipe to other points in the city as shall be directed by said superintendent of the waterworks, and that he will thereafter haul such quantities and amount of said pipe as said superintendent shall direct, where the same is needed for the water system of the city. \* \* \* In all cases, said pipe shall be delivered at the point or points, or along such

routes, designated by said superintendent. When any of said pipe is hauled from cars, said party of the second part shall unload the same from the cars, and the cost of such unloading is included in the cost of hauling as hereinafter stated. In all cases when pipe is being hauled, it shall be piled in such manner as the said superintendent shall direct, and the cost of piling shall be included in the price for hauling as hereinafter stated. \* \* \* And the party of the first part [the city of Seattle] hereby agrees to pay the party of the second part, for the due and punctual performance of this agreement, at the following rates, to wit: For all pipe unloaded from cars, hauled and piled on said wharf, forty cents (40) per ton. For all pipe unloaded and hauled from cars to any part of the city other than said wharf, as directed by said superintendent, including delivery at such points, or along such routes, as said superintendent shall direct, eighty-five cents (85) per ton. For all pipe hauled from said wharf to any part of the city, as directed by said superintendent, including delivery at and along points or routes so designated, eighty cents (80) per ton." After some of the pipe had been hauled to the Spring Street wharf, the superintendent of the waterworks directed appellant to haul no more pipe there, and told him to haul a certain quantity of it to the corner of Jackson and South Second streets, and to the corner of Grant and Dearborn streets, in said city, and the rate for this hauling is the matter in dispute; the appellant claiming the rate to be 85 cents, and the respondent 40 cents, per ton. Issue was joined, and a trial had, and the court instructed the jury to find a verdict for the defendant.

Some proof was introduced to show a subsequent agreement between the parties to the effect that the appellant agreed to haul the pipe to the localities in question in lieu of and for the same price that he was to haul the same to the Spring Street wharf. But this was a disputed question; and, the court having instructed the jury to find for the defendant, the only point to be considered upon this appeal is the construction of the contract. The respondent contends that it is apparent that the object in placing the pipe at the Spring Street wharf was simply to store it, for which only 40 cents a ton was to be charged, and that, after a portion of it had been stored there, it was found that said wharf was insecure, and that appellant was directed to haul the pipe to the other localities mentioned for the purpose of storing it there, in lieu of the Spring Street wharf, and that he could recover only 40 cents therefor, under the contract. It seems the court construed the contract to mean that the appellant was entitled to receive only 40 cents a ton for hauling the pipe from the cars to these other localities, or to any other points that the superintendent of waterworks might direct, in lieu of the wharf. But we cannot

agree with this construction. The terms of the contract are plain and unambiguous. If the plaintiff was required to haul the pipe to the wharf, he was to receive 40 cents per ton; and if he was required to haul it from the cars to any other place in the city, he was to receive 85 cents per ton; and if from the wharf to any other part of the city, 80 cents per ton. And, under the terms of this contract, appellant was entitled to recover. As to whether a subsequent contract was entered into to deliver the pipe at the points mentioned in lieu of the Spring Street wharf was a question of fact for the jury. Reversed.

DUNBAR, ANDERS, and GORDON, JJ., concur.

HOYT, C. J. (dissenting). In my opinion, the contract provided two prices for hauling,—one to the place of storage, and the other to the place where the pipe was to be used, the latter to include distribution along the line. I therefore think that the ruling of the superior court was right, and should be affirmed.

#### HOLMES & BULL FURNITURE CO. v. HEDGES, County Treasurer.

(Supreme Court of Washington. Feb. 14, 1896.)

SCHOOL DISTRICTS — INDEBTEDNESS — CONSTITUTIONAL LAW — SELF-EXECUTING ENACTMENTS — SCHOOL ELECTIONS — RIGHT OF WOMEN TO VOTE — SPECIAL LEGISLATION.

1. Const. art. 8, § 6, declaring that no school district shall become indebted, to an amount exceeding 1½ per centum of its taxable property, "without the assent of three-fifths of the voters therein voting at an election to be held for that purpose," does not require the express assent of the legislature to the holding of such election, but is self-executing, so far as to allow the question of extending the debt limit to be voted on at an election called by the officers of the school district, in accordance with existing general enactments regulating the holding of annual and special school district elections.

2. The provisions of the act of March 27, 1890, establishing a uniform system of common schools, apply to a school district organized under an act relating to schools in cities of 10,000 or more inhabitants, in so far as they are not inconsistent with that act.

3. Under Const. art. 6, § 2, authorizing the legislature to provide that there shall be no denial of the elective franchise at any school election on account of sex; and the common school act of March 27, 1890, § 68, providing that "every person, male or female," possessing certain qualifications, shall be a legal voter at any school election,—women are entitled to vote on the question of increasing the debt limit of a school district, though such district was organized under an act relating to cities of 10,000 or more inhabitants.

4. A school law is not unconstitutional, as special legislation, because it provides a different and better system of education for cities of 10,000 or more inhabitants than is enjoyed by the rest of the state.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Petition by the Holmes & Bull Furniture Company for a writ of mandamus to compel

John B. Hedges, county treasurer of Pierce county, to pay or indorse a warrant held by plaintiff. From a judgment overruling a demurrer to the petition, defendant appeals. Affirmed.

Coiner & Shackleford, for appellant. Snell & Bedford, for respondent.

GORDON, J. This proceeding was instituted to compel the appellant, the county treasurer of Pierce county, to pay a warrant of school district No. 10, held by respondent, or to indorse upon such warrant the statutory indorsement, "Presented for payment, and not paid for want of funds," if appellant, as treasurer, had not sufficient available funds to pay it. The application for the writ shows that, at the time of the creation of the debt represented by the warrant in question, school district No. 10, aforesaid, was in debt largely in excess of 1½ per centum of the taxable property within said district. Also, that the proper officers of the district had submitted to the legal voters therein, at an election held for that purpose, a proposition to permit the district to become indebted to the amount of 2 per cent. of its assessed valuation. It further appears that, at such election, more than three-fifths of the voters had voted in favor of the proposition. It is conceded that if this enabled the district to incur debts to the amount of 2 per cent. of the taxable property, then the warrant of respondent is valid, and the writ of mandate prayed for should be awarded. The appellant demurred to the petition in the court below, and, his demurrer having been overruled, an appeal was taken, which brings the case to this court.

Section 6, art. 8, of the state constitution provides that "no county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose." The objections made by the appellant to the legality of the warrant in question are: (1) That the constitutional provision, above quoted, in so far as it provides for the taking of the assent of the voters at the election, is not self-executing, and that it is necessary that the legislature should assent to the holding of such election; (2) that there is no provision authorizing women to vote at such an election, and that therefore an election held at which women were allowed to vote, as in the present case, would be void; (3) that the act under which school district No. 10 was incorporated is unconstitutional, in that it is special or class legislation.

1. The first of these objections is most strongly relied upon by counsel for appellant, and it is not without some difficulty that we



have reached a conclusion. After an extended examination of the subject, we are unable to agree with the contention of the appellant that "it is necessary that the legislature shall assent to the holding of such election." We think that if the legislature has, by general enactment, made provision whereby the officers of school districts may call elections, and has determined the character of the notice to be given thereof, and the manner for conducting the same and declaring the result, these provisions, in themselves, are sufficient; that the right to give or withhold assent to the incurring of the indebtedness belongs, under the constitution, to the voters, without other legislative authority or permission; that, to this extent, at least, the provision of the constitution in question is self-executing. The provision of the constitution should be construed as amounting to something more than a limitation upon legislative discretion. True, the provision, in and of itself, is silent as to the manner of holding such elections; but the legislature, by general enactment, has provided the manner for calling and conducting both annual and special school elections, and, indeed, like provisions existed in the territorial statutes at the time of the adoption of the constitution, and these provisions were by the constitution continued in force, subject, of course, to the power of the legislature to alter or repeal them, of which provisions it is only fair to presume that the framers of that instrument had full and necessary information. The contention of the appellant, if upheld, would be, in effect, to insert after the word "assent," in the constitutional provision, the words "of the legislature and." We think neither reason nor necessity requires that this be done. Section 1, art. 9, of the constitution declares that "it is the paramount duty of the state to make ample provision for the education of all children residing within its borders." It must not be forgotten that school districts throughout the Union are provided for, and were in existence here under territorial legislation at the time of the adoption of our state constitution; and while it is true that there must be a district lawfully created and organized upon which the provision of the constitution can operate, and that the creation and organization of such district must rest entirely with the legislature, nevertheless, in view of the language of section 1, art. 9, above quoted, and of the universal legislative practice, it was not to be supposed by the framers of the constitution that the legislature would fail to make provision for the organization of school districts. But, however that may be, the legislature has made ample provision for their organization, and also for the holding of general and special elections therein. We think that, having provided the means for enabling the voters of any school district to determine for themselves the propriety of extending the debt limit of the district, no further legislative ac-

tion was necessary, and that, with the aid of the machinery so provided, the constitutional provision under consideration becomes operative and effectual. In *Schertz v. Bank*, 47 Ill. App. 124, the court say: "A constitution may be, and often is, drawn with a view of submitting the matter to the legislature by enactment, to give it vital force and effect, and to leave it in abeyance until such time as the legislature sees fit to act; but, on the contrary, framers of constitutions often enact complete legislation, and there seems, in modern times, more of a tendency to adopt such a course than formerly. Where a principle is regarded as fundamental and of vital importance, the framers of the constitutions are apt to fix the matter irrevocably by complete enactment, intending to put it out of the power of a legislature to alter or change it, or to render it nugatory by nonaction. The power of a constitutional convention to legislate, we suppose, cannot be questioned. It may go as far [as] it wills in that direction. In any given case, it is only a matter of intention, to be deduced from the natural import of the language that we have to deal with." In *Cooley's Constitutional Limitations* (5th Ed.), at page 100, the learned author says: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." We think that the framers of the constitution intended, by section 6, art. 8, not merely to define, but to confer upon the voters of a school district, city, or county, when legally organized, the right to determine for themselves the propriety of incurring additional indebtedness, and for that purpose to make use of the general machinery which the law afforded for holding and conducting elections beyond this, and that the express assent of the legislature for that purpose was not considered necessary. The provision, "as far as it extends, has the form and properties of a law declarative of the will and purpose of the sovereignty." *Miller v. Marx*, 55 Ala. 322. It is legislative in its character, and was not intended merely as a limitation upon legislative power. No case has been cited, nor have we been able to discover one, bearing directly upon this branch of the question; but we may cite, as bearing upon the principle involved, *People v. Bradley*, 60 Ill. 390; *People v. Hoge*, 55 Cal. 612; *Friedman v. Mathes*, 8 Heisk. 488; *People v. Roberts* (Sup.) 34 N. Y. Supp. 641; *Wells v. Com.* (Ky.) 22 S. W. 552; *Parker County v. Jackson* (Tex. Civ. App.) 23 S. W. 924; *Sanders v. Com.* (Ky.) 18 S. W. 528; *Beecher v. Baly*, 7 Mich. 487.

But it is further contended that the general provisions of law concerning the holding of

annual and special school elections are not applicable to an election for the purpose of increasing the debt limit, and that they refer merely to elections the power to call which has been specially conferred upon school districts. Section 6 of the act of March 10, 1893 (Sess. Laws 1893, p. 268), after providing the time for holding the annual elections, contains this further provision: "Special school elections shall be called and conducted in the manner provided for calling and conducting annual elections." Section 822, 1 Hill's Code, provides that notice of a school election must be given by the district clerk for at least 10 days prior to the election. Also, that "said notice must designate the place of holding the election, day of holding the election, hours between which polls are to be kept open, names of offices for which persons are to be elected, and terms of office, with a statement of any other questions which the board of directors may desire to submit to the electors of said district." Provision is also made, in that act, for conducting the election and canvassing the returns; and we think that the provisions of the act of March 27, 1890, entitled "An act to establish a general uniform system of common schools in the state of Washington," are applicable to district No. 10, notwithstanding that said district is organized under an act relating to schools in cities of 10,000 or more inhabitants, excepting only in so far as said last-mentioned act may be inconsistent with, or provide a different method of procedure than, that provided for in the act of March 27, 1890. But, were we to agree with the contention of appellant's counsel in this particular, viz. that the general provisions of law relating to school elections, annual and special, should be restricted to such elections only as are particularly enumerated by the statute, we think it would then follow that the election could be held in accordance with the law providing for general elections in the same territory. In *People v. Dutcher*, 56 Ill. 144, the court say: "Where legislation is adopted in reference to the action of an incorporated body, and no mode is prescribed in which it shall be performed, the presumption must be indulged that it is intended that the body shall act through its officers, and in the course usually adopted and authorized by the law governing the action of the body. And, this being the rule, when the legislature has authorized this township as a corporate body to hold an election, and has prescribed no mode, a majority of the court hold that it was designed to authorize it to be in the manner township elections are required to be held in the election of their officers, and not under the general election laws. And it appears that this election was conducted in conformity to the law of its organization." In *People v. Hoge*, supra, the supreme court of California had under consideration section 8, art. 11, of the constitution of that state, providing that "any city con-

taining a population of more than one hundred thousand inhabitants may frame a charter for its government, \* \* \* by causing a board of fifteen freeholders \* \* \* to be elected by the qualified voters of such city at any general or special election." No provision was made for holding such an election, and in this respect that section may be likened to the section of our constitution here involved. An election of freeholders was held in the city of San Francisco, not pursuant to any act passed by the legislature after the adoption of the constitutional provision; but said election was called by the board of election commissioners pursuant to legislative enactments passed prior to the adoption of said constitutional provision. It was contended, in that case, that legislation was needed to give effect to section 8, art. 11, of the constitution; but the court held otherwise, saying: "The only condition imposed by the foregoing constitutional provision to make such election valid is that the freeholders must be chosen at a general or special election, and in this case that condition was fulfilled." So in the case at bar. "The condition imposed" (by section 6, art. 8, of the constitution of this state) to make such indebtedness valid is "the assent of three-fifths of the voters therein voting at an election to be held for that purpose." So that, whether we regard the language of the general provisions of law applicable to school elections as sufficient to warrant the proper officers of a school district to submit this question to the legal voters of their district or otherwise, the conclusion in either case is that, the election having been held in the manner provided by law for the holding of all school elections, either general or special, and the requisite number of the voters having given their assent thereto, such assent is binding upon the district, and is sufficient for the purposes of the constitution.

But counsel for the appellant, in their brief, inquire: "If the assent of the legislature is not necessary to enable a school district, with the assent of three-fifths of its voters, to increase its debt limit, why is it necessary to have the consent of the legislature to the validation of debts when three-fifths of the voters assent to such validation after the incurring of the indebtedness?" We think the distinction is clear between an act conferring authority upon a municipal corporation to ratify the attempted incurring of an indebtedness, and a provision of the statute or of the constitution which points out the manner in which the indebtedness may in the first instance be legally incurred. In *Hunt v. Fawcett*, 8 Wash. 396, 36 Pac. 318, this court, in construing an act of the former character, observes: "This statute is essentially a curative statute, and is only operative upon past transactions. It grants no license to create debts, but it provides, in clear and explicit language, the only method whereby indebtedness honestly attempted to be created for

legitimate purposes may be ratified." A different question was presented in the case of *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462. In that case this court was dealing with a provision of a city charter granted by the territorial legislature before the adoption of the constitution. Section 3 of the act of Feb. 1, 1888 (Laws 1887-88, p. 74), provided "that thereafter \* \* \* indebtedness shall not be created in excess of one per centum upon the assessed valuation of property except for the purposes of purchasing, paying for or constructing buildings for the use of such counties, cities, school districts or incorporated towns or villages," etc. Section 5 of the act of February 26, 1890 (Sess. Laws, 1889-90, p. 225), provided "that any indebtedness now owing by any such city or town, contracted strictly for municipal purposes, whether the same exceeds the amount which such city or town was authorized to contract under its charter or not, is hereby validated and declared to be a binding obligation upon such city or town when the only ground of the invalidity of such indebtedness is that it exceeds the amount authorized by the charter of such city or town: provided, that if said indebtedness exceeds one and one-half per centum, including present indebtedness, upon the taxable property therein, to be ascertained as hereinbefore provided, then such indebtedness shall not be deemed to be validated by this act until three-fifths of the voters in such city or town shall assent to the same, at an election held for that purpose, in the manner provided by section two of this act." It will be observed that, in that case, the limitation upon the power of the corporate authorities of the city of Seattle to incur indebtedness was imposed by a territorial statute. The constitution at that time was not in force. Under these conditions, this court, on page 587, 2 Wash., and 462, 27 Pac., said: "We are therefore constrained to view this case as one within the principle long sustained by the courts, that where a municipal corporation has done an act beyond its statutory powers, but within the powers which it was competent for the legislature to have conferred upon it, the act may be validated by a curative statute." While there may be found, in the course of the lengthy opinion in that case, some general expressions which might at first glance seem to be at variance with the views here advanced, we are satisfied that a careful reading will show that no conflict exists, and that the conclusion reached harmonizes with what we have here decided.

2. As to the objection that there is no provision authorizing women to vote at such an election, the position of counsel for appellant is that the act in relation to schools in cities of 10,000 or more inhabitants contains nothing whatever in reference to the qualification of voters, and that a person offering to vote at an election within such districts must possess the qualifications prescribed by the con-

stitution. Section 1, art. 6, of the constitution prescribes the qualifications of voters, and provides that all male persons possessing these qualifications shall be entitled to vote at all elections. Section 2 of that article is as follows: "The legislature may provide that there shall be no denial of the elective franchise at any school election on account of sex." Section 58 of the act of March 27, 1890, entitled "An act to establish a general, uniform system of common schools," provides that "every person, male or female," possessing certain qualifications, shall be legal voters of any school election. As observed in connection with the questions already considered in this opinion, we think that the provisions of that act are applicable to schools in cities of 10,000 or more inhabitants, and, by virtue of section 58, women were legally entitled to vote at the election in question.

3. The appellant insists that, by the terms of this act, under which district No. 10 was incorporated, a different and better system of education is provided for cities than was enjoyed by the rest of the state; that, therefore, the act is special legislation and in contravention of the provisions of the constitution. With this contention we cannot agree. As was held in *Landis v. Ashworth* (N. J. Sup.) 31 Atl. 1017, the constitution did not require the legislature to provide the same means of instruction for all children in the state. "A scheme to accomplish that result would compel either the abandonment of all public schools designed for the higher education of youth, or the establishment of such schools in every section of the state within reach of daily attendance by all the children there residing." We think that the cases cited by counsel for the appellant upon this branch of the controversy are not in point, and that the act in question is constitutional. The judgment is affirmed.

DUNBAR and ANDERS, JJ., concur.

#### STATE v. STEEVES.

(Supreme Court of Oregon. March 2, 1896.)

CRIMINAL LAW—APPEAL—REVIEW—INDICTMENT—ACCESSORY BEFORE THE FACT—IMPANELING JURY—CHALLENGES—WITNESS—IMPEACHMENT—ONCE IN JEOPARDY—NEW TRIAL.

1. On appeal from a conviction for manslaughter in a trial for murder defendant cannot object to the indictment as insufficient to charge murder.

2. Const. art. 1, § 11, giving an accused the right to demand the nature and cause of the accusation against him, does not render unconstitutional Hill's Ann. Laws, § 2011, abolishing the distinction between principal and accessory before the fact, and providing that both shall be indicted, tried, and punished as principals, and prevent an accused who procured the commission of a homicide, but who was not present at the killing, from being convicted on an indictment merely charging him with the commission of the overt act.

3. On the separate trial of a defendant joint-

ly indicted for murder, on the theory that he was an accessory before the fact, his codefendant having been convicted, it is error to refuse to permit him to interrogate jurors as to their opinion of his codefendant's guilt, so as to enable him to intelligently use his peremptory challenges.

4. An objection to the admittance of evidence on the ground that the witness was incompetent on account of a conviction for murder cannot be raised for the first time on appeal.

5. Where it is sought to impeach a witness by statements in a confession involuntarily made, which was reduced to writing, and signed by the witness, the writing itself must be shown to the witness when the foundation is being made for the admission of statements contained therein.

6. On the separate trial of a defendant jointly indicted for murder, on the theory that he procured his codefendant to commit the homicide, that the codefendant, when placed on the stand by the state, denies having made statements that defendant offered him money to do away with deceased, and that he had received money from defendant, does not entitle the state to impeach him by introducing contradictory statements in a confession by the witness involuntarily made.

7. Where, under an indictment for murder, defendant is convicted of manslaughter, on new trial, after reversal, he cannot be again tried for murder.

8. A principal may be convicted of murder in the second degree and an accessory before the fact of manslaughter.

Appeal from circuit court, Multnomah county; T. A. Stephens, Judge.

X. N. Steeves was convicted of manslaughter, and appeals. Reversed.

Rufus Mallory, for appellant. C. M. Idleman, Atty. Gen., and W. T. Hume, Dist. Atty., for the State.

MOORE, J. The defendant was jointly indicted with one Joseph Kelly for the crime of murder in the first degree, alleged to have been committed in the killing of one George W. Sayres. They had separate trials. Kelly, having been first tried, was convicted of murder in the second degree (*State v. Kelly*, 42 Pac. 217), and the defendant of manslaughter, and, being sentenced to imprisonment in the penitentiary for the term of 15 years, and to pay a fine of \$1,000, appeals, assigning numerous errors, a few of which we will consider.

1. It is contended that the indictment does not charge murder in any degree. This cannot avail the defendant. He, having been convicted of manslaughter only, can have no valid reason to question the sufficiency of the indictment for a failure to allege murder in either degree. The principle for which he contends implies that the facts constituting the crime of manslaughter are properly stated, and, having been convicted thereof, it is manifest that the indictment is sufficient to support the judgment.

2. The defendant's counsel, after the state had introduced its evidence and rested, moved the court to direct the jury to return a verdict of acquittal on the ground, *inter alia*, that the indictment did not charge the defendant with the commission of the alleged crime for which he had been tried. The motion having been overruled, and an excep-

tion allowed, it is insisted that the court erred in its refusal to so direct. It was not claimed at the trial that the defendant was present at the killing of Sayres, but it was insisted by the state, and the evidence introduced by it was in support of the theory, that Steeves counseled and procured Kelly to kill the deceased. The indictment charged the defendant with the commission of the overt act, and it is claimed that, instead thereof, he should have been charged as an accessory before the fact, and that to charge him as a principal violated the provision of the constitution which guarantees to the accused the right to demand the nature and cause of the accusation against him. Const. art. 1, § 11. The statute having prescribed that the indictment must contain a statement of the acts constituting the offense in ordinary and concise language without repetition, in such a manner as to enable a person of common understanding to know what is intended (*Hill's Ann. Laws Or.* § 1237), it is also claimed that the defendant could not know, from an inspection of the charge, that an attempt would be made to prove that he was an accessory before the fact, and that his right to be so informed was guaranteed by the organic law of the state. At the common law all persons who participated in any manner in the commission of high treason or misdemeanor were treated as principals, but accessories before and after the fact were recognized in the commission of felonies. 4 Bl. Comm. 85. Principals and accessories were punished alike by the general rule of the ancient law, but Blackstone says the difference between these classes of offenders was observed "that the accused may know how to defend himself when indicted." *Id.* 39. The accessory could not be arraigned until after the attainder of the principal, unless he chose it, for he might waive the benefit of the law, and be tried with the principal. *Id.* 323. Those who would be accessories after the fact in felony would in treason be regarded as principals, but they were nevertheless treated in every particular as accessories. The charge in the indictment against them had to specify the accessorial nature of the offense, and they could not be convicted in advance of the principal. 1 Bish. Cr. Law, § 701. And those who in felony would be treated as accessories before the fact would in treason be also regarded as principals, but they might be directly charged with having done the overt act, or with having performed it through the agency of another. *Id.* § 682. "The legal distinction between the accessory before the fact and the principal," says Mr. Bishop, "rests solely on authority; for it is without foundation, either in reason or the ordinary doctrines of the law. The general rule in our jurisprudence, civil and criminal, is that what one does through another's agency he does, in point of law, himself." *Id.* § 673. Our stat-

ute has amended the rules of the common law upon this subject, and now treats all persons concerned in the commission of a crime as principals (section 2011, Hill's Ann. Laws Or.), and also provides that: "The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the crime, or aid and abet in its commission, though not present, must hereafter be indicted, tried, and punished as principals, as in the case of a misdemeanor." Id. § 1289. The defendant's contention proceeds upon the theory that the section just quoted violates the provision of the constitution which guaranties to the accused the right to demand the nature and cause of the accusation against him. In support of the principle contended for, our attention has been called to the case of *People v. Campbell*, 40 Cal. 129, in which Crockett, J., says: "The accessory is to be indicted, tried, and punished as a principal. Nevertheless, the particular acts which establish that he aided and abetted the crime, and thus became in law a principal, must be stated in the indictment. When these facts are averred and proved, the law considers the accused to be a principal, and condemns him accordingly." But in *People v. Outeveras*, 48 Cal. 19, the court, reviewing the principle announced in the preceding case, held that, the statute having abrogated the distinction between a principal and an accessory, each might be indicted, tried, convicted, and punished as a principal; thus reversing one of the cases upon the authority of which the defendant relies. This doctrine was reaffirmed in *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36, but in these cases the defendants were present, aiding and abetting in the commission of the respective crimes with which they were charged, and at common law would have been denominated principals of the second degree. 1 Bish. Cr. Law, § 648. So, too, in *State v. Moran*, 15 Or. 262, 14 Pac. 419, it was held that under the statute abrogating the distinction between principals and accessories any person concerned in the commission of the crime is a principal, and he is to be charged as such whether he directly committed the act or not, and all evidence tending to prove his complicity is admissible under that form of the indictment. In that case it was admitted that Moran was an accomplice in the administering of morphine which caused the death of one Frederick Kaluscha. To the person who is present, aiding and abetting another in the commission of a crime, being a principal, the abrogation of the distinction between principals and accessories can have no application. *State v. Fitzhugh*, 2 Or. 227; *State v. Kirk*, 10 Or. 505. It has been held that a statute prescribing the form of the indictment

which does not inform the accused of the nature and cause of the accusation against him was violative of the organic law of a state which guarantied such a right. *McLaughlin v. State*, 45 Ind. 338; *People v. Olmstead*, 30 Mich. 432. In *State v. O'Flaherty*, 7 Nev. 153, it was held that the power of the legislature to mold and fashion the form of an indictment is plenary, but a statement in some form, of essential and material facts, cannot be dispensed with; and to the same effect is *Brown v. People*, 29 Mich. 232. In *State v. Duncan*, 35 Pac. 117, the supreme court of Washington, under a constitution containing a clause identical with ours (section 22, art. 1, Const. Wash.), held that an accessory before the fact may be charged in the information with the commission of the crime as a principal; but no reference is made by the court to that section of the constitution. As we have seen there exists no valid reason for the distinction between an accessory before the fact and a principal. How, then, can it be said that the statute abrogating the distinction between these classes of offenders violates the organic law of the state? When, the accessory before the fact is charged with the commission of the overt act, he is thereby substantially informed of "the nature and cause of the accusation against him." The person who counsels or procures another to commit a crime is by the statute properly deemed and considered as a principal, for in civil proceedings the maxim "Qui facit per alium facit per se" is applied to the relations of principal and agent; and, since the rule of the common law has been changed requiring the state to establish the guilt of the accused beyond a reasonable doubt, instead of requiring him to prove his innocence, there is no just reason why the same maxim should not now be invoked in criminal procedure; and, the overt act having been performed by him through his agent, the constitution, in our judgment, is not violated when the accessory before the fact is charged directly with having committed the crime. It is the intent of him that counsels or procures another to violate the law, coupled with the intent and act of the person who in pursuance thereof executes the original design, that constitutes the commission of the crime by the accessory before the fact. No crime is committed until the agent executes the orders of his principal, and the criminal responsibility of him who procured the act to be performed depends upon its performance by the agent. The most potent objection urged against an indictment charging an accessory before the fact with the commission of the overt act is that the accused, being innocent, may have prepared for trial upon the expectation that evidence would be introduced tending to support the charge as laid, and might not know anything to the contrary until the jury had been impaneled, and then surprised by learning

from the statement made by the prosecuting attorney the real nature of the accusation. The statute having treated the accessory before the fact as a principal, he may be tried before, with, or after the person who actually committed the overt act; but, his connection therewith being dependent upon the commission of the crime by his agent, the guilt of the latter must of necessity be an issue at the trial of the former, which would entitle him of right to have a jury unprejudiced. There was not, in our judgment, such a variance between the charge in the indictment and the evidence introduced at the trial as would have warranted the court in ordering a verdict of acquittal.

3. The defendant's counsel, anticipating that the state would pursue the theory which it adopted, that Steeves was an accessory before the fact, and had advised and procured his codefendant to kill Sayres, propounded to each juror on his voir dire the following question: "From what you have heard or read, have you formed or expressed an opinion as to the guilt of Joseph Kelly, indicted with Steeves?" The court sustained an objection to the question, and refused to permit the jurors to answer it until after the defendant had exhausted his peremptory challenges. An exception to this ruling having been saved, it is contended that the defendant had the legal right to ask the question, and to ascertain from the juror's answer thereto the state of his mind as to Kelly's guilt, notwithstanding his right to peremptorily challenge him. The theory pursued by the state assumed that there was an agreement between Steeves and Kelly to take the life of Sayres. But no crime could be committed by Steeves until Kelly, in pursuance of the supposed agreement, committed some overt act in the performance of the conspiracy. It is true that Kelly, though jointly indicted with Steeves, had been separately tried and convicted, but, the crime with which he was charged being in its nature several, the record of his conviction could not be offered in evidence to establish the guilt of Steeves (*State v. Bowker*, 26 Or. 309, 38 Pac. 124), who, not having been tried with Kelly, was not a party to or bound by the judgment in that case; and it was incumbent upon the state to establish the guilt of Kelly, as well as the advice and procurement of Steeves (*Ogden v. State*, 12 Wis. 532). Steeves' plea to the indictment, therefore, put in issue the overt act of Kelly as well as the alleged conspiracy, and the jury called to try the issue must have first determined that Kelly committed the crime before they could find Steeves guilty. The right to interrogate the jurors in relation to any opinion they might have formed concerning the issues involved must be conceded; but the mere fact of having formed or expressed a qualified opinion upon the merits of any question directly or collaterally in issue would not, of necessity, render them inelig-

ble to try the facts, if, in the discretion of the court, it should find them, upon examination, otherwise competent. *State v. Saunders*, 14 Or. 300, 12 Pac. 441; *Kumli v. Southern Pac. Co.*, 21 Or. 505, 28 Pac. 637; *State v. Ingram*, 23 Or. 434, 31 Pac. 1049; *State v. Brown (Or.)* 41 Pac. 1042; *State v. Kelly*, supra. This discretion could be exercised only by a trial of the qualifications of a juror, and from his answers to the questions, as well as from his manner, tone, and bearing. The court must be satisfied that he can disregard any casual opinion he may have formed, and fairly and impartially try the issues in controversy. When the qualifications of a juror have thus been tried, no bill of exceptions can portray the manner, tone, and bearing of the juror as he appeared and acted before the trial court during the examination; and for this reason, when the juror has said he can lay aside his previously formed opinion, and the court believes he can do so, its discretion, when exercised, will not be reviewed upon appeal except for a manifest abuse thereof. But it is not to be expected that the manner, tone, or appearance of the juror, without an oral examination as to the state of his mind upon the merits of the issue involved, are alone sufficient to determine his qualifications. The statute has wisely granted to the defendant in a criminal action the right to a certain number of peremptory challenges, which he may exercise without assigning any reason therefor; and to enable him to do so intelligently he is entitled of right to inquire into the fitness of persons called as jurors to try him, and in many instances he can determine when to wisely exercise this right only from their examination. In *Hale v. State (Miss.)* 16 South. 357, the accused was jointly indicted with one J. G. Robertson for the crime of murder. A separate trial having been granted, the state adopted the theory that the homicide was committed in pursuance of a conspiracy entered into between the defendant and Robertson. The accused, when the jury was being impaneled, propounded questions to the persons called concerning any opinion they might have formed as to the guilt or innocence of Robertson, but the court refused to permit them to answer. The defendant, having been convicted, appealed, and the supreme court of Mississippi, in reversing the judgment, and commenting on the defendant's right to propound the questions, say: "It was his right to make such examination as would enable him to decide if there was ground for exercising his great right to peremptorily challenge. This right, conferred upon him by law, could only be intelligently exercised after a full and fair inquiry of each juror as to the exact state of his mind and feelings, not only as affecting the defendant personally and primarily, but as likely to affect his action as a juror even, and perhaps unconsciously to himself. The office of the peremptory challenge is to pro-

fect the defendant against those legally competent, but morally or otherwise unfit or unsuitable to try the particular case; and to deny a full and fair examination of a juror in order to wisely exercise the peremptory challenge would be practically to nullify the right, for of what avail would a peremptory challenge be if exercised at random or blindly, and without reason? The right to peremptory challenge is the last precious safeguard of a fair trial left to one capitally charged, before he puts life and liberty in the keeping of his sworn triers." The previous trial and conviction of Kelly was liable to create in the minds of the jurors an opinion as to the guilt or innocence of his co-defendant, and, as Kelly's guilt was in issue in this case, Steeves was entitled to have the question answered by the jurors, and a denial of this right was error in the trial court.

4. Steeves' codefendant, being called as a witness for the state, testified that his name was Joseph Kelly; that he was indicted, but did not know whether jointly with Steeves or not; that he had been tried and convicted; that he did not know where he was on the night of September 26, 1894, between the hours of 9 o'clock and half past 11; and that he knew where the engine house was in Fulton Park,—when the following question was asked: "Did you have any arrangement with X. N. Steeves for the payment of any money to you for service to be performed by you in getting George Sayres out of the way?" to which he answered, "No." The prosecuting attorney was then permitted, over the defendant's objection, to lay the foundation for impeaching the witness, and he was asked if he had not stated, at the time and place and in the presence of the persons designated, that he saw Steeves several times, who urged him to do the work, and told him there was \$2,000 to get Sayres out of the way. The counsel for the defendant thereupon submitted to the court a written objection to the question, which, in substance, purported to detail the circumstances under which the witness had made an alleged confession; that it was not voluntarily made, and for that reason was not received in evidence at the time he was on trial under this indictment; that the alleged statements were orally made to the district attorney in the presence of the chief of police and other officers, and, being then reduced to writing, were signed by Kelly; that the writing was in existence, and then in the possession of the district attorney; and, if the witness could be examined at all concerning the matter, the writing should be exhibited to him, and he be allowed to examine it. The district attorney also submitted a written answer controverting the averments contained in the preceding statement, and the court, overruling the objection, required the witness to answer the question, which he did by saying, "I don't recollect anything at all about it,"

and also gave testimony tending to corroborate the statements contained in the written objection submitted by the defendant's counsel. The following questions were then propounded to the witness: "Did you receive any money from Steeves? Did he pay you any money after the 26th day of September of this year?"—to which he answered, "Steeves never paid me any money in his life." The witness was then asked if he had not said, at the time and place and under the circumstances named: "I got one hundred dollars from Steeves at his office on Thursday morning after Sayres disappeared, and I got one hundred dollars on Monday, October 1st, from Steeves, and twenty dollars on two other occasions," or words to that effect; to which he answered, "No, I don't recollect anything about it." John Minto, chief of police, being called as a witness for the state, testified in substance that whatever Kelly had said in the interview to which his attention had been called had been written down by the district attorney and signed by Kelly; that he said to Kelly, "Don't you sign that statement unless it is true;" that the district attorney made the same statement to Kelly, and also said to him, "If that statement is true, and you tell the truth, so far as I am concerned I am willing to use my influence towards saving your neck," or words to that effect. Objections having been made to the witness detailing any confession made by Kelly, the court held that only such statements as were voluntarily made by Kelly, and admitted against him at his own trial, were admissible in this case. The chief of police was then, over the defendant's objection and exception, permitted to testify concerning the said alleged confession, and corroborated the statements contained in the questions propounded to Kelly. It is contended that the court erred in permitting the chief of police to testify concerning any statements made by Kelly in relation to the commission of the crime or of the alleged conspiracy for the following reasons: (1) That Kelly was a codefendant, and hence an incompetent witness; (2) that the alleged statements, although reduced to writing, and signed by Kelly, were not shown to him when the foundation was being laid for their admission; (3) that the statements were made by Kelly while under duress, and could not be offered in evidence; and (4) that Kelly, having given no testimony against the state, could not be impeached by it. In considering these questions it is sufficient to say of the first objection that no exceptions to the competency of Kelly as a witness were taken at the trial. This being so, it must be presumed that the error, if any, was waived. It is admitted that the court at the trial of Kelly on this indictment refused to permit his alleged statements to be given in evidence, for the reason that they had not been voluntarily made, and they were admitted in this case for the purpose of contradicting

Kelly only. It is manifest that these statements were made in the presence of the chief of police and others, and, being reduced to writing, were signed by Kelly; but they were not shown to him before being interrogated concerning them, as required by the provisions of section 841, Hill's Ann. Laws Or. The reason assigned for not showing the writing to Kelly when called as a witness, as we gather it from the record, is that the statements were orally made by him to others before being reduced to writing, and therefore it was unnecessary to exhibit it to him. Kelly made the alleged confession for the purpose of having it written by the district attorney, and the statements therein contained must have been orally made before being written; but when he signed the confession he adopted the language there used, and made it his own as much so as if he had personally written it. This being so, by what authority could Kelly be interrogated as to the contents of the writing until it was shown to him? The object sought by the statutory requirement, as we view it, is to refresh the memory of the witness, and, his statements being in writing, that end could be best attained by submitting the manuscript to him for inspection. The fact that the statements were made in the presence of others before being written cannot change this rule, otherwise the writing could be wholly disregarded, and evidence of the oral statements, as remembered by the persons who heard them, could be substituted therefor. Oral statements, intended to be reduced to writing, when committed to paper and signed by the person making them, are supplanted, and must of necessity be excluded, by the writing; and, even if the writing in this case could have been admitted for any purpose, it was error to interrogate Kelly concerning the statements therein without having first shown it to him. *People v. Nonnella* (Cal.) 33 Pac. 1097; *People v. Ching Hing Chang*, 74 Cal. 389, 16 Pac. 201. The statements, not having been voluntarily made, were excluded at Kelly's trial; but, even if they had been admissible against him, having been reduced to writing, they could not be introduced in evidence at the trial of his codefendant, who was entitled to meet the witnesses face to face. Const. Or. art. 1, § 11. The reason assigned by the trial court for admitting them was to contradict Kelly, but we shall attempt to show that they were inadmissible for that purpose.

When a party producing a witness calls him to the stand, he thereby represents him to the court as worthy of credit, or at least as not so infamous as to be wholly unworthy of it; and is precluded from attacking his general character for veracity (1 Whart. Ev. § 549); but he may be grievously disappointed in the testimony given by him, for perhaps, being in collusion with the adverse party, the witness may have led the party calling him into the belief that the testimony expected

would be advantageous to the cause of such party; and if there were no method of correcting such mistakes a party would be at the mercy of a designing witness. But our statute has wisely provided that, while a party producing a witness is not allowed to impeach his credit by evidence of bad character, he may contradict him by other evidence, and may also show he has made at other times statements inconsistent with his present testimony. Hill's Ann. Laws Or. § 838. This section furnishes a means of correcting the mistake in calling the witness and neutralizing the effect of his adverse testimony by permitting the party to treat the witness as adverse, and to propound leading questions to him for the purpose of refreshing his memory; and, if he still persists in adhering to what he has said, such party may impeach him by evidence that he made at other times statements inconsistent with his present testimony. But before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, or shown to him if in writing; and he shall be asked whether he made such statements, and, if so, allowed to explain them. Id. § 841. If the witness denies or claims that he cannot remember having made the statements attributed to him, the party producing him may then offer evidence thereof to excuse his mistake in calling him, and to destroy the effect of any adverse testimony he may have given. This is as far as the rule can be legitimately carried, and courts should carefully guard against its abuse by the party producing the witness, for, if the statements made by him could be admitted in evidence in support of the cause of the party calling him, a witness in league with such party might make statements out of court, and not under oath, which he knew were false, and, being called as a witness, could truthfully testify concerning the facts in issue, and against the party calling him; and, upon his denying that he made the statements attributed to him, or claiming that he failed to remember of having made them, evidence thereof could be introduced, not for the purpose of excusing the mistake made in calling the witness, or to correct the effect of the adverse testimony, but as substantive evidence in support of the cause of the party calling him, thus permitting a party to do by indirection what he could not do directly. *State v. Fitzhugh*, 2 Or. 227; *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064. The rule appears to be well settled that a party cannot impeach his own witness by showing he has made statements inconsistent with the testimony given at the trial, unless the testimony so given be material and prejudicial to the interests of the party calling him. *Champ v. Com.*, 2 Metc. (Ky.) 17; *Hull v. State*, 93 Ind. 128; *Moore v. Railroad Co.*, 59 Miss. 243; *Force v. Martin*, 122 Mass. 5; *Hickory v. U. S.*, 151 U. S. 303, 14 Sup. Ct. 334; *Erwin v. State* (Tex. Cr. App.) 24 S. W.



577; Com. v. Welsh, 4 Gray, 535; Ohlsm v. State (Miss.) 12 South. 852; Smith v. State, 5 Neb 181; Josephi v. Furnish (Or.) 41 Pac. 424; People v. Jacobs, 49 Cal. 384; People v. Mitchell, 94 Cal. 550, 29 Pac. 1106; Burkhalter v. Edwards, 60 Am. Dec. 744; Hurley v. State (Ohio) 21 N. E. 645; Rhodes v. State (Ind. Sup.) 27 N. E. 806; Langford v. Jones, supra. Looking at the evidence in the light of this rule, it shows that the state had not proven that Steeves paid or promised money to Kelly for any purpose. It is true, the evidence introduced by it tended to show that on the day of the homicide Kelly had no money, but on the day thereafter he paid out about \$80, and that Steeves on the day last named drew from the bank \$100; but it cannot be inferred from these circumstances that the money drawn from the bank by Steeves was paid or given to Kelly, or that the money expended by Kelly on the day after Sayres disappeared was not legitimately acquired. If Kelly had sworn to the fact which he was called to prove, his testimony would have been material for the state and against the defendant; but as it was only a denial it may well be doubted if such testimony can be considered in any other light than a failure to prove a relevant fact. When Kelly testified that Steeves never paid him any money in his life, his testimony did not contradict any evidence introduced by the state. It may have tended to refute the theory adopted by it, and in that respect, if it be conceded that his evidence was material and prejudicial, Kelly could not be contradicted, unless his statements had been voluntarily made. When he was on trial, the court, deeming his statements not to have been so made, refused to permit them to be offered in evidence, and, this being so, how could he be contradicted by them? If Kelly, through fear of personal violence or the hope of saving his life thereby, made the confession attributed to him, the court could not do otherwise than exclude it. Had the confession been extorted by fear, would any one contend that Kelly should have been bound by it? Assent to a contract executed under such circumstances would not be a meeting of the minds, but a submission to superior force, and no court would enforce its terms. Such is the rule even in civil actions, but it is of vastly more importance in criminal proceedings. If such a rule could be invoked, it would be an illustration of the familiar statement that "history repeats itself," and would, in effect, be a revival of the methods of torture resorted to in times long past as a means of securing evidence with which to convict persons charged with the commission of crime. Kelly's confession not having been voluntarily made, the court erred in permitting the foundation to be laid for his impeachment, and in allowing the chief of police to

6. It is contended that, the defendant having been indicted for the crime of murder in the first degree, and being convicted of manslaughter only, the verdict of the jury, though general in its terms, was an acquittal of the charges of murder in the first and second degrees, and that, in case the judgment rendered against him be reversed, he cannot be retried upon the charges of which he has been acquitted, Section 12 of article 1 of the constitution provides that "no person shall be put in jeopardy twice for the same offense." The defendant, having been arraigned, entered a plea of not guilty to the indictment, and the moment the jury was sworn to try him jeopardy attached, and, had the jury been discharged without his consent, except upon a failure to agree upon a verdict, he would stand acquitted before the law. Conklin v. State, 25 Neb. 794, 41 N. W. 788; Murphy v. State, 25 Neb. 809, 41 N. W. 792; State v. Shaffer, 23 Or. 555, 32 Pac. 545; State v. Reinhart, 28 Or. 406, 38 Pac. 822. The defendant having, therefore, been put in jeopardy for the crime of murder in the first and second degrees, his conviction for manslaughter, while unreversed, is a bar to another prosecution for all other degrees embraced within the indictment. Hill's Ann. Laws Or. § 1390.

It remains to be seen whether the granting of a new trial places the defendant in statu quo, and removes the bar created by the arraignment, plea, and verdict. Mr. Van Fleet, in his excellent work on Former Adjudication (volume 2, § 606), in discussing this question says: "If one is tried upon an indictment which either expressly charges or impliedly includes different degrees of the same crime, it is held, as a common-law question in Alabama, Arkansas, California, Florida, Georgia, Illinois, Iowa, Michigan, Mississippi, Texas, and Wisconsin that a conviction of one degree is an implied acquittal of all higher degrees, and bars their prosecution upon a new trial." In Hurt v. State, 59 Am. Dec. 225, Fisher, J., in speaking of the effect of a verdict of conviction of an inferior degree, says: "The jury in such case, in contemplation of law, render two verdicts, one acquitting the accused of the higher crime charged in the indictment, the other finding him guilty of an inferior crime. They must first determine his guilt or innocence upon the charge made by the indictment before proceeding to consider whether he is guilty of an inferior crime. The verdict of manslaughter is as much an acquittal of the charge of murder as a verdict pronouncing his entire innocence would be, for the effect of both is to exempt him from the penalty of the law for such crime." The statute provides that: "In all cases, the defendant may be found guilty of any crime, the commission of which is necessarily in-

cluded in that with which he is charged in the indictment, or of an attempt to commit such crime." Hill's Ann. Laws Or. § 1383. The effect of this section is to regard each degree necessarily embraced within the specifications of the charge as a separate indictment upon all of which the accused is tried at the same time, and the verdict of conviction upon an inferior degree operates as an acquittal of all the superior degrees necessarily included therein. In Indiana, Kansas, and Kentucky statutes provide that "the granting of a new trial places the parties in the same position as if no trial had been had," and in those states it has been held that one who has been convicted of manslaughter upon an indictment that charges the crime of murder, and obtained a new trial, may be retried for the higher degree. *Ex parte Bradley*, 48 Ind. 548; *Veatch v. State*, 60 Ind. 291; *State v. McCord*, 8 Kan. 232; *Com. v. Arnold*, 83 Ky. 1. Prior to the amendment of the constitution of Missouri, the supreme court of that state uniformly held that when a new trial was granted to a person convicted of an inferior degree upon an indictment charging the commission of a crime in a superior degree he could not be retried for the higher degree. *State v. Ross*, 29 Mo. 32; *State v. Kattlemann*, 35 Mo. 105; *State v. Smith*, 53 Mo. 139; *State v. Brannon*, 55 Mo. 63; *State v. Bruffey*, 75 Mo. 389. On November 30, 1875, that state adopted a new constitution, which contained the provision (section 23, art. 2) that, "if judgment on a verdict of guilty be reversed for error in law, nothing contained herein shall prevent a new trial of the prisoner on a proper indictment, or according to the correct principles of law." In *State v. Simms*, 71 Mo. 538, it was held that this provision overturned the rule announced in *State v. Ross*, supra, the court saying it was "equivalent to declaring that, when such judgment is reversed for error at law, the trial had is to be regarded as a mistrial, and that the cause, when remanded, is to be tried anew, and is put on the same footing, as to a new trial, as if the cause had been submitted to a jury, resulting in a mistrial by the discharge of the jury in consequence of their inability to agree on a verdict." Our statute prescribes that "a new trial is a re-examination of an issue of fact in the same court after a trial and decision or verdict by a court or jury" (Hill's Ann. Laws Or. § 234), but it is nowhere provided that the granting of a new trial places the parties in the same position as if no trial had been had. "One indicted for murder," says Mr. Bishop in his work on Criminal Law (7th Ed. vol. 1, § 1056), "and found guilty of manslaughter, is protected from any further prosecution for the murder." And in the succeeding section the same learned author, in discussing the effect of a conviction of a smaller grade included in an indictment

charging a greater crime, says: "Besides, as a larger includes a smaller, it is impossible one should be convicted of the larger without being also convicted of the smaller; and thus, if he has been found guilty or not guilty of the smaller, he is, when on trial for the larger, in jeopardy a second time for the same, namely, the smaller, offense. Some apparent authority, therefore, English and American, that a jeopardy for the less will not bar an indictment for the greater, must be deemed unsound in principle." While there is some conflict of authority upon this subject, we believe that the great weight of it, as well as the better reason, supports the rule that a conviction of a lower degree, necessarily included within an indictment charging the commission of a greater crime, operates as an acquittal of all the degrees above it; and that a new trial, in the absence of a statute declaring the effect of a reversal of the judgment, must be confined to a retrial of the charge upon which the accused was convicted, or of a lower degree. The defendant, having been convicted of manslaughter, cannot, therefore, be tried for the commission of a greater crime. It may be suggested that the announcement of this conclusion is premature and that the question cannot be involved until a demurrer to a plea in bar by the defendant has been sustained, a trial and conviction had for the commission of a crime of a higher degree, and the judgment brought before us on appeal for review, but, the statute having provided that when a new trial is ordered the cause shall be retried according to the direction of the appellate court (Hill's Ann. Laws Or. § 1454), we believe that, in order to save the costs and disbursements incident to an additional trial in case of such conviction, it becomes our duty to direct the mode of retrial upon remanding the cause.

6. The defendant, having been tried as a principal, was convicted of manslaughter, and, there being no accessories before the fact in this grade of crime, and since he cannot be prosecuted for a higher degree, it is contended that, as a legal consequence, he is entitled to be discharged. If it be conceded that the defendant's conviction as a principal conclusively established the fact that his codefendant was guilty of manslaughter only, it would necessarily follow that the cause should be remanded with a direction to the trial court to discharge the prisoner. Malice not being a feature in manslaughter, it has for this reason been held that there can be no accessories before the fact in the commission of that crime (*Boyd v. State*, 17 Ga. 194; *State v. Mahly*, 68 Mo. 315; *State v. Robinson* (Wash.) 41 Pac. 51; *Bowman v. State*, 20 S. W. 558); but, as murder in the second degree involves malice, the principal may be convicted of that degree, and the accessory before the fact of manslaughter (*Jones v. State*, 13 Tex. 168). In that case *Lipscomb, J.*, in rendering the decision of the court, says: "One might en-

courage and counsel another to commit some violent outrage on the person of a third person,—mayhem or the like,—not to kill, but in the execution of this design a homicide might be committed. This would be murder in the second degree, under the statute, because it is not embraced in the statute classification of the evidences of malice, to make it murder in the first degree. But, it being murder, it falls under the second degree. Murder in the first degree, under our statute, is 'committed by poison, starving, torture, or other premeditated and deliberate killing; or committed in the perpetration, or in the attempt at the perpetration of arson, rape, robbery or burglary' (Hart. Dig. art. 2515). Now, such killing as is described in the statute cited, as constituting the first degree of murder, would be, at common law, murder with express malice; leaving for the second class all murders with implied malice, not so designated; as would be the case if there was a preconcerted act to commit some other felony, but not to kill, and the killing ensued in the attempt." In order, therefore, to find the defendant guilty of manslaughter, the jury must first have found his codefendant guilty of murder in at least the second degree, and, having found the defendant guilty as aforesaid, it necessarily follows that they also found Kelly guilty of murder, either in the first or second degree; and, this being so, the defendant is not entitled to be discharged until acquitted, or so ordered by the court. In the trial of this cause, occupying the attention of the trial court from December 13, 1894, to the 5th day of the following month, every material point was vigorously contested by eminent counsel representing the state and the defendant, and many alleged errors are assigned as cause for the reversal of the judgment. We have considered only those that we deemed most important, and such as, in our judgment, were prejudicial to the rights of the defendant; and, having reached the conclusions hereinbefore announced after a careful examination of the record and the very excellent briefs submitted by both sides, we feel that the interests of justice will be subserved by a retrial of the cause, and hence it follows that the judgment is reversed, and a new trial ordered in accordance with this opinion.

**CALIFORNIA LOAN & TRUST CO. v.  
HAMMELL. (L. A. 5.)<sup>1</sup>**

(Supreme Court of California. Feb. 24, 1896.)

APPEAL—REVIEW—QUESTIONS NOT PRESENTED TO TRIAL COURT.

Where questions, the determination of which is essential to the full adjustment of the equities between the parties, were not presented to the trial court for determination, and the findings of that court upon the issues submitted are supported by the evidence, its judgment, warranted by such findings, will not be reversed on appeal.

<sup>1</sup> Rehearing denied.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the California Loan & Trust Company against James Hammell. Judgment for defendant, and plaintiff appeals. Affirmed.

Walter Bordwell, for appellant. Guthrie & Guthrie, for respondent.

TEMPLE, J. Appeal from judgment, and from an order refusing a new trial.

One Wilkins owned land at Azusa; Goldsberry, a tract at Clearwater. They agreed to exchange lands. Goldsberry was to convey his tract clear of incumbrance, and give \$2,000 difference,—the \$2,000 to be secured by a mortgage on the Azusa property which he was to get from Wilkins. It was found that his land was mortgaged to one Tring for \$830; and Goldsberry, to pay this, agreed to mortgage the Azusa tract for \$830 more, and Wilkins assented to the change. Wilkins owed plaintiff about \$3 500, which was secured on the Azusa tract. Plaintiff consented to take, in lieu of this security, whatever Wilkins received in exchange. Accordingly, when the trade was consummated, Wilkins assigned the notes and mortgage which he received from Goldsberry to plaintiff, as collateral security, and also had the Clearwater tract conveyed to a trustee, also as security for his indebtedness to plaintiff. Subsequently Goldsberry paid both of his notes, and they were credited upon Wilkins' indebtedness. It appears incidentally—although neither party seems to think the circumstance of any importance—that plaintiff had assigned Wilkins' note with the security, and guaranteed its payment. Afterwards plaintiff purchased the Tring mortgage, and brought this action to foreclose it.

It is contended by the defendant that, at the time of the execution of the \$830 note to Wilkins, plaintiff agreed to take the note, and, in consideration of it, to pay the debt secured by the Tring mortgage; in other words, that the \$830 note was not assigned to plaintiff as security for the payment of Wilkins' debt to it, but in consideration of its promise to pay the Tring debt. So far as it concerned the amount of Wilkins' debts, or the incumbrance upon the mortgaged premises, it did not matter upon which debt the \$830 was credited; for Wilkins had assumed the Tring mortgage, and both constituted liens upon the same property. Upon which ever it was paid, therefore, Wilkins would get the benefit of it, and the premises would be relieved of the incumbrances upon it to just that amount. And the same is true as to defendant, who purchased the mortgaged premises from Wilkins. As both debts constituted incumbrances upon his land, upon whichever the \$830 was paid, he was relieved to the same extent. The only possible difference it could make to either Wilkins or

defendant would be that, if the Tring debt became due first, by paying that off the time of payment would be extended, and there would be but one mortgage on his land, instead of two. It would be quite natural, therefore, for the parties to agree that plaintiff would take care of the Tring mortgage, and see that it was not foreclosed. The court found—and the finding is sustained by the evidence—that plaintiff did agree to pay the Tring debt with the \$830 received from Goldsberry. Instead of doing this, plaintiff assigned the Wilkins note, and passed to the assignee the \$830 note as collateral security, and, when paid, the money was credited on the Wilkins debt. This mistake did not harm Wilkins or defendant, unless he is called upon to pay the Tring debt before the Wilkins debt is due. The mere fact that money received by the mortgagee was credited upon the wrong note will not deprive the creditor of his lien. If the notes were still owned by plaintiff, the error could now be corrected, and the result would be that the Tring mortgage would be canceled, and the plaintiff would be permitted to collect the money upon its second mortgage. And if the Wilkins debt has been fully paid, and the \$830 was used in its payment, I see no reason why plaintiff should not be permitted to foreclose the mortgage in question here. It can make no difference to defendant on which mortgage he pays the money, which, in any event, is justly a burden upon his land. But the record does not show the facts which would entitle the plaintiff to that relief. Since no issue was made upon the question in the court below, and there is no finding, we are not permitted to conclude that plaintiff did guaranty to its assignee the payment of the Wilkins debt; and we do not know whether the Wilkins debt is due, or has been paid. Upon the facts found, plaintiff is not entitled to a foreclosure of his mortgage. The findings are sustained by evidence; and although I may feel that justice has, somehow, miscarried, I do not see how, under the circumstances, it can be prevented in this case. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

**McCARTHY v. MT. TECARTE LAND & WATER CO. (L. A. 85.)**

(Supreme Court of California. Feb. 21, 1896.)

ACCOUNT STATED — JUDGMENT — CORPORATIONS —  
SERVICES BY DIRECTOR — COMPENSATION —  
IMPLIED CONTRACT — LIMITATIONS.

1. In an action based on a stated account the judgment cannot exceed the balance due on the face of the account in favor of the prevailing party.

2. In an action by a director of a corporation for compensation for services rendered by him to the corporation under an implied contract, evidence is admissible on the part of defendant corporation to show to what extent plaintiff was in-

terested as stockholder, usage of defendant as to compensation paid to directors, and an agreement between the original incorporators that no salaries should be paid to officers.

3. A resolution of a board of directors of a corporation appointing one of their number superintendent, but containing no provision as to his compensation, which depended on the "understanding and expectation" that there should be a reasonable compensation, is not a contract in writing, within Code Civ. Proc. § 337, and an action for services rendered thereunder is within section 339, subd. 1, and barred by limitation after two years.

Department 2. Appeal from superior court, San Diego county.

Action by D. O. McCarthy against the Mt. Tecarte Land & Water Company on an account stated and for alleged services. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Jas. E. Wadham and F. W. Stearns, for appellant. McDonald & McDonald and Gibson & Titus, for respondent.

McFARLAND, J. Judgment went for plaintiff, and defendant, a corporation, appeals. There are two counts in the complaint. In the first it is averred that on September 11, 1891, there was an account stated between the parties for moneys before that time expended by plaintiff for the use of defendant, that the balance on said account stated was on said day \$10,050.07, and that defendant agreed and promised to pay said balance. The alleged cause of action in this first count is purely an account stated. The second count is for \$23,000, alleged services by plaintiff as general manager of defendant.

1. The court found, on the first count, that on September 11, 1891, defendant was indebted to plaintiff for moneys expended for defendant's use in the sum of \$10,050.07, "and that on the said 11th day of September, 1891, the plaintiff stated his account for such moneys to the defendant in the said sum of ten thousand and fifty and seven one-hundredths (\$10,050.07) dollars, and that defendant accepted the account as stated, and agreed in writing to pay the same." It is further found that defendant afterwards paid plaintiff \$2,000, and that at the commencement of the action there was due thereon \$8,050.07, with interest from said September 11th at 7 per cent. per annum, for which amount judgment was rendered. Appellant contends that the finding of an account stated on September 11th for \$10,050.07 is not supported by the evidence, and is against law; and the contention must be sustained. As to the question whether there was any stated account at all on September 11th,—that is, whether the appellant then agreed to any account presented by respondent as a final settlement,—the evidence is conflicting. But, if we assume that there was an account stated on that day, it is clear that it was not for \$10,050.07, but for only \$3,550.07. The contract found is not the one proved. The statement on motion for a new trial contains

the following: "Said account was headed, 'Mt. Tecarte Land and Water Company in account with D. O. McCarthy,' and consisted of a large number of items of debit against the defendant running from May 15, 1888, to September 2, 1889, and aggregating the sum of \$10,050.07, with a credit under date of July 2, 1891, of \$6,500 and showing a net balance of \$3,550.07; the aggregate of the account, the credit thereon, and the balance after deducting the credit, being as follows:

July 2, 1891, Cr. by issue to D. O. McCarthy of 65,000 shares of stock at ten cents per share....	\$10,050 07 6,500 00
Balance due .....	\$3,550 07"

—And immediately following was an indorsement as follows: "Approved and ordered paid at a meeting of the board of directors held September 11, 1891. E. M. Dean, Secretary, by B. F. Moore, Ass't Sec'y." (The respondent withdrew from his offer of the account the indorsement of the secretary, Dean. Appellant objected to this withdrawal, because then only a part of the account was offered, and his objection was overruled. If that indorsement be not considered, then there is little evidence tending to show that any account was agreed to by appellant; but that is not important here, because we are now assuming that there was some kind of a stated account on September 11th.) There is no evidence showing or tending to show any account stated on September 11th, other than the one described in the part of the transcript above quoted; and that account clearly showed a balance of only \$3,550.07, and for the latter sum alone could the appellant be held liable upon the contract which is created by a stated account, which is a new and independent contract. See *Coffee v. Williams*, 108 Cal. 556, 37 Pac. 504, and cases there cited. The finding was no doubt based upon some occurrences which took place long after the alleged stating of the account on September 11th, and which, keeping in view the nature of a stated account, should not have been considered. The \$6,500 worth of stock of the corporation defendant, with which respondent credited appellant in the alleged stated account of September 11th, had been purchased by respondent on July 2, 1891, and had not been paid for; and it appears that afterwards, on November 20, 1891, the board of directors of the appellant, —a new board having been elected about that time,—by resolution allowed respondent to surrender the certificates for said stock, and cancel said sale, and to be released of said credit, and it was resolved "that said D. O. McCarthy be, and he is hereby, requested and allowed to present his account against the company, together with the account of J. Harvey McCarthy against the company, to this board for examination and allowance, within the period of sixty days next ensuing from and after this date." There is a conflict

of evidence on the question whether respondent ever did afterwards present another account; but this is immaterial here, because the transactions of November 26th did not change the liability of appellant upon the contract evidenced by the alleged stated account of September 11th,—unless, indeed, they showed that said alleged account was not intended to be a final stated account, or unless they worked a rescission of that contract. In this action respondent must rely upon the alleged stated account of September 11th, as it stood stated on that day. If it was afterwards opened up, it cannot stand as a cause of action. A judgment for \$10,150.07 upon a stated account which shows a balance of only \$3,550.07 cannot be sustained. If the account of September 11th was a stated account, the appellant is in the same position, except in some particulars, not important here, as it would have been if it had given its promissory note for the said balance of \$3,555.07; and in an action based on the stated account a judgment for more than the balance due on the face of the account would be as erroneous as a judgment on a promissory note for more than the face of the note.

It is also averred in the complaint that the account was restated on or about the 24th of November, 1891; but, as the averment was denied, and the court made no finding on the subject, it must be disregarded.

2. In the second count it is averred that on or about February 1, 1888, the defendant employed plaintiff as its general manager, and agreed to pay him for his services as such a fair and reasonable compensation; that he accepted such employment, and remained its general manager continuously from about February 1, 1888, to about November 24, 1891; and that his services during that period were reasonably worth \$23,000, no part of which had been paid. In the answer all these averments are denied, and it is averred that the cause of action, if it ever existed, is barred by subdivision 1 of section 339, and by section 337, Code Civ. Proc. During all the time mentioned in the complaint the respondent was a large stockholder and a director of the corporation defendant. The court found that on June 6, 1888, the defendant, by a resolution of its board of directors, appointed the plaintiff its superintendent, and that he then entered upon the duties of "said office," and discharged them until November 24, 1891; that during that time he assumed and discharged the duties of general manager with the knowledge and consent of the directors, but without any express appointment, until September 2, 1891; and that on said September 2, 1891, he was, by resolution of the board, appointed "superintendent and general manager." It was further found "that no order was ever made by the board of directors of the defendant, nor any contract or agreement by any of its officers, fixing the compensation of plaintiff for his services, or

was nevertheless the understanding and expectation of the plaintiff and the board of directors of the defendant, at the time of plaintiff's said appointment, and during the entire period of his services, that he was to receive reasonable compensation for such services." It was also found that the value of his services during said period was \$150 per month; also that no part of this cause of action was barred by subdivision 1 of section 339, Code Civ. Proc.; but that his right to recover for services rendered prior to January 11, 1889,—four years before the commencement of the action,—was barred by section 337, Id. Judgment on this count was ordered and rendered for \$5,175. Counsel for appellant contends that the evidence is insufficient to support the finding that "it was nevertheless the understanding and expectation of the plaintiff and the board of directors" that respondent was to receive compensation; but that, on the contrary, the evidence shows that the company was in poor financial circumstances, and that it was understood that none of the directors were to receive compensation for what they should do in the interest of all the projectors of the water scheme which they had in view. The preponderance of the evidence certainly seems against any understanding or expectation that respondent was to be paid; but, under our views of the case on other points, it is unnecessary to decide whether there was any material evidence sufficient to justify said finding. In the first place, we think that the court erred in ruling upon the admissibility of evidence offered on that point. As the respondent was a stockholder and director of the corporation, he was not entitled to compensation for services rendered by him for it, no matter under what name or official position, unless there was some kind of a contract for such compensation. Now, there is no pretense that there was any express contract for compensation; consequently, if there was any such contract, it must have been an implied contract arising out of and inferable from the situation and relation of the parties; and any fact which could reasonably throw light upon that relation, or tend to show the intention of the parties, was relevant and admissible. *Barstow v. Railroad Co.*, 42 Cal. 465. And we think that the court erred in sustaining objections to evidence offered by appellant for that purpose. For instance, appellant asked the respondent when on the witness stand: "To what extent were you interested as a stockholder in the Mt. Tecarte Land and Water Company in the year 1883?" and he was asked the same question as to the years 1889, 1890, and 1891. Objections to these questions were sustained, and we think erroneously. The questions tended to show the relations of the parties, and the interest which respondent himself had in the property, and to throw light on the question

should have compensation, or, if so, how much; and "the situation of the parties at the time—the relation, if any, in which they stood, of a business character or otherwise—is important to be known and considered in order to arrive at a correct solution of the ultimate question involved." *Barstow v. Railroad Co.*, supra. Other questions of a similar character, not necessary to be here specially mentioned, were incorrectly ruled out; and it was particularly erroneous and prejudicial to sustain objections to the following question, asked by appellant of one of its witnesses, who was an original incorporator and director: "Was it not a usage of the defendant corporation that no compensation should be paid to the directors or its officers?" and to strike out the following statement of another of its witnesses: "It was agreed upon between the original incorporators that no officers should receive salaries for their services." The court found that there was an "understanding" by the appellant that there was to be compensation to respondent; and, as bearing on that question, the said testimony sought to be introduced by appellant was relevant and competent. Whether there was such a usage was a fact, and not a mere conclusion of the witness. Upon this point the case at bar is not distinguishable from *Fraylor v. Mining Co.*, 17 Cal. 594. In that case the plaintiff was a stockholder in the corporation defendant, and had been appointed its secretary, and he sought to recover the value of services rendered as such secretary. The defendant "offered to show that by the usage and custom of the corporation no compensation was chargeable for services of this nature." Objection was sustained, and this court on appeal reversed the judgment. The court, in its opinion, quotes from *Ang. & A. Corp.* as follows: "The officers of a corporation who are to receive any compensation are usually provided for by regular salaries. If there is no salary, and no particular contract, much must depend, as in other cases, upon the custom with regard to compensation for the particular services, and the expectations of the parties growing out of it." The court then say: "The rule thus laid down covers the principle involved in the offer made by the defendant; and we think there was a violation of this rule in the rejection of that offer. \* \* \* We have no doubt of the admissibility of the evidence; and, if the plaintiff was informed of the existence of the usage and custom referred to, the inference would naturally be that he accepted the office and performed its duties without any expectation of being compensated for his services. If any such usage in fact existed, his position as a member and officer of the corporation is sufficient *prima facie* to charge him with a knowledge of its existence." In the case at bar we gather from the evidence that the project of the corpo

ration was to acquire and create water and ditch property with means to be obtained by the sale of its stock; and, while the record does not show affirmatively that the project was a failure, it does appear in the evidence that all the money it ever received and expended on its works did not exceed \$10,000. Under these circumstances it might well have been the usage, custom, and understanding that the directors should not receive compensation for their efforts in helping along the enterprise in which all were interested; and the said testimony offered by appellant and excluded by the court was not only admissible but highly important.

There is another point in the case which demands notice. The court found that no part of respondent's cause of action for services was barred by subdivision 1 of section 339, Code Civ. Proc., but that the part of the cause of action which accrued more than four years before the commencement of the action was barred by section 337. The court, therefore, must have found that the action is upon a "contract, obligation, or liability founded upon an instrument in writing." We think that the court erred in thus holding. It is contended by respondent that the resolution of the directors of appellant appointing him superintendent or general manager is the instrument in writing upon which this action is brought. (It may be observed that, even under this view, there was no resolution appointing him "general manager" until September 2, 1891, which was only a couple of months before his alleged services ended, and that the complaint is for services only as general manager. The resolution of June 6, 1888, was for his appointment only as superintendent, and there usually is a great difference between the two positions. But, as appellant does not make this point, it may be assumed, we suppose, that the resolution of June, 1888, appointed him to the place for services in which he sues.) But a cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the nonperformance of which the action is brought. In *Chipman v. Morrill*, 20 Cal. 132, it was held that an action by one joint maker of a promissory note against the others for contribution was not upon the note as "an instrument in writing," within the meaning of the statute, and was barred in two years. In that case Justice Field, delivering the opinion for the court, said: "Our conclusion is that it is not thus founded; that the statute, by the language in question, refers to contracts, obligations, or liabilities resting in or growing out of

written instruments, not remotely or ultimately, but immediately." He further says: "The construction would be the same if the word 'founded' were omitted, and the statute read 'upon any contract, obligation, or liability, upon an instrument in writing.'" In the case at bar the contract—if any such there be—of the appellant to pay respondent for services is not the direct and immediate consequence of the resolution appointing him superintendent. Respondent, being a director of appellant, was not entitled to compensation for services rendered the corporation, unless the circumstances were such as to raise an implied assumpsit to pay what they were reasonably worth. But that assumpsit did not arise out of the mere fact of his appointment as superintendent, as might have been the case, perhaps, if he had been a stranger. In *Smith v. Railroad Co.*, 102 N. Y. 192, 6 N. E. 397, where it was held that the employment by a corporation of a stranger as secretary raised an implied obligation to make compensation for services, the court put it on the express grounds that "he was neither stockholder nor director of the defendant, and stood in no relation to the company which entitled it to his gratuitous service, or which made it his interest to serve the company without compensation." And the court say further: "The rule that directors or trustees cannot recover for services rendered for the corporation upon an implied promise is an application of the general rule applicable to trustees. But we perceive no reason of policy or justice which should prevent a person appointed as secretary, and who is neither a director nor stockholder, from receiving a reasonable compensation for his services." See *Tayl. Priv. Corp.* §§ 646, 647, and cases cited; *Brown v. Silver Mines*, 17 Colo. 421, 30 Pac. 66. In most of the cases cited by respondent the officer or employé was a stranger having no relation to the corporation. In *Rosborough v. Canal Co.*, 22 Cal. 557, the decision was upon the ground that there was a written order that the compensation of the plaintiff "be established at fifty dollars per month"; and what the court said in its opinion on the subject here involved was dictum, and was not clear, because it speaks of an "understanding and expectation" which "removes all presumptions that the services were performed gratuitously." The opinion refers to *Fraylor v. Mining Co.* (heretofore cited), in which the court say that "the right of the plaintiff to recover rests alone upon the fact of the rendition of the services." In the case at bar, therefore, respondent's cause of action is not upon a "written instrument," to wit, the resolution appointing him superintendent or general manager. Appellant could not have been precluded from showing affirmatively that no compensation was intended or expected, upon the ground that it would have been an attempt to contradict

standing of appellant and the expectation of respondent that he would be compensated, which may be implied, if the evidence be sufficient, from all of the circumstances of the case, and not upon any written instrument. Indeed, the finding of the court is, not that there was a contract in writing to pay compensation, but that there was "nevertheless the understanding and expectation" of the respondent and the board that there should be reasonable compensation. Our conclusion, therefore, is that the cause of action set up in the second count is not upon an instrument in writing, within the meaning of said section 337 of the Code of Civil Procedure, and that, as to all services rendered more than two years before the commencement of the suit, the cause of action is barred by subdivision 1, § 339, of said Code. The judgment and order denying appellant's motion for a new trial appealed from are reversed, and a new trial is granted.

We concur: HENSHAW, J.; TEMPLE, J.

**CITY AND COUNTY OF SAN FRANCISCO  
v. BRODERICK. (S. F. 20.)**

(Supreme Court of California. Feb. 21, 1896.)

**MUNICIPAL CORPORATIONS—TAXATION—LIMITATION  
OF ELECTION EXPENSES—SUBDIVISION OF  
GENERAL FUND—AUDITOR.**

1. Under Consolidation Act, § 71 (as amended St. 1885-86, p. 436), requiring the board of supervisors of San Francisco city and county, when making the levy of taxes for a fiscal year, to apportion and divide the taxes to certain specific funds, the board is limited to the funds therein named, and is not authorized to subdivide the general fund and limit the subdivisions to the objects indicated.

2. Under such section (subdivision 3), election expenses are payable from the general fund; and where the expenses incurred by the election commissioners exceed and have exhausted the amount estimated for elections by the board of supervisors in making the tax levy, the holder of an unpaid claim arising from an election is not restricted thereby, but may have it audited, and paid from the general fund, if there is money enough there to meet it.

3. If a demand on the county and city treasury has been approved and ordered paid by the proper board or officer, and presented to the county and city auditor in proper form, and he is satisfied that the demand is legally due and unpaid, and its payment is authorized by law, he is bound to audit it, and cannot be restricted in the exercise of his office by a city ordinance.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by the city and county of San Francisco against William Broderick to restrain him from auditing warrants made out by the board of election commissioners. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

**HARRISON, J.** At the time of levying the annual tax for the fiscal year ending June 30, 1895, the board of supervisors of the city and county of San Francisco fixed the sum of \$150,000 as its estimate of the registration and election expenses for the general election to be held in November, 1894, and set apart and appropriated out of the general fund that amount of money for that purpose. Subsequently they adopted an ordinance purporting to limit the expenditures for this object to this amount, and directed the auditor not to audit, and the treasurer not to pay, any demand in excess thereof. In holding and conducting said election, however, the board of election commissioners and the registrar of elections incurred liabilities and charges against the city and county in a sum of upward of \$40,000 in excess of the amount thus set apart, and made out and delivered warrants therefor, on the general fund, to the parties claiming to be entitled to the same. After warrants amounting to \$150,000 had been paid, the plaintiff herein commenced the present action against the defendant, who is the auditor of said city and county, to restrain him from auditing and allowing or approving any warrant or warrants made out by said board of election commissioners, or by said registrar of elections, in excess of said sum of \$150,000, upon the ground that after that sum had been set apart for this purpose, and while there was other money in the treasury to the credit of the general fund, exclusive of said sum of \$150,000, it had, upon the faith of said moneys in excess of said sum, entered into contracts with divers persons for necessary and lawful supplies for its use, and, if the aforesaid warrants in excess of \$150,000 were paid, the general fund would be so depleted that there would be no funds with which to pay the claim of said contractors; that said contractors had protested against the payment of said warrants, and had threatened to sue the plaintiff upon their contracts, and would vex and harass the plaintiff with a multiplicity of suits if said warrants were allowed and paid. To this complaint the defendant demurred, and, his demurrer having been sustained, judgment was rendered in his favor, from which the plaintiff has appealed.

Section 1 of the act of March 18, 1878 (St. 1878, p. 299), declares: "The conduct, management and control of elections, and matters pertaining to elections in the city and county of San Francisco, is hereby taken from the board of supervisors, and vested in a board of five commissioners \* \* \* which board is hereby invested with all the powers and charged with all the duties, as to matters pertaining to elections, now vested in said board of supervisors." Other sections of the act point out the duties of this board of election commissioners and of the registrar,



making it incumbent upon them to select rooms or places for registration, and polling places; to designate the officers of election, and, in certain instances, fix their compensation therefor, "to be paid out of the treasury of said city and county, in the manner now provided by law for the payment of such services"; to provide books, blanks, and stationery, and other matters requisite for the performance of their duties. And by section 1216 of the Political Code they are to exercise all the powers and duties which by that Code are conferred upon county clerks and other officers in relation to matters of election and polling places. Section 33 of the act of 1878 declares: "All provisions for carrying out the registration and election laws in said city and county of San Francisco shall be made by the board of election commissioners, and demands on the treasury authorized or allowed by them for such purposes shall have the same force and effect as if authorized or allowed by the board of supervisors."

It is not claimed by the appellant that the board of election commissioners had incurred any unnecessary expenses, or allowed any demands upon the treasury that were not proper claims for expenses incurred in the discharge of their duties under the statutes by virtue of which they acted, but it contends that the estimate and appropriation of \$150,000 by the board of supervisors is a limitation upon the amount that may be expended for that purpose. The transfer to the board of election commissioners of the conduct, management, and control of elections in San Francisco gives to this board the same power and authority to incur expenses in reference thereto, and to make the same a charge against the city, as was previously held by the board of supervisors; and the provision in section 33, that "demands on the treasury authorized or allowed by them for such purposes shall have the same force and effect as if authorized or allowed by the board of supervisors," gives to their demands the same validity, and right to immediate payment from the funds of the city, as if their payment had been directed by the board of supervisors. The provision in section 71 of the consolidation act, requiring the board of supervisors, when making the levy of taxes, to apportion and divide the taxes to be collected to certain specific funds, "according to the estimate of said board of the necessities of said funds," is limited to an apportionment of the taxes to those funds which are therein designated, viz. "corporation debt fund, general fund, school fund, street light fund, and street department fund," and does not confer authority to subdivide those funds, or either of them, and restrict the several subdivisions to the objects for which they may be indicated. The third subdivision of the section, which declares that "the general fund shall be applied and used for the payment of all sums authorized by law to be paid out of the general fund, and

not otherwise provided for in this act," implies that the whole of the general fund shall be so applied and used, and that the holder of any claim against the city which is payable out of the general fund is entitled to have his claim audited, and also to have it paid, if, at the time of presentation for payment, there is sufficient money therefor in the general fund. Section 76 of the consolidation act declares that "the general fund consists of all moneys in the treasury not designated and set apart by law to a specified use, and of the overplus of any special fund remaining after the satisfaction of all demands upon it"; and in section 83 it is declared that "the term 'law' or 'laws,' as used in this act, is never to be understood as applicable to any regulation of the board of education, or of the board of supervisors, but only applicable to the constitution, and the laws made or adopted by the legislature in pursuance thereof." The estimate which the board of supervisors is directed to make of the necessities of the several funds, as the basis of the tax which they will levy, is not a conclusive determination of the amount that may be expended for these several necessities; and, although the failure to levy a tax which shall raise a sufficient amount of money for these needs will prevent the expenditures, yet, if the money has been collected and is in the treasury, applicable thereto, its expenditure or disbursement is not limited by the amount of the estimate. In the present case the board of supervisors were required to estimate the expenses that would be incurred at the general election for the year 1894, and, in the exercise of their judgment, they deemed it necessary to provide the sum of \$150,000 therefor. As the incurring of these expenses was not under their control, it would not be competent for that body to determine the amount that should be expended, and their estimate would be, at most, only an approximate opinion of the amount of the expense. Nor does the fact that their estimate was too low deprive the holders of claims for the excess above this estimate of the right to payment, so long as there is money in the treasury applicable thereto. See *Cashin v. Dunn*, 58 Cal. 582; *Welch v. Strother*, 74 Cal. 415, 16 Pac. 22.

The duties of the defendant are defined in the consolidation act and other statutes, and it is not competent for the board of supervisors, by any ordinance or resolution, to restrict him in the exercise of his office, or to absolve him from the performance of these duties. In a demand upon the treasury has been approved and ordered paid by the proper board or officer, and is presented to him in proper form, and he has satisfied himself that the money is legally due and remains unpaid, and that payment thereof from the treasury is authorized by law, it becomes his duty to audit the demand, and the holder of the demand has a right to the enforcement of this duty. He is not justified in showing any favoritism by auditing the claim of one per-

son in preference to that of another, upon the theory that there may not be sufficient money in the treasury to meet all demands upon it; and, as the appellant herein can, in law, have no choice as to which of its creditors shall first be paid, it cannot restrain the defendant from auditing demands against it which have been properly allowed and ordered paid. The judgment is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

### CITY AND COUNTY OF SAN FRANCISCO v. WIDDER. (S. F. 21.)

(Supreme Court of California. Feb. 21, 1896.)

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by the city and county of San Francisco against J. H. Widder. Judgment for defendant, and plaintiff appeals. Affirmed.

W. C. Graves, for appellant. Thornton & Merzbach, for respondent.

PER CURIAM. This case is a companion to S. F. 20, this day decided (43 Pac. 960); that action having been brought to prevent the auditing, while this was brought to prevent the payment, of certain demands against the appellant. The principles therein declared are applicable to the present case, and upon its authority the judgment appealed from is affirmed.

### HAVENS v. DONAHUE. (S. F. 16.)

(Supreme Court of California. Feb. 21, 1896.)

#### CONTRACTS—PERFORMANCE—ARCHITECTS.

1. Under a contract with an architect to furnish the necessary drawings, specifications, and details for the construction of a building for a certain percentage on the total cost of the construction of the building, the architect, after furnishing the drawings, etc., is not limited, in case his employment is terminated before the construction of the building is completed, to a recovery of the percentage on the cost of the building in so far as it was at the time completed.

2. An architect employed to furnish plans for the erection of a building on a site on which there is another building, occupied by tenants, is not liable to the owner by disclosure of the intended erection of the new building—the architect having neither contracted nor been requested to keep such fact a secret—for the loss of rent caused by the vacation of the building by the tenants.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Charles I. Havens against Annie Donahue. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Stanley, Hayes, McEnerney & Bradley, for appellant. Boyd, Fifield & Hoburg, for respondent.

GAROUTTE, J. This is an action to recover for the services of an architect. Judgment went for plaintiff, and defendant appeals from the judgment, and also from an

order denying her motion for a new trial. Plaintiff's contract was to furnish all necessary general drawings, specifications, and details for the construction of a building, upon a commission of 2½ per cent. upon the total cost. He was paid \$3,750 under the contract, and seeks to recover the balance.

Defendant's first claim is that under such contract, plaintiff was only entitled to recover his commissions upon the cost of construction as far as the building had proceeded at the time his employment was terminated. This contention cannot be sustained. Plaintiff had nothing to do with the construction of the building. His contract was simply to furnish the plans, drawings, and specifications, and this he did. The actual construction and cost of construction are only material to him as fixing the amount of defendant's liability for the services rendered. Again, the complaint also charged upon a quantum meruit, and the court found the value of the plaintiff's services at the amount fixed by the judgment. This would seem to dispose of any question upon such contention.

The defendant, by her pleading, set up a counterclaim to the amount of \$500. This counterclaim is based upon allegations to the effect that she (defendant) employed plaintiff, as an architect, to furnish the plans, etc., for the erection of a certain building upon a site where a building of hers was then standing, which was occupied by tenants; that plaintiff improperly notified a reporter of the San Francisco Chronicle of her intention to erect a building upon such site, and also furnished the paper a drawing of said building. And it is alleged that these things were published in that paper as a matter of public news, and thus came to the knowledge of defendant's tenants. It is charged that, by reason of these facts coming to their notice, some of them removed from her building; thus depriving her of future prospective rents and profits, and damaging her to the extent of such prospective rents. We attach but little importance to this contention. Aside from the remoteness of the damages sought to be recovered, and their contingent and speculative character,—matters which we will not discuss,—there is no cause for relief stated. There is no allegation that plaintiff agreed not to make disclosure of defendant's intentions to erect the building, nor was he requested not so to do. Neither did the law cast upon him any duty to keep his knowledge as to these matters to himself. It necessarily follows that no cause of action is stated. The relations arising between the plaintiff and defendant came solely from the contract, and we cannot see that they were in any sense confidential. Section 1881 of the Code of Civil Procedure treats of confidential relations existing between certain parties, but the facts of the present case do not bring it within the provisions of that section. We do not think

the disclosures here made were any more confidential than if the dealer furnishing the lumber, or the contractor who was to do the work, had given notice to the public that the building was to be erected.

It would appear that the principal controversy in this case centers around the location of a certain stack of chimneys, and damages are claimed from plaintiff for an alleged mislocation of these chimneys upon the plans. The building was to be seven stories in height. The six upper floors were arranged for offices, and each was a duplicate of the other. During the progress of construction the seventh floor was changed to a photographic gallery. The chimneys were located according to the original plan, which contemplated this floor to be devoted to offices, and were not located in the proper place for a gallery, and this fact was the occasion of the controversy arising between these parties. The trial court found in favor of plaintiff upon the charge of negligence, and as the evidence is conflicting the judgment will not be disturbed upon this ground. The claim of defendant at the trial of the case was that plaintiff furnished a gallery plan for the seventh floor, locating the chimneys in the partition wall, and that when actually located they came through the floor at a distance of five feet therefrom. But this unfortunate condition was not attributable to the architect, and the court has so found. It arose from the delay practiced by the defendant in arriving at a determination to change the seventh floor from an office floor to that of a gallery; for, at the time this change was determined upon, the chimneys had been erected by the contractors according to the original plans. This fact is undisputed. When the gallery plan was adopted the chimneys were already there. The mischief was done, and there was no remedy for it. It may be assumed, for present purposes, that, prior to this time, plaintiff had furnished a gallery plan, showing the location of the chimneys to be in the partition wall; but at that time the chimneys had not been built, the contract for their building had not been let, and then they could have been placed according to such plan. A witness (Sullivan) was sworn, and placed upon the stand, when counsel for defendant said: "I want to prove that Mr. Sullivan got this sketch from Mr. Havens between the 18th and 20th of July, 1892. (Counsel referred to a lithographic sketch of the gallery, which was sent East to various photographers for the purpose of securing a tenant, but was not, and did not purport to be a copy of defendant's Exhibits D and E.)" An objection was sustained to the offer. Appellant's attorney stated at the time that he offered this evidence for what it was worth. The trial court concluded that as evidence it was worth nothing, and we think the conclusion right. The offer to prove this sketch was too general to be of any service. If

the evidence had been introduced as offered, it would have been entirely too vague and indefinite to have given the court any light upon the issue then under consideration. And under any circumstances, in view of all the other evidence in the case, it is a matter of too slight importance to demand a reversal of the judgment. We find nothing further in the record demanding our consideration. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

# ROSENBERGER v. PACIFIC COAST RY. CO. (L. A. 86.)<sup>1</sup>

(Supreme Court of California. Feb. 21, 1896.)

## MASTER AND SERVANT—TERM OF EMPLOYMENT—WRONGFUL DISCHARGE.

1. Under Civ. Code, § 2010, providing that "a servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages, a hiring at a yearly rate is presumed to be for one year," an employment at a stated yearly salary, without other agreement as to the time, constitutes a contract for one year, and this will not be changed by the fact of the monthly payment of salary, nor by the custom of the employer, a railroad company, or of all railroad companies, to employ only by the month.

2. In an action by an employé wrongfully discharged to recover wages, he is not required, as a condition of recovery, to show whether or not he has endeavored to secure other employment, and, if so, with what result, such facts being matters of defense, as to which the burden of both pleading and proof rests on defendant.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by E. B. Rosenberger against the Pacific Coast Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. Graves & Graves, for respondent.

PER CURIAM. This cause was tried by the court and a jury, the plaintiff had judgment, and the defendant appeals therefrom, and from an order denying a new trial. The plaintiff claimed that he was employed by the defendant as an accountant for the period of one year, commencing November 24, 1893, at a salary of \$1,800 per annum, payable in monthly installments of \$150, and that he was discharged without cause March 24, 1894. This action was commenced, July 17, 1894, to recover three months' salary, from March 24 to June 24, 1893, amounting to \$450, and for that sum he recovered judgment. The defense was that the employment was not for any definite time, and that his discharge was justifiable, because of his failure to give bond for the faithful discharge of his duties.

Prior to the employment in question, plain-

<sup>1</sup> Rehearing denied.

na, and had made an application for employment to the auditor of the Oregon Improvement Company, with which company defendant is connected. C. O. Johnson, defendant's superintendent, wrote plaintiff, November 4, 1895, to know whether he was still an applicant, and for information as to experience, salary required, etc. To this letter plaintiff replied, saying, as to salary, that it should be worth \$1,800 or \$2,000 a year. To this Johnson replied by telegraph, saying: "Yours ninth. Salary eighteen hundred. Change immediate if possible. Could probably arrange transportation. Wire earliest date." Plaintiff arrived at San Luis Obispo the night of November 24th, and on the morning of the 25th talked with Mr. Johnson an hour and a half, but plaintiff was unable to state with any particularity what was said, but, as he expressed it: "As near as I can give it, we arrived at an understanding to furnish me one year's employment upon satisfactory performance of my duties which I had undertaken. \* \* \* I say that, as near as I can recollect, we arrived at that understanding." Mr. Johnson testified that, in this conversation, nothing was said as to salary, or the term for which he was employed, but that it related wholly to the duties he was to perform. Though plaintiff was paid monthly, up to the time of his discharge, at the rate of \$150 per month, the correspondence constituted a hiring for a year. Section 2010 of the Civil Code provides: "A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified time." The payment by the month, at the monthly proportion of the yearly rate, would not, of itself, be sufficient to change the contract to a hiring by the month; nor would the custom of the defendant, or of all railroad companies, to hire by the month convert the contract, created by the correspondence between the parties, which, under the Code, constituted a contract for a year, into a contract by the month. If the correspondence had not fixed the term for which the plaintiff was hired, section 2011 of the Civil Code, as well as the custom, would have made a hiring by the month. Upon this point, the instruction to the jury was right, and the verdict justified by the evidence.

The second defense, viz. the failure of the plaintiff to give a bond for the faithful discharge of his duties, was not established at the trial. This was an affirmative defense, alleged by the defendant in its answer, and, unless established by evidence, would not prevent a recovery by the plaintiff. The appellant does not claim that the giving of a bond was originally made a condition of the employment or that any reference thereto

plaintiff had entered upon the discharge of his duties, but alleged, in its answer, that there was a general usage among railroad companies to require bonds from those of their employes whose duties required the handling of money, and that the plaintiff was aware of this usage, and contends from this that it entered into and formed a part of the contract of employment. To establish this defense, it was, therefore, necessary for the defendant to show not only the existence of the usage, but also that the plaintiff was aware of its existence at the time of the hiring. The record, however, fails to show that any evidence of this nature was presented to the jury. Mr. Johnson, who was the only witness on the part of the defendant at the trial, testified that the plaintiff was discharged for the reason that he failed to furnish such a bond, but no question was asked him on behalf of the appellant respecting the usage of railroad companies in requiring bonds to be given, or the knowledge of the plaintiff of such usage. Upon his cross-examination, after he had stated that there was no other contract with the plaintiff with reference to the employment than the correspondence which was in evidence, he was asked what right he had to require him to give a bond, to which he replied: "Because he, in his letter, showed that he was sufficiently familiar with railroad usage to know the necessity of a bond in connection with his duties." This is the only evidence in the case with reference either to the usage or the knowledge of the plaintiff, and falls far short of establishing either. The letter referred to is entirely silent upon this subject, and gives no ground for inferring either the existence of the usage or the knowledge of the plaintiff. The request of the plaintiff that he give a bond, which was made by the defendant after he had entered upon his duties, did not make it one of the terms of the employment, nor were those terms varied by the fact that, in pursuance of that request, he filled out the blank application which was handed him.

The court properly refused the instruction asked by the defendant. While it is the duty of an employe who has been wrongfully discharged to seek other employment, and thus diminish the damages sustained by him, he is not required, as a condition of recovery, to show that he has made such endeavor and failed. The burden is on the defendant to show that he could, by diligence, have obtained employment elsewhere. Whatever compensation may have been received in such employment is also to be shown by the defendant in mitigation of damages; otherwise, the damages will be measured by the salary or wages agreed to be paid. *Suth. Dam.* § 693; *Costigan v. Railroad Co.*, 2 Denio, 609; *Howard v. Daly*, 61 N. Y. 362; *Utter v. Chapman*, 43 Cal. 279. The judgment and order are affirmed.

THOMAS et al. v. SAN DIEGO COLLEGE  
CO. et al. (No. 19,560.)

(Supreme Court of California. Feb. 25, 1896.)

JUDGMENT — RIGHT TO CONTROL EXECUTION —  
PRACTICE — SUSPENDING SALE UNDER  
DECREE OF FORECLOSURE.

1. Trustees to whom a mortgage securing bonds is made payable, and who have foreclosed such mortgage, have not such absolute control over the decree as will preclude the court from ordering a sale of the property thereunder, over their objection, on motion of one of the bondholders, though he is also owner of the equity of redemption in the property.

2. An error in granting an order on a motion of which no notice was given the adverse party is without prejudice, where a motion to set aside the order is afterwards made and heard.

3. The depreciation of property owing to general business depression is not a sufficient reason to justify a court in ordering a suspension of the sale of mortgaged premises under a decree of foreclosure, and a plaintiff is not entitled to such an order, against the objection of other parties in interest, where the conditions have not changed since he took his decree and had an order of sale issue, under which no sale was made because of an irregularity.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by R. A. Thomas, William Collier, and J. E. Fishburn, trustees, against the San Diego College Company, George Hannahs, assignee, and O. J. Stough. Plaintiffs appeal from two orders after decree. Affirmed.

Trippet, Boone & Neale, for appellants. Conklin & Hughes, for respondents.

HAYES, C. This appeal is by the plaintiffs from two orders, made after judgment; the first directing the immediate issuance and execution of an order of sale, made upon the ex parte application of defendant Stough, and the second an order denying plaintiffs' motion asking that the order of sale be recalled, or that its execution be postponed.

The San Diego College Company issued 298 bonds, for the sum of \$100 each, together with interest coupons thereto attached, and executed to the plaintiffs, as trustees, a mortgage upon several parcels of real estate to secure the same, the most valuable of which is known as the "College Campus," upon which there was a large building. The above-entitled action was brought to foreclose said mortgage, and a decree of foreclosure was entered therein December 22, 1893. The findings set out the names of the holders and owners of said bonds, and the number held by each, from which it appeared that defendant O. J. Stough was the holder of 157 of said bonds, 132 of which he owned, and the remaining 25 he held as collateral security, the college company being the owner, subject to the pledge thereof. Defendant Hannahs is the assignee of the college company, an insolvent debtor. Prior to the commencement of the foreclosure proceedings, and also prior to the insolvency of the college company, defendant Stough became the owner of

the mortgaged property, but took it subject to said mortgage, and was, therefore, a necessary party to the foreclosure suit. The decree directed certain parcels of the mortgaged property to be first sold, and, on March 13, 1894, an order of sale was issued, and under it the sheriff sold all the property except that known as the "College Campus." But this sale, made on May 21, 1894, did not realize enough to pay the interest due on the bonds, and the condition upon which the remainder of the property could be sold was thereby fixed, and the "College Campus" property was afterwards advertised to be sold on July 2, 1894, but by direction of plaintiffs' attorneys it was readvertised, and was offered for sale on August 1, 1894, and on that day L. L. Boone and O. A. Trippet (two of plaintiffs' attorneys), "on their own responsibility and not for their clients," bid therefor \$3,000, but refused to complete the purchase, because, as they claimed, the sale was made without legal notice. On August 28, 1894, the first of said orders was entered in said cause upon motion of Conklin & Hughes, attorneys for defendant Stough, but without notice to counsel for plaintiffs. The order recited that it appeared "to the satisfaction of the court that O. J. Stough, named as defendant in said cause, is the person most largely interested in the enforcement of said decree." A writ was accordingly issued that day, and counsel for plaintiff moved, upon notice to counsel for defendant Stough, to recall said writ, and postpone the sale until the further order of the court, upon the grounds (1) that said writ was issued without their request, knowledge, or consent; (2) "that it is against the interests of plaintiffs' cestuis que trustent to have a sale made of the mortgaged premises at the present time;" and (3) "that equity and justice to the bondholders named in the judgment herein demands that the sale of said premises be postponed." This motion was denied, and plaintiffs appeal from the order denying it, and from the ex parte order directing the writ to issue. The facts appear in a bill of exceptions.

In support of the second and third grounds of said motion, an affidavit made by L. L. Boone was read, to the effect that, as he was informed and believed, the improvements on the "College Campus" property cost \$40,000; that the buildings thereon were designed for college purposes; that their chief value depends upon the use to which they might be put; that it is the opinion of real-estate agents that a purchaser could be found at the price of \$12,000, but that, owing to the present depressed financial condition of the country it would take some time to find a purchaser at that price, say six months; that, since the last attempted sale, the attorneys for the bondholders, other than Stough, have been making efforts among themselves to raise sufficient money to enable them to bid \$6,000; but, as the principal bondholder, Mr. Groh, lives in Nebraska, it would take some

time to complete arrangements, in which event affiant believed a bid of \$6,000 would be made; but that, if a sale were forced immediately, not more than \$3,000 would be obtained.

Appellants contend that a writ for the enforcement of the judgment could not properly issue without their request or consent. There is no doubt about the general proposition laid down in *Freeman on Executions* (section 21), that, "as the judgment is the property of the plaintiff, he alone, while the property remains his, is entitled to exercise dominion over it," and "to allow another to control the writ is to turn the dominion of the property over to some one who is not entitled to it." But, it will be observed that the learned author is speaking of cases where the plaintiff "is the only one entitled to the fruits of the judgment," and in the same section he further says: "A stranger may acquire an equitable right to the benefit of the execution, or to the property upon which it is levied; and such equitable right may, in most cases, given him authority to sue out and conduct the process." So that it is the ownership of or interest in the judgment, or in the fruits of the execution, or in the property upon which it is levied, which authorizes a party to cause it to be issued. In *Cortez v. Superior Court*, 86 Cal. 274, 24 Pac. 1011, it was held that a commissioner in partition who is allowed a fee for his services, the amount of which is fixed by the court and made a charge upon the land, is a "party in whose favor judgment is given," within the meaning of the word "party" as used in section 681 of the Code of Civil Procedure. In *Kelly v. Israel*, 11 Paige, 147, cited by respondent, there were several mortgages, in favor of different parties, and a decree of foreclosure had been entered in each, and the property ordered sold by a master under one of the decrees, but for the benefit of all. The master, having advertised the sale, postponed it at the request of the complainant's solicitor. One De Launy, the assignee of a junior mortgage for \$20,000, but who was not made a party because his assignment had not been recorded, but who came in and stipulated to be bound by the decree, thereupon tendered to the complainant the full amount of the three decrees, with interest and costs, upon condition that he would assign the decrees to him; which offer was declined. Thereupon Rogers and Sagory, De Launy's assignors (who had assigned the mortgage as security only), and De Launy, petitioned the chancellor, praying that the complainant might be required to proceed and sell the premises, or that he should assign the decree to De Launy upon payment of the amount due. An order was thereupon made permitting such payment, and authorizing the party paying the same to proceed to sell the property. Upon appeal from this order, made by the vice chancellor, the court, among other

things, said: "If the complainant neglects to proceed to a sale with due diligence, the court, upon the application of any other party interested in the execution of the decree, will commit the prosecution thereof to him; or, if the decree has already been placed in the hands of a master to be executed, will direct him to proceed to a sale without delay, notwithstanding any directions he may receive to the contrary from the complainant or his solicitor. Indeed, it is the duty of the master, without any special order of the court for that purpose, to proceed to a sale of the property with all reasonable diligence, if requested to do so by any party to the suit who must necessarily be injured by the delay if the sale is stayed without a sufficient cause."

In that case, the circumstances requiring the action of the court were stronger than here, and the action of the court was invoked by petition; but the principle involved there and in the case at bar is the same. The case here was also equitable. The decree required the sale of the property, and, as no provision was made in the decree for delaying the sale, it was the duty of the plaintiffs to proceed without unreasonable delay to have the decree executed; and, upon their failure to do so, it became the duty of the court, upon the complaint of any party to the suit interested in its execution, to direct that its execution be proceeded with. It would be a vain thing to bestow upon a court of equity the power to make a decree which it had no power to enforce, and yet such would be the case if its execution depended upon the pleasure or convenience of the plaintiffs. It is quite true, as urged by appellants, that the trustees were the proper plaintiffs in the action, and that the duty of prosecuting it rested upon them; but it does not follow that they had such absolute control of the action, or of proceedings under it, as is necessarily accorded to those who litigate in their own right, and not for the benefit of another. If, for example, they had refused to bring the action to foreclose the mortgage, it appearing that the circumstances made it their duty to do so, such refusal would not have tied the hands of the court or of the bondholders, and thereby prevented a foreclosure. They had no personal interest in prosecuting the suit or enforcing the decree, and were only instruments in the hands of the court, after they brought themselves within its jurisdiction, for the enforcement of the trust created for the benefit of others, and were therefore peculiarly within the power and control of the court. The respondent O. J. Stough owned 132 of said bonds, and held 25 more as collateral security for a debt of the college company, and was found by the court to be the person most largely interested. But it is contended that his interest was adverse to that of the other bondholders, inasmuch as he was the owner of the mortgaged property, subject to the

mortgage, and therefore interested in having the property sold for a small sum, in order that he might redeem at a small cost. But the fact that defendant Stough was the owner of the mortgaged property is an additional reason in support of his right to make the application, as it shows that he was not only interested as a bondholder, but was interested in the property to be sold, and the question was, therefore, not one affecting his right to apply for the issuance of the order of sale, but one to be considered by the court as a ground for granting or refusing his motion.

But it is contended that the first order was granted upon the ex parte application of defendant Stough, and that plaintiffs have not consented to or ratified the order. Whether the court erred in granting the order without notice need not be considered, as plaintiffs were heard upon the motion to recall the order, or to stay its execution; and, if their motion was properly denied, they were not prejudiced by the first order. The interest of Mr. Stough was known from the beginning. He was made a party because he held the legal title to the mortgaged premises. Nor does there appear to have been any change in the condition of the property, or in the financial condition of the country between March 13, 1894, on which date an order of sale was issued at plaintiffs' request, and October 5, 1894, when the motion to recall the order was denied; and, between those dates, and after the sale of the other property, the "College Campus" was twice advertised for sale under plaintiffs' instructions, first for July 2d, and then for August 1st, and on the last-mentioned day the property was struck off to Boone and Trippet, who afterwards refused to complete their purchase because of some alleged irregularity or defect in the notice of sale. If July or August were a proper time to sell said property, it is difficult to understand why it might not properly be sold in September or October. In *McGown v. Sanford*, 9 Paige, 290, it was held that the fact that property was depressed in consequence of the general derangement of the finances, affidavits of the defendants and others of their belief that the politics and finances of the country would be settled at an extra session of congress, so as to greatly increase the value of property, were insufficient to justify the court in ordering a suspension of the sale of mortgaged premises under a decree of foreclosure; and in *Astor v. Romaine*, 1 Johns. Ch. 310, it was decided that the actual existence of war (1814), where there was no immediate danger of an invasion of the place where property was advertised to be sold, formed no sufficient ground for suspending the sale of mortgaged premises under a decree.

Of course, what has been said does not conflict with the well-established power of a court to refuse to confirm or to set aside a sale where special circumstances have prevented competition, and assurance is given

that, upon a resale, a better price can be obtained, sufficient to justify the delay and additional expense. The uncertainty of any agreement or combination of the stockholders being effected, as suggested, is too great to justify a postponement of the sale. The condition of the country affecting the value of the property was well known long before, and ample time had elapsed after the decree was entered to consummate the arrangements, if such consummation were practicable. The orders appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the orders appealed from are affirmed.

SMITH v. LUNING CO. (No. 15,940.)<sup>1</sup>  
(Supreme Court of California. Feb. 21, 1896.)  
MUNICIPAL CORPORATIONS—OPENING OF STREETS  
—LAYING OF SEWERS—CONTRACTS.

1. In an action on a contract whereby plaintiff undertook to lay a sewer in front of defendant's premises, it appeared that the city ordinances required for such work the consent of the superintendent, and that, before the superintendent could issue a permit for street work under a private contract, such contract must be for work on the entire length of a block, and be signed by the owners of three-fourths of the frontage; that the contract between the parties was for work in front of defendant's premises only, which occupied but one-fourth of the frontage. *Held*, that it was implied that plaintiff should procure the necessary signatures of other property holders, and a permit from the superintendent, and that, in the absence of such acts, he acquired no rights under the contract.

2. In such case, in the absence of evidence that plaintiff had a contract with the owners of the necessary frontage, he had no authority to do the work, and could confer none on another.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by plaintiff, Smith, against the Luning Company, to foreclose a lien acquired under an alleged contract for the construction of a sewer in front of defendant's premises. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. P. Langhorne, for appellant. J. C. Bates, for respondent.

HARRISON, J. The plaintiff and the defendant entered into an agreement June 7, 1893, by which the plaintiff was to construct an ironstone pipe sewer in front of the property of the defendant on Leavenworth street, between Greenwich and Lombard streets, in San Francisco, to the satisfaction of the superintendent of streets and highways of said city and county. There was at this time an ordinance in force in the city and county making it a misdemeanor, punishable with fine or imprisonment, for any person to break up or disturb any public street, without the permission of the superintendent of streets and

<sup>1</sup> Rehearing denied.

highways, and providing that that officer should not issue a permit for the doing of any street work under a private contract, unless said contract provided for doing the work on the entire length of the block, and was signed by the owners of three-fourths of the frontage of the property in said block. The defendant was the owner of one-fourth of the frontage on Leavenworth street between Greenwich and Lombard, and prior to this date, viz. April 11, 1893, one Daniel O'Connor had entered into a contract with the owners of the other three-fourths of the frontage on said street for building a sewer therein, and had obtained a permit from the superintendent of streets for constructing said sewer, which he afterwards completed, and on the 10th of August received from the superintendent of streets a certificate of his acceptance of said work. The plaintiff never received a permit from the superintendent of streets to do any work on this portion of Leavenworth street, and did not do any of the work in constructing the sewer. The plaintiff brought the present action to foreclose a lien upon the land of the defendant by virtue of its agreement with him for the construction of the sewer. Judgment was rendered in his favor, and the defendant has appealed.

As the construction of the sewer in front of the defendant's lot, without obtaining a permit therefor from the superintendent of streets, would have been in violation of the city ordinance, and have constituted a misdemeanor, any agreement between the plaintiff and defendant to construct it without obtaining such permit would have been unlawful, and could not form the basis of a civil action. Parties to an agreement are, however, deemed to have intended a lawful, rather than an unlawful, act; and their agreement is to be construed, if possible, as intending something for which they had the power to contract. As the obtaining a permit from the superintendent of streets was essential to rendering the agreement between the plaintiff and defendant valid, and as the instrument in question is silent upon that subject, the obtaining of such permit must be implied as a condition of the agreement between them, and the instrument signed by them as merely an inchoate agreement, which would become effective and binding only in case such permit should be issued. This construction is corroborated by the terms employed by the parties to the instrument. It purports to be made between the plaintiff, as party of the first part, "and certain owners of property, lots, and lands fronting on Leavenworth street, whose names are hereunto subscribed, each contracting severally, parties of the second part"; and in the body of the agreement the plaintiff agrees to and with the said "parties" of the second part, and they, "each for himself, and not one for the other," agree to pay "for the work done in front of his or her own property, respectively, and not in front of others, according to the ratio that his front-

age bears to the whole frontage here represented." In view of the requirement of the ordinance that the owners of three-fourths of the frontage on the block should sign the contract before a permit could be granted, it is evident that in signing the instrument there was implied a condition that, before the defendant was to be bound thereby, the plaintiff was to procure other parties thereto sufficient to entitle him to obtain the permit. If the plaintiff had refused to obtain such permit, and the defendant had attempted to enforce the agreement in the form in which it is found, or to recover damages from the plaintiff for its breach, it would have been a sufficient answer for the plaintiff to say that the ordinance forbade him from doing the work.

The plaintiff, moreover, failed to show that he had performed the contract on his part. He testified that he "had not himself performed any of said work, but all of said work had been performed by one Daniel O'Connor"; and O'Connor also testified to the same effect. The plaintiff offered in evidence "a written instrument, signed by him," by which he purported to appoint Daniel O'Connor "my true and lawful attorney, for me, and in my name, place, and stead, to do and perform the work of constructing an ironstone pipe sewer in front of the property of the owners of lots and lands on Leavenworth street, under a certain written contract, heretofore entered into between the owners of lots and lands fronting on said Leavenworth street, between Greenwich and Lombard streets, and myself." The record does not show that this instrument was ever delivered to O'Connor, or that he accepted the appointment, or acted under its terms, or did any work for the plaintiff. But, irrespective of this, the plaintiff acquired no rights against the defendant by reason of this power of attorney, or any act of O'Connor in the performance of the work. At the time this instrument was signed, O'Connor had already entered into a contract for constructing the sewer throughout the entire block; and whatever work was performed by him in the construction of the sewer was done under the obligation assumed by him in this contract, and not by virtue of any authority derived from the plaintiff. The finding "that said O'Connor, under authority from plaintiff, performed for plaintiff the work described in plaintiff's said contract," is without any evidence to support it. The finding that the plaintiff and O'Connor "had a contract with all the owners of the 550 feet frontage of the lots and lands fronting the proposed work, except the frontage of defendant's property, for similar work to that mentioned in the contract between plaintiff and defendant," is also unsupported by the evidence. There is no evidence that the plaintiff was a party to any contract with the owner of any frontage on the work, excepting the frontage of the defendant; and, as the contract with the defendant gave him no authority to do the work of building the sewer, he



could not, by virtue of that contract, confer any authority upon O'Connor to build the sewer. The defendant's liability to the plaintiff does not depend upon the construction of the sewer, but upon its construction by the plaintiff, and it was not sufficient for the plaintiff to show that the sewer had been constructed. He was also required to show that it had been constructed by him. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

WITTER v. McCARTHY CO. (L. A. 67.)

(Supreme Court of California. Feb. 21, 1896.)

TRUSTS—RATIFICATION BY BENEFICIARIES—PRINCIPAL AND AGENT—PRINCIPAL CHARGEABLE WITH KNOWLEDGE OF AGENT.

1. In an action to quiet title to an undivided interest in land, it appeared that defendant's grantor, as owner of a tract of land, after contracting to convey undivided interests in it to several persons, of whom plaintiff was one, and receiving part of the purchase price, by agreement with them dated March 1, 1888, conveyed the land to a trustee, a party to the agreement, with plenary power to sell and convey; that this agreement required the trustee to distribute the proceeds among the respective grantees in proportion to the interests held by each, deducting from the share of each the amount due from him on the purchase price, and pay the same to the grantor, less the amount of a mortgage which he had agreed to pay; that the trustee never sold the land, but, November 1, 1892, conveyed to each of the beneficiaries his undivided interest; that an interest of  $\frac{25}{40}$  was conveyed to the grantor, who recorded the deed thereof; that the grantor subsequently acquired an  $\frac{8}{40}$  interest conveyed to others by the trustee at the same time, and January 30, 1893, conveyed his entire interest ( $\frac{33}{40}$ ) to defendant. There was no evidence that any of the parties to the agreement objected to the conveyances by the trustee, or that defendant did till filing its answer in this action, November 12, 1894. Held, that a finding that all the beneficiaries to the trust consented to and acquiesced in the conveyances by the trustee was warranted.

2. A corporation is charged with the knowledge of its president, acting as attorney in fact of one making an assignment to it.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by W. E. Witter against the McCarthy Company to quiet title. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

McKeeby & Appel, for appellant. Wicks & McDonald, for respondent.

VANCLIEF, C. Action to quiet the alleged title of plaintiff to an undivided  $\frac{2}{40}$  parts of a tract of land containing about 130 acres, situate in the county of Los Angeles. The defendant, for want of information or belief, denied plaintiff's alleged title, and asserted title adverse to that claimed by plaintiff. The court below, without the interven-

tion of a jury, found the facts and law in favor of plaintiff, and rendered its judgment accordingly. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The facts relative to the question of title are substantially as follows: Prior to March 1, 1888, Edward McCarthy was sole owner of said tract of land, subject to a mortgage for \$15,000, but prior to that day had contracted to sell to each of a number of persons undivided portions thereof, and had received from them portions of the purchase money. The plaintiff was one of such contractors, to whom, on February 15, 1888, Edward McCarthy had contracted to sell  $\frac{2}{40}$  of said tract for the price of \$6,000, of which \$1,500 was paid at the date of the contract, and the remainder was to be paid, \$1,125 in 3 months, \$1,125 in 6 months, \$1,125 in 9 months, and \$1,125 in 12 months, from date of the contract. All parties interested desiring that the whole tract of 130 acres be subdivided and sold in lots to suit purchasers, and that the proceeds in money be distributed in proportion to the undivided interests of the parties, it was agreed that Edward McCarthy should convey the whole tract to J. I. Weed in trust to make such sales and conveyances and to distribute the proceeds thereof according to the agreement. This agreement was reduced to writing and executed by the three parties thereto, on March 1, 1888, to wit, Edward McCarthy, of the first part; W. E. Witter, G. P. Lyman, L. A. Thompson, and eight others (contractors for undivided interests), of the second part; and J. I. Weed, of the third part. The agreement confers upon the trustee plenary power "to grant, bargain, sell, and convey all or any portion of said land for such price and upon such terms as he shall deem best," and, as to his duties, contains the following: "It is further agreed that the trustee aforesaid shall receive and collect all moneys for sales of the land aforesaid, and pay all taxes, commissions, expenses of sale, of all kinds, and improvements authorized by the parties of the second part, and shall on or before the 1st day of July, A. D. 1888, declare a dividend in favor of the second parties of any and all moneys in his hands, in proportion to the interests of the respective parties therein, as shown by the contracts with Edward McCarthy aforesaid, and shall, out of said dividends, pay to Edward McCarthy the amounts due or to become due to him from second parties on said contracts, and the balance, if any there be, to the respective parties entitled thereto; and, in case the dividend shall not equal the installment due on said contract, second parties shall pay the balance of said installments at the times provided therein, and said trustee shall declare dividends, and apply the proceeds in the same manner every three months thereafter until all the installments on said contracts have been paid, and all of said property shall have

been disposed of. It is further understood and agreed that whereas there is now a mortgage on said property to the amount of \$15,000, with interest at 10% from March 1, 1888, of which Edward McCarthy has assumed the payment, that in case it becomes necessary or expedient to change or renew said mortgage the trustee shall, and he is thereby authorized to, execute such mortgage in his own name, and the amounts received by said trustee from said second parties, or in their behalf applicable to the installments due to Edward McCarthy, shall be applied to the liquidation of said mortgage, and shall be credited on the contracts of Edward McCarthy to second parties in the proportions to which they are respectively entitled thereto. It is further understood and agreed that in case of the failure or refusal of second parties, or any of them, to make the payments to Edward McCarthy provided for in said contracts, so as to thereby forfeit their rights to the interest in said land as provided in said contracts, the said trustee shall pay to Edward McCarthy all the proceeds of the sales of said lands to which the holder of said contract would otherwise be entitled to receive, and second parties agree to hold said trustee harmless in carrying out this provision." Contemporaneously with the execution of this tripartite agreement, Edward McCarthy conveyed the legal title of said tract of land to J. I. Weed by deed absolute upon its face, the trust being expressed only in said agreement. Weed never sold any part of said tract of land as contemplated by the trust agreement, but on November 1, 1892, four years and eight months after having accepted the trust, he conveyed to each of the beneficiaries an undivided part thereof equal to his beneficial interest in the whole. To plaintiff he thus conveyed  $\frac{2}{40}$ , that being the interest which plaintiff had contracted to purchase from Edward McCarthy as aforesaid, and for which he had fully paid according to the terms of his said contract with Edward McCarthy, and had also settled his proportion of the expenses of the trust to the satisfaction of the trustee. To Edward McCarthy the trustee conveyed on the same day (November 1, 1892)  $\frac{25}{40}$  of the land. Afterwards Edward McCarthy acquired from other parties to the tripartite agreement  $\frac{8}{40}$  which had been conveyed to them by the trustee on November 1, 1892, as aforesaid. On January 30, 1893, Edward McCarthy, Charles McCarthy, Emeline McCarthy, and Mrs. L. E. Hensler executed a deed purporting to convey to the defendant corporation the land in question and other property, this being the only evidence of defendant's legal title to the land. Yet defendant objected to this deed as being irrelevant, and claims nothing under it. It was relevant, however, as tending to prove that Edward McCarthy consented to and acquiesced in the aforesaid conveyances by the trustee to the beneficiaries, and for this pur-

pose it was, presumably, introduced by plaintiff.

The only grounds upon which appellant claims a reversal of the judgment are that the conveyances of the land by the trustee to the beneficiaries on November 1, 1892, were void for the alleged reason that they were made without the consent of all the beneficiaries, and that the finding by the court that all the beneficiaries of the trust did consent to and acquiescence in those conveyances is not justified by the evidence. The finding of the court is that "said J. I. Weed, at the request of Edward McCarthy, grantor of defendant, and with the consent of the other parties in interest, conveyed the entire property to the respective parties in interest, and that such conveyances were accepted by the various parties, and were acquiesced in by the grantor of this defendant and all other parties to said agreement [tripartite agreement] set out in defendant's answer." The evidence tending to prove this finding as applied to Edward McCarthy, grantor of defendant, is (1) that he accepted and recorded a deed from Weed for  $\frac{25}{40}$  of the land on the same day (November 1, 1892) that deeds were made to all the other beneficiaries; (2) that he subsequently purchased the interests conveyed by Weed on the same day to two other beneficiaries, amounting to  $\frac{8}{40}$  of the land; (3) that thereafter, on January 30, 1893 (three months after the said conveyances by Weed), he conveyed all his interest in the land in question, then amounting to  $\frac{25}{40}$ , to the defendant corporation; and (4) there is no evidence or pretense that Edward McCarthy, or any one of the parties of the second part to the tripartite agreement, ever objected to any one of said conveyances by Weed of November 1, 1892, nor that the defendant corporation ever objected thereto before it filed its answer herein, on November 12, 1894,—over 2 years after said conveyances were executed, and 21 months after it had accepted a conveyance of  $\frac{25}{40}$  of the land from Edward McCarthy, who claimed title under said Weed conveyances alone. I think this evidence, though merely circumstantial, is sufficient to justify the finding in question. Besides, it would not be consistent for the defendant to claim title to  $\frac{25}{40}$  of the land under or through the Weed conveyances, and at the same time to deny the title of plaintiff and others who claim the other  $\frac{7}{40}$  from the same source. But, as before remarked, defendant professes to claim nothing in this action under the conveyance from Edward McCarthy of January 30, 1893, and therefore claims no title at all unless it was acquired from some other source, or in some other manner. There is no evidence, however, of any other title, legal or equitable, in the defendant, except an instrument purporting to be an assignment by Charles McCarthy, Minnie A. Austin, and Mrs. L. E. Hensler, by their attorney in fact, James P. McCarthy, to the defendant, of all moneys and property to

which they (assignors) "may be entitled from the proceeds of the sales of the land described" in the tripartite agreement, and in the deed from Edward McCarthy to J. I. Weed, "which property was deeded to said J. I. Weed in trust for certain purposes in said agreement mentioned." Yet even this assignment bears no date, and there is nothing in the record indicating when it was executed. Edward McCarthy is named in the body of the instrument as one of the assignors, but he does not appear to have signed it. Nor is there anything in the record indicating when the defendant was organized as a corporation. It is stipulated that, during all the transactions involved in this action, James P. McCarthy was the general attorney in fact for Edward McCarthy, Charles McCarthy, Mrs. L. E. Hensler, and Minnie A. Austin, and that he was president of the defendant corporation from its organization until the trial of this action. It is further stipulated that he expressly approved of the conveyances by Weed (of November 1, 1892) to plaintiffs Lyman and Thompson of the  $\frac{1}{40}$  not conveyed to Edward McCarthy. Therefore at the time he executed said assignment for Charles McCarthy, Minnie A. Austin, and Mrs. Hensler, he had actual notice of the conveyances by Weed to plaintiffs Lyman and Thompson of  $\frac{1}{40}$  of the land; and such notice to him was notice to said assignors for whom he acted as attorney in fact, and also notice to the defendant corporation (the assignee), of which he was then the president. It thus appears that at the time James P. McCarthy executed the assignment he was the agent of both parties thereto, and consequently both parties are chargeable with notice of all facts affecting or relating to the assignment then known to him, and, among them, the facts that, with his written approval, Weed had conveyed  $\frac{1}{40}$  of the land to plaintiffs Lyman and Thompson who had paid the stipulated purchase money therefor to Edward McCarthy, defendant's grantor, of all his interest in the land, which could have been only  $\frac{23}{40}$ . Moreover, the assignment does not purport to be an assignment of any interest in the land, nor of any specific interest in the tripartite agreement. It is merely a quitclaim of all right to moneys which the assignors "may be entitled to" from sales of the land, both parties to the assignment then knowing that  $\frac{1}{40}$  of the land had been conveyed to plaintiffs Lyman and Thompson, provided that the aforesaid conveyances by Weed were valid. Thus we are brought back to the questions first above stated and answered. It is unquestionable that the conveyances by Weed to the beneficiaries of the trust are valid if all the beneficiaries consented thereto at the time they were made, and thereafter acquiesced therein until the commencement of this action; and from the conclusion above arrived at, that the finding of such consent and acquiescence by the lower

court is justified by the evidence, it necessarily follows that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

THOMPSON v. MCCARTHY CO. (L. A. 69.)  
(Supreme Court of California. Feb. 21, 1896.)

Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.  
Action by L. A. Thompson against the McCarthy Company to quiet title. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

PER CURIAM. This cause being in all respects similar to that of Witter v. McCarthy Co. (L. A. 67, this day decided) 43 Pac. 969, having been tried upon the same evidence and at the same time, the judgment and order herein appealed from are affirmed, for the reasons stated in the opinion of the commissioners filed in the last-mentioned cause, numbered 67.

LYMAN v. MCCARTHY CO. (L. A. 68.)  
(Supreme Court of California. Feb. 21, 1896.)

Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.  
Action by G. P. Lyman against the McCarthy Company to quiet title. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

PER CURIAM. This cause being in all respects similar to that of Witter v. McCarthy Co. (L. A. 67, this day decided) 43 Pac. 969, having been tried upon the same evidence and at the same time, the judgment and order herein appealed from are affirmed for the reasons stated in the opinion of the commissioners filed in the last-mentioned cause, numbered 67.

HUMBOLDT SAVINGS & LOAN SOC. v.  
BURNHAM et al. (S. F. 190.)<sup>1</sup>  
(Supreme Court of California. Feb. 24, 1896.)

MORTGAGE—DECEASED MORTGAGOR—FORECLOSURE  
—COMPLAINT—SUFFICIENCY—AMOUNT OF JUDGMENT—ACTION ON NOTE—COMPLAINT.

1. A complaint for foreclosure of a mortgage, alleging that plaintiff, within the proper time, presented its claim, duly verified, for the amount of the mortgage, against the estate of a deceased mortgagor, and that the same was duly approved, allowed, and filed, sufficiently alleges a presentation of the claim, as against a general demurrer, where the claim was not attached to nor set out in the complaint.

2. A complaint which alleged that a note counted on was given by Joel S. J. and Georgia C. J., in words and figures as therein set out, and set out a note signed "J. S. J." and "G. C. J.," sufficiently identified Joel S. J. and Georgia C. J. as signers of the note, respectively, as "J. S. J." and "G. C. J."

3. Taxes and insurance paid by a mortgagee under authority of the mortgage, and which are secured by it after his claim against the estate

corrected presentation of the case here, or a mere defective averment of the essential fact of presentation, but an averment from which it appeared that no proper presentation was ever had. The other cases relied upon by appellants we do not regard as affecting the question under consideration.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by the Humboldt Savings & Loan Society against Georgia C. Burnham and others. From a judgment for plaintiff, Georgia C. Burnham and another appeal. Affirmed.

J. D. Boyer, for appellants. A. H. Loughborough, for respondent.

VAN FLEET, J. Action to foreclose a mortgage. Defendants, other than Georgia C. Burnham and James D. Boyer, made default. The two latter demurred to the complaint. Their demurrer was overruled, and, upon failure to answer, judgment was entered against all the defendants, foreclosing the mortgage. From the judgment the two named defendants appeal upon the judgment roll, the only questions made being as to the sufficiency of the complaint.

1. The contention that the complaint does not state a cause of action, for want of a sufficient averment of presentation of the mortgage claim to the estate of Joel S. Josselyn, deceased, is ill founded. The particular objection is that the complaint does not allege, in terms, either that the claim contained a description of the mortgage, with a reference to the date, volume, and page of its record, or that it was accompanied with a copy thereof. The averment was that the plaintiff did, within the proper time, "present to said executrix its claim against the estate of Joel S. Josselyn, deceased, for the amount due and to become due on the said note and mortgage, and that the said claim was duly verified in all respects according to law, and was duly allowed and approved by said executrix and by the judge of said court, and that the same was duly filed on the 20th day of March, 1890, in the office of the clerk of said court, in the matter of the estate of said deceased." The claim was not set out, or attached to the complaint. We deem this a sufficient averment of the ultimate fact of presentation, as against a general demurrer; and the demurrer here was no less a general one because it undertook to specify the particulars wherein the complaint failed to state a cause of action. Whether the claim, as presented, was sufficient in form, or properly presented, was a matter of evidence, of which the general allegation made was sufficient to authorize proof. In *Bank v. Charles*, 86 Cal. 322, 24 Pac. 1019, relied on by appellant, the claim was set out in full in the complaint, and it appeared affirmatively therefrom that the presentation counted upon was insufficient; and the ruling there made that the demurrer should have been sustained was upon that ground, the court saying, "The complaint shows upon its face that the only presentation of the claim was as above stated, and makes the presentation a part of

the essential fact of presentation, but an averment from which it appeared that no proper presentation was ever had. The other cases relied upon by appellants we do not regard as affecting the question under consideration.

2. The further objection that the complaint is ambiguous and uncertain is equally untenable. This objection is based upon the fact that the complaint alleges the note counted upon to have been given by Joel S. Josselyn and Georgia C. Josselyn, while the note, which is set out in full, appears to have been signed "J. S. Josselyn" and "G. C. Josselyn;" and it is said that there is nothing to show that the last-named persons are the same two parties alleged to have executed the note, and that, for all that appears, they may be entirely different individuals. But it is alleged that "Joel S. Josselyn and said defendant Georgia C. Burnham, then the wife of the said Joel S. Josselyn, \* \* \* then and there made, signed, and delivered to said plaintiff, the payee therein named, their certain promissory note in writing, which said promissory note is in words and figures following, to wit," and then follows the note. This was quite sufficient to identify the parties signing the note as Joel S. and Georgia C. Josselyn.

3. Nor was it improper to include in the decree the items paid out by plaintiff for taxes and insurance on the mortgaged property. These expenditures were covered and secured by the mortgage, and were paid under the authority therein given. Having been paid subsequent to the presentation of the claim, for the protection of the property, they were properly allowed, on foreclosure, without demand or presentation. *Society v. Hutchinson*, 68 Cal. 52, 8 Pac. 627. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

#### WEAVER v. CITY AND COUNTY OF SAN FRANCISCO. (No. 16,017.)

(Supreme Court of California. Feb. 21, 1896.)

MUNICIPAL CORPORATIONS—JUDGMENTS AGAINST—CITY AND COUNTY OF SAN FRANCISCO—INDEBTEDNESS PAYABLE FROM SURPLUS REVENUE—EXHAUSTION OF FUNDS.

1. Under the provisions of the constitution (article 11, § 18) and of the San Francisco city and county charter (sections 95-98), the board of supervisors are permitted to make expenditures, for purposes other than those enumerated, only from the surplus revenue of the year in which such indebtedness is incurred, and one who becomes a creditor for such purposes must take notice of the limitation, and of the fact that, should the revenues for the current year become exhausted, though by the payment of claims arising after his own, he has no means of obtaining payment.

2. The fact that the only fund from which a claim against a municipal corporation can be paid is exhausted constitutes no defense to an action thereon, but the proper form of judgment to be entered is one specifying the fund from which it is payable, in that, as in all cases of recovery for indebtedness incurred by a municipality, the constitution (article 11, § 18) having limited their liability therefor to the revenues for the fiscal year in which contracted.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by one Weaver against the city and county of San Francisco. Judgment for defendant, and plaintiff appeals. Reversed.

J. C. Bates, for appellant. H. T. Creswell, for respondent.

HARRISON, J. The plaintiff, in the months of November and December, 1892, performed certain labor in plumbing, gasfitting and tinning upon certain engine houses of the defendant, under an employment by the officers in charge of the fire department of the city, amounting in value to the sum of \$4,517.17. Itemized demands therefor, duly verified, were presented to the officers of the defendant, and approved by the standing committee on the fire department of the board of supervisors, but the auditing committee of said board refused to allow the claims, and they were never audited or allowed. The present action was brought to recover judgment against the defendant for the amount of these demands. The complaint was filed May 9, 1893, and the answer upon which the case was tried was filed February 21, 1894. In its answer the defendant sets forth facts showing the sources and amount of the income and revenue of the city and county for the fiscal year ending June 30, 1893, and the different modes in which this income and revenue had been disposed of and expended; that not only had this entire revenue and income been exhausted, but that, for debts and liabilities incurred during that fiscal year, there had been allowed and audited by the proper officers of the city demands against the city amounting to upward of \$200,000 in excess of the amount of this income, and that this deficiency was represented by allowed, audited, and registered demands for the payment of which no money had been provided; that, in addition to this deficiency, there were outstanding demands against the general fund amounting to the further sum of upward of \$100,000, which had never been audited, and that the demands of the plaintiff were payable only out of this general fund, and had never been allowed, audited, or registered; that, at the time this action was commenced, viz. May 9, 1893, the audited and registered demands against the city, payable out of the general fund, together with the preferred claims for salaries during the remainder of the fiscal year, far exceeded in amount the income and revenue of the fiscal year then remaining in said general

fund; and that, on said 9th day of May, 1893, there was not, and had not since been, any money in the treasury of the defendant, or in any of the funds thereof, which could be applied to the payment of the plaintiff's demands. The cause was tried by the court, who made findings in accordance with these averments of the answer, and rendered judgment in favor of the defendant. The plaintiff has appealed directly from the judgment upon the findings contained in the judgment roll.

The principles governing the decision of this case, as well as the provisions of law applicable thereto in support of the judgment of the superior court, have been so frequently pointed out by this court that it is only necessary to cite a few of the cases in which they are found: *Gas Co. v. Brickwedel*, 62 Cal. 641; *Shaw v. Statler*, 74 Cal. 258, 15 Pac. 833; *Schwartz v. Wilson*, 75 Cal. 502, 17 Pac. 449; *Lewis v. Wildber*, 99 Cal. 412, 33 Pac. 1128; *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231; *Smith v. Broderick*, 107 Cal. 644, 40 Pac. 1033. In addition to the provisions in the constitution (article 11, § 18) referred to in the foregoing cases, the consolidation act, or charter of the city and county of San Francisco, contains provisions applicable to the present case. By section 71 of that act, the board of supervisors is directed, when making the levy of taxes for the fiscal year, to apportion and divide the taxes so levied and to be collected and applied to the several funds therein named, one of which is the general fund, and, at the close of each fiscal year, "the said board shall direct the treasurer to transfer all surplus moneys of all funds excepting the school fund, after liquidating or providing for all outstanding demands upon said funds, to the general fund." Section 76 declares: "The general fund consists of all moneys in the treasury not designated and set apart by law to a specified use, and of the overplus of any special fund remaining after the satisfaction of all demands upon it." A surplus fund is also provided for, which is defined, in section 76, to "consist of any moneys belonging to the general fund, remaining in the treasury after the satisfaction of all demands due and payable which are specified in the first fourteen subdivisions in section 95." This surplus fund is further defined in the fifteenth subdivision of section 95 to be the surplus of money that shall remain in the treasury "at the end of each fiscal year, and after every lawful demand on the treasury then due and payable, or to accrue for that year, shall have been actually paid, taken up and cancelled, and record thereof made in the proper books, or cash in the treasury have been set apart and reserved equal to the amount of said demands that may then be outstanding, or to accrue for that year." It is further provided, in this subdivision of section 95, that payments of demands on the treasury of said city and county may be

zed by the board of supervisors in the lawful exercise of their powers for objects other than those specified in the preceding fourteen subdivisions of this section, out of this surplus fund as specified in sections ninety-seven and ninety-eight, but not otherwise." The claim of the plaintiff is not included within the preceding 14 subdivisions of this section. Section 97 declares that the powers of the board of supervisors enumerated in this act, so far as the exercise thereof may involve the expenditure of money otherwise than for the objects enumerated in the first 14 subdivisions of section 95, "shall be deemed to extend only to authorizing the appropriation and application of any surplus moneys remaining in the treasury during any one fiscal year, to the objects specified in such enumeration of powers, after the demands mentioned in the first fourteen subdivisions of section ninety-five, due and payable during such fiscal year, shall have been paid." And section 98 provides: "If any expenditures not authorized by this act be incurred, they can never be paid out of the treasury, nor shall they be deemed to constitute or lay the foundation of any claim, demand or liability, legal, equitable or otherwise, against the said city and county. If expenditures be incurred which are authorized by this act to be paid out of the surplus funds in the treasury, but not for the preferred objects specified in section ninety-six (those enumerated in the first fourteen subdivisions of section ninety-five), such expenditures can only be paid out of such surplus funds and revenues strictly appertaining to the fiscal year in which such expenditures have been ordered, or the contracts therefor entered into, and cannot be carried forward and paid out of any revenues accruing and receivable into the treasury for any subsequent year."

The court finds that the board of supervisors, at the time of levying the tax to provide for the expenses of the fiscal year ending June 30, 1893, estimated the expenses of the general election to be held November 8, 1892, to be \$140,000, and provided that sum and no more for that purpose; but that claims and demands for the expenses of said election, amounting in the aggregate to the sum of \$293,998.23, had been allowed and paid by the treasurer out of the general fund. This excess of the expenses of the election over the estimate therefor, and its payment out of the general fund, however much it may have depleted the fund out of which the plaintiff would have been entitled to receive payment for his labor, does not give him a right to receive such payment out of the income and revenues of the city for any other year, subsequent to that in which his claim accrued. Whether the expenses thus incurred were proper or not cannot be investigated in this action, since those by whom they were incurred, or to whom they were payable, are not parties hereto. The

were allowed by the board of election commissioners "under the authority vested in it," and it must therefore be assumed that all of these expenses were necessary, and were properly incurred, and, consequently, that their payment was a legitimate disbursement of the revenues of the city. The expense of this election was one of the items which the board of supervisors was called upon to consider when determining the amount of tax to be levied for that fiscal year; and, if the estimate which they made of the amount which would be expended was inadequate, the payment of the expenses incurred was not thereby limited to the amount of the estimate, any more than would be the payment of any other expense which is payable out of the general fund, where the actual expense proved to be greater than was estimated as the basis of the tax to be levied. Whoever deals with a municipality does so with notice of the limitation of its powers, and with notice, also, that he can receive compensation for his labor or materials only from the revenues and income previously provided for the fiscal year during which his labor and materials are furnished, and with the knowledge, too, that all other persons dealing with the municipality have the same rights to compensation, and are subject to the same limitations, as he is. Even though, at the time of making his contract, there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city, and if others, whose claims have accrued subsequent to his, are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim. He acquires no claim in the nature of a lien upon these funds for the amount of his demand, nor is there any legal obligation upon the municipality, any more than upon any other debtor, to pay the claims against it in the order in which they are incurred, unless they are presented in that order, and in such condition and with such formalities as entitle the claimant to immediate payment. In dealing with the municipality, he must rely upon the integrity of its officers that they will not incur any liabilities during the year in excess of the income and revenues provided for that year, and, as a prudent man, he will ascertain, not only the amount of that income, but also the amount of the claims already existing, and of those that are likely to be incurred.

The court finds that, of the amount of the plaintiff's claim, \$2,290.48 was furnished between the 22d of November and the 1st of December, 1892, and the sum of \$2,226.69 between the 13th and 29th days of December. By the act of March 28, 1878 (St. 1878, p. 556), the amount which the board of super-

visors may appropriate for the expenses of the fire department, which include the claim of the plaintiff, is \$80,000 in each year. By section 1 of the act of February 25, 1878, p. 111, commonly known as the "One-Twelfth Act," it is made unlawful "to contract for, or render payable in the present or future, in any one month, any demand or demands against the treasury" in excess of one-twelfth of this amount. Section 2 declares: "All contracts, authorizations, allowances, payments and liabilities to pay, made or attempted to be made in violation of section one of this act, shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of said city and county." The court finds that, during the month of November, 1892, and prior to the 22d day thereof, the board of supervisors had allowed and ordered paid demands against said fund of \$80,000, amounting to the sum of \$10,645.49. It follows that the plaintiff has no right of action for the labor and materials furnished during the month of November. The court does not, however, find that any part of the appropriation applicable to the month of December had been allowed or ordered paid, and it must be assumed that at the time the plaintiff was employed to render the services in December, there was an unexpended portion of this appropriation with which to meet his claim. The contract between him and the city was therefore valid in its inception, and, upon its completion, he had a valid right of action against the city, which he was authorized to have established by the judgment of a court of record. The depletion of the treasury, or the application of the funds therein to other claims before the trial of the action, was not a satisfaction of the plaintiff's claim, nor did it constitute a defense to his action. He was still entitled to a judgment, with the direction therein that it should be satisfied only out of the income or revenue provided by the city for the fiscal year in which the liability in his favor was incurred. This, indeed, would be the appropriate form at all times in which to render a judgment against a municipality, whenever, in an action brought against it for any liability or indebtedness incurred by it, the court shall determine that judgment should be given against it. As the constitution limits the obligation of the municipality, upon any indebtedness or liability that it may incur, to the income and revenue provided by it for that year in which such indebtedness or liability is incurred, the means for satisfying a judgment which establishes that obligation is equally limited, and it is eminently suitable that the mode of satisfaction should be made a part of the judgment. See *Smith v. Broderick*, 107 Cal. 644, 40 Pac. 1033. Whether the income for that year has been exhausted or not is immaterial. The rights of the parties are measured by the terms of the constitution, and not by this fact. In the present

case it appears, from the findings of the court, that the whole amount of the tax that was levied for the fiscal year ending June 30, 1893, has not been collected, and it may be that, in the future, there will be received into the treasury, from this tax, a sufficient amount of money from which the plaintiff's claim may be satisfied. At all events, he has the right to a judgment against the city for the amount of his claim, with the limitation that it shall be satisfied out of the income and revenue provided for the fiscal year ending June 30, 1893, after the payment of such other demands against such income as are properly payable in preference to his own.

The judgment is reversed, and the superior court is directed to enter a judgment in favor of the plaintiff, and against the defendant, for the sum of \$2,226.69, and directing that the same be satisfied out of the income and revenues of the defendant provided for the fiscal year ending June 30, 1893, in accordance with the foregoing opinion.

We concur: GAROUTTE, J.; VAN FLEET, J.

MARSH v. HANLEY et al., Supervisors. (L. A. 180.)

(Supreme Court of California. Feb. 25, 1896.)

CONSTITUTIONAL LAW—SPECIAL LEGISLATION—  
ELECTIONS.

St. 1895, p. 207, regulating the holding of primary elections, which is made applicable only to counties which cast a certain number of votes at the last election, which makes it applicable to only two counties, is unconstitutional as special legislation.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Suit by one Marsh against one Hanley and others, supervisors of Los Angeles county. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. A. Donnell, for appellants. M. W. Conkling, for respondent.

BEATTY, C. J. This is a suit by a taxpayer to enjoin the defendants from appropriating public funds of the county for the purchase of ballot boxes and the payment of other expenses involved in carrying out the provisions of the act of March 27, 1895, commonly known as the "Primary Election Law" (St. 1895, p. 207). The claim of the plaintiff is that the act is local and special, and therefore unconstitutional and void. This contention was sustained by the superior court of Los Angeles, and the injunction granted. Defendants appeal from the judgment.

There can be no question that the act is local and special, since, by its terms, it is to "apply to, take effect in and be in force only in counties of the first and second classes"; that is to say, in San Francisco and Los

relating the compensation of county officers in proportion to their duties (article 11, § 5), and for that purpose a classification has been established under which San Francisco falls into the first class and Los Angeles falls into the second class. But the fact that these and the other counties of the state have been classified for a purpose which the constitution recognizes as a proper and necessary one does not relieve a law relating to other and distinct matters from the objection that it is local and special if by its terms it is limited in its application or operation to one or more classes of counties less than the whole. *Dougherty v. Austin*, 94 Cal. 620, 28 Pac. 834, and 29 Pac. 1092; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Bloss v. Lewis* (Cal.) 41 Pac. 1081; *Turner v. Siskiyou Co.* (Cal.) 42 Pac. 434; *Darcy v. City of San Jose*, 104 Cal. 642, 38 Pac. 500; *Denman v. Broderick*, 11 Cal. 48, 43 Pac. 516. This act, therefore, not being a regulation of the compensation of county officers, is local and special, notwithstanding it embraces two counties, each of which constitutes one of the classes defined by the county government act; and the only question to be determined is whether or not the subject of the act is one of those as to which special and local legislation is inhibited by the constitution. The act is intended to regulate primary elections, i. e. the election of delegates to nominating conventions, and not only in its general scope and nature, but by various specific provisions, is made an essential part of the general election law of the state. By section 21, for example, it is provided that no candidate can have his name printed upon any ballot as a candidate for public office at any general election in this state unless he shall have been nominated by a convention composed of delegates chosen as in the act provided, or nominated by a certain percentage of electors as in the Political Code prescribed. The entire act presents an elaborate scheme for the conduct of the primary elections by sworn officers whose certificates of election will constitute the credentials of the delegates to the various political conventions,—state, district, and local. Not only is it a general law, which should have a uniform operation (Const. art. 1, § 11), and not only is the case to which it applies one in which “a general law can be made applicable” (Const. art. 4, § 25, subd. 33), but from an inspection of its terms it clearly appears that it was designed originally to apply uniformly throughout the state. This is shown by various expressions scattered throughout its first 24 sections, in which the original scheme of the law is embodied. Section 25, which is in some respects incongruous with other portions of the act,

imagined to be a national convention, and, by a proviso, is made obligatory only in counties which cast 9,000 votes and upward at the last preceding general election. But by section 26 this proviso is superseded by the provision limiting the application and operation of the act to counties of the first and second classes. But for these two sections we should have a law complete and full, capable of applying, and intended to apply, in every part of the state. It is not a matter for argument or speculation, therefore, whether this is a case in which a general law could be made applicable. This act, by its terms, shows that such is the case; and, if it did not, it is apparent that a law regulating the election of public officers by prescribing the exclusive means by which candidates of the great political parties can secure a place on the official ballot is necessarily a law of a general nature and capable of uniform operation. The act is therefore unconstitutional by reason of its conflict with section 11 of article 1, and subdivision 33 of section 25 of article 4, of the constitution above cited. It is also in conflict with the more specific provisions of subdivision 11 of section 25 of article 4, prohibiting local or special laws for conducting elections.

Counsel for appellants have made no answer to these objections to the validity of the act, and we know of none which can be made. An *amicus curiæ* makes an urgent appeal in behalf of the law on the ground that it is a good law, designed to prevent, and capable of preventing, evils of great and increasing magnitude, but he does not deny that section 26 makes it unconstitutional if it is allowed to stand. He suggests, however, that we should hold that section void (he would have to include section 25 also) and the act valid throughout the state. If we should do so, we would be imposing upon the whole state a law which it is clear the legislature intended to apply in only two counties, and which would not otherwise have passed. This we cannot do, as it would be nothing short of legislation.

If the act is as beneficent as is claimed, it is to be regretted that it cannot stand; but, as we have more than once been compelled to remind the defenders of special and local laws, we cannot have the advantage of such legislation when it happens to be good without changing a constitution which absolutely prohibits it upon the assumption that it is generally bad.

The judgment of the superior court is affirmed.

We concur: MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; TEMPLE, J.; and HENSHAW, J.



**ZEAR v. BOSTON SAFE-DEPOSIT & TRUST CO.**

(Court of Appeals of Kansas, Northern Department, O. D. Feb. 14, 1896.)

**BONA FIDE PURCHASER—RECORD OF MORTGAGE.**

1. A purchaser of real estate must take notice of the recitals contained in the deeds which make up his chain of title, and is bound thereby.

2. When a mortgagee deposits his mortgage, duly signed and acknowledged, with the register of deeds of the proper county, and the same is filed for record, a subsequent purchaser is presumed to have notice of the contents thereof, notwithstanding, by the mistake of the register, the amount of the mortgage is incorrectly stated upon the record.

(Syllabus by the Court.)

Error from district court, Ellsworth county; W. G. Eartland, Judge.

Action by the Boston Safe-Deposit & Trust Company against John Zear. Judgment for plaintiff, and defendant brings error. Affirmed.

A. M. Lasley, for plaintiff in error. C. J. Evans, Ira E. Lloyd, J. G. Stonecker, and Wheeler & Switzer, for defendant in error.

**GARVER, J.** The mortgage in controversy in this action was executed by Frank E. Barr and wife October 5, 1885, on a tract of land in Ellsworth county, to secure the payment of the sum of \$1,000. It was forthwith deposited with the register of deeds of that county for record, and recorded, but, by the mistake of the recording officer it was entered of record as a mortgage of \$100 instead of \$1,000. Subsequently Barr sold and conveyed the land to Offa Hill, the latter being at the time informed of the previous mortgage, and his deed reciting that the conveyance was made subject to a mortgage for \$1,000. The deed from Barr to Hill was duly and correctly recorded. Thereafter Hill conveyed the land by a deed of general warranty to the plaintiff in error, John Zear, the deed specifically referring to the mortgage in question as a mortgage for only \$100. In the suit to foreclose the mortgage Zear claimed to be an innocent purchaser, and contended that, as against him, the mortgage could be enforced as a lien for only \$100. The court rendered judgment for the full amount of the mortgage, and this ruling is now assigned for error.

The decision of the lower court was proper, and the judgment must be affirmed. The rule is well settled that a purchaser of real estate is charged with notice of the recitals contained in the deeds which make up his chain of title. 2 Devl. Deeds, § 1000 et seq. Under this rule the deed which was the evidence of the title of Hill, the immediate grantor of the plaintiff in error, was sufficient notice to him of the fact that there was a mortgage on the land for \$1,000. It put him on inquiry, and, if followed up with reasonable diligence, he would have been informed of the mistake in the record, and of the ac-

tual condition of the title. Having this notice from the deed, as well as from the record of it in the office of the register of deeds, he was not an innocent purchaser, and took the land subject to the mortgage.

The authorities are in irreconcilable conflict as to the legal effect of such a mistake as was made in this case in the record of the mortgage. In some states, the doctrine prevails that the grantee named in the instrument, which is incorrectly recorded, should be held responsible for, and must suffer the consequences of, the mistakes of the officer; that a record is constructive notice only to the extent that it is a true copy. In other states the courts hold that when the grantee has deposited his deed with the recording officer he has done all that is required of him, and that constructive notice, under the recording acts, of the actual contents of the instrument filed for record, is thereafter conclusively presumed, without regard to the errors of the officer whose duty it is to make a true record. The latter view has been adopted by the supreme court of this state, and this is no longer an open question with us. *Poplin v. Mundell*, 27 Kan. 138, 158; *Lee v. Birmingham*, 30 Kan. 312, 1 Pac. 73. In the first of these cases *Horton, C. J.*, said: "It seems to us that when the party holding the title presents his deed, duly acknowledged and certified, to the register of deeds for record, and demands that it be placed upon record, and the register thereupon accepts the same, and duly indorses it filed of the date it is so presented, such party has discharged his whole duty to the public, and his muniment of title cannot be shaken by any subsequent purchaser. If any subsequent purchaser be injured by the neglect or delay of the register as to his duties in the registration of such conveyance, such injured party has his action against that officer." Upon the authority of these decisions, we hold that the mortgagee in this case had done all that was required of him when he had deposited his mortgage with the register of deeds for record, and that thereafter, the mortgagee not being guilty of any laches with reference to the mistake in recording, any subsequent purchaser was bound in the same manner and to the same extent as if a correct record had been made. The judgment will be affirmed. All the judges concurring.

**WRIGHT v. McKITTRICK.**

(Court of Appeals of Kansas, Northern Department, O. D. Feb. 14, 1896.)

**PROMISE TO PAY DEBT OF ANOTHER—CONSIDERATION—BURDEN OF PROOF.**

1. When the defendant to an action on a note pleads want of consideration, and it appears that the note was executed by the defendant in favor of the plaintiff for the surrender and cancellation of another note for the same amount held by the plaintiff against defendant's father, the burden is upon the defendant to show the

invalidity of the first note, and its consequent insufficiency as a consideration for the second.

2. It is not necessary that one be originally liable for a debt which he agrees in writing to pay, when the assumption of the liability is not a mere naked promise, and is supported by a sufficient consideration.

3. It is no defense to an action on a promissory note for the maker to say that there was no consideration which was beneficial to him personally; it is sufficient if the consideration was a benefit conferred upon a third person, or a detriment suffered by the promisee, at the instance of the promisor.

(Syllabus by the Court.)

Error from district court, Ellsworth county; W. G. Eastland, Judge.

Action by George F. Wright against Edward McKittrick. From a judgment for defendant, plaintiff brings error. Reversed.

Ira E. Lloyd, for plaintiff in error. R. W. Carter, for defendant in error.

GARVER, J. This was an action brought by the plaintiff in error, as plaintiff, on a note executed by the defendant, McKittrick, in favor of the plaintiff. The defense set up was want of consideration. The note was given to the plaintiff for another note held by him for the same amount against J. T. McKittrick, father of the defendant, and which J. T. McKittrick had executed on account of professional services rendered by the plaintiff, as a physician, in attendance upon Mrs. Ben Fowle, in her last sickness. After her death, her father, J. T. McKittrick, was appointed executor of her will, and had charge of the administration of her estate. After he had qualified as executor, he gave his personal note to the plaintiff for \$135, payable in one year, "provided it shall then be determined, after reasonable effort and due diligence on the part of said Wright, that the estate of Ella McK. Fowle, deceased, is not responsible for the bill for which this note is given." Upon the trial, there was a conflict of evidence as to whether J. T. McKittrick had employed Dr. Wright to attend Mrs. Fowle, and therefore was personally liable for the services, or whether the note given by him, as well as the note sued on, was without consideration. Under the instructions of the court, the jury found for the defendant.

The principal contention in the case is as to the consideration of the notes. While the court presented to the jury the same legal proposition in different ways, the following portion of the instructions is sufficient to substantially show the matters of which complaint is made: "(10) You are instructed that if you find and believe from the evidence in this case that the original note given by J. T. McKittrick to the plaintiff was given without consideration,—that is, for services already rendered before that time,—and that the same were not rendered at the request of J. T. McKittrick, but were rendered for and at the request of one Fowle, and you should further find and believe from the evidence that the note sued upon in this action has

no consideration for its execution other than the surrender of the original note, then the plaintiff cannot recover, unless you shall believe and further find from the evidence that the note sued upon in this action was given by the defendant with full knowledge of all the facts, and in satisfaction of a disputed claim between plaintiff and J. T. McKittrick as to the liability of J. T. McKittrick for the medical services rendered by plaintiff in and about the medical attendance of said Ella Fowle." The inquiry concerning the consideration of the first note should not have been confined to such narrow limits. The court virtually held that there was no legal consideration for it, unless the maker was originally, personally liable for the debt for which it was given. Under the facts of this case, such a holding was clearly erroneous; for there are various other matters which may have entered into the transaction between the parties, and have furnished a sufficient consideration for the promise of J. T. McKittrick to pay the claim. It must be remembered, too, that these were contracts in writing, for which the law presumes a sufficient consideration; and the burden is upon the defendant to overcome that presumption. As it is admitted that the surrender of the first note was the consideration for the note in suit, and the presumption of law, as to consideration, attaches to both notes, the defendant must show the want of consideration for the first note. *Sullivan v. Collins*, 18 Iowa, 228; *Gunning v. Royal*, 59 Miss. 45. Upon the trial, the defendant rested his defense upon the mere fact that the debt was originally not the personal debt of J. T. McKittrick, and argued that each note was therefore without consideration. In this respect he fell short of establishing his defense.

There must, of course, have been a legal and sufficient consideration for the first note. But it is not necessary, as was assumed by the court in the instructions, that the services should have been rendered at the special request of the maker of the note, or that any special benefit should have accrued to him; any forbearance given or detriment or loss suffered by the payee was sufficient. If J. T. McKittrick thought it was for the interest of the estate, or would result in some benefit to himself, to have this, as a claim against the estate, disposed of in a different manner from that ordinarily followed under the law, and as an inducement for the foregoing of some proceeding or right which the law gave the claimant, personally promised in writing to pay the debt, there would be a sufficient consideration to support the obligation thus incurred. The court properly held that a naked promise to pay a debt owing by the estate or other person, for which J. T. McKittrick was not personally liable, would not create a legal liability. It is not necessary, however, that a claim should be a strictly legal one in order that a note given in settlement thereof may be enforced; it is enough that it have

some foundation in law or equity, though the legal liability be doubtful. *Mulholland v. Bartlett*, 74 Ill. 58; *Foster v. Metts*, 55 Miss. 77; *Harris v. Cassady*, 107 Ind. 158, 8 N. E. 29; *Tucker v. Ronk*, 43 Iowa, 80.

We do not pretend to say what consideration there might be in this case, even if it was a promise to pay the debt of another, and only make mention of some matters that could have entered into the transaction to show that there might have been a consideration other than that to which the court limited the inquiry. If the first note was given for a sufficient consideration, it necessarily follows that the defendant's note, which was given in lieu of it, created a valid and binding obligation, without regard to his knowledge of the facts as they existed between Wright and J. T. McKittrick, unless he was misled with reference thereto by the plaintiff. Upon this proposition, also, the instructions of the court were erroneous. In determining whether the surrender of the J. T. McKittrick note was a sufficient consideration for the execution of the note in suit, the court should inquire, not merely who was originally liable for the plaintiff's services, but the principal inquiry should be to ascertain whether there was a legal and sufficient consideration of any kind for the original note.

It follows from what has been said that the judgment must be reversed, and the case will be remanded for a new trial. All the judges concurring.

#### SHAFFER et al. v. HOENSCHILD.

(Court of Appeals of Kansas, Northern Department, C. D. Feb. 14, 1896.)

REVIEW ON APPEAL—MOTION FOR NEW TRIAL—  
COURT OF APPEALS—JURISDICTION—  
NOTE—PAROL EVIDENCE.

1. When the district court, on a petition in error from a justice of the peace, reverses the judgment of the justice, it is not necessary for the aggrieved party to file a motion for a new trial in order to have the decision of the district court reviewed on petition in error. *Lyons v. Osborn*, 26 Pac. 31, 45 Kan. 650.

2. The act creating the court of appeals confers jurisdiction upon them "as now allowed by law in all proceedings in error taken from orders and decisions of the district court," and when the error is apparent by an examination of the pleadings and judgment such error will be reviewed by this court.

3. Where a note is executed by a corporation, and is signed by the board of trustees, extrinsic evidence is admissible between the original parties to show that such trustees executed the instrument in their official capacity as officers of the corporation, and that they signed for the corporation, and that it was the intention of all the parties to the note to make it the obligation of such corporation.

(Syllabus by the Court.)

Error from district court, Saline county; R. M. Thompson, Judge.

Action by H. Hoenschild against William H. Shaffer and others before a justice. Judgment for defendants on error in the district

court reversed, and defendants bring error. Reversed.

The defendant in error, H. Hoenschild, brought suit before a justice of the peace of Saline county, Kan., upon the following promissory note:

"\$75.00. Salina, Kans., June 25th, 1888. Six months after date, for value received, we promise to pay to the order of Abbott and Hoenschild three hundred & seventy-five dollars, at the First National Bank of Salina, Kansas, with 8 per cent. interest until paid. W. H. Shaffer, Wm. Hogben, A. W. Krause, Trustees of Cydon Lodge No. 5, K. P., Salina, Kansas."

Indorsed: "Paid on the within note two hundred (\$200) dollars Dec. 27th, 1888. Abbott & Hoenschild."

—as the owner and holder thereof. At the trial the defense was that the note sued upon was not the personal note of the defendants, but was the note of Cydon Lodge No. 5, of Salina, Kan., a corporation. That the defendants signed the note only in their official capacity as trustees of said lodge; that the plaintiff, who was one of the payees of the note, as well as all of the defendants, understood at the time the note was executed that it was intended to be the note of the corporation, and not the personal note of the defendants, and introduced testimony showing that defendants were the trustees of Cydon Lodge No. 5, Knights of Pythias, Salina, Kan., a corporation, at the time said note was executed, and that they signed it only as trustees for the corporation; that the note was given for a balance due Abbott & Hoenschild, architects, for their services as such in making plans, etc., for the Knights of Pythias Building erected in Salina; that the note was given pursuant to a settlement made between Abbott & Hoenschild and said Cydon Lodge, and that at a meeting at which Abbott was present as a member of said lodge, defendants, as trustees of said lodge, were directed to give the note; that the \$200 paid on said note was paid by defendant Hogben, as treasurer, out of the lodge funds; that the defendant had no personal interest in the payment of said note, and that such facts were well known to plaintiff; that at the time said note was executed and delivered plaintiff was present, and wrote the note, including the words, "Trustees of Cydon Lodge No. 5, K. P., Salina, Kansas," affixed to their signatures, and that until the commencement of this suit demand for payment of said note was made by plaintiff on said lodge, and that it was the understanding of the defendants, as well as the payees of said note, that it was the note of the corporation, and not the personal note of the defendants. This testimony was introduced over the objection of the plaintiff, and judgment rendered by the justice of the peace against plaintiff for costs. Plaintiff thereupon filed his petition in error in the district court to

review the proceedings and judgment of the justice of the peace. Upon the hearing thereof the judgment of the justice of the peace was reversed, and set aside, and cause held for hearing in the district court. It was admitted that there was no other defense to the note sued upon in this action except such as was made before the justice of the peace, and judgment was rendered in favor of the said Hoenschild and against the defendants Shaffer, Hogben, and Krause for the sum of \$233.10, with interest and costs of suit. Defendants bring the case here for review upon petition in error and transcript.

Wilson & Wilson, for plaintiffs in error.  
Bond & Osborne and T. M. Jones, for defendant in error.

GILKESON, P. J. (after stating the facts). The errors assigned in this action are: (1) Said court erred in sustaining the petition in error of said H. Hoenschild, plaintiff in error, in said court. (2) Court erred in rendering judgment for said Hoenschild, plaintiff in error, in said court. (3) Said court erred in not rendering judgment for the said W. H. Shaffer, William Hogben, and A. W. Krause, defendants in error, in said court.

Defendant in error contends that the errors complained of in this action are not reviewable in this court. We cannot agree with counsel on this proposition. When an error is apparent by an examination of the pleadings and judgment, such an error can be reviewed in this court. *Stapleton v. Orr*, 43 Kan. 170, 23 Pac. 109. Where the district court, on a petition in error from a justice of the peace, reverses the judgment of the justice, it is not necessary for the aggrieved party to file a motion for a new trial in order to have the decision of the district court reviewed on petition in error. *Lyons v. Osborn*, 45 Kan. 650, 26 Pac. 31. If the record shows the final judgment to be erroneous, it is reviewable in an appellate court without exception. *Koehler v. Ball*, 2 Kan. 180; *Wilson v. Fuller*, 9 Kan. 176. We think this case is properly here for review. Did the trial court err in sustaining the petition in error and in rendering judgment for Hoenschild, plaintiff in error? This we must answer in the affirmative. The only question presented to the district court upon the petition in error was, did the justice of the peace err in admitting testimony? The testimony admitted by the justice of the peace over the objection of plaintiff in that court shows that this note was given to Abbott & Hoenschild for a balance due them for their services as architects, for making plans, etc., for the Knights of Pythias Building, the property of Cydon Lodge No. 5, K. P., Salina, Kan.; that it was not a personal note of the signers, but was the note of the said lodge; that they signed it in their official capacity as trustees of said lodge; that this was known to the payee Abbott,

and that it was intended and understood at the time it was made to be the note of the lodge; that said Abbott was present as a member of said lodge at the meeting when the defendants, as trustees, were directed to make this note; that said Abbott wrote the note, including the words, "Trustees of Cydon Lodge No. 5, K. P., Salina, Kansas," and was present when it was executed and delivered. In *Kline v. Bank*, 50 Kan. 91, 31 Pac. 688, the parties wrote their names on the back of the note as "Board of Directors." Chief Justice Horton, in delivering the opinion of the court, says: "If the parties who wrote their names upon the back of the note as directors had signed their names upon the face thereof, they could have shown by extrinsic evidence that they were acting for the corporation only." "If it is not clear from the face of the note whether the signers contracted on behalf of the association or for themselves, then, as between the original parties, extrinsic evidence may be introduced to show in fact it was the intention of all the parties, at the time of the execution of the note and its acceptance, to bind the association only, not to make the signers liable personally." *Benham v. Smith*, 53 Kan. 495, 36 Pac. 997. "Considerable diversity of decision, it must be admitted, is found in the reported cases, where the record presents the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee, and before it is delivered to take effect; the question being whether the party is to be deemed an original promisor, guarantor, or indorser. Irreconcilable conflict exists in that regard, but there is one principle upon the subject which is almost universally admitted by them all, and that is that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties; and in most cases it is admitted that proof of the facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed." *Good v. Martin*, 95 U. S. 90. We think the parties who signed this note as trustees, had the right at the trial to introduce this testimony, and that it was properly admitted. The judgment of the district court will be reversed, and cause remanded for further proceedings in accordance with the views herein expressed.

CLARK, J., concurring. GARVER, J., not sitting, having been of counsel in court below.

#### TULLIS et al. v. McCALL.

(Court of Appeals of Kansas, Northern Department, C. D. Feb. 14, 1896.)

#### ATTACHMENT—INTERVENTION—EVIDENCE.

1. One claiming ownership of property as against attaching creditors of a former owner,

there being no actual change of possession, must prove not only an actual sale and transfer of the property to him, but also that it was made in good faith and upon sufficient consideration.

2. The evidence in this case examined, and held not to be sufficient to show an intention on the part of the former owner to part with the absolute title to the property attached.

(Syllabus by the Court.)

Error from district court, Ellsworth county; W. G. Eastland, Judge.

Action by Samuel McCall against John H. Tullis and others. Judgment for plaintiff. Defendants bring error. Reversed.

H. A. Coates, for plaintiffs in error. Ira E. Lloyd, for defendant in error.

GARVER, J. The controversy in this case is over the ownership of some wheat attached by the sheriff of Ellsworth county, as the property of Robert McCall. Samuel McCall, defendant in error, claiming ownership by purchase from Robert McCall, his father, instituted this action against the sheriff for its conversion. Verdict and judgment were rendered in favor of Samuel McCall.

The land upon which the wheat was grown was owned by Robert McCall, a resident of Oklahoma, the premises being occupied by a tenant who farmed the same for a share of the crop. Plaintiff relied upon a letter from his father as evidence of his purchase and ownership. Upon the trial it was claimed that this letter had been mislaid or lost; and after the plaintiff testified concerning its receipt, and his fruitless search for it, he was permitted to testify to its contents. It is argued at great length by counsel for plaintiffs in error that the plaintiff was not a competent witness to testify upon these matters, and also that a sufficient showing was not made of the loss of the instrument to permit the introduction of secondary evidence of its contents. No legal reason is suggested, nor do we know of any, why a party to an action should be disqualified as a witness upon such matters. The statute itself answers the objection: "No person shall be disqualified as a witness in any civil action or proceeding, by reason of his interest in the event of the same, as party or otherwise. \* \* \*" Gen. St. 1889, par. 4114. No exception is made by the statute, and the plaintiff was as competent to testify to the loss of the letter and to its contents as to any other fact in the case subject, of course, to his interest in the case being considered for the purpose of affecting his credibility. The evidence as to the search made for the letter, was sufficient to justify the court in admitting secondary evidence of its contents.

When asked to state what the letter contained, the plaintiff said: "As near as I can recollect it, I was to have the wheat: There was a mortgage on the wheat of \$60 or \$65, and I was to pay off that mortgage, and have my money out of what was left." There is no other evidence in the case concerning the

transaction between father and son which aids in the interpretation of the letter. The evidence shows that at the time it was written, about June 1, 1889, the wheat then being a growing crop, Robert McCall was indebted to his son in the sum of about \$178, and that there was a chattel mortgage upon the landlord's share of the wheat to a bank in the city of Ellsworth for \$60 or \$65. The value of the wheat remaining after the payment of the chattel mortgage was about \$227. All communications between the plaintiff and his father concerning the wheat were by mail. What this correspondence was, except as to the one letter offered in evidence, does not appear. In fact, so far as there is any showing of a sale and transfer of the wheat, this letter stands isolated and alone. There is nothing in the surrounding circumstances, so far as shown, to enable one, with any degree of certainty, to determine the intention of the writer of the letter. The wheat, at the time the letter was written, and up to the time when it was attached by the sheriff, remained in the exclusive possession of the tenant; no actual possession had been taken by Samuel McCall, nor any act of ownership exercised by him. Under such circumstances, as against an attaching creditor, the sale of the wheat is deemed to be void, unless it is affirmatively shown to have been made in good faith and upon sufficient consideration. Gen. St. 1889, par. 3163. It devolved upon the plaintiff to show, not merely the fact of the sale, but also that it was a sale made in good faith, and supported by sufficient consideration. When we turn to the letter, the contents of which were presented to the court in such an unsatisfactory way, the transaction is shrouded in doubt. The testimony of the plaintiff was, at best, only his conclusion as to the meaning of the letter; it hardly pretended to be a statement of the substance of the contents. His answer, however, was allowed to stand without objection, and now must be considered as a substantial statement of what the letter contained. Accepting it thus, how does the matter stand? Nothing is said about a sale or transfer of the wheat; nothing as to the effect the transaction should have upon the indebtedness existing between the parties; nor is there anything to indicate what may have been the writer's understanding as to those matters. The inquiry arises: For what purpose was Samuel McCall to have the wheat? Was it to be in the nature of a purchase or mortgage, or was it intended that he should only act as agent for Robert McCall to dispose of the wheat, and out of the proceeds to pay the liabilities referred to? If there had not been sufficient wheat to pay both the mortgage and indebtedness to Samuel McCall, was Robert McCall to be released from any further liability on account thereof? Or, if there should be a surplus, as was the case, after paying these liabilities, who was entitled to receive it? The evidence leaves the answers to these

several questions to mere conjecture and unfounded supposition. Before it can be said that there was a sale, it must appear that there was mutual consent to giving such effect to the transaction between the parties to it. If we turn to the record, the only other evidence materially bearing upon the transaction is contained in the following testimony given by the plaintiff: "Q. Was there any transfer from your father to you of any nature with reference to his interest in the wheat? A. Yes, sir. Q. Was that by writing or by word of mouth? A. Writing. Q. Did you ever show it to any one? A. Yes, sir; to you (referring to his attorney, Mr. Lloyd) and Aaron Alderson. \* \* \* Q. Where was it written? A. In Oklahoma. Q. How did you receive it? A. By mail. Q. Had you written for it? A. I had. \* \* \* Q. Was you expecting it? A. I was. I wrote twice for it." It is very evident that the foregoing questions and answers furnish no aid whatever in construing the contents of the letter. Suppose a similar letter had been written to the tenant directing him to sell the wheat, first to pay the mortgage to the bank, and then to pay Samuel McCall out of what was left; what interest would the tenant have acquired? Certainly, it would not have transferred the ownership to him as against attaching creditors. If it could be said that the letter was virtually a mortgage, the plaintiff would be in no better position, for the reason that it was not filed with the register of deeds of the county, nor possession of the property taken. In any view we take of this letter, we are forced to the conclusion that it is not reasonable to base upon it alone a presumption that Robert McCall intended to make an absolute sale and transfer of the wheat. There being no dispute concerning the contents of the letter, and the meaning not being affected by surrounding circumstances, its proper construction was for the court, and not the jury. In many cases the facts and circumstances surrounding a transaction have an important bearing in determining the intention of the parties. But the language of this letter must speak for itself, and an effect cannot be given to it which the words used do not justify.

Some complaint is made by the plaintiffs in error because they were not permitted to show, upon the trial, that the premises upon which the wheat was grown were sold, pursuant to a judgment of foreclosure of a mortgage thereon, to the plaintiff in the attachment proceedings, before the wheat was cut. We find no error in the ruling of the court in this respect. The evidence shows that the crop was matured at the time of the sale, and under the authority of *Bank v. Beegle*, 52 Kan. 709, 35 Pac. 814, it did not pass with the land. It would seem, also, that the plaintiff in attachment did not regard it as so passing, for the reason that he subsequently attached it as the property of the judgment debtor, and the defendants below

justified their taking by reason of such attachment.

Because there was an entire failure on the part of the plaintiff below to show a sale and transfer of the wheat by Robert McCall to him, in good faith, the judgment is reversed, and the case remanded for a new trial. All the judges concurring.

#### REAM v. SAUVAIN et al.

(Court of Appeals of Kansas, Northern Department, C. D. Feb. 14, 1896.)

#### SPECIFIC PERFORMANCE—ILLEGAL CONSIDERATION.

An action cannot be maintained to enforce a contract which is entire, and the consideration for which is illegal, in whole or in part.

(Syllabus by the Court.)

Error from district court, Smith county; Cyrus Heren, Judge.

Action by A. J. Ream against R. Sauvain and others. Judgment for defendants. Plaintiff brings error. Affirmed.

McNall & Blake, for plaintiff in error. W. R. Myers, for defendants in error.

GARVER, J. This action was brought by A. J. Ream against R. Sauvain, as principal, and Benjamin Gustin and Ellen Gustin, as sureties, on a note executed by the defendants to the plaintiff, under date of November 23, 1889, for the sum of \$258.92. The defendants, in defense, alleged that the only consideration for the note was the illegal promise of Ream to desist from the further prosecution of a criminal case which he had instituted against Sauvain, before a justice of the peace of Smith county, on a charge of embezzlement. Trial was had before the court without a jury, and a general finding made by the court in favor of the defendants, upon which judgment was rendered.

The evidence shows that, for some months prior to the date when the note was given, Sauvain was in the employ of Ream, and in charge of his harness shop in said county; that, on November 20, 1889, Ream made complaint, under oath, before one H. H. Reed, a justice of the peace of said county, charging the said Sauvain with unlawfully and feloniously embezzling certain goods and money, of the value of \$200, the property of the complaining witness; that, on such complaint, Sauvain was arrested, and gave his recognizance for his appearance before said justice on November 25th for a preliminary examination; that, after his arrest, and prior to November 25th, negotiations were had between Ream and Sauvain for a settlement of their differences, which resulted in the execution of the note in question and the dismissal of the criminal prosecution. Upon the trial of this case, the principal controversy was as to the consideration of the note,—the plaintiff contending that the sole consideration was the settlement of Sauvain's

civil liability for the goods alleged to have been appropriated by him, while the defendants claimed that the only consideration and inducement for the giving of the note was the promise of Ream to dismiss the criminal case, and not further to prosecute Sauvain on account of the alleged embezzlement. On the part of the defendants, there was testimony to the effect that the settlement of the civil liability did not enter into the transaction; that, in fact, Sauvain was not indebted to Ream in any such amount; that Ream, as the inducement for giving the note, among other things, said: "I won't prosecute this case any further. I will see that the costs are paid and release you. \* \* \* There is only two things you can do. You can sign that note, or I will send Rud [meaning Sauvain] over the road." \* \* \* He said that he would dismiss the case and see that the costs were paid, and he would prosecute it no further. \* \* \* 'If you don't do that, I will send him to the penitentiary in spite of h-l and d—n.'" Benjamin Gustin further testified: "I says, 'Jack [meaning Ream], I don't like to sign this note at all,' and I says, 'I would not do it under no other consideration whatever, only to save Rud, as you say, to save him from going to the penitentiary.' \* \* \* My understanding all the time was that that was to stop this criminal suit by the signature of myself and Andy, or my wife, on that note, and for no other reason." The plaintiff's testimony was equally positive that he only demanded the note as payment and settlement of the actual losses sustained by him by reason of the wrongful appropriation of his property by Sauvain. Upon this conflicting testimony, the court found in favor of the contention of the defendants, and that the note was, consequently, void. This finding and conclusion was sustained by the evidence.

Plaintiff's contention is that the decision is erroneous, even conceding the truth of the allegations of the defendant's answer, and the evidence introduced in its support. The argument of counsel for plaintiff in error, as presented in his brief, seems to be based upon the assumption that the defense was duress in the execution of the note; and he cites a large number of decisions upon the proposition that the lawful arrest and imprisonment of a person, or the threat to effect his lawful arrest, does not constitute such duress as will avoid a contract which was induced by such arrest or threat. We are not furnished with a brief for the defendants in error, and do not know what their theory of the issues to be tried may have been. We think, however, it is clear that the defense presented was not duress, but illegality of consideration. These defenses may coexist, but there is no necessary connection between them. Illegality of consideration may be successfully pleaded against one attempting to enforce an execu-

tory contract, without regard to duress or other elements of the contract, or other circumstances surrounding the parties to it. Hence, the merits of the criminal charge against Sauvain do not enter into this controversy. But, the prosecution having been instituted, the interests of the public demanded that it should be investigated, and not used in barter for the private gain of the prosecutor; and his promise or agreement to stifle the prosecution furnished no valid consideration for the note, nor will the law aid him in its collection. This is so, though a part of the consideration of the note may have been the settlement of the civil liability of Sauvain; for the entire consideration would, even then, be tainted by the illegal promise. Of course, Ream had the right, notwithstanding the arrest and prosecution of Sauvain, to settle with him for the value of any goods taken; but the evidence tends to show, and the court has found, that he did more than that. The consideration of the note being illegal, the plaintiff's action must fail. *Friend v. Miller*, 52 Kan. 139, 34 Pac. 397. The judgment is affirmed. All the judges concurring.

#### KING v. CITY OF FRANKFORT.

(Court of Appeals of Kansas, Northern Department, C. D. Feb. 14, 1896.)

##### MUNICIPAL CORPORATIONS—LIABILITY ON WARRANT—LIMITATION—ACKNOWLEDGMENT.

1. A city warrant, issued in payment for a sidewalk built by the city in front of a lot of a private owner, creates an absolute liability against the city, which is payable without regard to the making or collecting of an assessment against the lot improved.

2. An action on such warrant is barred in five years after its maturity, and an acknowledgment which can have effect to remove the bar of the statute must recognize a subsisting liability on the warrant, and be made to the holder thereof, or to his representative.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spilman, Judge.

Action by A. S. King, receiver, against the city of Frankfort. From a judgment sustaining a demurrer to the petition, plaintiff brings error. Affirmed.

W. W. & W. F. Guthrie and W. J. Gregg, for plaintiff in error. G. E. Scoville and J. B. Van Vleet, for defendant in error.

GARVER, J. This was an action, commenced November 7, 1891, upon a warrant issued in favor of J. S. Walker by the city of Frankfort, under date of January 1, 1883, for the sum of \$34.60, payable January 1, 1884, with interest at the rate of 10 per cent. per annum. A demurrer to the petition was interposed by the defendant, and sustained by the trial court, on the ground that the petition showed upon its face that the action was barred by the statute of limitations.

action was issued in payment for work done by the payee, J. S. Walker, in the construction in said city of a sidewalk, which was built in front of lot 20, block 67, pursuant to a city ordinance duly enacted for that purpose. It is conceded that the warrant was, when issued, a valid and binding obligation of the city; but the plaintiff in error contends that a cause of action did not accrue thereon against the city until a demand for payment had been made. We think it is well settled in this state that such warrant created an absolute liability against the city, upon which an action could be maintained after the time named for its payment, without regard to what the city may have done with reference to making or collecting an assessment upon the lot improved. *City of Wyandotte v. Zertz*, 21 Kan. 649; *City of Burrton v. Savings Bank*, 28 Kan. 390; *City of Atchison v. Leu*, 48 Kan. 138, 29 Pac. 467.

We think it is also clear that an action on such warrant would, ordinarily, be barred in five years after its maturity. *Walnut Tp. v. Jordan*, 38 Kan. 562, 16 Pac. 812. To avoid the effect of the statute of limitations, the plaintiff claimed, and so alleged in his petition, that the city had made a written acknowledgment of its liability within five years next preceding the commencement of the action, and thus removed the bar of the statute. In support of this claim, there is attached to the petition, as a part thereof, a copy of a resolution passed by the city council of said city, in 1889, for the purpose of making an assessment upon said lot 20 to provide means to reimburse the city for the construction of said sidewalk. The resolution, so far as pertinent to this case, recited: "Whereas, the sidewalk tax, levied on the 7th day of July, A. D. 1884, against lot 20, in block 67, in the city of Frankfort, Kansas, for the building of a sidewalk along the said lot, as by Ordinance 39 provided, has not been paid; and whereas, there was, on the 1st day of January, A. D. 1883, due against such lot, for the building of such sidewalk, as aforesaid, the sum of \$94.60; and, whereas, on such last-mentioned date a voucher for such assessment was duly issued to J. S. Walker in payment for such walk by the said city of Frankfort, and bears interest at the rate of ten per cent. per annum from date; and, whereas, there is now due upon such sidewalk-tax assessment the sum of \$150.00; and whereas J. J. Barber, city clerk for said city, neglected to report such assessment according to law: Therefore, be it resolved, that an assessment is hereby levied against said lot 20 in block 67, to pay for said sidewalk, \* \* \* and the clerk is ordered to report the assessment to the county clerk." We do not think this resolution is such an acknowledgment as the statute contemplates. There are no

acknowledgment of a subsisting liability (*Hanson v. Towle*, 19 Kan. 273; *Elder v. Dyer*, 26 Kan. 604), but it must be an acknowledgment made to the creditor, or to some one representing him (*Sibert v. Wilder*, 16 Kan. 176; *Schmucker v. Sibert*, 18 Kan. 104; *Clawson v. McCune's Adm'r*, 20 Kan. 337). This resolution was adopted without any apparent regard for the holder of the warrant. Its sole object and purpose was to make an assessment on the lot in front of which the sidewalk had been built. So far as the resolution itself indicates, the warrant may have been paid, and not have been, at that time, an outstanding obligation against the city. The demurrer having been properly sustained, the judgment is affirmed. All the judges concurring.

#### SWIFT et al. v. WYATT.

(Court of Appeals of Kansas, Northern Department, C. D. Feb. 14, 1896.)

##### TRIAL—SPECIAL FINDINGS—HARMLESS ERROR.

While, under the statutes of this state, it is the duty of the court, upon request of either party to an action, to submit to the jury particular questions of fact, yet a refusal so to do is not sufficient ground for the reversal of a judgment rendered therein, where it clearly appears that responsive answers to the particular questions thus sought to be submitted, no matter what such answers might have been, would be entirely consistent with the general verdict which was returned by the jury.

(Syllabus by the Court.)

Error from district court, Dickinson county; M. B. Nicholson, Judge.

Action by Edward F. Swift and J. W. Higgins, doing business under the firm name of Swift & Co., against W. A. Wyatt. Judgment for defendant, and plaintiffs bring error. Affirmed.

Stambaugh & Hurd, for plaintiffs in error. J. H. Mahan, for defendant in error.

CLARK, J. This is an action of replevin, brought by Swift & Co., to recover from W. A. Wyatt the possession of a span of mules, and damages for their unlawful detention. The jury returned a verdict in favor of the defendant. A motion for a new trial, setting up the statutory grounds, was duly filed and overruled, to which the plaintiffs duly excepted. Judgment being rendered in favor of the defendant, the plaintiffs have brought the case to this court for review.

The error chiefly relied upon by the plaintiffs in error is the refusal of the court to direct the jury to find upon particular questions of fact, as requested by them. The plaintiffs requested the court to submit to the jury the following interrogatories, to be answered by them: (1) Had the plaintiffs



taken the mules from the possession of R. G. Dotey, and transferred them to the possession of C. A. Stannard, before Dotey sold the mules to the defendant? (2) Had R. G. Dotey been discharged from the employ of the plaintiffs before he took the mules or sold them to the defendant? (3) Did R. G. Dotey steal the mules in controversy in this case from the plaintiffs, and sell them to the defendant? (4) At the time of the commencement of this action, did the defendant have any right or title to the said mules, except as derived from his purchase from R. G. Dotey? The evidence disclosed by the record shows that, on April 29, 1891, the defendant purchased the mules in controversy from one R. G. Dotey, who had, a short time prior thereto, been in the employ of plaintiffs, and authorized by them to sell certain personal property belonging to them, including this span of mules, and to deposit the proceeds thereof in the bank at Hope, in Dickinson county, to the credit of Mr. Higgins, a member of the firm of Swift & Co.; that a notice was published in a newspaper at Hope, only  $1\frac{1}{2}$  miles distant from plaintiff's premises, in the issues of that paper of April 16th and 23d, that Dotey had for sale, at the Hope sheep ranch, certain personal property, including a span of mules; that certain of the property of plaintiffs was sold by him, and the proceeds thereof deposited in the bank as directed; that Mr. Higgins informed his banker, Mr. Richardson, of his arrangements with Dotey as above stated; that defendant saw the published notice referred to, and on April 28th was informed by Mr. Richardson that the plaintiffs had a span of mules for sale at the ranch, and that Mr. Dotey was authorized to sell them, and deposit the proceeds of the sale in his bank; that Dotey had been discharged by the plaintiffs four days prior to the sale to the defendant, but of this fact neither the defendant nor Mr. Richardson had any knowledge or information, until after the defendant had purchased and paid for the mules; that Dotey was subsequently charged with the larceny of the mules, convicted, and sentenced to a term in the state penitentiary. Under this evidence, the court, in effect, instructed the jury that defendant's title to the property in controversy rested solely upon his purchase from Dotey, and that, if the jury should find that Dotey's employment as agent of the plaintiffs had in fact terminated prior to the sale to the defendant, and that he was no longer authorized to sell the property in controversy, the defendant acquired no title thereto, unless the jury should also find that the defendant purchased the property in good faith, believing that he was thereby obtaining a good title thereto, and that he was justified in such belief from the acts and conduct of the plaintiffs, and all the circumstances surrounding the transaction, and that it was therefore wholly immaterial as to whether or not the property had

been taken from Dotey's possession, or he had been discharged by the plaintiffs, prior to the sale, or as to whether or not he had stolen the mules. The record shows that the defendant claimed no right or title to the property, except such as he acquired by his purchase from Dotey, and the court so instructed the jury; and it is not apparent as to how the rights of the plaintiffs could, under the evidence and the instructions of the court, have been prejudiced by the refusal to direct the jury to answer the interrogatories submitted by the plaintiffs. While, under the statutes of this state, it is the duty of the court, upon request of either party to an action, to submit to the jury particular questions of fact, yet a refusal so to do is not sufficient ground for the reversal of a judgment rendered therein, where it clearly appears that responsive answers to the particular questions thus sought to be submitted, no matter what such answers might have been, would be entirely consistent with the general verdict which was returned by the jury.

As this is the only assignment of error upon which any argument was made or authorities cited by counsel, no others will be considered. The judgment will be affirmed. All the judges concurring.

#### BOARD OF COM'RS OF CLAY COUNTY v. STREETER.

(Court of Appeals of Kansas, Northern Department, O. D. Feb. 14, 1896.)

CONSTRUCTION OF CASE—ACTION FOR TAXES PAID  
—LIMITATION—ACCRUAL OF CAUSE.

In 1875, Mrs. Streeter leased a certain building in Clay Center, Clay county, Kan., to the county of Clay for the term of 99 years, and, among others, the following stipulation was contained in the lease: "The county of Clay, or its assigns, during the continuance of this lease, shall pay its proportionate share of the taxes levied upon all of said building in the proportion which the interest of Clay county or its assigns bears to the value of the whole building." The county failed to pay any part of the taxes for the years 1875 to and including the year 1889, and the same were all paid by Mrs. Streeter, who, upon the 17th day of September, 1890, began her action in the district court of said county to recover the amount so paid, with interest. The trial court rendered judgment in favor of Mrs. Streeter and against the county for the taxes for the years 1878 to 1885, inclusive, in the sum of \$835.91. *Held* error; that the cause of action upon each of the payments accrued as soon as it was made, and the action for recovery thereof would be barred by the three-years statute of limitations.

(Syllabus by the Court.)

Error from district court, Clay county; Spilman, Judge.

Action by Mrs. J. F. Streeter against the board of county commissioners of Clay county. From a judgment for plaintiff, defendant brings error. Reversed.

This action was originally brought in the district court of Clay county, Kan., by Mrs. J. F. Streeter, against the board of county

Mrs. Streeter: That on the 7th day of September, 1875, she leased to the board of county commissioners of said county the upper stories of a certain building owned by her as a courthouse for said county and for county offices. That the lease contained the following stipulation: "The county of Clay, or its assigns, during the continuance of this lease, shall pay its proportion of the taxes levied upon all of said building in the proportion which the interest of Clay county, or its assigns, bears to the value of the whole building." In pursuance to said lease, the board of county commissioners of Clay county took possession of the upper stories of said building, and from that time up to the beginning of the action the same was continuously in the possession, under the control, and used by the county of Clay as a courthouse and for county offices. Mrs. Streeter paid all of the taxes assessed against said building from 1876 to 1889, inclusive. The defense interposed was that the action was barred by the statute of limitations under paragraph 1676, Gen. St. 1889, and also by the provisions of the Code of Civil Procedure (section 18, subd. 2), with reference to the time of the commencement of actions; and also that, the upper story of said building being held by the county exclusively for county purposes under a lease for 99 years, the building was exempt from taxation; and that, if Mrs. Streeter paid taxes levied upon that portion of the building, and such payment was voluntary, she cannot recover from the county. The case was tried to the court without a jury, and on the evidence the court made certain findings of fact, and as a conclusion of law the court held that Mrs. Streeter was entitled to have and recover of and from the board of county commissioners of Clay county two-fifths of all the taxes paid on the building for the years of 1878 to 1885, inclusive, amounting in all to \$835.91, but could not recover for the taxes paid for the years 1876, 1877, 1886, 1887, 1888, and 1889. From the judgment of the court both parties excepted, and bring the case here for review.

J. P. Otis and F. B. Dawes, for plaintiff in error. F. P. Harkness and A. A. Godard, for defendant in error.

GILKESON, P. J. (after stating the facts). Several questions are presented for our consideration. We will consider first the question raised by plaintiff in error, "Was the cause of action barred by the statute of limitations at the time of the commencement thereof?" This we are constrained to answer in the affirmative. The wrongs charged in the petition, and which are the foundation of the action, are that the county failed to pay certain taxes, which they agreed to

arise out of an implied contract, and falls within the limitations of subdivision 2 of section 18, Code Civ. Proc. The contract of lease gives no cause of action. It is a mere agreement to do a certain thing; makes no promises as to what will be the effect if the agreement is not performed; no express stipulation therein that, if the county did not pay, the lease would be forfeited. Nor can any such inference be drawn from its terms. Suppose these taxes had never been paid, what cause of action would Mrs. Streeter have against the county? It is only by operation of law that Mrs. Streeter has any cause of action or right of recovery; she being the party to whom the agreement run, and having paid to protect herself, which it was her duty to do, so as to keep the damages within the lowest possible limit. The law creates an implied contract that the county will reimburse her; not, however, upon the written contract, but upon the fact of payment; and this implied contract creates the cause of action, and it accrues as soon as the payments are made. It is the wrongs done (the delicts) that create the cause of action, and these are not complete until the other party has suffered damage, and this could not occur in this case until she paid. When did the delicts occur? Take the earliest possible moment of time when the county could be said to be in default or have committed a wrong. Certainly not until the taxes become due. But can she complain at this time? We think not, for she has not been harmed; but when she has made the payment she is damaged to the amount paid, and by reason of the implied contract has a cause of action against the county for the amount to which she has been damaged. We think this view of the case is sustained by not only the decisions of the supreme court of this state, but by the courts of last resort in many others. *Ryus v. Gruble*, 31 Kan. 767, 3 Pac. 518; *Commissioners Graham Co. v. Van Slyck*, 52 Kan. 622, 35 Pac. 299. In the last-cited case (which was an action against a county clerk for failure to account for fees) the court held: "A cause of action for fees not accounted for and wrongfully retained by such officer accrues at the end of each quarter, when the allowance of salary is made." And, notwithstanding the officer's bond, his official bond, upon which, under the fifth subdivision of section 18, Code Civ. Proc., an action could be commenced within five years, the limitation in subdivision 2, of said section controls. Justice Johnston, in delivering the opinion of the court, at page 628, 52 Kan., and page 299, 35 Pac., uses this language: "An action accrued against the defendant for the fees collected and unaccounted for at the quarter settlement following the receipt of the fees. The public records disclosed the performance of the official services of the clerk, and what

fees should have been charged and collected. The statutory limitation could not be extended by the failure to make the payment of the fees collected." We think this rule strictly applies to the case at bar, and not, as contended for by defendant in error, that the statutory limitations can be extended (at the pleasure of the party) by neglecting to bring suit. We do not think this view conflicts with the decision in *Whitaker v. Hawley*, 30 Kan. 317, 1 Pac. 508, relied upon by defendant in error; nor is it applicable to the facts in this case. Could the defendant, in the case at bar, defeat all the other items of taxes paid by proof as to one? Would the bringing of suit upon the first item before a default as to others, and a prosecution thereof to a final determination, be a bar to an action upon any of the others? Are the facts constituting the cause of action upon any one of them necessarily involved in an action upon any or all of the others? If so, they would constitute one cause of action, and the issues in one be res adjudicata as to the others, and the contention of defendant in error would be correct. But all of these questions must be answered in the negative. Each and every item charged stands alone, and might depend upon an entirely different state of facts, the proof of which in one instance, or as to one item, would not be admissible in any of the others. For instance, the legality of the tax for each year would be necessary to be established. All of these taxes might be illegal, but from entirely different causes. Would proof of the fact that the taxes in 1877 were legal or illegal establish the legality or illegality of the taxes for any other year? We think not. If suit had been brought for the taxes of 1877, and judgment rendered, would that act as a bar to an action for the taxes of 1878, which had not been paid by Mrs. Streeter at the time she recovered for the taxes of 1877? Certainly not. Nor are the facts constituting the cause of action upon any one of them necessarily involved in an action upon any of the others. The building leased by the county of Clay was located upon portions of two lots, viz. 18 and 19, which were 46 feet wide and 130 feet long; and said building was so constructed and located that it stood one-half on the east 71 feet of the north half of lot 18 and one-half on the east 71 feet of the south one-half of lot 19. The court, in its eighth special finding of fact, found: "At no time was the building in controversy with the portions of lots 18 and 19, upon which it was located, ever assessed together as one property, or separate from the remainder of lot 19, for the twelve years from 1876 to 1887, inclusive." In making the assessment the value of the building was taken as if it was all located on the east 71 feet of the north half of lot 18, while for the years 1888 and 1889, in making the assessment, the building was treated as if one-half of it was on the east

71 feet of the north half of lot 18, and one-half of it on the south half of lot 19. In the 10 years from 1876 to 1885, inclusive, the value of the whole building was taken into consideration in making the assessment, while for the four years from 1886 to 1889, inclusive, the value of the first story only of the building was taken into consideration, and the value of that portion of it occupied by the county of Clay was not included in the assessed value of the property. In the tenth finding of fact the court states: "The proportionate share of the taxes levied upon said building for the years 1876 and 1877, which should have been paid by the county of Clay, cannot be ascertained from the evidence. The conclusions of law are as follows: "(1) That plaintiff is not entitled to recover from the defendant anything in this action on account of taxes paid by her for the years 1876, 1877, 1886, 1887, 1888, and 1889 on the building in controversy in this action." This conclusion, under the findings and the pleadings, is undoubtedly correct. "(2) The plaintiff is entitled to recover from defendant the share of taxes levied on the building in controversy in this action and paid by her, which, under said lease, should have been paid by said county of Clay, for the years 1878 to 1885, both inclusive, as follows: \* \* \* with interest on said amounts at the rate of 6 per cent. per annum from the dates they were respectively paid." This is erroneous, as all of these payments were barred by subdivision 2 of section 18, Code Civ. Proc. (Gen. St. par. 4095), more than three years having elapsed from the time the payments were made before the commencement of the action. The judgment in this case will be reversed, and cause remanded, with instructions to render judgment for the county of Clay. All the judges concurring.

CHARLES P. KELLOGG & CO. v.  
HAZLETT.

(Court of Appeals of Kansas, Northern Department, C. D. Feb. 14, 1896.)

ACTION ON DEBT NOT DUE—GARNISHMENT—WHEN ISSUED.

1. An action can be brought, under section 230 of the Code, on a claim, before it is due, only for the purpose of having an attachment of the property of the defendant on the grounds specified in the statute. If there is no attachment of property, the action fails.

2. Garnishment before judgment, as now allowed in this state, is an independent provisional remedy, not a mere incident of attachment, and cannot be had at the commencement of an action brought on a claim before it is due.

3. A garnishee summons, issued without the filing of the requisite statutory bond, should be quashed.

(Syllabus by the Court.)

Error from district court, Dickinson county; James Humphrey, Judge.

Action by Charles P. Kellogg & Co. against Edward E. Hazlett, in which a garnishee

summons issued. From a judgment quashing the summons on motion of the garnishees, plaintiff brings error. Affirmed.

John H. Mahan, for plaintiff in error.  
Stambaugh & Hurd, for defendants in error.

GARVER, J. Charles P. Kellogg & Co. commenced this action, January 20, 1892, in the district court of Dickinson county, against Edward E. Hazlett, on a debt not due, and had an order of attachment issued, under section 230 of the Civil Code. At the same time, an affidavit was made and filed for a garnishee summons, on the ground that the defendant had not property liable to execution sufficient to satisfy the plaintiff's demand. No bond, in addition to the undertaking in attachment, was given in the garnishment proceeding, but a garnishee summons was issued by the clerk of the court, and certain persons summoned as garnishees. The order of attachment was not executed by a levy on any property of the defendant, for the reason, as stated in the sheriff's return, that no property was found on which to make the levy. Thereafter, on motion of the garnishees, the court set aside and quashed the garnishee summons, for the reason that it was issued "without authority of law." This ruling is assigned for error, and is the only question demanding the consideration of this court.

Can the plaintiff in an action commenced on a debt not due avail himself of the provisions of the statutes of 1889 relating to garnishment? The answer to this question involves a consideration of the changes made in such proceedings by the statutes of 1889. Previous to that year, a garnishee summons was issued as a mere aid to an order of attachment, and was only another method of attaching the defendant's property. The affidavit and bond for attachment furnished the grounds and the authority for garnishment. Nothing more was required of the plaintiff, except the showing that he had good reason to and did believe that the person or corporation to be summoned as a garnishee was indebted to the defendant, or had property belonging to him. Whatever might be the ground laid in the affidavit for the attachment, it was the same ground which justified proceedings in garnishment. A summons in garnishment, like an order of attachment, could, under the statutes of 1863, be had in any civil action brought for the recovery of money, regardless of whether such action was founded upon contract or sounded in tort. If it was an action for money, and the defendant was charged with conduct which operated as a fraud upon the plaintiff, the latter was afforded a remedy, to obtain security for his claim, either by a direct seizure of the property of the defendant, or by garnishing it in the hands of a third party. In 1889 the legislature made some radical changes. While the grounds for attachment

and the proceedings therefor remain without substantial change, the remedy by garnishment before judgment is no longer available, except in an "action to recover damages founded upon contract, express or implied, or upon judgment or decree." The statutory grounds for attachment do not authorize the issuing of a garnishee summons before judgment,—the only ground therefor now being that the defendant "has not property liable to execution sufficient to satisfy plaintiff's demand." Prior to 1889, fraud was the ground upon which garnishment proceedings were based. Since then, it is sufficient that a defendant be merely unfortunate,—that he has failed to accumulate property subject to execution. There is also, now, the further requirement, except when the defendant is a nonresident, "that the order of garnishment shall not be issued by the clerk unless an undertaking on the part of the plaintiff has been executed \* \* \* to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of such garnishment, if the order be wrongfully obtained." The undertaking for attachment is no longer sufficient for both attachment and garnishment. Thus, garnishment has been made an independent provisional remedy, instead of a mere aid to attachment. Each proceeding is based upon its own peculiar grounds, and supported by its own independent undertaking.

Does section 230 of the Code of Civil Procedure authorize garnishment at the commencement of an action brought on a claim before it is due? The plaintiff in error contends that it does. That section reads: "Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts, or is about to make such sale, or conveyance, or disposition of his property, with such fraudulent intent, or is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due and have an attachment against the property of the debtor." The right to sue on a claim not due is purely statutory. In such a case, a cause of action does not exist independent of the statute. *Rullman v. Hulse*, 32 Kan. 598, 5 Pac. 176; *Wurlitzer v. Suppe*, 38 Kan. 31, 34, 15 Pac. 863. An action can, therefore, be maintained only as it is expressly authorized. To warrant such an action under section 230, two things must concur: First, the disposal of property by the defendant, or his intention to dispose of it, with the fraudulent intent to cheat or defraud his creditors; and, second, the attachment of the defendant's property. If the attachment fails, the action also fails. *Pierce v. Myers*, 28 Kan. 364; *Voorhis v. Michaels*, 45 Kan. 255, 25 Pac. 592. If the

writ of attachment be not served because there is no property to attach, it cannot be said that there has been an attachment in the case. The mere issuing of an order of attachment, without a levy being made, counts for nothing. The legal effect is the same as if an attachment had been actually made and afterwards discharged. It must be observed that this statute does not authorize the commencement of an action on a debt not due upon the mere showing that the defendant has made, or is about to make, a fraudulent disposition of his property. The proceedings are permitted before the maturity of the debt only for a specific purpose,—to have an attachment of the defendant's property. For no other purpose and on no other conditions can such action be maintained. *Buck v. Panabaker*, 32 Kan. 466, 4 Pac. 829. The fact that a defendant may not have property subject to execution sufficient to satisfy the plaintiff's demand has never, in this state, been made a ground for the commencement of an action on a debt not due. As garnishment is a special and extraordinary remedy, it can be used only at the times and upon the grounds expressly authorized by statute. The statutory conditions for its exercise are conclusive, and exclusive of all others. Garnishment is not now, as we have seen, merely incident to attachment, nor is a garnishee summons authorized by a fraudulent disposal of property by a debtor. It follows, therefore, as a necessary conclusion, that proceedings in garnishment are not authorized, before judgment, in an action brought on a claim not due, even though proper grounds be laid for attachment.

Upon another ground, also, the decision of the lower court should be affirmed. The record shows that the requisite statutory bond was not given in the garnishment proceedings. This was a fatal omission. A summons issued without such bond should be set aside. *Hallinger v. Lantier*, 15 Kan. 608; *Rullman v. Hulse*, 33 Kan. 670, 7 Pac. 210. There being no error apparent in the record, the judgment is affirmed. All the judges concurring.

#### PERRY v. BLATCH.

(Court of Appeals of Kansas, Northern Department, C. D. Feb. 14, 1896.)

##### GARNISHMENT—INTEREST IN JOINT DEBT.

The defendant's interest in a debt owing to him and another, but not as partners, is subject to garnishment; and upon payment by the garnishee of the full amount of the debt into court, and the appearance of all parties claiming an interest in the money, the court should determine the interest of the defendant, and hold it subject to the garnishment proceedings.

(Syllabus by the Court.)

Error from district court, Clay county; R. B. Spillman, Judge.

Action by Thomas Perry against Anna T. Buckell. William Stacy was summoned as

garnishee, and W. E. Blatch filed an interplea. The court adjudged the money to the interpleader, and plaintiff brings error. Reversed.

Stambaugh & Hurd, for plaintiff in error. F. L. Williams and B. B. Tuttle, for defendant in error.

GARVER, J. In an action commenced in the district court of Clay county by Thomas Perry, the plaintiff in error, against Anna T. Buckell, one William Stacy was summoned as garnishee. Stacy answered, and paid into court the sum of \$126, which he admitted he was owing under a contract made between him and the defendant Buckell. Afterwards the defendant in error, W. E. Blatch, filed an interplea in the case, claiming that the money was owing to him instead of to Mrs. Buckell. Upon issues joined between Perry and Blatch, the court adjudged the money garnished to belong to the latter. Of this decision and judgment Perry complains.

The evidence shows that W. E. Blatch, a nonresident of the state, was the owner of a quarter section of land in Clay county, of which Mrs. Buckell had charge. With the owner's consent, Mrs. Buckell used the land in various ways, and, at her own expense, inclosed it with a fence, with the understanding that she should be repaid therefor out of the use of the land. Thereafter she leased the land, in her own name, to William Stacy, for a cattle pasture during the season of 1891, she agreeing to be responsible for his cattle and to supply them with salt. In consideration of the use of the pasture and said services of Mrs. Buckell, Stacy agreed to pay her the sum of \$130. The evidence shows, without substantial dispute, that there was still due Mrs. Buckell, on account of the fencing, about \$70, and that her services in looking after and caring for the cattle while in the pasture were a substantial part of the inducement for the consideration agreed to be paid by Stacy. On the part of the plaintiff, it was contended that Mrs. Buckell had leased the land from Blatch, and that, therefore, she was entitled to what was due on the subletting to Stacy. On the other hand, it was claimed by the interpleader, Blatch, that Mrs. Buckell acted simply as his agent in leasing the pasture, and that he, as owner and principal, was legally entitled to the money paid therefor.

The evidence is somewhat conflicting and unsatisfactory concerning the arrangement between Blatch and Mrs. Buckell, and it is not clear what their relations in fact were. But, in the view we take of the case, it is not necessary for us to determine these matters; for, if she had a lease from Blatch, the entire rent to be paid by Stacy was owing to her, and, if she was only an agent, yet she was an agent with an interest of such a character that she might, in her own name, have maintained an action upon the contract

ant and Blatch are interested as partners. If it were, it would not be attachable at the suit of a creditor of one of the partners for his individual debt. *Trickett v. Moore*, 34 Kan. 755, 10 Pac. 147. But, conceding that there was a joint ownership of the money, each owner had an interest which was easily determinable and capable of being definitely fixed, and therefore was, in law, an interest which was certain. The garnishee, without objection, paid the money into a court having full jurisdiction of all the parties and of the subject-matter of their controversy. Whatever interest Mrs. Buckell had at the time the garnishee was summoned was transferred to the plaintiff by the garnishment, so as to be beyond the reach of any subsequent agreement between her and Blatch. Thereafter, the only question left was the determination of how much of this garnished fund legally belonged to the defendant as against the interpleader, Blatch. What she could have legally claimed was subject to garnishment in this action. *Whitney v. Munroe*, 19 Me. 42; *Thorndike v. De Wolf*, 6 Pick. 120; *Miller v. Richardson*, 1 Mo. 310; *Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. 909. We think the court should have found what the defendant's interest was in the money paid in by the garnishee, and should have applied that amount on the plaintiff's judgment, returning the balance to Blatch. The judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion. All the judges concurring.

#### TRUEDELL v. PECK.

(Court of Appeals of Kansas, Northern Department, O. D. Feb. 14, 1896.)

#### FINDINGS OF COURT—TAX SALE—VALIDITY—APPEAL—REVIEW.

1. Where a case is tried by the district court without the intervention of a jury, and the court makes special findings of facts, such findings are as conclusive in this court as the verdict of a jury. And where there is testimony clearly establishing the facts and sustaining the findings, this court will not reverse the findings.

2. A county cannot legally collect for the publication of the delinquent tax list a sum in excess of the actual amount paid therefor, and a tax deed founded upon a sale on which an excess charge for publication is included may be declared void.

3. Where a question is raised for the first time in this court, it will always be looked upon with great disfavor. Only such questions as have been raised and decided by the trial court will be reviewed by this court in a proceeding in error.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by Letitia W. Truesdell against William M. Peck. From a judgment for defendant, plaintiff brings error. Affirmed.

This was an action brought in the district

court as defendant, to recover the possession of certain real estate situated in the city of Concordia, Cloud county, Kan., under and by virtue of a tax deed thereto. The real estate in controversy, to wit, lots 22, 23, and 24, in block 154, was subject to taxation for the year 1883. Henry Kelsey, the then owner, having failed to pay the taxes so assessed against him, they were sold at a tax sale begun and held on the first Tuesday in September, 1884, being the 2d day of September, 1884, and continuing on the next succeeding days; and certificates of purchase were issued to one J. C. Elliott, and dated September 2, 1884,—that is, two certificates were issued for the three lots, one including lots 22 and 23, and one for lot 24. On the 25th of February, 1886, the then owner, Henry Kelsey, and wife, mortgaged this property to the Cloud County Bank. On the 2d of September, 1887, Elliott assigned the tax-sale certificates to the plaintiff in error. On the 9th of November, 1887, the mortgage heretofore mentioned having been foreclosed, judgment was rendered in favor of the bank. On the 10th of May, 1888, order of sale was issued, upon which, and on the 11th of June, 1888, the land was sold to William Peck. This sale was confirmed, and upon the 11th of August, 1888, the sheriff of Cloud county made a deed to William M. Peck, he being the purchaser at the said sale. On September 3, 1887, the plaintiff in error took out and recorded a tax deed to said property, and upon the same day the then mortgagee, the Cloud County Bank, offered to redeem the property from the tax sale, and tendered to the treasurer of Cloud county the proper amount. On June 11, 1888, the plaintiff, believing her tax deed first taken out to be void, obtained another tax deed, and had it recorded. On the 11th of June, 1890, she commenced this action by filing her petition and praecipe for summons. The summons, however, was not issued nor served until the 12th day of June. To the petition filed in this case the defendant filed answer of general denial, and also setting up the statute of limitations as to the commencement of the action within the time prescribed by law. Upon the issues so joined trial was had to the court, which made special findings of fact and separate conclusions of law. Each and every one of the findings of fact was in favor of the defendant, and the conclusions of law were also in favor of the defendant, except with reference to the bar of the statute of limitations, and judgment was rendered thereon against the plaintiff and in favor of the defendant for costs. Plaintiff filed motion for judgment upon the special findings and motion for new trial, which were overruled, plaintiff excepting thereto, and brings the case here for review.

L. J. Craus, for plaintiff in error. Kennett & Peck, for defendant in error.

GILKESON, P. J. (after stating the facts). The findings of fact made by the trial court in this case are all sustained by the testimony. The conclusions of law are founded thereon, and supported thereby. The decision in this case, therefore, will not be disturbed, and from a careful examination of the record we perceive no error therein. The court adjudged the tax deed invalid for several reasons; among others, that the mortgagee had the right to redeem on the 3d day of September, 1887, the date that the first tax deed was issued, and that there were excessive sums included in the amount for which the land was sold. The final redemption notice in this case stated that the time allowed by law for the redemption of lands sold for delinquent taxes of 1883, at the sale begun and held on the first Tuesday in September, being the 2d day of September, 1884, and continued on the next succeeding days, will expire on the 3d day of September, 1887, being three years from the date first above mentioned. The court found that the mortgagee offered to redeem and tendered the proper amount of money for the redemption of these lots on the 3d day of September, 1887, and as a conclusion of law found that the defendant had the right to redeem at that date. We think this is correct. *English v. Williamson*, 34 Kan. 212, 8 Pac. 214; *Cable v. Coates*, 36 Kan. 191, 12 Pac. 931.

As to the excessive amounts included, while they are small, yet the record discloses they were intentionally added, and were illegal charges. There is no claim made that they occurred by an error in calculation, or occasioned by making and copying figures, or by carrying out the various amounts, but, on the contrary, they had existed in the sale record in the certificates of sale, and were carried out into the deeds. One of these items is evidently for the issuing of a sale certificate which was never issued. Two of these lots were assessed and sold together, and but one tax-sale certificate was issued therefor. Yet the court found, and the testimony clearly shows, that a charge was made in this instance for a certificate issued for each lot. The county paid for advertising the delinquent tax list the year in which these were advertised the sum of two cents for each town lot. In the case of lot 24, the court found that there was also an excess charged of two cents. This the trial court evidently found was a double charge for advertising, and we think the testimony upholds this conclusion. A county cannot legally collect a sum in excess of the actual costs it pays or is liable for, and a tax deed founded upon a sale including such an excess will be adjudged invalid, and set aside, if challenged before the running of the statute of limitations. The excess being something for which the treasurer had no right to sell the land, whatever may be the rule where a trifling mistake may have occurred, we think the weight of authorities is to the effect that, where it is plainly the purpose of the of-

ficer to include illegal sums within the amount for which the land is sold for taxes, and the sale includes such illegal sums, such circumstances render the sale void. The plaintiff in error, however, contends that it was the duty of the court to ascertain the amount paid by them, with the interest and costs, and to award a recovery therefor. Of this, we think, she has no right to complain. She did not ask the court below so to do in her pleadings, or by motion, and the question is raised for the first time in this court by her brief. "Where a question is raised for the first time in this court, it will always be looked upon with great disfavor. Only such questions as have been raised and decided by the trial court will be reviewed by this court in a proceeding in error." *Byington v. Commissioners*, 37 Kan. 654, 16 Pac. 105. The judgment in this case will be affirmed. All the judges concurring.

### KANSAS LOAN & TRUST CO. v. GILL et al.

(Court of Appeals of Kansas, Northern Department, C. D. Feb. 14, 1896.)

#### MORTGAGE—CONSTRUCTION—OPTION TO DECLARE DEBT DUE.

1. A note and the mortgage securing the same should be construed as parts of one transaction, and the conditions of the mortgage, when not in conflict with the terms of the note, as to the effect of a default in the payment of interest when due, govern the rights of the parties respecting that matter.

2. When the conditions of a mortgage provide that, upon a failure to pay interest when due, the holder of the mortgage may, at his option, declare the whole sum due, and foreclose the mortgage, the right to exercise the option exists as long as the default continues; and it is not waived by a mere delay, which has not operated to the benefit of the mortgagee nor to the detriment of the mortgagor.

(Syllabus by the Court.)

Error from district court, Mitchell county; Cyrus Heren, Judge.

Action by the Kansas Loan & Trust Company against Gibson Gill and others. Judgment for defendants. Plaintiff brings error. Reversed.

Fuller & Whitcomb and A. W. Hicks, for plaintiff in error. J. T. Hicks, for defendants in error.

GARVER, J. This was an action, brought April 27, 1892, in the district court of Mitchell county, by the plaintiff in error, as plaintiff, on a note executed by the defendants in error, and to foreclose a mortgage given to secure the same. The note was dated June 1, 1888, and made for the payment of the sum of \$900, in five years after date, with interest, payable semiannually, on the 1st days of June and December in each year. The mortgage provided, as one of its conditions: "If the makers of said note shall fail to pay or cause to be paid any part of said money, either principal or interest, according to the tenor and effect of said note and

\* \* \* the whole sum of money hereby secured shall, at the option of the legal holder or holders thereof, become due and payable at once, without notice." The petition alleges the failure to make the several payments of interest falling due on and after June 1, 1890; and on that ground plaintiff elected to exercise the option to declare the whole sum due, and to foreclose the mortgage. A demurrer to this petition was sustained, on the ground that it failed to state facts sufficient to constitute a cause of action. This ruling of the court is now complained of.

The specific objection which is made to the petition is that, because of the delay of the plaintiff to exercise its option to declare the whole sum due within a reasonable time after the last default in the payment of interest, it must be deemed to have waived such right on account of any default preceding the commencement of the action. Did the petition state a cause of action? *Crossmore v. Page*, 73 Cal. 213, 14 Pac. 787, is cited as the principal authority relied upon for this ruling. The construction which the supreme court of California put upon the contract before it in that case does not seem a reasonable one, and what is said by the court as to the legal effect of the delay is much weakened by subsequent decisions of the same court. *Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423; *Fletcher v. Dennison*, 101 Cal. 292, 35 Pac. 868. The note and mortgage must be considered together as one contract; and the conditions of the mortgage, as to the effect of a default in the payment of taxes or interest, become a part of the contract for the payment of the sum named in the note. *Muzzy v. Knight*, 8 Kan. 456; *Meyer v. Graeber*, 19 Kan. 185. According to the conditions of the mortgage, upon the failure of the mortgagor to pay the interest when due, the holder of the mortgage had a right to declare the whole sum due, and foreclose his mortgage, if he so elected. *Bank v. Peck*, 8 Kan. 660; *Stancil v. Norton*, 11 Kan. 218; *Darrow v. Scullin*, 19 Kan. 57. The rights of the parties in this case grow out of a contract which they voluntarily entered into. It is not like a case of forfeiture, where the party who exercises the option may derive large benefits from it. Forfeitures are not favored by the courts, and slight circumstances will often be seized upon to avoid them. But, even in cases of forfeiture, the rule requiring prompt action is founded upon the presumption of a change in the situation of the parties after the time when a forfeiture might have been first declared.

In a contract such as that under consideration, the option is for the special benefit of the mortgagee, and for his protection. Two things are its principal purposes: First, the prompt receipt of the interest by the holder of the note; and, second, the avoidance of any impairment of the security by

charges upon the property, in addition to the original sum secured. The exercise of the option does not affect the rights of the parties in any manner, except merely as to the time of payment. The agreement of the mortgagor to pay the interest at stated times is a continuing obligation, which can be discharged, within the terms of the contract, only by actual payment. Whether one week or four months have elapsed since the payment should have been made, the default is still as continuous as is the promise to pay. The reason for giving the option has not necessarily lost any of its force by the delay, and the right to exercise it should be secured as long as the reason exists. If, by reason of the delay, the plaintiff should gain any advantage, or the defendant should suffer any detriment or loss, other considerations would enter into the case, and it might then be said that there was a waiver. In this case, nothing of the kind is claimed. The first default on the interest occurred nearly two years, and the last, over four months, prior to the commencement of the action, with nothing done otherwise by either party to affect their legal rights. We think the controlling question in such a case is whether the defendant made default, and was continuing so, to the prejudice of the contract rights of the plaintiff, at the time he elected to declare the whole sum due and payable. In this particular case, the rule applied by the district court might operate to the advantage of the defendant; but it is of doubtful benefit to mortgagors generally to lay down a rule which would require the holder of a mortgage containing such conditions to foreclose, if at all, under such option, immediately upon the happening of any default, and to hold that no delay or indulgence could be given by the creditor except at the risk of waiving all right to foreclose for such default. We admit our inability to perceive any reason for holding, under such circumstances, that the petition does not state a cause of action. Authority, as well as reason, oppose the construction placed upon the terms of this mortgage by the trial court. *Railroad Co. v. Brickley*, 21 Kan. 275-295; *Manufacturing Co. v. Howard*, 28 Fed. 741; *Swearingen v. Lahaer* (Wis.) 61 N. W. 431.

No special notice of the election was required. The commencement of the action was sufficient notice that the plaintiff had elected to exercise the option to declare the whole sum due. *Shattuck v. Rogers*, 54 Kan. 266, 38 Pac. 280; *Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423; *Buchanan v. Insurance Co.*, 96 Ind. 510; *Trust Co. v. Munson*, 60 Ill. 371; *Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. 265. The judgment will be reversed, and the case remanded, with directions that the district court overrule the demurrer to the plaintiff's petition. All the judges concurring.



## SHOCKEY et al. v. JOHNTZ et al.

(Court of Appeals of Kansas, Northern Department, C. D. Feb. 14, 1896.)

## MORTGAGES—FORECLOSURE SALE—RIGHTS OF PURCHASER—GROWING CROPS.

1. Growing crops pass with the soil to a purchaser at a mortgage sale, where there is no reservation or waiver of the right to the crops at such sale.

2. The fact that the mortgagor had leased the lands, and the lessee had mortgaged the crop to a third person, does not change the rule. By the lease from the mortgagor the lessee acquired no greater right in the premises than the mortgagor had. The tenant stands exactly in the situation of the mortgagor. Hence, he could not give any greater title than his own, and the mortgagee of the lessee obtained no better right to the growing crop than his lessor had or could give. The rights of the purchaser were not, and could not be, defeated by reason of the lease. The right to the possession of the land and the right to the growing crop passed to the purchaser.

3. Nor does it vary the case because the tenant was not made a party to the foreclosure suit. The purchaser's rights are just the same as they would have been if the tenant had been made a party.

(Syllabus by the Court.)

Error from district court, Dickinson county; James Humphrey, Judge.

Action by John Johntz and others, partners as Malott & Co., against Isaac Shockey and another. From a judgment for plaintiffs, defendants bring error. Affirmed.

This action was brought by John Johntz, A. W. Rice, T. H. Malott, D. R. Gordon, and W. B. Giles, partners as Malott & Co., to recover the value of a crop of wheat alleged to have been converted by plaintiffs in error, Isaac Shockey and Daniel E. Snider, who were defendants below. The land upon which the wheat in controversy was raised was in 1884 owned by Robert E. Knapp, and was mortgaged by him to the Travelers' Insurance Company, for a loan of \$2,500, on January 6, 1885. On September 8, 1887, Knapp leased the land to S. S. Kalebaugh, to have and to hold from the 15th day of September, 1887, to the 1st day of March, 1889, "and with privilege of two years longer if the farm is not sold by first party [Knapp] previous to the expiration of said date." The mortgage became due, by its terms, by reason of default, and foreclosure suit was begun on it January 3, 1889. Judgment was rendered in the foreclosure suit July 9, 1889. There were other liens upon the place, but we will not notice them. On February 24, 1890, the sheriff of Dickinson county sold the premises to T. H. Malott. Confirmation of sale was had February 26, 1890. Malott, the purchaser, was a member of the plaintiffs' copartnership, and took the title in his own name, for sake of convenience. The deed issued May 30, 1890. The plaintiffs took possession of the premises in March, 1890, the lessee, Kalebaugh, having left the premises. Prior to his leaving, in the fall of 1889, he sowed the wheat in controversy. On February 23, 1890, he mortgaged the wheat to

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Shockey & Snider. Some time in July, 1890, the plaintiffs in error harvested the wheat, over the objection and defiance of the defendants in error. Kalebaugh, the lessee, was not a party to the foreclosure suit, nor is it claimed there was any reservation in the order of sale issued, or sale made by the sheriff in the foreclosure proceedings, or any waiver to the right to the crop at such sale. Malott & Co. sued Shockey & Snider in the district court of Dickinson county. Trial had by jury. General verdict for Malott & Co. No special findings were asked by either party. Judgment upon verdict. Motion for new trial denied, and Shockey & Snider bring the case to this court.

John H. Mahan, for plaintiffs in error.  
Stambaugh & Hurd, for defendants in error.

GILKESON, P. J. (after stating the facts). The plaintiffs in error contend that "by reason of the terms of the lease, Kalebaugh having the right to renew the same on March 1, 1890, for a further period of two years, and having remained upon the land for some time after March 1, 1890, this gave him the right to the crop, and that his mortgagees succeeded to his rights by virtue of the mortgage." We cannot agree with plaintiffs in error. In *Smith v. Hague*, 25 Kan. 246,—a case where a crop of wheat was planted upon the land after a judgment had been rendered decreeing a foreclosure of the vendor's lien against the land, and ordering that it be sold to satisfy such lien, and under such order of sale the land was sold before the crop was ripe or harvested,—it was ruled that the crops which were then growing upon the land, and not reserved in the order of sale, or at the sale, passed by the sale and deed of conveyance of the sheriff. In *Beckman v. Sikes*, 35 Kan. 120, 10 Pac. 592, Mr. Justice Johnston, in delivering the opinion of the court, says, "The fact that the mortgagor or judgment debtor sold the growing crop prior to the sheriff's sale of the land \* \* \* does not vary the case, because he could not pass a title greater than his own, and therefore Sikes obtained no better right to the growing crop than Baker had or could give." Of course, the mortgage, as well as the judgment decreeing a foreclosure, was only a lien upon the land, and did not confer title. The title and right of possession remained in the mortgagor until the sale and conveyance of the land. Until that time he was entitled to the use of the land, and to all the crops grown thereon that had ripened and were severed. The lien of the mortgage and judgment, however, attached to the growing crops, until they were severed, as well as to the land. The mortgagor planted the crops knowing that they were subject to the mortgage, and liable to be divested by the foreclosure and sale of the premises. Any one who purchased such crops from him took them subject to

the same contingency, as the recorded mortgage and the decree of foreclosure were notice to them of the existence of the lien. If the land was not sold until the crops ripened and were severed, the vendee of the mortgagor would ordinarily get a good title; but if the land was sold and conveyed while the crops were still growing, and there was no reservation or waiver of the right to the crops at such sale, the title to the same would pass with the land. But the plaintiffs in error contend that this case (*Beckman v. Sikes*, supra) does not apply. There the sale was made by the mortgagor. Here it was made by the tenant of the mortgagor. We cannot understand how this could change the rule laid down in the case. If the mortgagor's title was limited and restricted by the mortgage and judgment, his lessee had no greater title than he could give. The record of the mortgage implied notice to him, and Shockey & Snider could obtain no greater right to the crops than Kalebaugh had; and in the case at bar they not only had the notice of the recorded mortgage and decree of foreclosure, but of the sale (which it is presumed was made, as required by law, upon published notice) that occurred some days before they obtained their mortgage.

It is further contended by plaintiffs in error that Kalebaugh was not made a party to the foreclosure suit; hence the rule is changed. We think not. The right of the purchaser was not, and could not be, defeated by reason of the lease, or by the fact that the possession was in, or that the crops were grown by, the lessee. The right to the possession and the right to the growing crops passed to the purchaser. If the tenant had been made a party to the foreclosure suit, the possession and the crops could have been delivered to him by process under that judgment; but, since he was not made a party thereto, he cannot obtain that remedy, except by some other action. The purchaser's rights, however, are just the same as they would have been if the tenant had been made a party. It follows, therefore, that Malott, by his purchase and sheriff's deed, became the absolute owner of the premises, including the crops growing thereon. *Downard v. Groff*, 40 Iowa, 597; *Goodwin v. Smith*, 49 Kan. 331, 31 Pac. 153. The judgment in this case will be affirmed. All the judges concurring.

#### NOBLE et al. v. HUNTER et al.

(Court of Appeals of Kansas, Northern Department, C. D. Feb. 14, 1896.)

#### ASSIGNMENT OF CLAIM AFTER VERDICT—VALIDITY.

A claim for money found to be due by the verdict of the jury in an action for the conversion of personal property may be assigned to a third person, so as to give the assignee the right to recover the same. And where the record shows that it was the intention of all the parties that the written instrument under which the as-

signee claims should vest the title to the money in the assignee, although inappropriate terms have been used, the instrument will be so construed as to carry into effect the intent of the parties.

(Syllabus by the Court.)

Error from district court, Republic county; F. W. Sturges, Judge.

Action by Hunter Bros. against T. M. Noble and others for an injunction. Judgment for plaintiffs, and defendants Noble and Van Natta & Close bring error. Modified.

In the spring of 1887, S. L. Parkhill executed and delivered to Hunter Bros. a mortgage on certain personal property, and in the fall of the same year executed to them a real-estate mortgage for the same debt. Upon the real estate mortgaged as aforesaid there were several other liens; and in an action brought in May, 1888, to foreclose the first mortgage on said real estate, in which Hunter Bros. were made defendants, their mortgage from Parkhill was declared a third lien, but was foreclosed, and judgment was rendered in their favor, and against Parkhill, for the sum of \$947.95. This judgment was rendered on the 8th of October, 1888. Shortly after the commencement of the foreclosure suit, Hunter Bros. attempted to collect under the chattel mortgage first given, and took into their possession certain personal property, and sold the same. About August 20, 1888, Parkhill brought suit against Hunter Bros. for the value of the personal property so taken and converted to their own use, alleging that the chattel mortgage had been fully paid. In this action judgment was rendered on the 4th of October, 1889, for the sum of \$408. From this judgment Hunter Bros. attempted to commence proceedings in error, but, having failed to do so within one year from the date of the rendition of the judgment, an execution was issued against them, and placed in the hands of the sheriff of Republic county. Thereupon Hunter Bros. commenced an action against the sheriff of said county, asking that the judgment of Parkhill against them should be set off against their judgment against Parkhill, and that the sheriff be restrained from making any levy under said execution. This injunction, it appears, was dissolved; and thereupon a stipulation was entered into by and between Hunter Bros. and Noble and Van Natta & Close, by which they were made codefendants with the sheriff, Swartz, showing that the said Noble and Van Natta & Close claimed title to the judgment in favor of Parkhill against the Hunters, and upon which the execution before mentioned had been issued, and agreeing that the case should be docketed, and stand regularly for trial at the next term of the court. Noble and Van Natta & Close thereupon filed an answer alleging that they were the owners of the judgment, and that the same had been regularly transferred and assigned to them on or about the 4th day of October, 1889, to secure certain indebtedness due from Park-

hill to them for services as attorneys before that time rendered, and also for other fees in the case of Parkhill against Hunter Bros., which were sought to be set off, and for other sums of money which Parkhill owed them. Parkhill also filed an answer setting forth, in substance, the same facts as set up in the answer of Noble et al. Hunter Bros. filed reply of general denial. Upon the issues thus made the case was tried before the court without a jury. The court made special findings of fact and conclusions of law, and rendered judgment in favor of Hunter Bros.; setting off the judgment of Parkhill, and enjoining all the defendants from attempting to collect said judgment. Noble and Van Natta & Close bring the case here for review.

Noble & Hogan and Van Natta & Close, for plaintiffs in error. Cooper & Cooper and W. T. Dillon, for defendants in error.

GILKESON, P. J. (after stating the facts). But one question is presented for our consideration, and, for sake of brevity, we will consider it in this form: Who was the owner of the judgment rendered on May 29, 1890, in the case of S. L. Parkhill v. Hunter Bros.? The court, among others, made the following findings of fact: "No. 7. The attorneys who brought the suit for the Parkhills against the plaintiffs herein (Hunter Bros.) were defendants herein, T. M. Noble, N. T. Van Natta, and J. F. Close. At the time of the bringing of the same there was no definite understanding as to the fees, although it was talked between them that whatever fees the attorneys recovered would have to be recovered out of any judgment Parkhill might recover against the Hunters; for the Parkhills were in failing circumstances,—owing more than they could pay. Immediately after the hearing of the motion to dismiss, it was agreed between said attorneys and S. L. Parkhill that the attorneys should have, for their fees in the suit of S. L. Parkhill to recover from Hunter Bros. the value of property, one-half of the judgment recovered, and out of the other half they should be entitled to retain such an amount as their services were reasonably worth, which they had rendered S. L. Parkhill in other suits, and as much as they have rendered or might render Emma D. Parkhill in her suit. This agreement was oral, and not in writing, and made, as above, soon after the hearing of the motion to dismiss, in October, 1889." "No. 9. Immediately upon the reception and reading of the verdict, said Parkhill executed and delivered to his said attorneys, who have since retained the same, the following written assignment: 'Belleville, Kans., Oct. 4th, 1889. For a valuable consideration, I hereby sell and assign all my right and title to T. M. Noble, Van Natta and Close, in and to a certain judgment I have this day recovered against Hunter Brothers in the case of S. L. Parkhill vs. Richard Hunter and Henry Hunter, partners as Hunter Brothers, for the

sum of \$480.00, in the district court of Republic county, Kansas. [Signed] S. L. Parkhill.'" The court further found that the date of the written instrument above set forth was the date upon which the verdict of the jury was rendered, but that no judgment was rendered upon said verdict until after the hearing of the motion for a new trial, which was on the 29th of May, 1890; that, between the dates of rendering the verdict and the giving of the judgment, Parkhill filed a motion for judgment on the verdict, which the court refused to render until after the motion for new trial was heard. As a conclusion of law, the court found: "No. 3. Although, as between the defendant S. L. Parkhill and his attorneys, they had a claim against him for one-half of the amount of his judgment against Hunter Bros., to wit, \$204, also the reasonable value of their services rendered about other matters, to wit, \$70, making a total of \$274, yet they had no attorney's or other lien for this amount, or any portion thereof, as against the Hunter Bros.; and, under all the circumstances, there were no steps they could take, as against Hunter Bros., to cut off the right which they (Hunter Bros.) had to have their judgment for \$247.95 offset against any judgment Parkhill might recover against them on account of any matter then existing between them. Neither could Parkhill assign his judgment against the Hunters, or the claim on which it was based, to the attorneys, or any one else, for attorney's fees or other consideration, so as to cut off that right to the Hunter Bros."

Reading findings of fact 7 and 9 together, was there not virtually an assignment to the attorneys of the sum found to be due by the jury, even though no judgment had been rendered thereon? Does not the word "judgment," used in the written instrument, evidently refer to the mere fact of recovery by the verdict? And is not this written instrument sufficient to carry with it the right to all future benefits that might arise by reason of the fact that a certain sum had been found due? And could not the attorneys, in the event of a new trial being granted, rightfully claim that the cause of action, from that date, had been assigned to them? Did not it assign the claim that Parkhill had against Hunter Bros.? The same rule should apply in construing this as in the case of a sale of personal property,—“that the intent of the parties controls, and if they intended a permanent vesting of the title the title will at once pass.” *Kneeland v. Renner* (Kan. App.) 43 Pac. 95. Civ. Code, § 420, provides: “In addition to the causes of action which survive at common law, causes of action for mesne profits, or for injury to the person, or to real or personal estate or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same.” It is conceded that the action of Parkhill v. Hunter Bros. was in tort. Can such a claim be

assigned? We think so. The taking of a man's money tortiously is a tort that affects and injures his personal estate, and at the same time it increases the value of the estate of the person who receives it; and such a claim can be assigned. *Stewart v. Balderston*, 10 Kan. 142. Justice Valentine, in delivering the opinion of the court, says: "Under the statute of this state, a cause of action for money had and received, whether obtained tortiously or otherwise, as well as some other cause of action which affects injuriously the estate of the party injured, is such a cause of action as will survive, after the death of the party injured, to his legal representatives;" citing Code Civ. Proc. §§ 420, 421. And, according to the authorities which we have already cited, this is conclusive proof that the cause of action is assignable. As long ago as 1828, in *Comegys v. Vasse*, 1 Pet. 213, Mr. Justice Story, in delivering the opinion of the court, said: "In general, it may be affirmed that mere personal torts, which die with the party, and do not survive to his personal representatives, are not capable of passing by assignment, and that vested rights, ad rem and in re, possibilities coupled with an interest, and claims growing out of and adhering to property, may pass by assignment." And this doctrine has been followed in this country ever since. It is now generally conceded that survivorship of a cause of action and assignment go hand in hand. We think, therefore, that on the 4th of October, 1889,—the date the written assignment was made,—the attorneys were the owners of any and all rights that Parkhill had before under his claim against Hunter Bros. Until the cause of action became merged into a judgment, and thus became a debt, the Hunters could not set off. "A verdict in an action of tort does not convert the tort into a debt. It does not become a debt until merged into a judgment." *Stauffer v. Remick*, 37 Kan. 454, 15 Pac. 584. The Hunters' right of set-off arose after judgment, which was months after the claim was assigned. The judgment in this case will therefore be reversed, and cause remanded, with instructions to award to the defendants Noble and Van Natta & Close so much of the judgment against Hunter Bros., and in favor of S. L. Parkhill, as found by the trial court to be due them from Parkhill for services, viz. \$274, and the balance of said judgment be credited upon the judgment of Hunter Bros. against Parkhill. All the judges concurring.

**BIRMINGHAM v. LEONHARDT et al.**  
(Court of Appeals of Kansas, Northern Department. C. D. Feb. 14, 1896.)

**PLEADING—WAIVER OF DEFECTS—JUDGMENT—ERROR IN ENTRY.**

1. The sufficiency of the allegations of a petition to state a cause of action cannot be questioned for the first time by a motion to set aside

a sheriff's sale made pursuant to the judgment rendered in the case.

2. A mere clerical error in the entry of a judgment may be corrected at any time, upon motion and notice to the opposite party, so as to make the record conform with the judgment actually rendered.

3. The case of *Trust Co. v. Gill* (in this court) 43 Pac. 991, followed.

(Syllabus by the Court.)

Error from district court, Osborne county; Cyrus Heren, Judge.

Action by Edward Birmingham, Sr., against Frederick Leonhardt and others. Judgment for plaintiff. From an order setting aside such judgment and dismissing the case, plaintiff brings error. Reversed.

E. F. Robinson and C. H. Nichols, for plaintiff in error. Clark A. Smith and N. F. Hillebrandt, for defendants in error.

CLARK, J. In this action, brought on a note and for the foreclosure of a mortgage securing the same, jurisdiction of the parties and of the subject-matter was regularly obtained, judgment duly rendered November 7, 1891, an order of sale issued, and the mortgaged premises sold June 27, 1892. On motion of the defendants, filed October 19 and heard November 11, 1892, the court set the sale aside, and vacated the judgment, on the ground that the petition did not state a cause of action. The plaintiff in error, who was plaintiff below, brings the case to this court, assigning for error this ruling of the court. The defendant in error has made no appearance in this court, and we have not the benefit of any suggestions which he might make concerning the decision complained of. All the proceedings in the case, including the sale, appear to be regular. As the jurisdiction of the court over both the person and the subject-matter is not controverted, the judgment rendered was not void, even conceding that the petition was open to the objection made to it. At the most, it was only irregular and voidable, if timely attacked in a proper manner. But we know of no authority to raise such question for the first time after the term at which the judgment was rendered, by a motion to set aside a sale which has been made pursuant to the judgment. The district court has very wide discretion in opening up judgments and correcting errors, in the proceedings, if it does so at the same term at which the judgments or proceedings are had. "But it is a rule equally well established that after the term is ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceedings, by a writ of error or appeal, as may be allowed in a court which by law can review the decision." *Bronson v. Schulten*, 104 U. S. 410. Any exceptions to this rule are made and governed by special statutory provisions.

The proceeding complained of finds no support in any statute. This court had occasion recently to consider a somewhat similar proceeding in the case of *Haseltine v. Gilleland*, 43 Pac. 88, in which it was said: "The defendants had ample opportunity to defend in the case by pleading the several matters set up in this motion, and the plaintiff had the right to have such questions determined in the regular course of legal procedure, and by a formal trial in court. The ruling of the court permitted the defendants to avoid a trial when the issue was properly presented, and to dispose of the entire question affecting the right of the plaintiff to his lien upon the summary hearing of a motion. The law certainly does not contemplate any such procedure. It does not matter that the issue was not made, nor the question raised, in the case proper. It could have been made and determined therein. The defendants were challenged to it by the petition, and their default had the same legal effect as an actual appearance and trial." Upon the merits of the motion, under the decision of this court in the case of *Trust Co. v. Gill*, 43 Pac. 991, the ruling of the court must be held to be erroneous.

With his motion to confirm the sale the plaintiff joined a motion to correct a clerical error in the entry of the judgment. The judgment actually rendered was for \$1,518, but by mistake was entered for only \$518. Such a clerical error in the entry of a judgment can be corrected at any time upon motion and notice to the opposite parties. Upon the showing made in the district court the clerk should have been directed to correct the journal entry and record of the judgment so as to make them conform with the judgment rendered. The record shows that the proceedings upon the sale were regular, and that the premises were sold for a reasonable price. At least no objection on that ground was made by the defendants in their motion to set aside the sale. The judgment will therefore be reversed, and the case remanded, with directions that the district court overrule the motion of the defendants to set aside the sale, and sustain the motions made by the plaintiff to correct the journal entry of the judgment, and to confirm the sale, All the judges concurring.

CHICAGO, K. & W. RY. CO. v. NEED et al.  
(Court of Appeals of Kansas, Northern Department, C. D. Feb. 14, 1896.)

EMINENT DOMAIN — CONDEMNATION OF MORTGAGE LIEN.

1. The right of eminent domain cannot be exercised by a railroad corporation with respect to a right of way, when it is already the absolute owner of the land included therein; and condemnation proceedings, had under such circumstances, are ineffective against a mortgage lien placed thereon by a former owner.

2. Condemnation proceedings cannot be instituted by a railway corporation for the special

purpose of condemning a mere mortgage lien on land, the absolute title to which is vested in such corporation, subject to the lien. The law does not recognize a mere lien as an interest in real estate which is subject to such proceedings.

(Syllabus by the Court.)

Error from district court, Clay county; R. B. Spilman, Judge.

Action by the Chicago, Kansas & Western Railway Company against U. E. Need, as sheriff of Clay county, and Peter Sanborn. Judgment for defendants, and plaintiff brings error. Affirmed.

A. A. Hurd, for plaintiff in error. C. C. Coleman and Beardsley, Gregory & Flannelly, for defendants in error.

GARVER, J. The principal question to be determined in this case is this: After a railway corporation has acquired the title in fee simple, by purchase from the owner, of a strip of land for the right of way of its road through a larger tract which is subject to a mortgage, can it, by condemnation proceedings, wipe out the mortgage lien on the right of way? The plaintiff in error contends that it can, and by this action sought to enjoin the sale of the right of way, which was threatened under a judgment of foreclosure of the mortgage. The injunction was denied. In purchasing the right of way from the owner and accepting the absolute title thereof the railway company acted in a mere private capacity, and acquired only such title as would have vested in an individual under a similar conveyance. As grantee, it took subject to the lien of the mortgage, with the equitable right—no part of the mortgage debt being assumed—to have the land not conveyed first exhausted under a foreclosure of the mortgage. In accordance with this rule, in an action brought after the conveyance to the railroad company to foreclose the mortgage upon the quarter section of land from which the right of way had been taken, the court sustained the mortgage lien upon the entire tract, but directed that the right of way should be sold only in case the remaining land did not sell for sufficient to satisfy the judgment. The railroad company, being a party to the foreclosure suit, was bound by the judgment therein. Subsequently the railroad company instituted proceedings under the statute for the condemnation of this right of way, which was then, and had been for two or more years, occupied by the company in the operation of its road. The application for the appointment of the commissioners and the report filed by them were in the form common to condemnation proceedings. The report purported to be an appraisal and condemnation of about 13 acres of land, the damages being assessed at one dollar.

The right of eminent domain grows out of the necessities of the public, and is enforced only for public or quasi public uses. This right may be, and generally is, delegated to railroad corporations, to enable them, with-

out interference or delay, to construct their roads through the lands of private owners. When the necessity for the exercise of such right does not exist, recourse cannot be had to it. It certainly was not the intention of the legislature that the right of eminent domain should be vested in any such corporation for the purpose of acquiring an interest in lands inferior to that already possessed. In such a case the corporation asks for an appraisal of the damages which it proposes to inflict upon itself by a voluntary appropriation of its own property for uses which are entirely proper and legitimate for it, as owner, to make. The ultimate object of the proceeding is to enable it to deposit with the county treasurer the amount of damages so ascertained, in order that it may receive the same for its own indemnity. After such superfluity of action it is somewhat difficult to comprehend just what has been accomplished. If the company were not the absolute owner of the fee, and there were interests held by other parties which were subject to appropriation under the right of eminent domain, the mere fact that the company already had an interest would probably not prevent it from appropriating outstanding interests by the same proceedings, and to the same extent, as would be proper in case it had no previously acquired interest. For example, a leasehold estate in the right of way, already possessed by the railroad company, would not prevent it from thus subjecting and appropriating all other interests, legal or equitable, in the land. *Railroad Co. v. Kip*, 46 N. Y. 546. Under condemnation proceedings only an easement or right of occupancy for railroad purposes is acquired,—an interest inferior to the fee. As a general rule, an inferior interest or title is merged in the greater interest or superior title which is vested in the same person, and an owner's rights are measured by the latter. It is a contradiction of terms to say that one who is the absolute owner of real estate can acquire an easement in his own lands. We are of the opinion, therefore, that the condemnation proceedings under consideration were unauthorized in law, and wholly nugatory, so far as they were instituted for the purpose of affecting the railroad company, as owner, and that they could have no incidental effect upon the mortgage.

Did the condemnation proceedings affect the mortgage lien, even if they were specially instituted for that purpose? Under the decisions of the supreme court of this state a mortgagee is not an owner with an interest in the land mortgaged, so as to make him a proper party to such proceedings. In this state a mortgage vests no title and conveys no interest in the land; it creates a mere lien. *Chick v. Willetts*, 2 Kan. 384; *Vanderslice v. Knapp*, 20 Kan. 647. While the word "owner," as used in our statutes with reference to real estate, has a very broad meaning, it cannot be construed to apply to per-

sons who have no interest whatever. In most of the cases where this question has been raised and considered railroad companies have contended that a mortgagee was not a party to condemnation proceedings; that he had no interest in the land; no right to appeal from any award that might be made; and that his lien was wholly subject to the result of the proceedings against the landowner. In this contention they have been sustained by the supreme court. *Goodrich v. Commissioners*, 47 Kan. 355, 27 Pac. 1006; *Rand v. Railway Co.*, 50 Kan. 114, 31 Pac. 683; *Railroad Co. v. Sheldon*, 53 Kan. 169, 35 Pac. 1105; *Railroad Co. v. Thayer*, 54 Kan. 259, 38 Pac. 266. In *Railroad Co. v. Sheldon*, it was held: "The mortgagee, however, had only a lien upon the land out of which the right of way was taken. He was not the owner of the same, nor the owner of an interest therein. Not being an owner within the meaning of our statutes, it was not necessary to name the mortgagee in the proceedings, nor to make any award to him." It is a necessary deduction that if the mortgagee had no interest nor any right to be considered in making the award, he had no right to appeal. *Railroad Co. v. Grovier*, 41 Kan. 685, 21 Pac. 779. The only right or interest, under such condemnation proceedings, which the supreme court has recognized in the mortgagee, is his right, where equity warrants, to resort to the fund awarded, and have it applied on his mortgage. *Railroad Co. v. Sheldon*, 53 Kan. 169, 35 Pac. 1105. The force of these decisions is not lessened by the fact that they were in harmony with the views then urged upon the court by the same company that appears as plaintiff in error in the case before us. Under these circumstances the conclusion is inevitable that there was no outstanding interest to be condemned, and that the rights of the mortgagee were not affected by the condemnation attempted in this instance. The case of *Kennedy v. Railway Co.*, 22 Wis. 582, to which we are cited by counsel for plaintiff in error, involved some questions similar to those in this case. An examination of that case shows, however, that what is said in the opinion of the court concerning the condemnation of a mortgagee's lien is based upon the statute of Wisconsin, which makes special provisions for such cases. As we have no similar statute in this state, that decision is not applicable. Of course, it is not just that the railroad company, having in good faith constructed its road through these lands, should be made to suffer unreasonable loss by reason thereof. The mortgagee has no equitable claims upon the roadbed and railroad tracks. We think it is within the power of a court of equity, by appropriate proceedings, to preserve and protect the rights of all parties in such a case, but it cannot be done as here attempted. Judgment affirmed. All the judges concurring.

GUENTHER v. PEOPLE.

(Supreme Court of Colorado. Jan. 26, 1896.)

FORMER ACQUITTAL—PLEADING—EXCEPTION.

1. The overruling of a plea of former acquittal may be reviewed, though no exception was taken thereto.

2. Mills' Ann. St. § 1461, providing that on the arraignment of a prisoner it shall be sufficient, without complying with any other form, to declare orally that he is not guilty, does not dispense with former acquittal being pleaded specially, it being necessary at common law, and being provided by section 1467, that all trials for criminal offenses shall be conducted according to the course of the common law, except when this chapter points out a different mode.

3. A plea of former acquittal is not bad because not verified, defendant's willingness to verify being stated therein.

Error to district court, Arapahoe county.

Oscar E. Guenther was convicted of embezzlement, and brings error. Reversed.

On April 24, 1894, the district attorney of the Second judicial district filed in the district court of Arapahoe county an information charging the defendant with the crime of embezzlement. This information contains two counts. In the first the defendant is charged with fraudulently converting to his own use \$196.95 of the money of Herman Goldsmith, the same having been delivered to the defendant by Goldsmith in trust and confidence, and with the direction and agreement that the defendant would and should apply it to the payment of the first premium on a policy of insurance upon the life of Goldsmith in the Travelers' Insurance Company, if such policy could be obtained; otherwise the money to be returned to Goldsmith. In the second count the defendant is charged with having received the check of Goldsmith for \$196.95 for the purposes stated in the first count, but that, in violation of the trust and confidence reposed in him, it is averred that he obtained and received, as the proceeds of such check, \$196.95 in lawful money, etc., and did then and there feloniously embezzle and fraudulently convert the same to his own use. To this indictment the defendant filed a plea of *autrefois acquit*. In this plea a certain prior information, filed in the same court, is set out, containing three counts, in the first of which he is charged with the embezzlement of the money of Goldsmith to the amount of \$196.95, obtained and embezzled as charged in the first count of the last indictment as hereinbefore stated. In the third count of the first information, as set forth in the plea of former acquittal, the defendant is charged with the embezzlement of the check for \$196.95. The plea further avers that the defendant pleaded not guilty to each count in this former information, and that a jury was duly impaneled and sworn to try the issue so joined, and thereafter such proceedings were had that the jury returned a verdict of not guilty upon which a judgment of acquittal was duly entered by the district court. It is farther averred that the felony and embezzlement in the former

information mentioned and the felony and embezzlement in the present information mentioned are one and the same, all of which the defendant stands ready to verify. The court overruled this plea, and, the defendant being required to plead further to the second information, he entered a plea of not guilty to each count thereof. Upon the issues thus joined a trial was had to a jury, who returned a verdict of guilty. Upon this verdict the defendant was sentenced to imprisonment in the state penitentiary for a term of one year. Upon the record being filed in this court, a writ of error was issued, and made a supersedeas.

L. G. Rockwell, for plaintiff in error. B. L. Carr, Atty. Gen., and F. P. Secor, Asst. Atty. Gen., for the People.

HAYT, C. J. (after stating the facts). As the record fails to show an exception to the ruling of the court upon the defendant's plea of *autrefois acquit*, it is claimed that such ruling is not open to review in this court. This plea, however, like a demurrer in a civil action, is preserved by the record proper, and the objection to the proceeding made by this plea saves itself, and no exception to the ruling need be reserved. Hall v. Linn, 8 Colo. 270, 5 Pac. 641; Burton v. Snyder, 21 Colo. —, 40 Pac. 451; Young v. Martin, 8 Wall. 354.

It is next contended that the plea is made available by our statute under the general issue, and that a special plea of *autrefois acquit* is, for this reason, useless and unnecessary, and, being unnecessary, it was not error to overrule the plea or strike it from the files, as by such action of the court, it is said, the accused sustained no wrong, as he might nevertheless have introduced evidence in support thereof under the issue made by his plea of not guilty. This argument is based upon section 1461 of Mills' Ann. St., which provides that "upon the arraignment of a prisoner, it shall be sufficient, without complying with any other form, to declare orally, by himself or his counsel, that he is not guilty." In the case of *Hankins v. People*, 106 Ill. 628, a majority of the court of that state indorsed the views now advanced by the attorney general. Mr. Justice Scholfeld dissented from these views, although he concurred with the majority in affirming the judgment. Justices Mulkey and Dickey also concurred in this dissent. The general statute governing criminal trials in this state reads as follows: "All trials for criminal offenses shall be conducted according to the course of the common law, except when this chapter points out a different mode." Mills' Ann. St. § 1467. At common law a plea of former acquittal or conviction must be specially pleaded, evidence of either not being admissible under the general issue. 1 Bish. Cr. Proc. (2d Ed.) § 805; *State v. Barnes*, 32 Me. 530. And, as the statute does not point

cially pleaded. Aside from this, it has always been the practice in this state to interpose such defenses by special plea, and, as this practice has received the direct sanction of this court, it should not now be departed from to the injury of persons charged with crime. In *re Allison*, 13 Colo. 531, 22 Pac. 820. Why this plea was overruled by the district court we are not informed, as no defense to this ruling has been attempted in this court, except upon the ground that the plea was not verified, which is not well taken, as the defendant in his plea states his willingness to verify, which is all that good practice requires. It appears from the plea that in the first count of the former information the defendant was charged with the embezzlement of \$196.95 in money, and in the second and third counts he was charged with embezzling a check of that value, while the count upon which the defendant was convicted and sentenced is made up by joining together the first and third counts in the first information. In the case of *Dill v. People*, 19 Colo. 469, 36 Pac. 229, it was said that, in determining whether or not a plea of *autrefois acquit* is sufficient in law, the following may generally be regarded as the proper test: "Was the matter set out in the second indictment admissible as evidence under the first, and could a conviction have been properly maintained upon such evidence? If yes, then the plea is sufficient; otherwise it is not." As we have seen, the matters set out in the second count of the second information were all set out in the first information, and were admissible in evidence thereunder, and, if deemed sufficient by the jury trying that case, a verdict of guilty might properly have been returned thereon; but, a jury having passed upon this evidence, and returned a verdict of not guilty, the defendant cannot be again put in jeopardy for the same matters; hence the plea of *autrefois acquit* should have been sustained. For this error the judgment of the district court is reversed, with directions that the defendant be discharged. Reversed.

#### BOARD OF COM'RS OF PITKIN COUNTY v. BALL.

(Supreme Court of Colorado. Jan. 27, 1896.)

TAXATION—ERRONEOUS LEVY—TAX SALE—LIABILITY OF COUNTY.

In the absence of direct statutory authority making a county liable for the tortious acts of its officers, it is not liable to a landowner because its officers assessed untaxable property, levied an illegal tax, and sold the property for failure to pay the same.

Error to Pitkin county court.

Action by Mary J. Ball against the board of county commissioners of Pitkin county to recover the cost of removing an alleged cloud on

tax sale. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Plaintiff held, under the town-site act, possessory title of a lot in Aspen, upon which an illegal tax was assessed and levied by Pitkin county for the year 1884. For failure to pay such tax the lot was advertised for sale, and bid in by the county treasurer for the county. Thereafter the county canceled said tax, as illegal; but the treasurer, notwithstanding such order of the county commissioners, in due time executed his tax deed therefor to the county. Subsequently the county conveyed this lot to one Mitchell, as it is alleged, fraudulently, and with intent to cloud the title of the plaintiff. Afterwards plaintiff received a patent for this lot from the United States government, and bargained it for sale. When the title was examined it was discovered that Mitchell held under this tax deed, which had been placed on record, and, in order to complete the sale, plaintiff alleges that she was compelled to pay Mitchell \$250 to remove the cloud. It is further alleged (but we do not consider it material) that the board of county commissioners, when this claim was presented to it by the plaintiff, agreed to abide by the decision of its county attorney, which was that the board should pay the claim, but it refused to comply. Upon these facts, admitted by the defendant when it demurred to the complaint, the county court rendered judgment against the county for the full amount of the claim, and by a peremptory writ of mandamus ordered the board to levy a tax to pay the judgment. The writ of error was made to operate as a supersedeas by this court, and is now being prosecuted by the defendant to reverse the judgment.

Robert G. Withers, for plaintiff in error.

CAMPBELL, J. (after stating the facts). This action is not one for damages against the county for casting a cloud on plaintiff's title, but it is for a fixed sum which the plaintiff alleges she was compelled to pay to Mitchell, the grantee of the defendant, in order to clear her title from a cloud before she could complete a sale. This money was paid to Mitchell. The county received none of it. The wrong committed by the county, through its officers, was in assessing untaxable property, levying an illegal tax, and selling the property for failure to pay the same. If the county is liable at all to a landowner under these circumstances, the extent of the liability would not be whatever sum Mitchell should exact, or the plaintiff be willing to pay, or what these persons should mutually agree upon, to have the cloud removed. But for such tortious acts of its officers, or for acts clearly beyond their power, the county, in the absence of a statute, is not liable. *Commissioners v. Bish*, 18 Colo. 474 33 Pac. 184, and cases cited; *Mechem*, Pub. Off. § 850; 1 *Beach*, Pub. Corp. §§ 258-263; *Id.* c. 20. In the absence



of direct statutory authority therefor, we know of no law that would make the county liable for money paid by a landowner to one who holds a recorded tax deed for the land, in order to clear his title. If the board of county commissioners fraudulently, or with intent to damage the plaintiff, wrongfully conveyed to Mitchell the plaintiff's land, of which the county held a tax deed issued under a void tax sale, even if this occasioned a cloud upon the title, the county cannot be held in damages therefor, whatever may be the liability of the officers in their individual capacity, as to which we express no opinion. The circumstance that the county promised to pay, if the county attorney should so advise, is not important; for the liability of the county for an illegal demand preferred against it is not made legal merely because the county attorney advises that the claim be paid. If the plaintiff has a remedy for the recovery of the money paid to Mitchell, she has mistaken it in the present action. The judgment is reversed, and the court below ordered to dismiss the complaint. Reversed.

#### JONES v. SULLIVAN.

(Supreme Court of Colorado. Feb. 17, 1896.)

##### CONFLICTING EVIDENCE—REVIEW.

A finding on conflicting evidence will not be reviewed.

Error to court of appeals.

Action between Lucy H. Jones and Dennis Sullivan. From a judgment against her, Lucy H. Jones brings error. Affirmed.

Robert E. Foote, for plaintiff in error.

PER CURIAM. This case comes here on error to a judgment of the court of appeals. The facts out of which the controversy arose, and the issues joined upon which the cause was tried, are sufficiently set out in the opinion rendered by that court (*Jones v. Sullivan*, 3 Colo. App. 406, 33 Pac. 687), and it will serve no useful purpose to restate them here. An examination of the record satisfies us that the conclusion reached by the court of appeals is correct. The court below determined the issues joined in favor of defendant, upon conflicting testimony, and its finding as to the weight of the evidence is conclusive upon review. For the reasons given in the opinion of the court of appeals, its judgment is affirmed. Affirmed.

#### MEDINA v. MEDINA et al.

(Supreme Court of Colorado. Jan. 27, 1896.)

##### DIVORCE—VACATING DECREE.

1. Code 1877, § 75, providing, "when \* \* \* the summons in an action has not been personally served on the defendant, the court may allow \* \* \* defendant \* \* \* at any time within six months after the rendition of any judgment in such action to answer to the merits

of the original action," applies to decrees of divorce, as well as other judgments.

2. A decree granting a divorce may be opened, notwithstanding the person obtaining the divorce has in the meantime been married.

Error to Douglas county court.

Action by Emma M. Medina against Mary G. Medina and another. Complaint dismissed, and plaintiff brings error. Affirmed.

On the 1st day of December, 1891, Emma M. Medina, plaintiff in error, instituted this action against Mary G. Medina and Frank J. Medina, in the county court of Douglas county, to set aside a certain order entered by that court in an action theretofore pending between Mary G. Medina and Frank J. Medina, vacating a decree of divorce rendered therein, and an order dismissing that action. The facts upon which she predicates her right to relief are, in brief, as follows: On the 4th day of April, 1881, in an action pending in the county court of Douglas county, in which Frank J. Medina was plaintiff and Mary G. Medina was defendant, upon an alleged service by publication, an absolute decree of divorce was granted in favor of the plaintiff. Subsequent to the rendition of that decree, and on the 12th day of May, 1881, this plaintiff was married to Frank J. Medina, and commenced living with him as his lawful wife. On the 22d day of July, 1881, on motion of Mary G. Medina, the county court vacated and set aside such decree of divorce, and permitted her to appear and answer. On the 6th day of June, 1882, Mary G. Medina, having filed her answer, on motion of Frank J. Medina the action was dismissed without prejudice to the bringing of another action. That these motions and orders were made without notice to, and without the knowledge or consent of, this plaintiff in error. That since her marriage with Frank J. Medina she had lived openly with him, as his wife, and that he had openly acknowledged her as his wife for a period of over 10 years, and a child had been born as the fruit of such marriage. That Mary G. Medina, well knowing these facts, had at no time interfered with or claimed that this marriage was illegal, or made any protest against the same. It appears from the record in the divorce suit that the decree was vacated because obtained by perjury and fraud, in this: That plaintiff swore, both in his complaint and in his affidavit to obtain service of summons, that he (the plaintiff) was ignorant of the residence of defendant, which statement was false, and well known to plaintiff to be false; that no copy of summons was mailed to the defendant, as it should have been; and that defendant had no notice whatever that an action was commenced or pending against her until after the decree was rendered. The case was tried to the court, and judgment rendered in favor of defendants, dismissing plaintiff's complaint. To reverse this judgment she prosecutes this writ of error.

GODDARD, J. (after stating the facts). The controlling question presented by the assignments is whether the county court had jurisdiction to entertain the motion to vacate the decree of divorce after the lapse of the term at which it was rendered. Upon this proposition we entertain no doubt. Even assuming a valid service of the summons was had by publication, the court had jurisdiction to entertain the motion, under section 75 of the Code of 1877, which, *inter alia*, provides: "When, from any cause, the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action." Plaintiff in error contends that the foregoing provision does not apply to decrees of divorce, and cites in support of this claim *McJunkin v. McJunkin*, 3 Ind. 30; *Lewis v. Lewis*, 15 Kan. 181. In *McJunkin v. McJunkin* the court had under consideration a special act of the legislature, which provided that the practice and proceedings in divorce cases should be the same as in other chancery cases, and whether, by virtue of such provision, decrees of divorce were included in certain sections of the chapter relating to suits in chancery, which provide for the opening of decrees rendered without other notice than by publication in a newspaper, and held that decrees of divorce did not come within the latter sections. These sections are not at all similar to the provision of our Code above quoted. The decision in *Lewis v. Lewis*, *supra*, does not sustain the plaintiff's contention. The court expressly refuses to decide whether, had there been only a publication in the newspaper, the case would not fall within section 77 of their Code, but expressly held that the application was properly denied because, in addition to the publication in the newspaper, a copy of the petition and notice was mailed to the defendant, as required by section 641, and the court say: "The conclusion, then, to which we have come,—though, as we freely admit, with grave doubts,—is that the mailing of the copy of the petition and notice, as required by said section 641, is a part of the service, and that, therefore, in a case where such mailing has been duly made, in addition to the publication of notice in the paper, section 77 does not apply, and that a decree legally entered under those circumstances cannot be set aside upon the mere showing of actual ignorance of the pendency of the suit." In the case of *Hemphill v. Hemphill*, 38 Kan. 220, 16 Pac. 457, it was held that a judgment in a divorce action came within section 77 of the Code, and the case of *Lewis v. Lewis*, *supra*,

to entertain an application to vacate a decree of divorce, when rendered upon service by publication in a newspaper only, as well as other judgments, is sustained by *Lawrence v. Lawrence*, 73 Ill. 577; *Edson v. Edson*, 108 Mass. 590; *Dunn v. Dunn*, 4 Paige, 425; *Weatherbee v. Weatherbee*, 20 Wis. 499; *Smith v. Smith*, 20 Mo. 166. And the fact that the party to whom the decree was granted has married in the meantime, or that a child has been born, as the fruit of such second marriage, cannot divest the court of its power to set aside the decree of divorce. *Crouch v. Crouch*, 30 Wis. 667; *Comstock v. Adams*, 23 Kan. 513; *Allen v. Maclellan*, 12 Pa. St. 328; *Holmes v. Holmes*, 63 Me. 420. "Persons \* \* \* acting under such a decree are not entitled to the protection of the court, as acquiring rights, in good faith, in reliance upon a decree of court." *Lawrence v. Lawrence*, *supra*.

But, aside from the authority conferred by the foregoing provision, the county court of Douglas county had jurisdiction to vacate and set aside the decree upon the further ground of its invalidity for want of service upon the defendant in the original suit. The court never acquired jurisdiction of the defendant *Mary G. Medina*, and for this reason the order of publication, and all subsequent proceedings, including the decree, were of no validity, and should have been set aside. The court, therefore, having jurisdiction to entertain the motion and enter the orders complained of, its orders being unaffected by fraud, even if erroneous, cannot be questioned or disturbed in this proceeding. From this conclusion it follows that the oral evidence sought to be introduced would in no way affect or change the result reached by the court below, even if admissible. Therefore we deem it unnecessary to consider the question. From an examination of the record, we are satisfied that the judgment of the court below is correct, and it must be affirmed. Affirmed.

#### AMTER v. CONLON.

(Supreme Court of Colorado. Jan. 27, 1896.)

##### QUIETING TITLE—ADVERSE CLAIM—PLEADING.

Under Code Civ. Proc. 1887, § 255, providing that "an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim," plaintiff need only allege that he is the owner in fee simple and in possession, without defining the adverse claim which he seeks to have determined.

##### Error to court of appeals.

Action by *Anna Conlon* against *Marks Amter* to quiet title to real property. From a judgment of the court of appeals (3 Colo. App. 185, 32 Pac. 721) affirming a judgment in favor of plaintiff, defendant brings error. Affirmed.

Marks Amter, pro se. Anna Conlon, pro se. John H. Reddin, for defendant in error.

**GODDARD, J.** This is an action brought by the defendant in error against the plaintiff in error to quiet her title to lot 19 in block 3 of H. Witter's addition to the city of Denver, under sections 255 and 256 of the Code of Civil Procedure of 1887, which provide:

"Sec. 255. An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest.

"Sec. 256. If the defendant in such action disclaim in his answer, any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs."

Her complaint, in substance, alleges that she is the owner in fee simple and in possession of the lot, that the plaintiff in error claims an estate or interest therein adverse to her, and that such claim is without any right whatever. To her complaint the plaintiff in error interposed a demurrer upon the ground that it failed to state facts sufficient to constitute a cause of action. The demurrer was overruled, and plaintiff in error answered by a general denial and by an affirmative defense, setting up a claim to the property by virtue of a certificate of sale issued to him by the sheriff in pursuance of a sale of the lot under a judgment against the husband of defendant in error. To this answer a replication was filed. Thereupon plaintiff in error moved for judgment upon the pleadings, which was denied. The case was tried to the court, which found the issues in favor of defendant in error, and that she was the owner in fee simple of the premises, and in possession of the same, at the time of the commencement of the suit; that plaintiff in error had no estate, right, title, or interest in the premises,—and rendered judgment accordingly. On an appeal to the court of appeals the judgment of the district court was affirmed. To reverse this judgment, defendant below brings the case here on error. For a more elaborate statement, see Amter v. Conlon, 3 Colo. App. 185, 32 Pac. 721.

The assignments of error present but two questions: First, whether the complaint states facts sufficient to constitute a cause of action; and, second, whether the testimony is sufficient to sustain the findings of the district court.

1. In support of the first proposition, counsel contend that the complaint is defective in not setting forth the nature and character of plaintiff in error's claim to the premises in question. This claim, we think, finds no support in reason or in the authorities. The manifest purpose of the statute is to enable one who is the owner and in possession of real property to bring into court one who asserts an adverse claim or interest therein,

for the purpose of having such claim subjected to judicial investigation and determination, and upon allegation that he is the owner in fee simple and in possession, without defining such adverse claim, require the one who asserts it to either disclaim, or allege and prove the estate or interest which he claims. *Ely v. Railway Co.*, 129 U. S. 291, 9 Sup. Ct. 293; *Stark v. Starr*, 6 Wall. 402; *Curtis v. Sutter*, 15 Cal. 259; *Rough v. Simmons*, 65 Cal. 227, 3 Pac. 804; *Wall v. Magness*, 17 Colo. 476, 30 Pac. 56. The complaint therefore stated a cause of action, and the court properly overruled the demurrer thereto, and the motion for judgment on the pleadings.

2. Upon an examination of the testimony contained in the record, we are satisfied that the second proposition is also without merit. We find no substantial contradiction of the testimony introduced by defendant in error in support of her ownership or possession. The fact that her husband was in possession of the lot, carrying on his trade as blacksmith, by her permission, is uncontradicted. The fact that he so occupied it free of rent is of no significance. He was none the less her tenant.

Upon an examination of the record, we are satisfied that the rulings of the trial court presented for our consideration were correct, and its findings amply sustained by the evidence, and that its judgment, and the judgment of the court of appeals, should be affirmed. **Affirmed.**

# **KELLY v. E. F. HALLACK LUMBER & MANUFACTURING CO.**

(Supreme Court of Colorado. Feb. 17, 1896.)

**MORTGAGES—QUITCLAIM AS RELEASE—MOTION FOR NONSUIT—FURTHER EVIDENCE—UNLAWFUL DETAINER—VALUE OF PROPERTY—JURISDICTION.**

1. A quitclaim deed to a mortgagor, by the mortgagee, of the premises covered by the mortgage, cannot be urged as a release thereof, because dated later than the mortgage, where it appears that they were both delivered on the same date, as part of one transaction.

2. The introduction of further evidence by plaintiff, after motion for nonsuit, is in the discretion of the trial court.

3. Jurisdiction of an action of unlawful detainer is unaffected by the value of the property.

**Error to Arapahoe county court.**

This is an action of unlawful detainer brought by the E. F. Hallack Lumber & Manufacturing Company, in the county court of Arapahoe county, against Andrew J. Kelly, to recover possession of lots 1 and 2 in block 262, Clement's addition to the city of Denver. The cause was tried to the court. Judgment for plaintiff. Defendant brings error. **Affirmed.**

Sullivan & May, for plaintiff in error. Reginald Heber Smith, for defendant in error.

entry and detainer act (Sess. Laws 1885, p. 224), which provides: "Sec. 3. Any person shall be deemed and held guilty of an unlawful detention of real property in the following cases: \* \* \* (6) When the property has been duly sold, under any power of sale, contained in any mortgage, or trust deed, which was executed by such person, or any person, under whom he or she claims, by title, subsequent to date of the recording of such mortgage, or trust deed, and the title under such sale has been duly perfected, and the purchaser at such sale, or his assigns, has duly demanded the possession thereof." The plaintiff became the purchaser of the lots in question at a trustee's sale, regularly made, in pursuance of, and in conformity with, the provisions of a trust deed, dated March 3, 1891, executed by the defendant, Kelly, to D. B. Ellis, trustee, to secure the payment of his certain promissory note to the plaintiff. The complaint contains all the allegations necessary to state a cause of action under the statute. It avers, *inter alia*, that Kelly was the owner in fee simple and in possession of the lots on March 11, 1891. It appears, in evidence, that, on that date, the plaintiff company executed a quitclaim deed to him for the property.

It is contended by counsel for defendant that the execution of the quitclaim deed, subsequent to the date of the deed of trust, operated to release the incumbrance created thereby. However plausible this claim may appear, when predicated upon the assumption that the giving of the deed of trust and the deed of quitclaim were separate transactions, and that each took effect from its date, there is no merit in it when considered in the light of the facts as disclosed by the evidence, it being uncontradicted that the deeds were delivered at the same time, and constituted one transaction, and that the deed of trust, although dated March 3d, was not delivered until March 11th, simultaneously with the quitclaim, and took effect as of that date. 1 Devl. Deeds, § 264, and cases cited.

It is further urged that the court erred in permitting plaintiff to introduce further testimony after a motion for nonsuit was interposed; but that being a matter entirely within the discretion of the trial court, the exercise of that discretion is not reviewable here. *Insurance Co. v. Manning*, 3 Colo. 224; *Association v. Willard*, 48 Cal. 614.

The objection urged against the jurisdiction of the county court is also untenable. The action of unlawful detainer is a statutory proceeding, provided for the summary recovery of the possession of real property. In such proceeding, the title or ownership of the premises is not involved or tried, but simply the question whether the plaintiff is entitled to possession of the premises under some provision of the statute, and the de-

try this question is unaffected by the value of the premises, possession of which is sought to be recovered.

The foregoing are the only questions urged, and these, we think, were correctly decided by the court below, and its judgment is therefore affirmed. Affirmed.

# BURTON v. SNYDER.

(Supreme Court of Colorado. Feb. 3, 1896.)

## CONSTITUTIONAL LAW—TITLE OF ACT.

Sess. Laws 1887, p. 289, § 10, providing that "the money or other benefit, charity, relief, or aid to be paid, provided or rendered by any corporation authorized to do business under this act, shall not be liable to attachment or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, nor by operation of law, to pay any debt or liability of a policy or certificate holder or any beneficiary named therein," is germane to the subject expressed in the title,—"An act relating to life and casualty insurance on the assessment plan,"—and is therefore constitutional.

Error to district court, Gunnison county.

Action by William Snyder against Lydia Burton, aided by garnishment. From a judgment in favor of plaintiff, defendant brings error. Reversed.

W. D. Wright and J. C. Hilm, for plaintiff in error. T. C. Brown, for defendant in error.

GODDARD, J. The facts in this case are succinctly set out in *Burton v. Snyder*, 21 Colo. —, 40 Pac. 451, upon the hearing of a motion to dismiss the writ of error. By the decision then rendered all questions presented by the record were eliminated, except the ruling of the trial court upon the motion of plaintiff in error to discharge the garnishee, and the correctness of so much of the judgment in the main action as directed the application of the proceeds of the insurance policy. Our present investigation will therefore be limited to a consideration of those rulings.

It being conceded by counsel for defendant in error that the money in controversy was exempt from garnishment, by the provisions of section 10 of the act of 1887, the only question presented for our consideration is the validity of that section, which enacts: "Sec. 10. The money or other benefit, charity, relief, or aid to be paid, provided or rendered by any corporation authorized to do business under this act, shall not be liable to attachment or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, nor by operation of law, to pay any debt or liability of a policy or certificate holder or any beneficiary named therein." Sess. Laws 1887, p. 289. Its constitutionality is assailed upon the ground that its provisions are not germane to the subject expressed in the title of the

act, which reads, "An act relating to life and casualty insurance on the assessment plan." The argument, in brief, is that section 10 is an exemption law, and imposes upon the company the duty of protecting the fund against the attachment laws of the state; that the protection of the fund against legal process is foreign to the well known and understood scope of the business of insurance companies; and that the imposition of such a function is in no way to be inferred from the title of the act, which, in terms, limits the proposed legislation to the ordinary and well-understood purposes of the specified mode of insurance. But, notwithstanding the able and forcible presentation of this view by counsel for defendant in error, we think the subject-matter of the section is manifestly pertinent to the objects and purposes of the legislation suggested by the title. The character of the legislation contemplated, as naturally relating to life insurance on the assessment plan, is such as will insure a faithful application of the fund realized from the assessment of individual members; and to this end the mode in which corporations may be formed, the manner in which they shall conduct their business and perform the obligations they assume towards their members, the qualifications essential to membership, and the class of beneficiaries that may be designated and enjoy the benefits of the insurance, are matters necessarily indicated by the title of the act in question. It contemplates a scheme or system by which persons of small means may, by frugality and the payment of comparatively small sums, be able to provide a fund for those dependent upon them, when death shall have deprived them of their only support. What can be more legitimate and germane to this purpose than the provisions of section 10, which prevent a diversion of the fund from this purpose, by placing it beyond the reach of creditors? If section 9, which designates who may be beneficiaries, and makes the policy void if assigned to a person having no interest in the life of the assured, and thereby prevents a voluntary diversion of the fund from the purpose for which it was raised, is germane to the subject expressed in the title (which we understand is not questioned), then the provisions of section 10, which prevent the accomplishment by indirection of that which is expressly prohibited from being directly done, are certainly so. In *re Breene*, 14 Colo. 401, 24 Pac. 3, is mainly relied on by counsel for defendant in error as supporting his contention; and he admits that under the doctrine of that case, if the title under consideration had been "An act relating to insurance," it would have comprehended the subject-matter of section 10. If the subject of exemption is germane to the general subject of insurance, we are at a loss to perceive why it is not equally pertinent to insurance on the assessment plan, or why the title under consideration, when tested by the

rule announced in the *Breene Case*, is not sufficiently comprehensive to cover the subject-matter of the section in dispute. In several cases this court has held statutes valid, against the objection urged here, where the relevancy of the legislation embraced in the body of the act to the subject expressed in the title was much less apparent than in the one under consideration. Among them are *Clare v. People*, 9 Colo. 122, 10 Pac. 799; *Stocknan v. Brooks*, 17 Colo. 248, 29 Pac. 746; *Catron v. Board*, 18 Colo. 553, 33 Pac. 513; In *re Pratt*, 19 Colo. 138, 34 Pac. 680. Our conclusion is that the subject-matter of section 10 is germane to the subject, as expressed in the title of the act, and by virtue of its provisions the money in controversy was not subject to garnishment; that the court below erred in overruling the motion to discharge the garnishee, and in ordering the money to be applied towards the satisfaction of the judgment in the main action. So much of the judgment, therefore, as directs the money to be so applied, is reversed, and the cause remanded, with directions to enter a judgment in favor of plaintiff in error for the money in controversy, with appropriate damages. Reversed.

PEOPLE ex rel. STONE v. ORR.

(Supreme Court of Colorado. Jan. 27, 1896.)

CITY FIRE COMMISSIONER—REMOVAL BY GOVERNOR.

Denver City Charter, § 45 (Laws 1893, p. 172), provides that the governor shall appoint the fire commissioner of the city, by and with the advice of the senate; that the governor may, in vacation, fill vacancies by appointment; and that all appointments by the governor shall be made, with the power of suspension or removal at any time, for cause stated in writing, but not for political reasons. *Held*, the governor's power of removal extends to officers appointed by and with the consent of the senate, as well as to those appointed, in vacation of the senate, to fill vacancies.

Error to district court, Arapahoe county.

Action, on the relation of Charles B. Stone, against Jackson Orr, for usurpation of office. There was a judgment for defendant, and relator brings error. Affirmed.

Rogers & Stair, for plaintiff in error. N. B. Bachtell, for defendant in error.

PER CURIAM. This controversy grew out of the removal by the governor of Charles B. Stone from the office of fire commissioner of the city of Denver, and the appointment of Jackson Orr to fill the vacancy thus created. The facts are identical with those reviewed by this court in the case of *Trimble v. People*, 19 Colo. 187, 34 Pac. 981. In that case, the trial court denied the right of the executive to exercise the power of removal, while in the present proceeding the action of the governor was expressly affirmed by the district court. The judgment of the district

REDDIN v. DUNN et al.  
(Supreme Court of Colorado. Jan. 27, 1896.)

CANCELLATION OF DEED—FRAUD.

B. obtained a conveyance of property through fraud, and then conveyed to R., who, the facts tended to show, was cognizant of the fraud, but who denied all knowledge thereof. On the same day R. conveyed to his brother, who was absent, and knew nothing about the property, and did not appear as a witness in the case. There was no consideration, delivery or acceptance of the deed to the brother. *Held*, that all the deeds were properly canceled.

Appeal from court of appeals.

Action by Sarah Dunn against William G. Reddin and others. From a decree of the court of appeals affirming a decree for plaintiff (31 Pac. 947, 2 Colo. App. 518), said defendant Reddin appeals. *Affirmed*.

John H. Reddin, for appellant.

CAMPBELL, J. This action was brought by Mrs. Sarah Dunn to obtain a decree declaring void a deed of conveyance of certain land adjoining the town site of Yuma, Colo., from herself, as grantor, to one James W. Brown, as grantee, on the ground that the same was procured from her by fraud; and also to have declared void two other deeds of conveyance of the same property,—one from Brown to John H. Reddin, and another from the latter to William G. Reddin, his brother, on the ground that these two latter deeds were taken with full knowledge, by the grantees, of the fraud perpetrated upon the plaintiff. The defendants may be grouped in two classes: (1) those directly committing the frauds complained of; (2) those not participating therein, but who took this property with full knowledge of the fraud. With the first class we have no concern, as they do not question the correctness of the decree of the trial court which was against them. The trial court found all the issues of fact in favor of plaintiff against both classes of defendants, and entered a decree declaring void all three of these deeds, and removing from plaintiff's title the cloud created by these deeds which were recorded. Of all the defendants, William G. Reddin only appealed from the judgment of the district court; and upon a review of the case by the court of appeals, the decree of the trial court was affirmed. From this judgment of affirmance William G. Reddin prosecutes his appeal here.

For a full statement of the facts, as well as for a caustic review of the conduct of the defendants, we refer to the reported case at page 518, 2 Colo. App., and page 947, 31 Pac. As a statement of the case is there set forth at length, and as our conclusions coincide with the judgment of the court of appeals,

it is sufficient to say that it convinces us, beyond any doubt, as it did the trial court and the court of appeals, that a gross fraud was perpetrated upon the plaintiff, which was the inducement for her execution of the deed to Brown, for which she received no consideration. There is also evidence, which the trial court held sufficient, that John H. Reddin, Brown's grantee, before and at the time he received his deed, knew that Brown's title was worthless, and had knowledge of facts bearing upon the title which should have put a prudent man upon inquiry, the result of which, had the inquiry been properly pursued, should have satisfied him that frauds had been practiced upon Mrs. Dunn. In other words, he had both actual and constructive notice of the nonvalidity of the title he purchased. The appellant, William G. Reddin, in the light of the evidence, must be regarded, as tersely said by the learned judge who wrote the opinion of the court of appeals, as "a passive convenience in the hands of his brother." In no sense can he be regarded as a purchaser without notice, for but few, if any, of the essential elements of that relation exist in his case. Such being the situation of the appellant, the decree against him was right, and, accordingly, the judgment of the court of appeals should be affirmed. *Affirmed*.

SWEETLAND v. ATCHISON, T. & S. F. R. CO.

(Supreme Court of Colorado. Feb. 17, 1896.)

RAILROAD COMPANIES—CONSTITUTIONAL LAW—STOCK-KILLING ACT.

Laws 1891, p. 281, amendatory of Laws 1885, p. 304, an act imposing liability on railroad companies for the killing of live stock, does not change the act amended in principle, and, as it does not require the fencing of railways, there is no basis for the penalty fixed therein, and the mode prescribed, of enforcing liability as a matter of indemnity, is in violation of constitutional rights. *Wadsworth v. Railway Co.*, 33 Pac. 515, 18 Colo. 600, followed.

Error to county court, El Paso county.

Action by William Sweetland against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment on a demurrer to the petition, plaintiff brings error. *Affirmed*.

John Hipp, for plaintiff in error. Charles E. Gast, for defendant in error.

HAYT, C. J. This action was instituted for the recovery of damages for stock killed by the Atchison, Topeka & Santa Fé Railroad Company, and for attorney's fees. It is founded upon the act of 1885, as amended in 1891. Sess. Laws 1891, p. 281. Two causes of action are stated in the complaint. In the first, the defendant company is charged with killing certain high-grade cattle, the

property of plaintiff in error. The second cause of action is like the first. It is founded upon the killing by the railroad company of another animal upon a different date. Plaintiff sues to recover double the value of the stock so killed, with an attorney's fee of \$50 upon each cause of action. To this complaint the railroad company filed a general demurrer. After argument, this demurrer was sustained, and, the plaintiff electing to abide by his complaint, judgment was entered dismissing the action, and the case was brought here upon writ of error.

In the case of *Wadsworth v. Railway Co.*, 18 Colo. 600, 33 Pac. 515, the constitutionality of the stock act of 1885 was carefully considered. As a result, the act was declared to be in violation of the constitutional provision, guarantying to all parties "the equal protection of the laws"; and, as that statute did not require the fencing of railways, it was held there was no basis for the penalty fixed by the act, and that the statutory method for enforcing liability as indemnity was in violation of constitutional rights. Attention was then called by the court to statutes requiring railroad companies to fence their rights of way, and making them liable for stock killed, with a penalty in case of noncompliance, which had been upheld by the highest courts in the land; and the difference between these statutes and the act of 1885 was clearly pointed out. The opinion in that case was not announced, however, until the April term of the court, A. D. 1893, while the act upon which reliance is placed to support the present action was passed in 1891. This act is not essentially different from the act of 1885, in so far as the objectionable features pointed out in the *Wadsworth Case* are concerned. Since that decision, the court of appeals has, upon similar reasoning, declared the act of 1891 unconstitutional. *Railway Co. v. Vaughn*, 3 Colo. App. 465, 34 Pac. 284; *Railway Co. v. Outcalt*, 2 Colo. App. 395, 31 Pac. 177. For the reasons given in the cases cited, it will be seen that the act of 1891 is in violation of both the federal and state constitutions. The judgment of the district court is accordingly affirmed. Affirmed.

# CAMPBELL v. FIRST NAT. BANK OF DENVER.

(Supreme Court of Colorado. Jan. 15, 1896.)

TRUSTS—EVIDENCE—FINDINGS OF FACT—NOTICE—ATTACHMENT—KNOWLEDGE OF AGENT—PRINCIPAL—UNRECORDED DEED.

1. Where C. contributed the entire costs and expenses of locating a mine and acquiring title thereto, and the title was taken in the name of J., and afterwards C. paid all the costs of development, and J. conveyed the mine to C.'s brother, who reconveyed to J., and he to C., and there was no consideration for any of the transfers, except the advances made by C., who was recognized as the owner and entitled to dispose of the property as he saw fit, a resulting trust is shown in favor of C.

2. In such case, after J. has executed the

trust by delivering to C. a deed for the property, it is too late to urge that the prior transfers were in fraud of the federal statute, in order to deprive the federal courts of jurisdiction, and in fraud of creditors of C.'s brother, and therefore discharged the property of the trust.

3. A trial court's findings of fact will not be set aside unless there is a manifest insufficiency of the evidence, or unless passion or prejudice controlled the court's decision.

4. Whether one who, at different times during a period extending from 3 years down to 10 or 11 months prior to a levy of a writ of attachment in a suit by the bank of which he was and had been the president, had been frequently told of a third ownership of the property levied on, still retained that knowledge at the time the attachment suit was begun, is a question for the jury.

5. If, in such case, it be determined that he did retain such knowledge, the bank was charged with such notice, through him, as agent, though the information was gained in the transaction of the president's private business.

6. The rights of an attaching creditor, with knowledge of facts which, on further inquiry, would have resulted in the knowledge of a third person's unrecorded deed to the property levied on, are inferior to those of the purchaser under the deed.

## Appeal from court of appeals.

Proceedings in attachment between the First National Bank of Denver and William L. Campbell, intervening and claiming the property attached. From a judgment of the court of appeals (2 Colo. App. 271, 30 Pac. 357) reversing a judgment in favor of Campbell, he appeals. Reversed.

On the 3d day of September, 1886, the First National Bank of Denver brought its suit against Albert L. Johnson upon the latter's promissory note to the former in the sum of over \$9,000, and in aid thereof sued out a writ of attachment, which, on the 4th day of the same month, was levied upon an undivided one-fourth interest in the Sierra Nevada lode, standing at the time on the records of Lake county in the name of said Johnson. Thereafter, in this action, William L. Campbell filed his petition of intervention; claiming the attached property as his own, on the ground that the consideration therefor was paid by him, though the title was taken in Johnson's name. This petition of intervention was denied by answer of the plaintiff bank, and, upon the issues of fact thus joined, trial was had before the district court without a jury, which found in favor of the intervener, and entered a decree establishing his right to the undivided one-fourth interest in the property in question, and canceling the levy of the writ. Upon an appeal from this judgment to the court of appeals, the decree of the lower court was reversed, and it is from the judgment of the latter court that the intervener is prosecuting his appeal to this court. The findings of fact made by the trial court, upon which its decree was based, are as follows: "(1) That said intervener, William L. Campbell, advanced all the money by which the said one-fourth interest in the Sierra Nevada mining lode, described in his petition of intervention herein, was located and developed, and by which the title

ing property was made in the name of the defendant, Albert J. Johnson, at the suggestion of said intervener; that the title thereto was taken and remained in the name of said Johnson, and was conveyed to and remained in the name of Peter Campbell, and was again reconveyed to and remained in the name of said Johnson, until the same was finally conveyed to said intervener, as alleged in said petition; and that said conveyances and reconveyances, and the holding of said property by Johnson and by said Peter Campbell, were with the free and voluntary acquiescence and consent of said intervener, and there was no consideration whatever for any of said conveyances or reconveyances, except the moneys advanced by said intervener as aforesaid; and, as between the said intervener and the said Johnson and said Peter Campbell, the said intervener was at all times aforesaid the sole and exclusive owner, in equity, of said one-fourth interest. (3) During the time between the original location and acquisition of said mining property and the levying of the attachment thereon in this action, the intervener exercised dominion and control over said one-fourth interest, sometimes in his own name, and sometimes in the name of the party in whom the legal title was vested as aforesaid; but for something over two years prior to the levying of said attachment said mining property was not worked, and there was no actual possession thereof—no *pedis possessio*—by any one. (4) The deed of said one-fourth interest in and to said mining property, executed and delivered to said intervener by said Johnson in December, 1885, was a good and valid conveyance, vesting in the intervener all the right, title, and interest to the property therein described which any other person or persons had theretofore had therein, so far as appears by this record and trial; but said deed was not recorded nor filed for record by said intervener until after the levy of attachment in this action on said property. (5) The plaintiff, at the time of the levying of the writ of attachment in this action, on said mining property, had no notice whatever of the existence nor of the execution and delivery of said deed dated December, 1885, by which said Albert J. Johnson conveyed said one-fourth interest in and to said mining property to said intervener. But the plaintiff did, at and before the time of the levying of said writ of attachment, have notice that the said intervener had, or claimed to have, some interest in said mining property so levied upon, and had the means and opportunity of inquiring of the intervener for definite information in respect thereto before making said levy."

Thomas, Hartzell, Bryant & Lee, for appellant. Charles J. Hughes, Jr., for appellee.

CAMPBELL, J. (after stating the facts). At the threshold of this case, we are confronted

and held for naught by the court of appeals when this case was decided by it. The learned judge who wrote the vigorous opinion has stated the reasons for his conclusion in forcible and perspicuous language. The case is reported in 2 Colo. App. 271, 30 Pac. 357. As we read the decision, the intervener's case was held bad in all its phases—First, because there was no proof of an agreement between intervener and Albert Johnson, creating an express trust; second, because there was not sufficient proof of a resulting trust, and, if there were, the transfer by Johnson of the trust property to Peter Campbell, having been made in fraud of the federal statute (the object of the transfer being to defeat the jurisdiction of the federal court in threatened litigation between the owners of this and other mining property), and the subsequent conveyance by Peter Campbell back to Albert Johnson also being, as it is said, in fraud of the creditors of Peter, discharged the property of that trust, if it existed, and that the property then stood in the name of Johnson, relieved of all equities in favor of the intervener, and just as if Johnson was then the legal and equitable owner of the property, down to and including the day when the writ of attachment was issued; that, therefore, the rights of the intervener and bank are to be determined, the one as the holder of a prior and unrecorded deed, the other as an attaching creditor. And the ruling upon this branch of the case was that under the decision of this court in *McMurtre v. Riddell*, 9 Colo. 497, 13 Pac. 181, the rights of the bank were superior, inasmuch as there was no proof of notice to the bank, or its equivalent, of the alleged claims of ownership by the intervener before the levy of its writ. Unembarrassed by the decision of the court of appeals, our first impression, at least upon reading the foregoing findings of fact made by the trial court would naturally be, under the rule of this court, that the decree establishing the rights of intervener as superior, founded upon such findings, should be affirmed, if there were any legal evidence in the record to support them. A very careful examination of the entire record leads us to a conclusion, both as to the facts and as to some of the conclusions of law, different from that announced by the court of appeals. While the petition of intervention contains an averment of an express agreement between Johnson and Campbell, whereby a trust was created in this property, yet a fair construction of the entire pleading is that it sets forth a resulting trust in favor of Campbell, of which the plaintiff bank had notice at the time of its levy of the writ of attachment, when the property stood upon the records in the name of Johnson. If, however, there was such uncertainty in the petition in this regard as that a demurrer upon that special ground would have been sustained, there has been a waiver



by the bank of this defect, by its answering over. As there was no evidence in the case as to the existence of an express trust, but the evidence was directed towards the establishing of a resulting trust, it is only as to the latter that the evidence will be considered.

That the title to this property was taken in Johnson's name is conceded, and the evidence as to the other essential fact upon this phase of the case (the payment of the consideration by Campbell) is all one way. Campbell positively swears that he paid the entire costs and expenses of making the location and securing the patent, and there is nothing to contradict his statement. After the patent was obtained he paid all the costs for the development of the mine, and of the litigation in which it was involved. Of course, these subsequent payments do not constitute Campbell a beneficiary, any more than does the fact that, prior to the location, Campbell advanced to Johnson large sums of money, for which the latter was then indebted. But as the latter facts are admissible upon the real issue, as tending to show the financial condition of Johnson to be such that he was not able to buy any property, because he had no money, so, also, are these subsequent payments admissible as showing the acts of the parties in relation to this property, and as bearing upon their understanding as to who was the equitable owner. We are satisfied from the evidence that all the money paid for locating and patenting this mine was contributed by Campbell, and that it was his money at the very time that title was taken in Johnson's name, and that it was then their intention that Johnson should hold it as trustee for Campbell. No authority need be cited to the effect that a resulting trust would thus arise, but *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604, may be referred to as an instructive case as to this point. Indeed, if there was need of any proof of this resulting trust, other than the uncontradicted testimony of Campbell, it is furnished by the evidence in this case showing the manner in which this property was managed and transferred from time to time. At Campbell's request, Johnson conveyed it to Peter Campbell, a brother of the intervener; Peter then conveyed it back to Johnson; and Johnson then conveyed it to the intervener. Each of these conveyances was made at the request and direction of the intervener, and there was no consideration for any of them, except the advances by William L. Campbell; and all the parties recognized him as the owner, and entitled to dispose of the property as he saw fit. That Johnson conveyed it to Campbell voluntarily, and without any money consideration, is strong proof that he held the property as a trustee; and, as between all these parties, there seems to be no doubt that William was considered the owner. The contention that the transfer from Johnson to Peter Campbell, being made in fraud of the federal

statute relating to the jurisdiction of the federal courts, and the transfer from Peter back to Johnson, being made with the intention to defraud Peter's creditors, operated to discharge the property of the trust which theretofore existed in favor of intervener, might be good, had not the trust been executed. If this case were one wherein Campbell was seeking to declare a trust, while the legal title still remained in Johnson, and Johnson was resisting the same, these considerations might be urged; but when the trust itself has been declared by Johnson, and he has executed the same, so far as he can, by delivering to the equitable owner a deed for the property, the principle sought to be urged here has no application. *Ownes v. Ownes*, 23 N. J. Eq. 60.

Therefore we cannot agree with the court of appeals in its conclusion that a resulting trust was not shown, but we are satisfied, from a very careful examination of the record, that the first three findings by the trial court are correct. But, in our view of the case, we do not think it very material whether the evidence is sufficient to establish a resulting trust or not, for concerning the unrecorded deed of Johnson to Campbell, under which the latter claims, if not given in execution of such resulting trust, we still think—considering the close relations existing between Johnson and Campbell, and the indebtedness of the former to the latter—that the conveyance by Johnson to Campbell was supported by an adequate and ample consideration. This being so, the controversy here is between one who claims under the lien created by the levy of the writ of attachment, and one who claims under a prior, though unrecorded, deed. And so, whether we hold that a resulting trust in favor of the intervener was established, or that he holds a valid unrecorded deed to the property, his rights in the one case are the same as in the other,—no better, no worse; for if the plaintiff bank had no notice, or the equivalent of notice, of the equitable or legal rights of Campbell, its status as a valid incumbrancer by the lien of an attachment levy certainly cannot be better than, but we shall assume that it is the same as, that of a bona fide purchaser without notice, and that status makes its rights superior to those of a holder of a prior unrecorded deed. If, on the other hand, the bank had notice, its rights are subject to those of the intervener. *Knox v. McFarraan*, 4 Colo. 583; *McFarraan v. Knox*, 5 Colo. 217; *McMurtrie v. Riddell*, supra; 1 *Perry, Trusts*, §§ 217-219, 239; 2 *Perry, Trusts*, § 828; 2 *Lewin, Trusts*, \*869 et seq. So the controlling question in this case is whether the bank had notice of intervener's claim of ownership, or had knowledge of such facts as that, if diligent inquiry by the bank had been made, the result would have revealed to it knowledge of this prior unrecorded deed, or of intervener's claim of ownership of the property.

The bank had no actual notice of the unre-

corded deed, but the intervener, whose rights are evidenced thereby, claims that the bank had knowledge of facts which should have disclosed to it knowledge thereof. The findings of the trial court under this issue, upon somewhat conflicting evidence, were with the intervener. The court of appeals held that in law the evidence was insufficient to uphold the finding. Testimony upon this branch of the case was given by the intervener, by Peter Campbell (his brother), and by Mr. Moffat, who, at all of the times mentioned in this action, was the president of the plaintiff bank. It appears that prior to the levy of this writ the intervener, in December, 1883, had sold to Mr. Moffat the Louisville Mine, in Leadville, situate in the vicinity of this property, and, when the deed of conveyance therefor was given, it was executed by Peter Campbell, in whose name the title then stood, although Mr. Moffat knew that William was the owner. This fact, of itself, is not important, but, in connection with other evidence, it does throw some light upon this controversy. Campbell and Moffat were intimate friends for many years, and often talked over the former's business affairs and his property, and Moffat and the bank had loaned Campbell large sums of money. Both before and after the sale of the Louisville Mine, and down to a period of about one year before the attachment writ was levied (viz. in December, 1885), Campbell swears that he had different conversations with Mr. Moffat about his ownership of a one-quarter interest in the Sierra Nevada Mine; and at one time (in November or December, 1885) he testified that he was talking with the late Senator Chaffee about the lease of intervener's interest in this mine, for which Senator Chaffee was then negotiating, and that, though Mr. Moffat took no extended part in the conversation, he was present, and near enough to hear what was said. Campbell further testified that, after the sale of the Louisville Mine to Moffat, he went to the latter on two or three occasions, and tried to sell him his interest in this property, and that after the attachment was levied he had a conversation with Mr. Moffat, in which the latter was told by him that he (Moffat) knew that the property belonged to intervener, and ought not to have been seized for the satisfaction of Johnson's debt, to which Moffat, in reply, did not deny his knowledge as to Johnson's claim of ownership, but said that the suit was brought by the bank, and the bank found it in Johnson's name. Peter Campbell testifies that in November or December of 1883, in a conversation which he had with Mr. Moffat concerning the subject of a sale of this property by the intervener to Mr. Moffat, he told Mr. Moffat that his brother (the intervener) owned this quarter interest in the Sierra Nevada Mine, which was in Johnson's name, and that Johnson owned no interest therein, to which Moffat replied that "he was aware of it. Said he knew Will owned the quarter.

He said, 'I know that.'" In the same conversation, the witness testifies, he asked Mr. Moffat if the latter was not going to buy Will's interest in the mine, to which Mr. Moffat replied that, though he thought the mine a good one, he was not going to buy so small an interest in any mine. As bearing upon the knowledge he had of intervener's claim of ownership, the testimony of Mr. Moffat is significant. He says that he does not recollect the conversation between Senator Chaffee and the intervener in 1883, to which the latter testified, although he admits that he had often told Campbell and others that Senator Chaffee could have money as long as he had any, which statement is part of the conversation which Campbell relates as having occurred upon this occasion. The bill of exceptions as to Moffat's testimony shows the following in this connection: "Q. Did you know at that time whether the title [meaning the title to this Sierra Nevada Mine] was in Mr. Campbell or Mr. Johnson, or whom? A. I didn't know whom the title was in until I got the deed. \* \* \* Q. During this year whom the title was in? A. No, sir." Mr. Moffat denies altogether any recollection of the conversation between himself and Peter Campbell to which the latter testified, and says it never occurred. Further, upon this point, in the direct examination of Mr. Moffat, we find the following: "Q. I wish you would state to the court whether or not, \* \* \* on September 8, 1886, when this attachment was levied, you knew or had notice that Johnson was not an owner of an interest in the Sierra Nevada Mine. A. At the time of the attachment? Q. Yes, sir. A. At the time the attachment was made, I asked Mr. Buell—or just before the attachment was made—if he had got his lease. He said he had. I asked him who signed it, and he said 'Albert Johnson.' When I got that information I immediately told Mr. Wood of it, and he put on the attachment. \* \* \* Q. At that time, or prior to that time, had you had any notice from Mr. Campbell that Mr. Johnson was not in fact an owner, but that Campbell was? A. I never had any notice at all. Q. At the time of your negotiations respecting the Louisville, had the Sierra Nevada anything to do with it? A. Not anything." It should be stated in this connection that Mr. Buell obtained a lease of this quarter interest in the property from Mr. Campbell, and was told by the latter that the title stood in the name of Johnson, and Johnson signed the lease. The witness Moffat had been interrogated by his counsel concerning the sale of the Louisville Mine, and on cross-examination the following occurred: "Q. Any conversation concerning the Sierra Nevada take place? A. No, sir. Q. Did you know there was such a mine as the Sierra Nevada at that time? A. I knew there was a mine up there. I don't remember that I took interest enough in it to know what the name was. Q. You knew it was a mine that

W. L. Campbell was connected with? A. I knew he had something to do with it,—talked about it. I never remembered the name of it, though. Q. He had talked with you, and in your presence? A. I heard him speak about it,—Sierra Nevada, or something like that. Q. Spoke of it as an owner? A. Spoke of it as an owner, or interested party. Q. Was that not before the attachment? A. Yes, sir. Q. Was it after the purchase of the Louisville? A. Yes, sir; I think so. Q. Can you state the occasions when he had these conversations? Were they not, as a matter of fact, prior to the attachment? You knew that Mr. Campbell claimed some interest in this property? A. He claimed some interest; yes, sir. Q. How long after the lease was signed before you asked Buell by whom the lease was signed? A. I don't remember. It was one day here at the club,—in the dining room. Q. You went and told Mr. Wood? A. I told Mr. Wood that Johnson had signed the lease. Q. There was a claim in the bank of \$9,000 and over against Johnson? A. Yes, sir. Q. Didn't you ask that so as to find out whether the title stood in the name of Johnson, so that this attachment might immediately issue? A. No, sir; it surprised me when I heard it. I supposed that Mr. Campbell's brother, here,—Peter,—had it. Q. You supposed that Peter held it for W. L.? A. They had such a family way of doing things, you couldn't tell. \* \* \* Q. Now, before that time, didn't you suppose that the property belonged to W. L. Campbell, but that it stood in the name of Peter? A. I didn't know whom it belonged to, for I didn't pay any attention to it. Q. Didn't you know at that time? A. I didn't know who held it. Q. From your conversations with Mr. Campbell, didn't you know that he claimed to own an interest in the Sierra Nevada Mine? A. No, sir; I did not. He may have said that he had some interest in it, but I didn't charge my mind with it. Q. Didn't Mr. Buell tell you that he was negotiating with W. L. Campbell get a lease on the Sierra Nevada Mine? A. No; he said he was negotiating with W. L. Campbell and the other parties for a lease on the mine. Q. Didn't you understand that he was negotiating for W. L. Campbell's interest in the mine? A. I supposed he was negotiating for whatever interest W. L. Campbell had." Upon his re-examination by his counsel, Mr. Moffat testified as follows: "Q. Up to the time that Mr. Buell told you that Johnson was a signer of the lease, did you know that Johnson had an interest in the Sierra Nevada? A. I didn't know it at all. I supposed he had. Q. Did you know whether Campbell claimed that interest, or any interest in it? Did you know what interest he had? A. I did not, at all. Q. And, up to the time of the attachment, you say you had no notice that this Johnson interest was not Johnson's? A. No, sir."

It will be seen that Moffat does not deny that he had with W. L. Campbell conversa-

tions concerning this property, and that Campbell claimed an ownership of the same; nor does he pretend, at the time this attachment suit was brought, that he had forgotten these conversations and what transpired thereat. He does deny that he had any notice that Johnson did not own an interest in the property, and denies that he then knew in whose name the property stood on the records. But his testimony will be searched in vain for a positive denial by him that he knew when the bank suit was instituted that the intervenor claimed to own this quarter interest in the mine, and he does not claim that whatever knowledge he had previously acquired was not present with him at that time. But, if there was a direct conflict in the evidence upon this question, we could not sit as a jury to pass upon its weight, or determine the credibility of the witnesses. That function belonged to the district court, and its performance we are not at liberty to annul, under the well and long established rule of this court that the finding of a court, like the verdict of a jury, will not be set aside unless there is a manifest insufficiency of the evidence, or some improper motive governed the court.

It has been ruled in this court, in *Armstrong v. Abbott*, 11 Colo. 220, 17 Pac. 517, that the principal is not bound by the unofficial knowledge communicated to the agent, unless such knowledge is present to the agent's mind at the time of effecting the purchase, and upon this principle it is urged that the notice to Mr. Moffat did not bind the bank. This case, in turn, was based upon *The Distilled Spirits*, 11 Wall. 356, wherein it is said: "In England the doctrine now seems to be established that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust, or fraud, affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time. If he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time, and other circumstances. Knowledge communicated to the principal himself, he is bound to recollect; but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule, as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject." Mr. Moffat, at all times covered by the evidence, was president of the bank, and as such, of course, its agent. At different times, from a period extending from 3 years down to 10 or 11 months prior to the levy of the writ of attachment, the intervenor had frequently told Mr. Moffat

on the record is denied, and there is a denial of notice of claim of ownership; but the facts which, in law, constitute notice, or what is equivalent thereto, are not denied by Mr. Moffat, and a mere denial of a conclusion of law is not a denial of the facts which support such conclusion. These facts as to Campbell's claim of ownership Mr. Moffat knew, though he did not acquire the knowledge at the time of beginning the attachment suit, but before that time. Whether he still retained the knowledge thereof was the subject of inquiry upon the trial. If he did retain such knowledge, then, as the agent of the bank, the latter was charged with such notice, although the agent theretofore gained such information in the transaction of his own private business. Under all the circumstances of this case, we must affirm the judgment of the trial court, if there is legal evidence to sustain it. However great the conflict may be, we cannot substitute our own for the judgment of the learned judge who tried the case, saw the witnesses, heard them testify, and observed their bearing upon the witness stand, unless it is made to appear that the judge misconceived the legal effect of the evidence, or that the findings are manifestly against the weight of the evidence, or that passion or prejudice controlled the court's decision. These issues of fact were tried by the court below, and its judgment, having evidence to support it, under the established rule of this court, must stand, when, as in this case, there is present no element of viciousness, as just stated. Upon the findings of fact the equities here seem to be with the intervenor. There is no claim that credit was extended to Johnson by the bank by reason of the fact that the record showed him to be the owner of this property; but, on the contrary, when Mr. Moffat, as the agent of the bank, learned that this interest in the property stood upon the records in the name of Johnson, he was surprised, and at once this attachment suit was brought. The bank having knowledge of facts which, upon further inquiry, would have resulted in the knowledge of the existence of intervenor's unrecorded deed, its rights, depending solely upon the lien of the levy of the attachment writ, are inferior to the rights of the intervenor under his unrecorded deed. The judgment of the court of appeals is therefore reversed, and the cause remanded, with instructions to affirm the judgment of the district court. Reversed.

#### SULLIVAN v. SHEETS et al.

(Supreme Court of Colorado. Feb. 3, 1896.)

DECEDENT'S ESTATE—CLAIMS SECURED BY MORTGAGE—PRESENTATION—FORECLOSURE.

Under Act 1885, as amended in 1889 (Mills' Ann. St. § 4783), providing that a creditor

unless by the permission of the county court, and in no event until his claim has been allowed by that court, provided that the lien of such creditors having security on personal property, as aforesaid, shall not be impaired by such suspension, a creditor whose claim is secured by a real-estate mortgage, may enforce his lien though his claim is not presented for allowance within the year, it having been presented before discharge of the administrator, and while the estate was still in process of administration.

#### Error to La Plata county court.

Action by Dennis Sullivan against D. L. Sheets and others, administrators of John Reid, deceased. The judgment denied plaintiff's right to enforce his claim by foreclosure of mortgage, and he brings error. Modified.

The matters here in controversy are now before this court for the second time. See Reid v. Sullivan, 20 Colo. 498, 39 Pac. 338. In the former case Sullivan, the holder of certain secured notes, brought his action in the district court for the purpose of foreclosing upon certain deeds of trust; such action having been brought before the claims forming the basis of the action were presented for probate. The district court sustained the proceeding, and rendered a judgment in favor of plaintiff. Upon review in this court it was held that the statute of non-claims does not apply to claims secured by deeds of trust. It was further decided that section 4783 of Mills' Annotated Statutes did apply. Upon that case being remanded to the district court, it was dismissed upon motion of the plaintiff, whereupon he presented his claim for probate to the county court of La Plata, this being the court having jurisdiction of the estate of the decedent. Thereafter a hearing was had, which resulted in the allowance of plaintiff's claim in the sum of \$14,649.07. It was further found that this claim was secured by the decedent during his lifetime upon certain of his real property. It was, however, expressly adjudged in the county court that the claimant could not participate in any property or assets inventoried or accounted for in said estate within one year from the granting of letters of administration on said estate, but that such claim could be satisfied only out of newly-discovered and inventoried assets of the estate. To this latter part of the judgment the petitioner excepted, and brings the case here for review upon writ of error.

Wells, Taylor & Taylor, for plaintiff in error.

HAYT, C.J. (after stating the facts). Is a security creditor deprived of the benefit of his lien in case his claim is not presented to the court of probate until after the date set and advertised for the presentation of claims, in cases where more than one year has elapsed since the death of the decedent, but where such claim is presented and allowed while

the estate is still in process of settlement, and before the final discharge of the administrator? The claim not having been presented to the county court for allowance prior to the former review, this question was expressly left undetermined. After that opinion was rendered, plaintiff in error at once took steps to present his claims to the county court of La Plata county, sitting for the transaction of probate business. Notice of such presentation having been previously given, the court allowed the claim, but, as a part of its judgment, deprived the creditor of the benefit of his security. As the case is now submitted by plaintiff in error except we are not advised of the grounds upon which the lower court rested its decision. Presumably it was based upon the following statute: "All demands not exhibited within one year, shall be forever barred, unless such creditor shall find other estate of the deceased not inventoried." Mills' Ann. St. § 4780. This statute, however, does not apply to claims secured by mortgage or deed of trust, where the creditor relies solely upon the property covered by his lien, and relinquishes all claim against the general inventoried assets of the estate. This was expressly held upon the former review. *Reld v. Sullivan*, supra. The claim not being subject to the bar of the general statutes of limitations, the only other statute necessary to be considered is the act of 1885 as amended in 1889: "Creditors of any estate whose debts or claims are secured by mortgage or deed of trust or real estate, or by chattel mortgage or other security, or personal property, shall not be allowed to foreclose such mortgage, deed of trust, chattel mortgage or other security, within one year from the death of the testator or intestate, unless by the permission of the county court having charge of the estate, and in no event until their debts or claims have been first proved and allowed by such court; provided, that the lien of any such creditor having security upon personal property, as aforesaid, shall not be impaired by such suspension of his remedy." Mills' Ann. St. § 4783. Prior to the adoption of this statute, claims secured by incumbrances could, under the power of sale usually embraced in such instruments, be enforced at any time after default; and where such default occurred shortly before the death of the owner of the property or shortly afterwards, creditors frequently enforced a sale of the property before the representatives of the decedent had an opportunity to advise themselves of the condition of the estate, or to in any way provide for the payment of the claim. This often resulted in serious loss to the estate, as the property given as security for the debt would be sold at much less than its real value, and the creditor would then present his claim for the residue to the probate court, to be paid out of the general assets of the estate. It was, we think, to remedy

this evil, as well as to protect the estate from fraudulent claims, that the act under consideration was passed, and we are of the opinion that the legislature, while desirous of preventing the precipitate and unjust enforcement of liens created by mortgages or deeds of trust, did not intend to unreasonably embarrass creditors in the enforcement of such liens. Under the statute a foreclosure can only be had within one year from the death of the testator or intestate by permission of the county court; and before a foreclosure can be had in any case, although one year may have elapsed, the debt or claim secured must be presented and allowed by such court. The time within which such claims may be allowed is not fixed by statute, and we are of the opinion that where, as here, the claim is presented before the discharge of the administrator, and while the estate is still in process of administration, it is a sufficient compliance with the statute. The claims having been properly allowed, there does not appear to be any reason why the trustee should not proceed to sell under the deed of trust. And in so far, therefore, as the judgment of the county court undertakes to confine the creditor to the newly-discovered assets of the estate, and deprive him of the lien created by deeds of trust, it is erroneous, and will be reversed, with directions to the county court to modify its judgment in this regard in accordance with this opinion. In all other particulars the judgment of the county court is affirmed. Judgment modified.

# BRADFORD v. PEOPLE.

(Supreme Court of Colorado. Feb. 3, 1896.)

FORGERY—BILL OF EXCEPTIONS—EVIDENCE—ORAL INSTRUCTIONS—SENTENCE—JUDGMENT.

1. A petition for a change of venue, and the affidavits in support thereof, must be preserved in the bill of exceptions in order to save them for review.

2. Where accused becomes a witness in his own behalf, and denies writing a document alleged to be a forgery, he may be required on cross-examination to write in the presence of the jury for the purpose of comparison.

3. An objection to testifying on the ground of personal privilege must be made by the witness himself.

4. An accused who offers himself as a witness in his own behalf thereby waives the privilege of refusing to testify.

5. Testimony that one has been for two years the individual bookkeeper of a bank; that his duties daily required him to examine handwriting; and "that he should know in a minute whether a check was all right or not,"—is sufficient to show an expert knowledge of handwriting.

6. Under Mills' Ann. St. § 1468, instructions may be given orally in criminal cases, unless written instructions "shall be requested by the district attorney or by counsel for the defense."

7. Under Mills' Ann. St. § 3450, a prisoner's term is computed from and including the day on which he is received into the penitentiary, and a temporary confinement in a county jail for

safe-keeping is not an entering upon the execution of his sentence.

8. If a second judgment which in terms sets aside a valid judgment is void, the first remains in full force and effect.

Error to district court, Arapahoe county.

John A. Bradford was indicted for forgery, was tried, and convicted. From a judgment on the verdict, the prisoner brings error. Affirmed.

Plaintiff in error, John A. Bradford, was tried in the district court of Arapahoe county upon an information charging him with the crime of forgery. In the first count it is charged, in substance, that he did falsely and feloniously make and forge a check of the tenor following, to wit:

"Denver, Colo., Sept. 24th, 1892. No. ———,

"The People's National Bank,

"Pay to the order of John A. Bradford, \$24.60-100.

"Twenty-four 60-100 Dollars.

"Henry Johnston."

Indorsed: "John A. Bradford."

—With intent to damage and defraud Henry Johnston and some person to the district attorney unknown. In the second count, it is charged that plaintiff in error did, at the time and place mentioned, falsely and feloniously utter and pass the forged check described in the first count, with intent to cheat and defraud one Thomas F. Begley, the defendant knowing at the time that the check was a forgery. A jury trial resulted in a verdict of guilty upon each count in the information. A motion for a new trial having been overruled, the district court, on the 28th day of January, 1893, sentenced the defendant to confinement in the state penitentiary at hard labor for a period of one year. Three days thereafter, to wit, the 31st day of January, 1893, the court, of its own motion, set aside the sentence rendered on the 28th day of January, and imposed a new sentence. Nominally, this latter sentence requires the defendant to be confined in the state penitentiary at hard labor for a period of one year upon each count in the indictment; but, as it is specifically provided therein that the sentences shall run concurrently, the aggregate of the latter sentences is the same as the first. To reverse the judgment of the district court, the defendant brings the case here upon error.

N. Q. Tanquary, for plaintiff in error. Eugene Engley and H. T. Sale, for the People.

HAYT, C. J. (after stating the facts). It appears from the record that after the case had been set for trial upon a number of dates, and the trial upon each occasion continued, the case was finally set for trial upon the 18th day of January, 1892. Before the case was reached upon this latter date, the defendant interposed a petition for a change of venue. This petition was overruled, and this ruling of the court is challenged by

plaintiff in error's first assignment of error; but, as neither the petition for a change of venue nor the affidavits filed in support thereof are preserved in the bill of exceptions, these papers are not before this court for review. The statute in this state provides "that unless otherwise directed, the practice in criminal cases shall be according to the course of the common law." The statute makes no provision for bringing up for review petitions for changes of venue except by bills of exception, and in no other way can such questions be saved for review. 2 Elliot, Gen. Prac. § 508; Fitnam, Colo. Prac. § 597; Van Houton v. People, 21 Colo. —, 43 Pac. 187.

At the trial, the defendant offered himself as a witness in his own behalf. Upon cross-examination he was required to write, in the presence of the jury, against the objection of his counsel, and this constitutes the second assignment of error discussed in this court. The law in reference to the admission of writings for the purpose of comparison is the same in criminal as in civil cases. In Wilber v. Elcholtz, 5 Colo. 240, it was held that papers could not be introduced for the purpose of comparison merely, but where the papers belong to the files in the cause, or have been previously received in evidence, and are admitted to be genuine, either the witnesses or jurors might make comparison for the purpose of forming an opinion concerning the handwriting. Although this is the general rule, it is well settled that where a witness has denied writing a document which is alleged to be a forgery, or has denied his signature thereto, he may be called upon on cross-examination to write in open court, in order that the jury may compare such writing with the writing controverted. 2 Tayl. Ev. (4th Ed.) § 1669; Whart. Cr. Ev. § 550; Chandler v. Le Barron, 45 Me. 534; Sanderson v. Osgood, 52 Vt. 309; Huff v. Nims, 11 Neb. 363, 9 N. W. 548; Doe v. Wilson, 10 Moore, P. C. 530; Brookes v. Tichborne, 5 Exch. 929. The benefit of this kind of cross-examination is well illustrated in this case. The check alleged to have been forged was for the sum of \$24.60, the word "four" in the check having been written "four," and in the writing executed by the defendant upon the witness stand the same orthography is used. In so far as the objection to this testimony is based upon the personal privilege of the witness, there are two sufficient answers: First, this objection must be made by the witness himself, to be available; second, having offered himself as a witness in the case in his own behalf, he thereby waived the privilege.

The third assignment of error raises the question of the admissibility of the evidence of one Taylor, a witness for the state. This witness was introduced as an expert on handwriting. Taylor was examined with reference to his competency, and his answers were sufficient to satisfy the trial judge. We

think there was no error in the ruling in this behalf. The weight of the evidence of an expert must be left to the jury, while its competency must be determined by the court. The witness Taylor testified that he was at the time "the individual bookkeeper at the People's National Bank"; that he had held the position for upward of two years, and that, as such officer, he was daily required to examine handwriting; "that he should know in a minute whether a check was all right or not." We think that his answers show that his knowledge of handwriting was superior to the knowledge of the average juror, and that his testimony was competent.

Under the fourth assignment of error, counsel claim that the evidence is not sufficient to convict plaintiff in error. This conclusion is not, however, shared by this court. We think the evidence amply sufficient to warrant the verdict of the jury.

The fifth assignment of error is based upon the fact that the instructions of the court below to the jury were oral. This assignment is disposed of by reference to the statute, which permits instructions to be given orally, unless the state or the defendant requests the court to instruct in writing. *Mills' Ann. St. § 1468*. In this case the defendant expressly waived his right in this regard. The instructions given, although brief, correctly state the law of the case, and with sufficient fullness to be readily understood by the jury.

It is claimed, in conclusion, that the court erred in setting aside its sentence rendered on the 28th day of January, and giving a new sentence on the 31st. In support of this claim, it is urged that, at the time the latter sentence was rendered, the defendant had already been imprisoned on the former for a period of three days. In cases where the defendant has entered upon the execution of a valid sentence, it is well established that such sentence cannot be set aside, and a new sentence entered. The sentence in this case was for the full term of one year in the state penitentiary, and his incarceration in the county jail of Arapahoe county, temporarily or otherwise, could not be credited upon his term; it was simply a means to an end, in order that the defendant might not escape until he could be safely conveyed to and lodged in the state penitentiary. It was no part of his sentence under the statute, and the time so spent could not be deducted from his term, as it is provided that the term shall be computed from and including the day on which he is received into the penitentiary. *Mills' Ann. St. § 3459*. If, however, the position of counsel for plaintiff in error is sound, which we deny, it would not authorize the discharge of the prisoner, for if the second judgment, which in terms sets aside the first, is void, then the first is still in full force and effect, and must be executed. As a general principle, however, the judgments, orders, and decrees of courts are under their

control during the term at which they are rendered, and "may be set aside or modified as law and justice may require." *Ex parte Lange*, 18 Wall. 163; 1 Bish. Cr. Proc. § 1298.

Finding no error in the record, the supersedeas heretofore issued will be vacated, and the prisoner remanded to the custody of the sheriff, in order that the sentence of the district court may be carried into execution. Affirmed.

ALLEN v. COLORADO CENT. R. CO. et al.  
(Supreme Court of Colorado. Feb. 17, 1896.)  
RES JUDICATA — VOID CONDEMNATION PROCEEDINGS.

An owner of real property, who, with knowledge of proceedings to condemn it for railroad purposes, and of the compensation awarded therefor, voluntarily accepts and retains the sum so awarded, is bound thereby, though such proceedings be invalid; and he cannot thereafter, by action, recover possession of such property. *Railroad Co. v. Allen*, 22 Pac. 606, 13 Colo. 229, followed.

Error to district court, Larimer county.

Action by Com. L. Allen against the Colorado Central Railroad Company and others. There was a judgment entered on a verdict for defendants, and plaintiff brings error. Affirmed.

A. H. De France, for plaintiff in error.  
Teller, Oranhood & Morgan, for defendants in error.

CAMPBELL, J. This was an action by the plaintiff in error against the defendants in error for the recovery of possession of real property. The trial was before a jury, the verdict being for the defendants, on which a judgment was entered, which the plaintiff seeks to have reversed upon this writ of error. The chief controversy arises under the amended third defense of the answer, which, in substance, alleges that in certain condemnation proceedings heretofore pending in the county court of the county in which this real estate was situate, wherein the Colorado Central Railroad Company was petitioner and the plaintiff was respondent,—the object of the proceedings being to condemn the property in question for railroad purposes,—an award and compensation were made to the respondent in that behalf; that such proceedings, however, were, for certain reasons, not necessary here to specify, invalid, but that, nevertheless, plaintiff in error here (respondent in that action), with full knowledge of those proceedings and their object, and with full knowledge of such award being made, accepted the sum of \$180 as full payment of such award, and has ever since, and with full knowledge of the invalidity of the award, retained said money so paid, and has never returned or tendered the same to said defendant.

A preliminary question is raised by the plaintiff in error, attacking the order of the

trial. Assuming that plaintiff in error is in a position to urge this objection, our examination of the record satisfies us that the trial court was right in its ruling. The defendant had an unquestioned right to a new trial, upon compliance with the provisions of the statute and the orders of the court in relation thereto, and it seems that such compliance was had.

The sole question submitted to the jury by the trial court, by its instructions, was whether or not the plaintiff in this action, as the respondent in the condemnation proceedings, voluntarily, and with full knowledge of such proceedings, received and retained the amount of such award as payment for the land sought to be taken by the railroad company, as particularly alleged in the third amended defense. This question of fact thus submitted was found by the jury in favor of the defendant, and their verdict was in accordance therewith. This amended third defense was filed after the decision by this court in the case of *Railroad Co. v. Allen*, 13 Colo. 229, 22 Pac. 605, and evidently was drawn by counsel with such decision before them. That decision is res adjudicata of the case at bar, and although it was not at the time the unanimous opinion of the court, as then constituted, as nothing new, by way of argument or authority, is now advanced, although requested so to do, we decline to reopen the questions then determined. In 1877 the first litigation concerning this property began, and it would seem that it should now close. The rulings of the trial court being in accordance with the doctrine established in the foregoing case, they will not be disturbed.

A number of other alleged errors relating to the evidence, and to the rulings of the court thereupon, are assigned. But as the theory accepted by the trial court was based upon the decision just mentioned, and its rulings throughout the trial were consistent therewith, no error was committed. It follows that the judgment of the court below is affirmed. Affirmed.

#### FRANKLIN MIN. CO. v. O'BRIEN.

(Supreme Court of Colorado. Jan. 27, 1896.)

##### TENANCY IN COMMON—MINING CLAIMS—PURCHASE BY COTENANT OF CONFLICTING CLAIMS.

1. A tenant in common in a junior mining claim cannot buy in the title of a senior conflicting mining location, and assert it against his cotenant in the junior claim.

2. B., who was a tenant in common with plaintiff in the mining claim F., and who also owned an interest in a conflicting claim, D., entered into an agreement with S., the owner of other claims, whereby all the properties owned by B. and S. were to be consolidated and worked as one property, the title to which was to be ultimately taken in the name of a corporation thereafter to be formed. At the time a suit was

filed between the claims, B. and S. purchased the conflicting interests in the D. claim, and a decree was entered adjudging it superior to the F. claim. Plaintiff was at the time absent from the state, but was given to understand by B. that he would look after his interests in the suit. Held that, at the time of the purchase by B. and S. of the conflicting claim, they were cotenants with plaintiff, so as to entitle him to the benefits of the purchase on payment of his proportion of the purchase price.

3. The conveyance of the properties to the corporation formed by B. and S. did not defeat plaintiff's right to the benefits of the purchase, where, at the time, all the stock of the corporation was owned by B. and S.

Appeal from district court, Arapahoe county.

Action by Frank X. O'Brien against the Franklin Mining Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

The appellee, O'Brien, who was plaintiff below, is the owner of an undivided one-fifth of the Franklin mining claim; the appellant, the Franklin Mining Company, the defendant below, is the owner of the remaining undivided four-fifths thereof, the sole owner of the Dr. Franklin mining claim, and the owner of an undivided one-half of the Steele mining claim,—all situate in the Aspen mining district, Colo. The complaint in this case contains two causes of action, but as plaintiff bases his rights upon the second and upon his replication, the first cause of action, which is in the ordinary form for the recovery of the possession of real property, will not be further noticed. The second cause of action, in substance, alleges that the plaintiff is the owner of an undivided one-fifth of the Franklin lode, and the defendant is the owner of the other four-fifths thereof, and they, as tenants in common, are the owners and in the actual possession of said claim, and that while they were so in possession, and working and developing the mine, the defendant, on the 1st day of April, 1887, disregarding the plaintiff's rights, ousted him from possession of the premises in controversy, and wrongfully assumed and exercised the sole and exclusive ownership thereof; that from the territory in question the defendant has extracted, and converted to its own use, valuable ores, and has refused to account to the plaintiff for his share thereof. A decree is sought, adjudging the plaintiff to be the owner of the undivided one-fifth of the mining claim. An accounting is asked for, as well as a temporary injunction restraining the working of the mine, and general relief is prayed. To this complaint an answer was filed, containing eight separate and distinct defenses, the affirmative ones of which were substantially denied by the replication. The pleadings are very voluminous,—unnecessarily so,—and tend rather to obscure than to elucidate the real controversy in the case. No attempt will be made even to summarize all of these sep-



arate defenses; and while it is, among other things, contended that in the replication there is a material departure from the complaint, we are satisfied that the pleadings, as well as the evidence, fairly present for determination the legal propositions necessary for the appellee to maintain in order to justify the judgment below. It will, however, tend to explain this controversy to state generally that the defenses set up in the answer, so far as we deem them material, are—First, that the defendant is, in law and in fact, the owner, and entitled to the exclusive possession, of that portion of the territory which is in conflict between these three claims, by virtue of its ownership of the Dr. Franklin lode and of an undivided one-half interest in the Steele lode, each of which, we shall assume (what we consider to be admitted) to be a senior and prior location to the Franklin; second, and, as strengthening and fortifying this superior right, that in a certain adverse suit duly pending in the district court of Pitkin county, between the then owners of the Franklin and the Dr. Franklin claims, a judgment was duly rendered establishing the priority of the Dr. Franklin over the Franklin claim, and that the defendant, having bought into the latter after this suit was instituted, took subject to the determination of that action. Assuming the priority, as locations, of these two claims over the Franklin lode, the replication is that the plaintiff and defendant's grantors were tenants in common and in actual possession of the Franklin lode, and that arising therefrom the relations of trust were such that said grantors could not buy in and set up, as against their cotenant, a superior, outstanding, and adverse title; that the judgment making the Dr. Franklin superior to the Franklin was rendered by consent and for the benefit of all the several owners of the latter; and that the defendant company, in law, is charged with full notice of the equities belonging to plaintiff. Other issues, if any, raised by the pleadings, we do not consider important. Upon trial to the court without a jury, the finding was that the allegations of the second cause of action, and the matters set forth in plaintiff's replication, were established; and a decree was thereupon entered adjudging plaintiff to be the owner of an undivided one-fifth interest of the territory in conflict between the Franklin and the Dr. Franklin lodes, and an undivided one-tenth interest in the territory in conflict between the Steele and the Franklin lodes. From that decree the defendant is prosecuting its appeal to this court. The evidence tended to show, and is sufficient to uphold the finding of the trial court, that the plaintiff and the grantors of the defendant were tenants in common, and as such in actual possession of the Franklin lode, though they did not hold under the same instrument, or from the same grantor. The only unity in their ownership was that of possession.

While so in possession, plaintiff's cotenants bought all of the Dr. Franklin and one-half of the Steele mining claims, and would not, upon his offer so to do, permit their cotenant to contribute his portion of the purchase money, but, instead, refused to allow him so to do, and they now claim the exclusive ownership of the territory in conflict between these claims. It is probably true, as to some of the fractional interests, if the time when these superior rights were acquired is to be determined from the dates of the deeds of conveyance, that they were purchased by plaintiff's cotenants before they acquired their interest in the junior Franklin lode; but as the record shows that such interests were conveyed in accordance with a parol agreement made prior to that time, and which was after the cotenancy in the Franklin existed, it is only just and fair that the date of the acquisition of such superior interest is to be determined by reference to the time when the original agreement was made, and not when the conveyances were actually executed. Hence it follows that, as the interests were acquired or contracted for while the relation of cotenancy in the Franklin lode existed, the purchasers should, in equity, be considered as tenants in common with the plaintiff. This brief statement of the pleadings and the evidence will sufficiently indicate, generally, the nature of this cause; but, to make clear all the different questions involved, greater particularity in the statement will be observed in the appropriate place in the opinion.

Wolcott & Vaile and Thomas, Bryant & Lee, for appellant. Riddell, Starkweather & Dixon and Clinton Reed, for appellee.

CAMPBELL, J. (after stating the facts). To obtain a reversal of this judgment and decree, the appellant relies upon the following general propositions: First, that the appellee, O'Brien, is not, and never was, a cotenant with the appellant, nor with any of appellant's grantors, of the land in controversy; second, that if the Franklin claim, as such, should be held to include the ground in controversy, nevertheless the purchase by appellant's grantors of the superior and paramount title of the Steele and the Dr. Franklin did not inure to the benefit of the appellee, so as to give the latter an interest with the appellant in the lands held under such superior and paramount title; third, if the principle invoked by the appellee is applicable in any way to the facts of this case, his right would, in any event, be limited to a share in the individual purchases of the senior titles made by D. R. C. Brown; fourth, that the defendant company, formed after these various transactions occurred, took relieved of all equities that may have existed as between its grantors and plaintiff; fifth, that the plaintiff has failed to establish the existence of any such mining claim known as the

"Franklin Lode." These general propositions, together with such subordinate matters as naturally arise in connection therewith, and the facts which the evidence and pleadings disclose, will be treated in the order followed by counsel in their able and exhaustive arguments, which have materially assisted us in our examination of the complicated case presented in the record.

The general rule, as stated by Mr. Freeman, is: "A cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or incumbrance, and asserting it against his companions in interest. The purchase is, notwithstanding his designs to the contrary, for the common benefit of all the cotenants. The legal title acquired by him is held in trust for the others, if they choose, within a reasonable time, to claim the benefit of the purchase, by contributing, or offering to contribute, their proportion of the purchase money." *Freem. Coten.* § 154. In support of the first proposition, the argument is that each of these three mining claims is a separate and distinct thing, in law; that the first of the three embraced every part of the ground within its exterior boundaries, the second only that portion within its exterior boundaries not in conflict with the first, and the third only that territory within its exterior boundaries not in conflict with either the first or second. So that when the appellee or appellant, or any of its grantors, bought an interest in the Franklin lode, it being the third in order of priority, neither purchaser got any interest in any ground in conflict, but only what was outside of the boundaries of the two senior locations, and that when the appellant, or its grantors, while they were cotenants with the appellee of this nonconflicting ground, bought an interest in either of the senior conflicting locations, which in law absorbed the conflicting territory, there was not thus acquired an outstanding title or interest in the land in controversy in this case by a tenant in common in the Franklin lode, nor was there a purchase of any outstanding or adverse title relating to it, but a purchase merely of a title to an entirely distinct and independent entity. To put it in another form, it is contended that the owners of the Franklin are tenants in common only as to the nonconflicting territory, but not as to the ground in controversy. If this contention be true, or the distinction logical, the entire case of the plaintiff falls; for he must recover, if at all, only upon the theory of a trust relation between the defendant's grantors and himself as tenants in common of the disputed ground, and because of their having done something to his prejudice in reference to the common property. But this reasoning, while specious, and, in one view of the case, sound, is not applicable to the rights of the parties in this case. The rule that the appellee invokes, as was said by Mr. Justice Miller in the case of *Rothwell v. Dewees*, 2 Black, 613, is "based on a community of interest in a

common title, which created such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other in reference to the property so situated." Unquestionably, plaintiff and defendant's grantors were tenants in common of all the ground properly included in the Franklin location. It is true, also, that each one of these mining claims is, in law, a different thing from either of the others. Buying a title, therefore, in one of the senior claims, is not literally buying in an outstanding title of the Franklin claim. But to permit a tenant in common of the Franklin claim to buy in the title of a senior conflicting mining location, and assert it against his cotenant in the junior claim, would certainly prejudice his cotenant; for, if this could be done, the title of the latter as to the conflicting ground would thus be as effectually extinguished as if the patent to the junior location itself were obtained, with hostile intent, by the tenant, and successfully asserted against the cotenant. The reason for the application of the rule in the one case is as forcible as in the other, and to draw any such distinction as is here claimed with respect to cotenancy in mining claims would be to sacrifice substance for shadow, and enable gross wrongs to be perpetrated, contrary to the principle which gives life to the rule.

But it is further urged, and in support of, the second proposition, that the general rule, in any event, is confined to joint tenants, tenants by entireties, and coparceners, strictly, and to tenants in common only when they take from the same grantor, and by the same instrument, or by operation of law, or when the duty is the result of an express contract between them to that effect. The expression of this exception is found in section 155 of *Freeman*, and is as follows: "As the rule forbidding the acquisition of adverse titles by a cotenant from being asserted against his companions is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint tenants, tenants by entirety, and coparceners always hold by and under the same title. \* \* \* Tenants in common, on the other hand, may claim under separate conveyances, and through different grantors. Their only unity is that of right to the possession of the common subject of ownership. As their connection is not necessarily so intimate as that of other cotenants, it may well be doubted whether they should always be subject to the restraints imposed upon the others. There are many cases in which the rule in regard to the acquisition of an adverse title by a cotenant is spoken of in general terms as applying to tenants in common, irrespective of their special and actual relations to one another. But an examination of the decisions

clearly shows that tenants in common are not necessarily prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises." All the authorities upon this question are based upon the case of *Keech v. Sandford*, 1 White & T. Lead. Cas. Eq. p. 48, while the leading case in this country is *Van Horne v. Fonda*, 5 Johns. Ch. 388. Undoubtedly this exception to or limitation upon the general rule has been recognized, if the doctrine itself has not been expressly adjudicated, in the following, among other, cases: *Matthews v. Bliss*, 22 Pick. 48; *Notes to Keech v. Sandford*, supra; *Roberts v. Thora*, 25 Tex. 728; *Rippetoe v. Dwyer*, 49 Tex. 498; *King v. Rowan*, 10 Beak. 675; *Frentz v. Klotsch*, 28 Wis. 312; *Myers v. Reed*, 17 Fed. 401; *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. 192; *Stevens v. Reynolds* (Ind.) 41 N. E. 981. Also, *Freem. Coten.*, supra. On the contrary are the following, some expressly repudiating the exception, others tacitly recognizing that no such distinction in cotenancies exists: *Rothwell v. Dewees*, supra; *Smiley v. Dixon*, 1 Pen. & W. 441; *Bracken v. Cooper*, 80 Ill. 221; *Montague v. Selb*, 106 Ill. 49; *Venable v. Beauchamp*, 8 Dana, 321; *Brown v. Homan*, 1 Neb. 448; *Jones v. Stanton*, 11 Mo. 488; *Picot v. Page*, 28 Mo. 398; *Titsworth v. Stout*, 49 Ill. 78; *Keller v. Auble*, 58 Pa. St. 410; *Bozkowitz v. Davis*, 12 Nev. 446; *Tied. Real Prop.* § 252. See, also, notes to *Venable v. Beauchamp*, 28 Am. Dec. 74, which were prepared by Mr. Freeman, the author of the work on *Cotenancy and Partition*, in which he seems to question the correctness of the doctrine stated by him in section 155 of the first volume of his treatise. The list might be extended much further, but the doctrine will be found fully discussed in the foregoing citations. There are, we think, cases where the rule will not apply to tenants in common; but we need not attempt to specify what those cases are, for the case at bar falls within this exception, which is apparent upon a consideration of the evidence pertinent to the amended fifth defense of the answer. To give in detail the facts and circumstances disclosed by the evidence under this defense would serve no useful purpose, and we content ourselves with merely a statement of the conclusions therefrom reached by us after a careful examination, and these conclusions pertain both to the second and third propositions.

Before and during the month of August, 1886, D. R. C. Brown, for himself and Mr. Cowenhoven, and Eben Smith, for himself and others connected with him, owned, at Aspen, in the vicinity of this ground in con-

list, certain mining claims. Brown then owned, also, as we have seen, five-sixths of the Franklin, one-half of the Steele, and one-sixth of the Dr. Franklin, claims. An adverse suit was then pending between the owners of the Franklin and the Dr. Franklin claims, which was being pressed for trial by the latter. The attorneys of the Franklin advised their clients to settle the suit, and on August 2d, towards that end, an agreement for the purchase, at a consideration of \$9,000, of the five-sixths interest of the Dr. Franklin held antagonistically to the Franklin, was made by Brown and Smith; and on August 3d the deed of conveyance therefor was taken by T. G. Lyster, as trustee for Brown, Smith, and their associates. Thereupon, by consent, a judgment was rendered in the suit, establishing the priority of the Dr. Franklin location. Before this agreement of purchase was made, some sort of an arrangement was entered into between Brown and Smith, representing, respectively, themselves and their associates, whereby the aforesaid properties owned by Brown and Smith, together with the interests which Brown then owned in the three claims involved here, were to be consolidated and worked as one property, the title to which was to be taken ultimately in the name of a corporation thereafter to be organized, whose capital stock was to be entirely owned by this syndicate, in such proportion or shares as their agreement called for. In pursuance of this object, and as a part of the scheme (it being supposed that all antagonisms between the Franklin and the Dr. Franklin would be allayed thereby), this purchase was made, the conveyance above mentioned executed, and this judgment entered; and subsequently, and in furtherance of this design, a conveyance from Lyster, as trustee, was made to Moffat, as trustee, who, in turn, on February 28, 1887, conveyed to the defendant company (the two latter transfers being evidenced by one instrument) one-half of the Steele, five-sixths of the Franklin, and all of the Dr. Franklin, claims. There is no question that such, in brief, was the general scope of this plan; and, though every detail was not worked out at the time when the Dr. Franklin was purchased, yet before the conveyance to the defendant company was made the agreement, in all its details, was perfected, and the general scheme thus accomplished. When this judgment was entered, neither Brown nor O'Brien was a party to the adverse suit, but the two together then owned the whole of the Franklin claim. O'Brien was absent from the state, and not represented by counsel, when the settlement was perfected and the judgment rendered. Before this, however, in a conversation with Smith, he was given to understand that during his absence from the state his interests in this suit would be attended to by Smith, if the occasion required, as Smith was then, as he said, about to negotiate for an interest in this same property,

questionably, in existence, as to the Franklin claim, and they were in such possession thereof as the nature of the property admitted. In equity, this relation extended to Smith and his associates; for, by the scheme of consolidation, Brown and Smith were, in equity, cotenants of the same property of which O'Brien was part owner, and so the act of Brown affecting this Franklin claim under the scheme of consolidation equally affects all his associates, for the same trust relation attaches to all for whom Brown was then acting.

The fact that Lyster, as trustee, took title to the Dr. Franklin one day before he took the title to one-half of the Steele and four-fifths of the Franklin, and that Moffat, as trustee, and the defendant company, as the legal owner, took title to all these three properties in one and the same deed, cannot be successfully urged here to defeat the application of this equitable rule; for, aside from the fact that the time when the parol agreement for the purchase, and not the date of the instruments of conveyance, must govern, the order of priority of the different steps by which these properties were acquired, and this scheme of consolidation thereby perfected, is immaterial, so long as the very parties whose trust relations called for the exercise of good faith towards O'Brien were the active and prime movers in all these transactions. *Venable v. Beauchamp*, supra. If the facts do not bring this case literally within the application of the general rule, the conduct of the parties, in connection with the adverse suit, together with this trust relation, brings the case within the exception, and certainly estops them from asserting this superior title against O'Brien. We are of opinion that when these superior titles were bought the purchasers themselves supposed that O'Brien had an interest therein, and that they intended him to have the benefit thereof in such proportion as his ownership in the Franklin equitably entitled him, and their subsequent acts and conduct corroborate this conclusion. It was only when the property became valuable, and was a producing mine, that the attempt to exclude O'Brien was made. The securing of the Dr. Franklin claim by Smith and Brown was the result, in part, at least, of Brown's co-ownership with O'Brien of the Franklin, which enabled him to use the pendency of the adverse suit against his adversary as an aid in securing the superior title. To permit Brown, while the relation of cotenancy existed, and while he and his cotenant were in possession, so to use this relation as to get for himself that which he might employ to his cotenant's injury, cannot be tolerated by a court of equity. *Lee v. Fox*, 6 Dana, 171, 180. Our conclusion is that Smith and Brown, in acquiring title to the Dr. Franklin claim, em-

tenant in common with appellee; and, for the reasons above given, he should be held as a trustee, as to the same, for O'Brien's benefit, in such proportion as the latter's interests in the Franklin entitle him. *Duff v. Wilson*, 72 Pa. St. 442; *Dickey's Appeal*, 73 Pa. St. 218; *Flagg v. Mann*, 2 Sumn. 520, Fed. Cas. No. 4,847.

We have thus far considered the case as though it were between the original parties to these transactions, but the defendant insists that its rights and liabilities are different from those of its grantors. The general rule, undoubtedly, is that a corporation is not affected with notice or knowledge of facts merely because some of its promoters who organized the corporation had knowledge of such facts, or merely because some of its stockholders had notice; and a corporation is not charged with notice of facts known or acquired by its officer or agent in a transaction in which he acts for himself, and not for the corporation. To this effect we are referred to the case of *Davis Improved Wrought-Iron Wagon Wheel Co. v. Davis Wrought-Iron Wagon Co.*, 20 Fed. 699. Many other cases holding the same doctrine might be cited. Upon this principle the defendant contends that, even if its grantors knew of plaintiff's equities, the conveyance by them to it of this superior title vested the same in the defendant discharged of all previously existing equities. This principle might be applicable here, were it not for certain facts, which, we understand, are virtually uncontroverted. The grantors of defendant, representing themselves and their associates, who were its promoters and organizers, and who now constitute its directors and are its only stockholders, we have held to be charged with plaintiff's equities. The ownership of this conflicting territory is now in precisely the same persons that it was before the corporation acquired title, and that ownership is now represented by certificates of stock, whereas formerly it was evidenced by deeds of conveyance. In conveying to this defendant, it is true, these promoters dealt in their own interests, but they conveyed to a corporation whose entire capital stock they also owned. The consideration for the transfer passed from the same parties, in their capacity as shareholders of the corporation, to themselves as individuals. The grantors acted not solely for themselves, as individuals, but also for the corporation whose capital stock they owned, and the transaction should be regarded as one in which the same parties are grantors and grantees. We are of the opinion, therefore, that the same equities exist against this defendant as against its stockholders who were its grantors.

The point made that the plaintiff should not recover because no proof was made of the validity of the Franklin lode, we do not

think tenable. By all the parties to this suit, before its institution, the Franklin was treated as a valid claim, and throughout the trial the same assumption was indulged. The evidence may not be very direct as to this, but, in any event, the appellant is not authorized to urge this objection under any of the assignments of error. Upon the whole case, our conclusion is that the findings and decree of the district court are right, and accordingly the decree is affirmed. Affirmed.

WRIGHT v. PEOPLE.

(Supreme Court of Colorado. Jan. 27, 1896.)

CRIMINAL LAW—PLEA—RECORD.

To sustain a conviction for a felony, there must have been a plea, and the record must affirmatively show the arraignment and plea; Mills' Ann. St. § 1467, providing that all criminal trials shall be according to the course of the common law, except when this chapter points out a different mode; and section 1461 providing that on the arraignment of a prisoner it shall be sufficient for him to declare orally that he is not guilty, which declaration or plea shall be immediately entered on the minutes, and the mention of the arraignment and such plea shall constitute the issue between the people and the prisoner.

Error to district court, Montrose county.

John Wright was convicted of burglary, and brings error. Reversed.

Black & Catlin, for plaintiff in error. B. L. Carr, Atty. Gen., for the People.

HAYT, C. J. At the regular October, A. D. 1895, term of the district court of Montrose county an information was filed by the district attorney, charging plaintiff in error, John Wright, with the crime of burglary. Although the defendant was tried, convicted, and sentenced for the crime charged, the record fails to show that he pleaded to the information. The failure to plead seems to have been first called to the attention of the trial court upon the motion for a new trial. This motion should have been sustained, as under our practice there is no issue to try until the defendant pleads to the information, which plea is required by the statute to be made a matter of record. Mills' Ann. St. § 1467, provides that "all trials for criminal offenses shall be conducted according to the course of the common law, except when this chapter points out a different mode." Id. § 1461, provides that: "Upon the arraignment of a prisoner it shall be sufficient, without complying with any other form, to declare orally by himself or herself, or his or her counsel, that he or she is not guilty, which declaration or plea shall be immediately entered upon the minutes of the court by the clerk, and the mention of the arraignment and such plea shall constitute the issue between the people of the state and the prisoner; and if the clerk should neglect to insert in the minutes the said arraignment and plea, it may and shall be done at any time by order of the

court, and then the error or defect shall be cured." It is conceded that a conviction for a felony cannot be sustained at common law in the absence of a plea, but in this case it is claimed that the record sufficiently shows that the defendant did plead to the indictment. This claim is based upon the charge of the court to the jury, in which, after detailing the crime charged against the defendant, the court uses the following language: "The defendant has interposed the plea of not guilty." An examination of the transcript, however, discloses that the above statement of the court is not borne out by the record proper. The statute quoted requires the plea to be immediately entered upon the minutes of the court by the clerk, and provides that, in case of failure to make the necessary record at the time, it may be done at any time by order of the court. We cannot doubt that the learned judge who tried this case in the court below, upon his attention being called to the failure of the record to show affirmatively that the defendant had pleaded to the indictment, would have immediately caused such plea to have been entered, if by so doing the record would have spoken the truth. That the court did not cause the record to be so amended is conclusive proof that the facts did not justify the statement made in the instruction. Aside from this, it has been held in many cases that the record must affirmatively show the arraignment and plea to sustain a conviction of a felony. Yundt v. People, 65 Ill. 372; Aylesworth v. People, Id. 301; Price v. People, 9 Ill. App. 36; Ray v. People, 6 Colo. 231. The last case cited contains a full discussion of the entire question, and it must be regarded as stare decisis in this state. The statute was adopted from the state of Illinois, and in holding that an arraignment and plea are indispensable to a valid conviction we have simply followed the rulings of the Illinois court. An effort was made at the last session of the legislature to change this statute, and senate bill 145 was introduced for that purpose, but it failed to become a law. This would indicate that the legislature did not at that time favor a change of practice in this respect. The defendant may yet be required to plead, and be again put upon trial. The judgment of the district court must be reversed, and the cause remanded, with instructions to require the defendant to plead to the information. Reversed.

SHANNON v. TIMM.

(Supreme Court of Colorado. Feb. 3, 1896.)

EASEMENTS—CONSTRUCTION OF DEED—ESTOPPEL.

1. A deed providing that the grantor, as part consideration, "agrees to open and use as a private alley" a specifically described strip of land, across other land belonging to him, to the land conveyed, "to be used as a private alley" as long as the grantee required it, and reserving title to

trustee's deed conveying the same, do not except a right of way previously conveyed by the owner, will not estop the grantee of the right of way from enforcing his right thereto, as against the grantee of the trust deed, where the deed conveying it to him was duly recorded, and both he and his grantor informed the grantee of the trust deed of the easement claimed and granted by them, respectively, before he purchased.

Appeal from district court, Arapahoe county.

Action by Mary Timm against Matt Shannon to compel defendant to open, and to enjoin him from obstructing, a private alley. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 4th day of January, 1883, John Bumann was the owner in fee of lots 14, 15, and 16 in block 5 in Case & Ebert's addition to the city of Denver, situate at the northwesterly corner of Blake and Twenty-Eighth streets. Each of these lots is 25 feet in width by 125 feet in depth, fronting on Blake street, lot 16 being at the corner of the block; lot 15 next adjacent thereto, and lot 14 next to that. Being then the owner, Bumann conveyed by warranty deed to Mary Timm, the plaintiff in this case, 100 feet off the front end of lot 14; and in the deed of conveyance, which was duly recorded, there was this provision: "It is expressly agreed by the parties hereto, and as a part of the consideration hereof, that the said party of the first part agrees to open and use as a private alley the following described strip or parcel of land." Here follows the description, which embraces a strip of land in the shape of a right-angled parallelogram 10 feet in width on Twenty-Eighth street, and extending from the line of said street, a distance of 75 feet, across and immediately adjoining, and at the rear of, the front 100 feet of said three lots. Then comes the following: "Said strip of land to be used as a private alley so long as party of second part, her heirs and assigns, shall require the same for such purpose. The title of said 10-foot strip of land to remain in the party of the first part." Subsequently Bumann conveyed lots 15 and 16, together with other properties, by quitclaim deed to one Henry Taubessing, and thereafter the same property was conveyed by Taubessing to Mrs. Bumann, the wife of the original grantor, and both of the deeds were placed upon record. While Mrs. Bumann was the owner of this property, she borrowed of the plaintiff the sum of \$2,000, giving a trust deed on lots 15 and 16, so conveyed to her, to secure the payment of said note. Afterwards, and in the month of January, 1886, the trustee named in the deed of trust, at the request of the plaintiff (default having been made in the payment of said note), after due notice, sold the property embraced in the trust deed to satisfy the note, and in pursuance thereof executed and delivered to defendant, Shannon, a trustee's deed, he being the highest bidder, conveying to him the property described in

the deed to Matt Shannon, and in the trustee's trust, nor in the trustee's deed, was there any mention of or reference to this alley way. But, before the defendant purchased these lots at the sale under the trust deed, he negotiated for their purchase direct from Mrs. Bumann, who was the legal owner, subject to the incumbrance of this trust deed, and had proceeded so far as to pay her the sum of \$100 on the purchase price. Apparently, before that time, he did not know that the premises were subject to the lien of the trust deed, and, when he discovered the existence of the same, he applied to the plaintiff, and, upon advice of counsel, an arrangement was made between plaintiff, defendant, and Mrs. Bumann whereby the property should be advertised for sale under this deed of trust, and be bid in by defendant for the sum of \$1,725, which, though less than the then existing incumbrance, appeared to be satisfactory to the parties concerned. It also appears, from the evidence, as found by the trial court, that the defendant, Shannon, at the time he was negotiating with Mrs. Bumann for the purchase of lots 15 and 16, was informed by her that the plaintiff had a right of way over the rear end thereof, and it further appears that Mrs. Timm herself informed the defendant, both before and at the time he bid in this property, of her ownership of this right of way. Besides this, there was, of course, the constructive notice furnished by the record of plaintiff's deed from Bumann. Lots 15 and 16 remained uninclosed until after the same were purchased by the defendant, and until a short time before this action was begun. While the lots were uninclosed, the plaintiff had access to the rear end of her lot by driving over lots 15 and 16 in any manner she saw fit. She constantly and uninterruptedly used the alley way, although the line thereof was not distinctly marked out on the ground, for some time before the commencement of this suit, and until a deep ditch in Twenty-Eighth street, running along the block to the south of these lots, washed out by the running of water from the city ditch, prevented plaintiff's crossing over upon the designated alley way in the rear of lots 15 and 16, and thus going to the rear end of lot 14, her property; and this accounts for the conceded fact that, after the ditch was there, she drove over and used as a passage way any parts of lots 15 and 16 that were convenient. Soon after the defendant bought these premises he fenced the whole of lots 15 and 16, thus preventing ingress and egress by this alley to and from the rear end of lot 14. This suit is brought for the purpose of compelling the defendant to take down the fences and open the alley, and to enjoin him from further obstructing the same. The court below found the issues of fact in favor of the plaintiff, and entered a decree ordering the fences taken down, and enjoining the defendant from further inter-

ference with plaintiff's right of way. From this decree the defendant brings the case here upon an appeal.

Sullivan & May, for appellant. Mary Timm, in pro. per.

CAMPBELL, J. (after stating the facts). This controversy may best be presented by considering the defenses interposed by the defendant, which are—First, that the words contained in the deed from Bumann to the plaintiff in relation to the right of way do not amount to a grant in present, but, at most, are only a covenant to execute a deed for the right of way at some future time, and that, for this reason, the plaintiff's only remedy is by an action at law against her grantor for damages for failing to execute his agreement; second, if this is not true, that the appellee is estopped, by reason of silently standing by at the trustee's sale made at her instance and request, and not informing the plaintiff of the claim which she now asserts. Under the facts of this case we are relieved of the necessity of determining whether or not this right of way is a continuous or discontinuous easement, whether apparent or nonapparent, and so whether or not the defendant, who holds the servient estate, took charged or not charged with notice of the existence of the easement as depending upon the nature of the same. Nor do we think that the proposition advanced by defendant, that there was no grant of this easement in the deed of Bumann to the plaintiff, has any weight. The law endeavors to give effect to the intention of the parties, whenever that can be done consistently with rational construction; and, if necessary to that end, an agreement to convey may sometimes be held to be equivalent to a grant. Here the proposed alley way was designated by a clear and unambiguous description in the deed itself. The grantor reserved to himself the naked legal title of the ground over which the right of way was to be enjoyed, which was to be used "so long as the grantee, her heirs and assigns, should require the same for such purpose." Nothing further by the parties to this instrument was required to be done to give to the grantee the rights which she had purchased, and for which she had paid the consideration. This language, in itself, is sufficient to pass to the grantee this private way. *Stetson v. Curtis*, 119 Mass. 266; *Railroad Co. v. Battle*, 68 N. C. 540-546; *Smith v. Wern*, 98 Cal. 206, 28 Pac. 944; *Parker v. Nightingale*, 6 Allen, 341. But, suppose it was not. Certainly, there appeared on record an agreement for the conveyance of a private way, to compel specific performance of which contract an action lies both against the grantor, Bumann, and his remote grantee, the defendant, who is charged with notice of the recorded deed.

The estoppel in pais urged here does not arise, for various reasons. The defendant well knew, from the plaintiff's recorded deed,

that an attempt, at least, had been made to create the easement of a private alley for her benefit upon the land which he proposed to buy; and, when he negotiated with Mrs. Bumann, she told him that plaintiff's rights in this alley must be respected, if he purchased lots 15 and 16, and the plaintiff herself informed defendant, both before and at the time he bid in the property at public sale, and before he parted with his money, that she owned this right of way, and intended to use the same. Under our statutes (Mills' Ann. St. § 446), by plaintiff's recorded deed the defendant had constructive notice of her rights, and, besides this, he was in apt time informed by persons from whom such information should be acted upon and observed by a proposed purchaser, that the plaintiff claimed rights in the land which he proposed to buy. It is true that neither the deed of trust nor the trust deed contains any exception or reservation of this alley way, but in the plaintiff's deed there was a grant of this alley way,—at least, as defendant concedes, an agreement to convey,—and as it provided, also, that the legal title to the ground was reserved to the grantor, Bumann, the latter could convey, and his grantees take, only the naked legal title, subject to the easement. It is evident that such was the understanding of the defendant, and that he was aware that, by his deed, he could take, as against the plaintiff, only this naked legal title. But, if this were not so, still the plaintiff is not estopped to assert her claim to this easement by anything that occurred at or before the sale under the trust deed. In *Griffith v. Wright*, 6 Colo. 248, and *Patterson v. Hitchcock*, 8 Colo. 538, it was held that essential elements of estoppel by conduct are, *inter alia*, that there must be a concealment of a material fact, and that the person from whom it was concealed must have been ignorant of the truth of the matter, and must have been induced to act because of such concealment. It is evident that not one of these three elements is present in this case; for, as has been said, the defendant well knew, both constructively and actually, that the plaintiff claimed to own, and to exercise her right to use, a private alley way over and across the lands which the defendant proposed to buy. No concealment by her was practiced upon him. No silence was maintained when it was her duty to act. On the contrary, at least twice, as was found by the trial court, she informed him of her rights.

This contention that the defendant, by reason of the silence of the plaintiff, was induced to part with his money, and take his deed ignorant of the claim which she asserts in this action, is entirely without foundation. The price which he paid for the land which he bought was only what, willingly and with full knowledge of the plaintiff's record rights, and her own assertion in relation thereto, he bargained to pay before the mutual arrangement was entered into for going through the mere formality of advertising the property

NORRIS v. COLORADO TURKEY  
HONESTONE CO.

(Supreme Court of Colorado. Feb. 3, 1896.)

EVIDENCE—REVIEW—SUFFICIENCY OF RECORD—  
DEED—MUTUAL MISTAKE—REFORMATION—RIGHT  
PERSONAL TO GRANTEE—COMPLAINT—SUFFI-  
CIENCY.

1. The sufficiency of the evidence cannot be reviewed where no exception was taken to the final judgment.

2. A complaint alleging that defendant, who owned the north half of a government subdivision containing 80 acres of land, through her agent represented to plaintiff's grantors that the northeast quarter thereof, containing 40 acres, included a certain site; that said grantors, relying on such representations, contracted to buy the 40-acre tract on which it was situated, and that in performance thereof defendant conveyed and plaintiff accepted a conveyance of said northeast quarter,—is insufficient to entitle plaintiff, on the ground of mutual mistake, to have the deed reformed so as to include 40 contiguous acres of the 80-acre tract on which the site is located, irrespective of government subdivisions, since it fails to show that defendant ever intended to convey any other land than that actually conveyed.

3. A grantee's cause of action against a grantor for conveying through mutual mistake land other than that which it was the intention of both parties should be conveyed is personal to the grantee, and not a covenant running with the land, and will not, therefore, without apt words of assignment, pass to a purchaser from the grantee under a deed which describes the same land described in the deed to his grantor.

Appeal from district court, Jefferson county.

Action by the Colorado Turkey Honestone Company against Retta E. Norris to reform a deed. From a judgment for plaintiff, defendant appeals. Reversed.

The appellant, who was one of the defendants below, was the owner of an 80-acre tract of land, being the north one-half of the northeast one-quarter of section 12, etc., in Jefferson county, Colo. Through John C. Norris, her agent, a contract of sale was entered into in her behalf with William Casey for a 40-acre tract of this land, upon which, as it is alleged, were located the mouth of a cañon, a building site for a hotel, and a large and valuable honestone quarry. Casey afterwards assigned to William L. Durbin a one-half interest in the contract. The complaint in this case alleges that John C. Norris, as the defendant's agent, went with Casey upon this 80-acre tract, and represented to him that he knew the government corners of the same, and pointed them out to Casey upon the ground in such a way that the said mouth of the cañon, building site, and honestone quarry thereby appeared to be situate within the northwest one-quarter of said northeast quarter of section 12. To carry out the contract, a deed dated August 10, 1891, was executed to Casey and

instrument evidencing the transfer described the land conveyed as the "northwest one-quarter of the northeast one-quarter of section 12"; and that the said Casey and Durbin, believing that the said description included the particular parcel of land which they desired to buy, took the deed of conveyance, and paid their money therefor. About the same date Casey and Durbin conveyed an undivided one-third interest in said land to I. B. Porter, and on the 11th day of September, 1891, Casey, Durbin, and Porter conveyed the same land (viz. the northwest one-quarter of the northeast one-quarter of section 12) to the plaintiff in this case, the Colorado Turkey Honestone Company. The complaint further alleges that within a short time after plaintiff discovered this mistake this suit was brought, the object of which is to reform said deed of conveyance, and make it speak the contract and intention of the parties, so that the deed, as reformed, may describe a 40-acre tract of land embraced within said 80-acre tract, and within whose boundaries are situate the mouth of the cañon, the building site, and the honestone quarry. Casey, Durbin, and Porter were made defendants with Mrs. Norris, and they answered, disclaiming any rights in this land adverse to the rights of the plaintiff, and consenting to any decree the court might make respecting them. The defendant Norris answered, denying all the material allegations of the complaint, and upon trial to the court without a jury all of the issues of fact made by the pleadings were found by the court in favor of the plaintiff. A decree was entered reforming said deed, making it so read that out of the 80-acre tract of land which formerly had been owned by appellant a 40-acre tract was carved, including a portion of both 40-acre tracts as subdivided by the government survey, and vesting the title thereto in the plaintiff company. This reformed deed included all of said 80-acre tract except a strip of land containing about 8 acres on the westerly end of the 80-acre tract, and a strip of about 32 acres upon the easterly end thereof, which two noncontiguous tracts the court, by its decree, awarded to Mrs. Norris. From this decree she has appealed to this court.

O. B. Liddell, for appellant. John A. Perry, for appellee.

CAMPBELL, J. (after stating the facts). A number of errors have been assigned by the appellant relating to the rulings of the court upon the admissibility of evidence, to the insufficiency of the evidence to sustain the findings and decree, to the insufficiency of the complaint, and to the denying of appellant's motion for a nonsuit. The contention of appellee is that we cannot



review the evidence for the purpose of determining its sufficiency to support the findings and decree, because appellant saved no exception to the final judgment. This court has repeatedly so held, and the authorities are collected in the case of *Jerome v. Bohm*, 40 Pac. 570, 21 Colo. —. We are not satisfied that the complaint sets up with sufficient precision such a mutual mistake as would entitle the original grantees to a reformation of the deed, or that it clearly appears that the strip of land described in the complaint was, as a matter of fact, intended to be conveyed by the grantor; but, on the contrary, giving to the complaint the utmost plaintiff can claim, we are of opinion that the appellant never intended to convey anything but the northwest quarter of the northeast quarter of section 12; certainly never intended to convey a 40-acre tract carved out of the larger tract, disregarding entirely the government subdivisions. Such being the case, merely because of the alleged fraudulent representations made by the appellant that the hotel site, quarry, and mouth of the cañon were within this 40-acre tract so conveyed, plaintiff had no right to a deed for an entirely different 40-acre tract out of the larger tract including these desired things. For such fraud, if established, it is true, there is a remedy, but it is not a reformation of the deed which, in effect, is to compel a conveyance from the grantor of something which she never intended to convey, as a punishment for her alleged misrepresentations, but rather the remedy is a rescission of the contract or a suit for damages by the grantees against their grantor. There are, however, other insufficiencies in the complaint which bar a recovery. The action, as stated, is founded upon a mutual mistake of the grantor, Norris, and her grantees, Durbin and Casey, whereby a 40-acre tract of land was conveyed which it was neither the intention of the grantor to sell nor of the grantees to buy, but the real intent and purpose was, on the one side to sell, and on the other to buy, a 40-acre tract of land including "the mouth of the cañon, the quarry, and the building site." In her deed to Casey and Durbin there was described as the subject of the grant the northwest quarter of the northeast quarter of section 12. In conveying to Porter, Casey and Durbin described the same tract which was mentioned in the deed to them, and in the deed from these three to the appellee company the same description is found. If, as is claimed, by conduct which, in law, is a fraud upon the part of appellant, her grantees paid their money, and took a deed, for land different from, or of less value than, that which both parties intended should be transferred, these grantees have their remedy against their grantor. If this right of action, whatever it may be, is assignable at all, it cannot be transferred merely by a conveyance of the land, and it is not one of the implied covenants of the deed;

for such right to sue is not a covenant running with the land, but is personal. Hence, to effect an assignment, there must be employed apt and appropriate words. There is no claim that this right or cause of action was ever assigned, as such, by appellant's immediate grantees to the appellee; but, on the contrary, the theory of the complaint is that this right of action passed from appellee's grantors to it as a covenant running with the land. But such is not the law. It is doubtless true, as a general rule, that the assignee of property takes it subject to all the obligations and liabilities, and clothed with all the rights, which attach to it in the hands of the assignor; and that a purchaser ordinarily will be subrogated to all the rights of the vendor in the property, even though they are not expressly conveyed to him. *Broom, Leg. Max. (8th Ed.) 472; Sheld. Subr. § 34.* But the facts of this case do not bring it within the application of the foregoing authorities. A grantee's cause of action against his grantor for such misrepresentation as was made by the appellant in this case is a personal one, and does not pass to any subsequent purchaser from the grantee. Ordinarily, a mere right of action which has become vested in his grantor, such as an action for deficiency in the quantity of the land, or (as in this case) an action for conveying, as the result of a mutual mistake, land other than that which it was the intention of both parties should be conveyed, and which entitles the vendor to an action against the original owner for such deficiency or such mistake, will not extend to the purchaser whose deed merely describes the same land as conveyed to his original grantor. *Sheld. Subr. § 37; Collins v. Swan, 7 Rob. (N. Y.) 623; Willoughby v. Middlesex Co., 8 Metc. (Mass.) 296; Lawrence v. Montgomery, 37 Cal. 183; Davis v. Clark, 33 N. J. Eq. 579; Chambliss v. Miller, 15 La. Ann. 713.* The mere fact that the appellant's grantors are defendants here, and in their answer disclaim any rights adverse to appellee, is not equivalent to an allegation of an assignment to it of their rights, nor does it supplement the complaint so as to make it complete in this respect. An examination of the answer shows that this defect in the complaint is not thereby cured. There can be no pretense in this case that the plaintiff's grantors, at the time they purchased from the appellant, were acting for it, or in its behalf. It was incorporated after these transactions took place, and there is nothing in the record to show that its formation was contemplated at the time of the original transfer, nor that it has any rights other than or different from those of any other grantee under a deed of conveyance. Because of the insufficiency of the complaint the decree below cannot stand. The judgment and decree should, therefore, be reversed, and the cause remanded, and it is so ordered. Reversed.

1. Construing Gen. St. 1883, § 972, empowering the supreme court, or a justice thereof, to grant a supersedeas, and also to admit a prisoner to bail in certain criminal cases pending review, "provided, however, that in cases where corporal punishment is inflicted the prisoner shall in no case be bailed," the words "corporal punishment," in the proviso, do not include imprisonment, but are used in the restricted sense denoting punishment upon the body, such as whipping, the statute having been copied from that of an older state, and the proviso being probably of ancient origin.

2. Gen. St. 1883, § 972, makes the granting of a supersedeas and the admitting of a prisoner to bail pending a review separate and independent acts of the supreme court or justice acting thereon, and an order which seems to make the supersedeas dependent on the furnishing of the bail fixed therein will be corrected.

Error to district court, Boulder county.

John J. Ritchey was convicted of murder in the second degree, and brings error. Petition of defendant to amend an order granting a supersedeas, and admitting him to bail. Granted.

The following provision of the statute is necessary to a correct understanding of the opinion: "Writs of error in all criminal cases not capital shall be considered as writs of right, and issue of course, but no writ of error shall be a supersedeas unless the supreme court or one of the justices thereof in vacation, after inspecting a copy of the record, certified as in the preceding section, together with an assignment of the errors relied on for a reversal of the judgment, shall be of opinion that there is reasonable cause for allowing a writ of error; in such case the writ shall be granted by order endorsed on the back of such record, in which case the clerk of the supreme court shall issue a supersedeas, which shall have the effect [effect] to stay the execution of the sentence, but not to discharge the prisoner from custody. If the party applying for such writ of error shall at the time be in custody, under the authority of the judgment prayed to be superseded, and the said court or justice shall be of opinion that the party obtaining such writ of error ought to be bailed till the determination of such writ of error, the said supreme court or justice may make an order to discharge such prisoner from custody, upon the prisoner entering into a recognizance to the people of the state, before the sheriff of the county where she or he shall be imprisoned, in such sum and with such security as said court or justice shall prescribe, which recognizance shall be conditioned that the prisoner will appear in the next district court to be holden in the county where the trial of such prisoner took place, and at each subsequent term of the district court, on the first days, until the determination of such writ of error, and that he will be present and submit to such order as the supreme court

depart the court without leave. The recognizance so taken shall be returned to the next district court, and there entered of record, and such proceedings may be thereon had, in case of a breach of the conditions of such recognizance, as shall be according to the course of the common law: provided, however, that in cases where corporal punishment is inflicted the prisoner shall in no case be bailed; upon the affirmance of any judgment brought in to the supreme court by virtue of this section, the said court shall order and direct the district court to carry into effect the judgment of the court below. In case of affirmance, judgment shall be given for costs against the party prosecuting such writ of error, and execution shall issue thereupon from the supreme court." Gen. St. Colo. 1883, § 972.

Patterson, Richardson & Hawkins, for plaintiff in error. B. L. Carr, Atty. Gen., for the People.

HAYT, C. J. At the October, A. D. 1895, term of the district court of Boulder county, plaintiff in error, John J. Ritchey, was tried and convicted of murder in the second degree, and sentenced to 20 years' imprisonment in the state penitentiary at hard labor. To this judgment plaintiff in error excepted, and obtained a stay of execution from the district court until the record of the trial could be lodged in this court, and an application for a supersedeas and bail could be determined. On the 28th day of December the record was filed in this court, and a writ of error issued. At the same time an application was made to have the writ of error made a supersedeas, and the defendant discharged upon bail, pending further proceedings. This application coming on to be heard before two of the justices of this court in vacation, and it appearing that there was reasonable cause for allowing the same, it was ordered that the writ of error should be made a supersedeas upon the plaintiff in error entering into a recognizance to the people of the state of Colorado, before the sheriff of Boulder county, conditioned according to law in such case made and provided, in the sum of \$7,000, with good and sufficient sureties, to be approved by the sheriff, etc. Under this order the prisoner was held in the county jail of Boulder county for something like 30 days, when, it appearing to the sheriff that he would be unable to give bail, he undertook to convey him to the state penitentiary at Canon City, but before he was incarcerated in such institution he was taken from the hands of the officer by a writ of habeas corpus, and lodged in the jail of Arapahoe county, where he is now confined. His counsel claim that the original order was erroneous, in that it required the defendant to give bond as the condition upon which the judgment could only be superseded. We are

now asked to correct the order made in vacation, and to remand the prisoner to the county jail of Boulder county, to be therein confined pending proceedings in this court unless bail be procured.

The statute which controls the practice in this and other cases upon writs of error in criminal cases not capital was taken from the state of Illinois, and may be found upon pages 188, 189, of the Revision of 1845. The statute was adopted bodily in this state in the year 1861, and has remained as a part of our law to the present time. Although the practice under it has not been entirely uniform, this is the first time that counsel have called upon the court to construe its several provisions, and, in so far as we are advised, the supreme court of Illinois has never passed upon the act. A reading of the section discloses its purpose to be the accomplishment of three specified things, viz.: First, the making of a writ of error in any criminal case not capital a writ of right, and to issue of course; second, to provide that the writ of error shall be made a supersedeas upon the order of the supreme court, or of one of the justices in vacation; third, to provide for the discharge of a prisoner upon bail under certain conditions, pending the final determination of the case in the supreme court. Upon these points there is no controversy. Under the statute the making or refusing to make a writ of error a supersedeas is in no way dependent upon the question of bail; in other words, bail is made, by the statute, an independent matter. If there is reasonable cause for allowing a writ of error, the clerk shall issue supersedeas upon the order of the court in term time, or a judge in vacation; and if, in the opinion of the court or judge, the party ought to be bailed until the determination of such writ of error, an order for this purpose shall also be made. Up to this point the statute is plain and unambiguous. Whatever of uncertainty is to be found in the act grows out of the following proviso, to wit: "Provided, however, that in cases where corporal punishment is inflicted the prisoner shall in no case be bailed; upon the affirmance of any judgment brought into the supreme court by virtue of this section, the said court shall order and direct the district court to carry into effect the judgment of the court below." In the Illinois statute the semicolon is inserted after the word "section," so that the statute reads as follows: "Provided, however, that in cases where corporal punishment is inflicted, the prisoner shall in no case be bailed upon the affirmance of any judgment brought into the supreme court, by virtue of this section; the said court shall order and direct the circuit court to carry into effect the judgment of the court below." Rev. St. 1845, p. 189. The phrase "corporal punishment," in its enlarged meaning, undoubtedly embraces all kinds of punishment of, or inflicted upon, the body, including imprisonment; hence the attorney

general contends that, where imprisonment is a part of the penalty, this court is without power to admit the prisoner to bail upon writ of error. Counsel for plaintiff in error, on the contrary, urge that such a construction would nullify all the provisions of the section with reference to bail, and in effect deprive the defendant of the chief benefit of the writ of error. They ask the court to construe the proviso so as to limit the prohibitory words to cases in which bail may be asked after the affirmance of the judgment of the lower court. They say that this intent would clearly appear if the punctuation of the Illinois act be adopted, and that, as punctuation is usually the work of the draftsmen, courts may, and, if necessary, will, entirely disregard it, or repunctuate the act so as to make it express the legislative intent. In our opinion, however, the term "corporal punishment" in the statute is used in its primary and restricted meaning, and denotes punishment upon the body, such as whipping, rather than punishment of the body, such as imprisonment. Corporal punishment in the public schools or in the family is usually understood to imply some process by which pain is inflicted upon the body of the offender. We have not been able to trace the origin of the statute, but, if this could be done, we doubt not strong arguments in support of our conclusion might be drawn from its history. We find that the term is frequently used in the restricted sense with which we believe it to have been used in our statute. For example, section 16 of article 1 of the constitution of 1868 of the state of South Carolina reads: "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great; and excessive bail shall not, in any case, be required, nor corporal punishment inflicted." Peore, U. S. Chart. & Const. pt. 2, p. 647. If any argument is needed to show that the words "corporal punishment," as there used, do not include imprisonment, it may be deduced from the fact that in several sections of the same instrument imprisonment is made the penalty for many offenses. See, also, *Cornell v. State*, 6 Lea, 624; 2 Cent. Law J. 190; 21 Am. & Eng. Enc. Law, p. 768, "Schools." The strongest argument against this conclusion arises from the fact that in this state we have never had corporal punishment in the sense in which it is herein defined, but this argument loses much of its force when we remember that many of our statutes were taken from states where the great body of the law is essentially different. Corporal punishment of this nature has always been deemed so humiliating to the prisoner that no bail would be sufficient to induce his surrender upon the affirmance of a judgment requiring its infliction. The construction which we have given the statute permits the continuance of the practice of admitting prisoners to bail pending proceedings in this

practice that has been in vogue from the creation of the territory to the present, and sanctioned by many illustrious judges. If a change is to be made at this late day, it should come from the legislature, and not from the courts.

A further question in this case has reference to the place of confinement of the prisoner pending a review upon writ of error in cases where the writ of error has been made a supersedeas. A supersedeas, as the word indicates, supersedes the judgment of the court below, and no steps should be taken towards execution after this court, or a judge thereof, has determined prima facie that the defendant has not been legally convicted, and has ordered that a writ of error be made a supersedeas. If he procures bail, he should be discharged from custody in ballable cases; otherwise he should be detained. The statute does not clearly indicate where the prisoner should be confined in case he has actually entered upon a term in the penitentiary, but we are clearly of the opinion that if he is in the county jail he should be allowed to remain there. As the order entered in vacation is not in accordance with the foregoing conclusions, that order will be vacated, and an order will now be entered by the court requiring the sheriff of Boulder county to take the prisoner into his custody and return him to the county jail of Boulder county in default of bail; and also an order making the writ of error herein a supersedeas, and to operate accordingly until the further order of the court in the premises, and likewise an order that the prisoner be discharged from custody upon his entering into a recognizance in the sum of \$7,000, conditioned according to law, with sureties to be approved by said sheriff.

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### WHITE v. FARMERS' HIGHLINE CANAL & RESERVOIR CO.

(Supreme Court of Colorado. Jan. 15, 1896.)

#### IRRIGATION—STATE REGULATION—PARAMOUNT TO CONTRACT RIGHTS.

1. The taking and use of water for irrigating purposes is a matter of public interest, and subject to state control, and the irrigation act (Laws 1887, p. 304), regulating the taking and distribution of water from streams, and providing, among other things, that each company controlling canals or ditches shall appoint a superintendent, who shall measure to each person entitled thereto his or her pro rata share of water, applies to and governs companies carrying water for hire, and also their patrons, and one consumer cannot ignore the allotment made by the superintendent, and appropriate to himself more water than his just share.

2. The law regulating water rights, being in the exercise of the police powers of the state, is paramount to a private contract, though such contract antedates the passage of the law, and rights given by the contract must yield where they are in contravention of the provisions of the statute.

Farmers' Highline Canal & Reservoir Company against Torrence White. From a judgment of the court of appeals reversing a judgment for defendant in the district court, he brings error. Affirmed.

This action was originally commenced by the Farmers' Highline Canal & Reservoir Company, as plaintiff, against Torrence White. It appears from the undenied allegations of the complaint that the plaintiff is a corporation organized and existing under the laws of the state of Colorado for the purpose of owning, operating, and maintaining an irrigating ditch, together with reservoirs, etc.; that said company was organized on the 3d day of December, 1885, and from and after its organization it has diverted a large amount of water from one of the public streams of the state known as "Clear Creek." This water has been principally used by farmers for agricultural purposes, it being the custom of the ditch company to carry water for hire for the defendant and a large number of agriculturists along the line of the ditch. It is alleged that the defendant is entitled to 45 inches of water, and no more. Notwithstanding such fact, it is averred that the defendant demanded 120 inches of water. The company, averring its inability to comply with this demand, refused to supply the defendant with the same, or any part thereof in excess of 45 inches. Thereupon the defendant enlarged the opening in the box, through which the water in his ditch flowed to his land, and wrongfully took from the canal 75 inches of water for his individual use in excess of the 45 inches which he was entitled to. It is further alleged that the taking of this additional amount of water was at the expense and damage of many consumers of water from plaintiff's ditch. It is also averred that the plaintiff company had in its employ an efficient and capable superintendent, whose duty it was to fix and adjust the various boxes through which water is supplied to the various lands receiving water from the said ditch; that this superintendent, in the discharge of his duties, apportioned the water strictly and properly according to the amounts to which each consumer was entitled. It is further alleged that, notwithstanding this fact, the defendant, after enlarging the capacity of the box or headgate used to supply his lateral ditch with water, continued to divert 120 inches of water. It is further averred that numerous other persons, tempted and led thereto by the evil example of the defendant, desiring to procure water for the irrigation of their lands in excess of the amount possible for the plaintiff to furnish, threatened to follow the example of the defendant and at their will and pleasure take from said ditch various amounts of water, without consultation with the said superintendent, and against his op-

out from taking from plaintiff's ditch water in excess of 45 cubic inches. Upon the filing of this complaint a temporary writ of injunction was issued in accordance with the prayer thereof. Afterwards the defendant filed his answer. It is unnecessary to set forth this answer in detail. It suffices to say that by it the defendant claims the right to take the additional 75 inches of water from plaintiff's ditch by virtue of a contract made with plaintiff's grantors on the 22d day of March, 1873, and duly recorded. This contract is fully set out in the opinion of the court of appeals. See *Reservoir Co. v. White*, 31 Pac. 345, 5 Colo. App. 1. The answer also avers that the full amount of 120 inches of water was necessary to properly irrigate the defendant's lands described in the schedule annexed to this contract, and that previous to taking the same he had tendered to the plaintiff \$120 in cash for this water, this being in full payment for 120 inches of water at the rate fixed in the contract. Upon the filing of this answer the defendant filed a motion to dissolve the injunction, and about the same time also plaintiff filed a general demurrer to the answer. Whether or not the demurrer was filed before or after the dissolution of the injunction, as hereinafter set forth, does not definitely appear from the record. The record shows that after the coming in of the answer the case was heard upon the pleadings and evidence introduced by both parties. This hearing was had before the district judge at chambers, in vacation. Some months thereafter, the cause coming on to be heard before the district court in term time, the demurrer to the answer was overruled, and, the plaintiff electing to stand by the demurrer, the answer was taken as confessed, and judgment entered for the defendant. From this judgment an appeal was taken to the court of appeals. A hearing in that court resulted in a reversal of the judgment of the district court, whereupon White sued out a writ of error, upon which the record was brought into this court.

A. H. De France and A. J. Rising, for plaintiff in error. Osborn & Taylor, for defendant in error.

HAYT, C. J. (after stating the facts). The order dissolving the temporary injunction, being merely interlocutory, is not before this court for review, except as the result was repeated in the final judgment. So, likewise, the evidence taken upon the hearing at chambers in vacation is not open to review upon appeal or writ of error. When the case was regularly reached in the district court for final hearing and determination, that court was at liberty to, and did, as the record discloses, proceed to final judgment unembarrassed by its previous order. At this hearing a general demurrer was overruled

and defense to plaintiff's complaint. In this state of the record the cause must be reviewed solely upon the pleadings. The defendant, having tendered the schedule price of \$1 per acre for water for 120 acres of the lands embraced within the contract and described in the schedule annexed thereto, insists, as the water is necessary for the cultivation of his lands, that he is not only entitled to have that amount of water flow into his lateral ditch, but that he has the right to take the same, without let or hindrance from the ditch company, its superintendent, or any other water consumer. This right to actually divert water from the main canal in opposition to the will and against the protest of the plaintiff company and its superintendent is based upon the following provision of the written contract, set up in the defendant's answer: "That if the said ditch company, or the party of the second part, their assigns or successors, or whomsoever may be in control or management of the said ditch, as the case may be, shall at any time willfully or malignantly fail or refuse to comply with the terms of the indenture as to the furnishing of said water to said parties of the third part, or any or either of them, the party having right to demand and receive any part of said water for the uses aforesaid, upon payment or tender of payment at the proper time, and demand made in writing for such water, said tender or payment to be made to and said demand of the officer or agent, if any, appointed by the parties owning or managing said ditch, or, if there be no officer or agent appointed for the purpose of receiving such demand and payment, then such payment to be tendered to and demand made upon the president, secretary, treasurer, or superintendent of said ditch company, or person exercising control and management of the said ditch, it shall be lawful for the party so entitled to such water to draw from and take all such water as he may be entitled to at the time of such tender or payment, subject to payment therefor on demand made by the officer or persons authorized to receive the same." That part of this contract which attempts to give each consumer the right to determine the amount of water to which he is entitled, with permission to take the same regardless of the rights of other consumers or of the ditch company, was declared void by the court of appeals. The court bases its conclusion upon the following reasons: First. "It is a right incompatible with the right of control incident to the ownership of the property." Second. "It is against public policy, as tending to confusion and a breach of the peace 'in allowing parties to take whatever water they required,' regardless of the rights of others having the same legal right." The court, being of the opinion that this provision of the contract

was void, held that the lower court erred in refusing an injunction. Without reviewing the reasons given by the court of appeals, we think its judgment must be affirmed for a safer and better reason, viz. the right claimed by the consumer is a right the exercise of which is positively prohibited by the statute of this state. In 1887 the legislature passed an act entitled "An act regulating the distribution of water, the superintendence of canals or ditches used for the purposes of irrigation, and providing a penalty for the violation thereof." Sess. Laws 1887, p. 304. The first section of this act provides at what time water shall be kept flowing in ditches. The second provides that the owners shall keep their ditches in good order and repair, and that a multiplicity of outlets shall at all times be avoided, so far as the same shall be reasonably practicable. The location of such outlets is placed under the control of the superintendent. The third section provides that it shall be the duty of those owning or controlling such canals or ditches to appoint a superintendent, whose duty it shall be to measure the water from such canal or ditch through the outlet to those entitled thereto, according to his or her pro rata share. Section 4 fixes a penalty in case the superintendent or other person having charge of the ditch shall willfully neglect or refuse to deliver water, etc., as by the act provided. Section 5 provides that the water commissioner, his deputy, or assistant shall promptly measure the water from the stream or other sources of supply into the irrigating canals, etc. The right to the use of water in the arid region is among the most valuable property rights known to the law. Where there are a large number of consumers taking water from the same ditch, the excessive use by some may absolutely deprive others of water at times when its application to the thirsty soil is absolutely necessary to prevent the total failure of growing crops. So, also, as between different ditches, if one, in case of scarcity, takes from a public stream water to which it is not entitled, it must be at the expense of others. From the very nature of the business, controversies with reference to the use of water naturally led to unseemly breaches of the peace, and to avoid these it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the state, and regulating its distribution to those entitled thereto. Authority for such regulations may properly be based upon the principle that when private property is "affected by a public interest it ceases to be *juris privati* only." That a canal used for the carriage of water for hire in this state is affected by a public interest has been recognized by the repeated decisions of this court. Says Mr. Justice Helm in the case of *Wheeler v. Irrigation Co.*, 10 Colo. 582, 17 Pac. 487: "Under the constitution, as I understand it, the carrier

is at least a quasi public servant or agent. It is not the attitude of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others, being engaged in the business of transporting for hire water owned by the public to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. It may exercise the power of eminent domain. Its business is affirmatively sanctioned, and its profits or emoluments are fairly guaranteed. But in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties, and subject to a reasonable control." Although it is difficult to define the boundaries of the police power of the state, such regulations as those prescribed by the statute under consideration are by the decisions of the highest courts declared to be within such power. In the *Sinking-Fund Case*, 99 U. S. 700, Mr. Justice Bradley referring to the *Granger Cases* [*Munn v. Illinois*] reported in 94 U. S. 113, stated the principle as follows: "The inquiry there was as to the extent of the police power in cases where the public interest is affected, and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." In the case of *Beer Co. v. Massachusetts*, 97 U. S. 25, it is said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals."

It is said, however, that as the contract under which the defendant claims in this case was executed prior to the passage of the act of 1887, the parties to this action are not bound by that statute; the argument of the plaintiff in error in this particular being that he has a contract right to take this water as he pleases, and that this is a property right with which the legislature cannot interfere. This argument has been advanced in many cases, but, we believe, never successfully, where, as here, it is in opposition to the police power of the state. The extent to which the police power of the state may go is well illustrated by the case of *Fertilizing Co. v. Hyde Park*, 97 U. S. 659. In that case, by the act approved March 8, 1867, the legislature incorporated the Northwestern Fertilizing Company, to have continued succession and existence for the term of 50 years. By the act

dividing line between townships 37 and 38, chemical and other works, for the purpose of manufacturing and converting dead animals and other animal matter into an agricultural fertilizer and into other chemical products, by means of chemical, mechanical, and other processes." The company was also authorized to establish and maintain depots in the city of Chicago for the purpose of receiving and carrying off from and out of the said city any and all offal, dead animals, and other animal matter which it might buy or own, or which might be delivered to it by the city authorities and other persons. The works of the company were located within a designated territory, at a place then swampy, and nearly uninhabited, but at the time of the suit forming a part of the village of Hyde Park. In March, 1869, the legislature passed an act revising the charter of the village of Hyde Park, and granting to it the largest powers of police and local government. In 1872 the village authorities passed the following ordinance: "No person shall transport, carry or haul any dead animals or other offensive or unwholesome matter or material into or through the village of Hyde Park;" fixing a penalty for the violation of this ordinance. After this time the village authorities caused the arrest of the engineer and other employes of a railway company who were engaged in carrying offal through the village to the chemical works. These men were tried, and convicted for violating the ordinance, and fined \$50 each, whereupon the company filed its bill in the United States court to restrain further prosecutions and for general relief. When this case reached the supreme court of the United States, that court, in affirming the judgment of the state courts, held, among other things, that the charter was a sufficient license until revoked; but not a contract guarantying that the company should for 50 years be exempt from the police power of the state, notwithstanding its business might become a nuisance by reason of the growth of population around the place selected for its works; third, that the charter afforded the company no protection from the enforcement of the ordinance. The case of *Buffalo E. S. R. Co. v. Buffalo St. R. Co.*, 111 N. Y. 132, 19 N. E. 63, is directly in point upon this branch of the discussion. The contest in that case grew out of a contract between two street-railway corporations operating in the city of Buffalo. The contract provided, among other things, for the making of connections by each with the roads of the other "so long as it receives for the transportation of passengers the fare allowed on the 3d of May, 1872, and no longer"; each agreeing that it would charge the same rate that it was "permitted to charge by the statute in force, regulating the same on that day," and would make no changes in rates without the

company in Buffalo to charge more than five cents for each passenger, this being a sum less than that authorized by the statutes in force May 3, 1872. In obedience to this statute the defendant reduced its rates of fare to five cents, plaintiff claiming that such reduction was in violation of the contract. Upon these facts the court held that "the authority of the legislature in the exercise of its police powers cannot be limited or controlled by the action of a previous legislature, or by the provisions of contracts between individuals or corporations." As the charter under consideration in the case of *Fertilizing Co. v. Hyde Park*, supra, did not exempt the corporation from the police power of the state, although the exercise of that power in the manner attempted necessarily compelled the removal of its works to another location, and as neither the charter nor the contract between the rival street-car companies in the case of *Buffalo E. S. R. Co. v. Buffalo St. R. Co.*, supra, prevented the reduction of fares by the legislature, so our act of 1887, governing the distribution of water by ditch companies carrying water for hire, is binding upon the parties to this action, notwithstanding the agreement of March 22, 1873. The authority of the legislature in the premises is now so well settled that we may well rest content with the citations of a few of the many cases in which it has been upheld. *Granger Cases*, supra; *Beer Co. v. Massachusetts*, supra; *Shaking-Fund Cases*, supra; *Fertilizing Co. v. Hyde Park*, supra; *Buffalo E. S. R. Co. v. Buffalo St. R. Co.*, supra; *Bertholf v. O'Reilly*, 74 N. Y. 509; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682; *Richardson v. City of Boston*, 24 How. 188; *Tucker v. Ferguson*, 22 Wall 527; *West Wisconsin Ry. Co. v. Supervisors*, 98 U. S. 595. The statute does not affect the right of plaintiff in error to receive whatever water he may justly be entitled to under his contract, but where, as here, there is a controversy as to the amount of such water available for his use, he must bring his action to determine such right, and in no event can he be allowed to ignore the company's superintendent and its reasonable regulations, and, in violation of the statute, enlarge the outlet to his lateral ditch, and take water from the company's ditch at will. For the reasons given, the district court erred in overruling the demurrer to the defendant's answer and in refusing to restate the injunction upon the final hearing, and the judgment of the court of appeals is accordingly affirmed. Affirmed.

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#### THATCHER v. VALENTINE.

(Supreme Court of Colorado. Nov. 18, 1895.)  
ASSIGNMENT FOR BENEFIT OF CREDITORS — ATTACHING CREDITORS—PROCEDURE.

1. Sess. Laws 1885, p. 43, § 4, providing that in general assignments the assent of the

before notice of the assignment is recorded in the county in which the attached land is situated, a lien superior to the title of the assignee.

2. A creditor of an assignor for the benefit of creditors, attaching land, is an "incumbrancer," thereof, within the meaning of Sess. Laws 1885, p. 43, § 6, requiring notice of the assignment to be recorded in the county in which the land is situated, to give him constructive notice thereof.

3. Under Sess. Laws 1893, p. 64, providing that the assignee appointed under Act April 10, 1885, relating to assignments for the benefit of creditors, shall be deemed an officer of court, and prohibiting interference with the discharge of his duties as a contempt of court, the district court of the county in which the assignment is filed does not become possessed of land situated in another county, in which notice of the assignment has not been filed until after the lien of an attaching creditor had attached, so as to give it jurisdiction by summary proceedings to assail the judgment of the court having jurisdiction of the attachment suit.

**Appeal from district court, Arapahoe county.**

Petition in the matter of the assignment of M. J. McNamara, by J. A. Valentine, assignee of the estate of M. J. McNamara, against Mary E. Thatcher. From a judgment for petitioner, defendant appeals. Reversed.

On the 8th day of March, 1894, the appellee filed in the district court of Arapahoe county a petition entitled, "In the Matter of the Assignment of M. J. McNamara," and addressed to the honorable judges of that court, wherein it is alleged, in substance: That on the 18th day of July, 1893, M. J. McNamara, a resident of the county of Arapahoe, state of Colorado, made a general assignment, conveying to one M. M. Van Fleet, as assignee, all his property, of every kind and description, real, personal, and mixed, situate in the state of Colorado or elsewhere, for the benefit of his creditors. That said deed was recorded on the 18th day of July, 1893, in the office of the clerk and recorder of Arapahoe county, Colo. That afterwards the said Van Fleet neglected and failed to qualify as such assignee, and the petitioner was duly appointed assignee in his place, by an order of the district court of Arapahoe county, entered on or about the 29th day of July, 1893. That among the property conveyed by the said McNamara as above, by said deed of assignment, was the following: An undivided three-eighths interest in the certain lode mining claim known as the "Mary and Edith," an undivided three-eighths interest in a certain lode mining claim known as the "Jote Smith," and an undivided three-eighths interest in a certain other lode mining claim, known as the "Trueworthy," situate in the Roaring Fork mining district, Pitkin county, Colo. That on the 19th day of July, 1893, one Mary E. Thatcher, a resident of Pitkin county, Colo., brought suit in the district court of that county against M. J. McNamara to recover the sum of \$6,800. That in said suit she caused an attachment to be

described. That afterwards she obtained a judgment against the said M. J. McNamara in the district court of Pitkin county, and caused an execution to be issued to the sheriff of Pitkin county, who sold said property at sheriff's sale, under said execution, on the 20th day of September, 1893. That she became the purchaser at said sale, and the sheriff issued to her his certificate of sale of said property. That on the 21st day of October, 1893, the said certificate of purchase was recorded in the office of the county clerk and recorder of Pitkin county. Prayed that a summons issue, requiring said Mary E. Thatcher to appear and answer the petition, and that upon final hearing an order be entered directing and commanding her to release and forever discharge said property from her pretended claim, and that she be required to execute such a release as shall accomplish this purpose, both releasing the said title which she claimed by virtue of said sale, and releasing the said levy of attachment, and for an order decreeing that she holds no right or interest in said property by virtue of said writ of attachment or purchase by her of the property mentioned; that she be punished for contempt, etc. That afterwards, and on the 9th day of March, 1894, summons was duly served, and on the 23d day of April, 1894, she filed her motion to strike the petition from the files because the same was unauthorized, and the court had no jurisdiction to entertain the same. Said motion being overruled, afterwards, on the 9th day of August, 1894, she filed her demurrer, setting forth several grounds, attacking the sufficiency of the petition and the jurisdiction of the district court of Arapahoe county, or the honorable judges thereof, to pass upon or decide the questions presented, which demurrer was overruled. Thereupon she filed her answer, wherein she substantially admits the facts alleged in the petition, and alleges, inter alia, that the only notice of said assignment ever filed by said M. M. Van Fleet with the clerk and recorder of Pitkin county, Colo., the county wherein said real estate is situated, was not filed until 5 o'clock p. m. of the 24th day of July, 1893, and that the only notice of said assignment ever filed in the office of said clerk and recorder by the appellee, Valentine, was filed on September 2, 1893. Alleges that she commenced the said action against M. J. McNamara on the 18th day of July, 1893, and sued out said writ of attachment, and had the same levied upon said real estate, on the 19th day of July, 1893, without any notice or knowledge, of any kind, of the existence of the deed of assignment. Avers that the said McNamara was duly served with summons and the writ of attachment in that action, and that said Van Fleet and Valentine had actual notice of its pendency, and of said writ of attachment, and the levy of the same on



the property described in said petition; that on the — day of June, 1894, the time allowed by statute for the redemption of said property by said McNamara, or his judgment creditors, having passed without the same having been redeemed, the sheriff executed to her a sheriff's deed conveying said property to her in pursuance of said sale, which deed she caused to be recorded in the office of the clerk and recorder of Pitkin county, Colo. Other matters of defense were alleged in the answer, but, as they have no material bearing upon the questions that we regard as decisive of the case, we omit them from this statement. To this answer a demurrer was filed, and sustained. Mrs. Thatcher electing to stand upon her answer, judgment was entered in favor of appellee, adjudging him, as such assignee, to be the owner of the property described, free and clear from all liens in her favor by virtue of said attachment or sheriff's deed, and annulling and canceling said deed and the levy of execution and the writ of attachment upon the property, and decreeing that she had no right, title, or interest in said property adverse to the rights of appellee, and ordering her to release and forever discharge the said property from her pretended claim, and to execute a quitclaim deed of said property to said Valentine, as assignee of said M. J. McNamara, and adjudging her to pay the costs. To reverse this order and judgment she brings the case here on appeal.

J. W. Taylor and W. O'Brien, for appellant. A. B. Seaman and Hugh Butler, for appellee.

GODDARD, J. (after stating the facts). The facts appearing from the foregoing statement, in brief, are that McNamara, a resident of Arapahoe county, Colo., made, executed, and acknowledged a general deed of assignment for the benefit of his creditors, which was filed for record in the office of the clerk and recorder of said county on the 18th day of July, 1893. On the same day Mrs. Mary E. Thatcher, a resident of Pitkin county, brought her action in the district court of that county against said McNamara, and sued out a writ of attachment, which was levied on the 19th day of July, 1893, upon certain real property standing in his name on the records of that county. By subsequent proceedings she recovered a judgment against McNamara, caused the attached property to be sold under execution, purchased the property at such sale, and ultimately obtained a sheriff's deed to the same. At the time the action was brought and the attachment levied, no notice of the assignment was filed in Pitkin county, nor had she actual notice of such assignment. Under this state of facts, did she obtain a valid lien upon the real estate, or did the assignee, by virtue of the deed of assignment recorded in Arapahoe county, become vested with the title to

said property, clear and free of any such incumbrance? And, second, can the rights of these respective parties to the land in question be determined by the district court of Arapahoe county in the summary mode adopted by the assignee in this case?

The solution of the first question depends upon the meaning and effect of the following provisions of our statutes regulating general assignments for the benefit of creditors (Sess. Laws 1885, p. 43):

"Section 1. Any person, copartnership or corporation may make a general assignment of all her, his or its property for the benefit of the creditors of such assignor, by deed duly acknowledged which, when filed for record in the office of the clerk and recorder of the county where the assignor resides \* \* \* shall vest in the assignee the title to all the property, real and personal, or either real or personal of the assignor, in trust, for the use and benefit of such creditors."

"Sec. 4. In case of the assignment of property for the benefit of all the creditors of the assignor, the assent of the creditors shall be presumed."

"Sec. 6. Where real property, or any interest therein, is, by such deed, conveyed to the assignee, the assignee shall forthwith file with the clerk and recorder of each county where the real estate is situated, a notice of the assignment, containing the names of the assignor and assignee, the date of the deed of assignment, when and where recorded, and a description of the property in that county affected thereby, and the same shall be constructive notice to a purchaser or incumbrancer of the transfer of the property in said county, described in such notice."

And Sess. Laws 1893, p. 64:

"Section 1. That an assignee for the benefit of creditors appointed and qualified under and in pursuance of an act entitled 'An act in relation to assignments for the benefit of creditors, and to repeal acts inconsistent therewith,' approved April 10th, 1885, shall be held and deemed to be an officer of court. And any interference with the said assignee in the discharge of his duties shall be deemed contempt of court, and no suit against the said assignee in relation to or concerning the property assigned, shall be begun or instituted against the said assignee without permission of the district court within and for the county wherein the assignment is made first had and obtained."

It is contended by counsel for appellee that, by force of section 1, the title to the property in question becoming vested in the assignee, as an officer of the court, upon filing the deed of assignment for record in the county of Arapahoe, all of the assigned property, wherever situated, was from that time in the custody of the district court of that county; and the assignment being for the benefit of all the creditors of the assignor, by section 4 appellant's assent to such

assignment being conclusively presumed, she was estopped from acquiring a valid attachment lien upon the assigned property, notwithstanding the notice required by section 6 was not recorded in Pitkin county prior to its levy. In other words, that the want of such notice protects only purchasers and incumbrancers who become such through the fraudulent act of the assignor, and cannot be invoked for the protection of a creditor who, without actual notice of the assignment, levies an otherwise valid attachment upon the assigned property. Whether the possession of the assigned property, situated in the county where the deed of assignment is recorded, passes into the custody of the court upon the recording of the deed, it is unnecessary to decide, since, by virtue of the provisions of section 6, the property situated in other counties, notwithstanding the title is vested in the assignee, is subject to sale and incumbrance until the notice therein prescribed is filed with the clerk and recorder of such counties. It conclusively follows, therefore, that the mere vesting of title in the assignee, as to such property, does not, *ipso facto*, place it in *custodia legis*. The deed of the assignor, like the deed of any grantor, conveys the legal title to the property, and would, but for the statute, vest such title in the assignee, upon its delivery. Therefore the statute, in making its record essential to vest title, as well as to constitute constructive notice, gives it the same and no more force than any other deed would have, when recorded in the county wherein the real estate is situated. And to obviate the necessity of recording the deed in counties wherein real property assigned is situated, other than the county of assignor's residence, section 6 provides, in lieu thereof, that notice of the assignment shall be filed in such counties, which shall be constructive notice of the transfer of the property therein described; and since the filing of such notice is necessary to give constructive notice to innocent purchasers and incumbrancers, and to protect the title of the assignee against them, although it vested in him upon the recording of the deed in the county of assignor's residence, the effect sought to be given to the mere vesting of the title, as against an attaching creditor, does not follow, unless his exclusion from the protection of section 6 rests solely upon the fact that he is conclusively presumed to assent to the assignment. That an attaching creditor is an incumbrancer is conceded by counsel for appellee. Does the presumption of his assent to the assignment estop him from acquiring a valid incumbrance upon the assigned property, after the deed of assignment is recorded in the county of assignor's residence, and before the notice provided in section 6 is filed in the county wherein such property is situated? We think, clearly not. The presumption of assent contemplated in section 4 obtains only in cases

where no affirmative act on the part of the creditor evidences an intention to repudiate, or not to assent to, the assignment. It is a *prima facie* presumption, merely, that may be overcome by evidence to the contrary.

In the case of *Spangler v. West*, 7 Colo. App. —, 43 Pac. 905, recently decided in the court of appeals of this state, this identical question was presented; and upon a thorough consideration of section 4, in connection with other provisions of the statute, it is held that the presumption of assent on the part of a creditor contemplated in that section is not conclusive, but exists merely in the absence of evidence to the contrary, and that a creditor was not estopped by any such presumed assent from acquiring a lien upon the assigned property. In the reasoning of that opinion upon this subject we fully concur, and accept, as a correct interpretation of the meaning of the foregoing provisions of our assignment act, the conclusion there reached, that the word "incumbrancer" is employed in section 6 "in its broad and general sense, and embraces every class of incumbrancers and every class of incumbrances. A lien or charge upon land, which binds it for the payment of a debt, is an incumbrance, and the holder of the lien is an incumbrancer. The incumbrance may be created by contract, or it may be acquired in pursuance of some statute. The lien of an attaching creditor is an incumbrance equally with a mortgage." *Spangler v. West*, *supra*, and cases cited. The controversy in that case grew out of a state of facts identical with the facts appearing in this record, but the manner of procedure therein was different, in this: that the assignee intervened in the attachment suit, thereby presenting the question of the validity or the priority of the lien to the court having jurisdiction of the attachment proceedings, while in this case no appearance was entered in the action pending in the district court of Pitkin county, either by answer or intervention; but after the action therein had proceeded to judgment, and the attached property sold thereunder, appellee filed his petition in the district court of Arapahoe county, asking that the attachment lien and the sale on execution be set aside and held for naught, and the title acquired by appellant be adjudged invalid, and that she be compelled to release all claim to said property. Thus we have presented the question whether the district court of Arapahoe county had jurisdiction to determine, in this summary proceeding, the rights of the respective parties to the land in dispute. In support of the jurisdiction, we are cited to numerous adjudged cases in the supreme court of Illinois, and some other states, under similar statutes. Among them, and perhaps the leading case on the subject, is that of *Hanchett v. Waterbury*, 115 Ill. 220, 32 N. E. 194, wherein it is held that their assignment act—very similar in its provisions to our own—was essentially, in its framework and detail, a general

insolvent law, that conferred a special jurisdiction upon the county courts over the subject-matter of assignments, and the court say: "To give the statute practical effect in all its provisions, we feel constrained to hold, as we do, that upon the making, filing, and recording of the assignment, with the lists and schedules annexed, the county court wherein such assignment is filed and recorded, in its character as an insolvent debtor's court, by operation of law, at once acquires jurisdiction over, and becomes possessed of, all the property and estate embraced within the assignment, subject, of course, to all prior liens and just claims that third parties may have to or upon it. \* \* \* And all persons claiming an interest in or upon the fund are subject, alike, to the summary jurisdiction of the court." In that case *Waterbury*, as assignee, was in possession of the assigned property; and the county court, upon petition of the assignee, entered an *ex parte* order enjoining and restraining the sheriff from executing a writ of replevin therefor. The doctrine announced in this case has been uniformly followed in that state, and the jurisdiction of the county court upheld, in all cases where the assigned property was in the possession of the assignee, or where the county court had obtained jurisdiction over it at the time of the attempted interference therewith. On the other hand, where the property that is the subject of contention had not been reduced to the possession of the assignee, or brought within the jurisdiction of the county court, at the time the lien attached, this summary jurisdiction has been denied. *Preston v. Spaulding*, 120 Ill. 208, 10 N. E. 903. In the latter case the court, referring to the foregoing cases, say: "These cases were intended to hold, and properly, that when a voluntary assignment is made, under the statute, and the property assigned has passed into the possession of the assignee, such property is thereby brought within the jurisdiction and under the administrative control of the county court, and that the county court is vested with ample power and jurisdiction \* \* \* to direct and control the disposition to be made of such property under the statute, and, in doing so, to adjudicate upon the conflicting legal rights of claimants therefor, arising in that court. But these cases are not to be understood as holding that the county court is, by this voluntary assignment act, invested with general chancery powers and jurisdiction,—such, for example, as was invoked by complainant's bill in this case, or as would be invoked on bill for specific performance, for removing cloud from title, and the like, although the property assigned might be therein involved; for, in respect of matters of a purely equitable character, specially cognizable in courts of equity,

resort must still be had to the courts of general chancery jurisdiction." To the same effect is the case of *Ide v. Sayer*, 30 Ill. App. 210. It was also held in the case of *Yates v. Dodge*, 123 Ill. 50, 13 N. E. 847, that where a writ of attachment was levied on real estate on November 6, 1885, at 10:20 a. m., and a deed of assignment for the benefit of creditors made by the attachment debtor was filed in the county clerk's office some three hours later, but not recorded in the recorder's office until May 4, 1886, the attachment took precedence over the deed of assignment, and the assignee took the real property subject to the attachment lien. In the case before us, the attachment lien having been acquired prior to the filing of the notice of assignment in Pitkin county, it was a valid one, and took precedence over the deed of assignment; and thus, being a valid prior lien, the case would fall within the rule announced in the latter line of decisions. Certainly, under the circumstances disclosed in this record, the district court of Pitkin county having first acquired jurisdiction of the subject-matter in controversy, the district court of Arapahoe county had no authority to interfere with the action of that court, or to cancel or set aside its process in this summary way, or at all, under the familiar rule that, when two courts have concurrent jurisdiction of the same subject-matter, the court first acquiring jurisdiction will retain it to the exclusion of the other. In the case of *Manufacturing Co. v. Caldwell*, 136 Ill. 163, 28 N. E. 590, a voluntary assignment was consummated after the levy of an execution and certain writs of attachment in favor of several of the creditors. The court, in passing upon the right of the county court to interfere under such circumstances, say: "A voluntary assignment by an insolvent debtor, after a valid levy of an execution or writ of attachment on all his personal property, and while the sheriff has the same in his custody, necessarily fails to confer jurisdiction over such property upon the county court; nor will that court have power to interfere with the execution of process of other courts of competent jurisdiction." Our conclusion, therefore, is that, by the levy of the attachment prior to the filing of the notice of assignment in Pitkin county, appellant acquired a valid lien, and that the property in dispute passed to the assignee subject to such lien; and, the district court of Pitkin county having first acquired jurisdiction over the subject-matter, its judgment is conclusive, and the district court of Arapahoe county had no power or authority to entertain this proceeding, or to render the judgment complained of. The judgment will therefore be reversed, and the cause remanded, with directions to the district court to dismiss the proceeding. Reversed.

(Supreme Court of Colorado. Feb. 17, 1896.)

EQUITY—RESCISSION OF CONTRACT—CONSTRUCTION  
—CONDITION PRECEDENT—CONVEYANCE.

Plaintiffs conveyed to defendant, a town-site company, land adjoining its town site, receiving in consideration \$100 and a bond binding defendant to survey, grade, and improve the streets on said land, and make other valuable improvements thereon, and to commence within thirty days to survey and plat so much thereof as it deemed practicable, and deed to plaintiffs one-tenth of the lots, to be selected by lot. Defendant surveyed and platted a portion of the land, some of the lots, however, extending on to its own land, and proposed the division of the lots, which plaintiffs refused. Plaintiffs sued for rescission of the contract, on the grounds of fraud and failure of consideration, claiming that the grading of streets and making of other improvements were conditions precedent to the division of the lots, and that the manner of survey made a fair division impossible. Defendant averred its readiness to make the improvements as rapidly as needed, and that it had made contracts for such work, which contracts were shown at the trial to have been in part executed. *Held*, that the grading and making of other improvements called for were not conditions precedent to the division of the lots, nor was the manner of survey such as to prevent unfair division, and that, it appearing that defendant had expended a considerable sum in carrying out its contract, and that the consideration which plaintiffs would receive for the conveyance was not inadequate, a rescission would not be decreed.

Appeal from court of appeals.

Action by James Boyes and Samuel S. Hunter against the Green Mountain Falls Town & Improvement Company. There was a judgment for defendant in the district court of El Paso county, which was reversed by the court of appeals. 33 Pac. 77. From the judgment there, defendant appeals. Reversed.

On August 19, 1889, the appellees filed their complaint in the district court of El Paso county; wherein it is alleged, in substance, that on December 26, 1888, Boyes was induced, by false and fraudulent representations, to convey by warranty deed to the Green Mountain Falls Town & Improvement Company 160 acres of land, situate in El Paso county, Colo.; that said land was of the value of \$7,000; that the company owned land south and west of this quarter section, which constituted the town site known as "Green Mountain Falls"; that, in consideration of such conveyance, the company agreed to pay \$100 in cash, and build a \$75,000 hotel on the property, west of and adjoining said land, during the summer of 1889, that they would grade the streets, and make other valuable improvements, which would make the property very valuable, and that they would reconvey to him every tenth lot; that, relying upon the truth of these representations, he made the conveyance to the company; that the company had done nothing towards performing its contract except to pay the \$100, and survey the land into lots in such a way as to make a division

of the company other than that conveyed; that the company had made a written demand for a division, and threatened to sell the property; thereupon Boyes tendered the \$100, and demanded a rescission of the contract; prays for a cancellation of the deed, etc. The defendant company answers, denying all allegations of fraud; denies that it agreed to build an hotel which would cost \$75,000, or of any description whatever; and avers that the only considerations for said deed, except the payment of the \$100 in cash, which had been paid, were expressed in the written contract executed at the time the deed was delivered, which was as follows:

"Know all men by these presents, that the Green Mountain Falls Town and Improvement Company, a corporation with its principal office in the city of Colorado Springs, county of El Paso, and state of Colorado, is held and firmly bound unto James Boyes, of the county and state aforesaid, in the penal sum of five hundred dollars (\$500) lawful money of the United States, for the payment of which sum, well and truly to be made to the said James Boyes, the said company binds itself and its successors. Sealed with its corporate seal, and dated this 26th day of December, A. D. 1888. The Green Mountain Falls Town and Improvement Co. F. E. Dow, President. I. J. Woodworth, as Secretary.

"The condition of the above obligation is such that whereas, the said James Boyes has executed a warranty deed, running to the said Green Mountain Falls Town and Improvement Company, of the following property, to wit: The southwest quarter ( $\frac{1}{4}$ ) of the southwest quarter ( $\frac{1}{4}$ ) of section five (5), and the north one-half ( $\frac{1}{2}$ ) and the southwest quarter ( $\frac{1}{4}$ ) of the northwest quarter ( $\frac{1}{4}$ ) of section (8), all in township No. thirteen (13), range No. sixty-eight (68) west, situate in the county of El Paso, and state of Colorado: Now, therefore, if said company shall survey, grade, and improve the streets on said lands, make other valuable improvements thereon, and commence, within thirty days of the date hereof, to survey into lots and plat said lands, or so much thereof as said company may deem practicable, and deed to said Boyes one-tenth of said lots so platted, to be divided as follows, to wit, said Boyes to draw one of said lots, and said company to draw nine of said lots, said drawing to be continued until all of said lots platted are drawn, also to pay said Boyes one-tenth of the net proceeds from the sale of said lands not surveyed and platted by said company, and to allow him (the said Boyes) to retain the house now occupied by him, then this obligation to be null and void; otherwise, of full force and effect. It is distinctly understood and agreed by said Boyes that the penalty and conditions of the above obligations are subject to the validity

and sufficiency of the above warranty deed, above referred to."

—Averred that it did, within 30 days of the execution of said contract, commence surveying and platting said land into lots, and so much of said land as was deemed practicable was platted into town lots, to the number of about 150, and such plat was duly recorded on July 2, 1889; averred its willingness and offer to make conveyance of the lots, and the refusal of Boyes to accept the same; that no time was specified as to when the grading and other improvements should be made, but it was the understanding between the parties that this part of the contract should be performed when needed, and that the other improvement contemplated was the bringing of water upon the land for the use of the inhabitants, when the same should be needed; that it had entered into contract with parties for water pipes through the streets, to be completed June 1, 1890, and was then negotiating with parties to grade the streets. To this answer a replication was filed, which pleaded the statute of frauds to the written contract set forth in the answer. The cause was tried to the court, which found the issues joined in favor of the defendant, and rendered a decree dismissing the plaintiffs' complaint for want of equity, and decreed performance on the part of Boyes in accordance with the prayer of defendant's cross complaint. On appeal to the court of appeals, the judgment of the court below was reversed. 33 Pac. 77. From that judgment the defendant company prosecutes this appeal.

T. A. McMorris, for appellant.

GODDARD, J. (after stating the facts). This action was brought to cancel a conveyance of a quarter section of land alleged to have been procured by fraud. The averments of the complaint relied on as constituting the ground for relief are to the effect that the officers of the company made false representations as to certain improvements that the company proposed to make; that, relying on the truth of these statements, and believing that by reason of such improvements the land would become greatly enhanced in value, Boyes was induced to convey the entire tract to the company, in consideration that it would plat so much thereof into town lots as was practicable, and deed to him one-tenth of the lots so platted, and pay him one-tenth of the net proceeds derived from the sale of the land not surveyed and platted. It appears from the evidence that appellant owned land which constituted the town site known as "Green Mountain Falls," adjacent to the land conveyed, and, desiring to obtain the latter as an addition to the town site, opened negotiations to that end with the appellee Boyes, through Charles Sprague, its general manager, several days before concluding the ar-

rangements under which it purchased. On December 26, 1888, these negotiations resulted in a conveyance of the land by Boyes to the company for a cash payment of \$100 and the further considerations expressed in the written agreement above set forth. There is no substantial disagreement between the parties as to the consideration for the conveyance, except as to the building of the hotel. This the company denies constituted a part of the consideration. While the testimony of the respective parties on this point is conflicting, its clear preponderance supports the company's contention. The written contract makes no mention of the building of an hotel; and that it was not contemplated as among the other valuable improvements to be made, but that such improvements were to consist of waterworks, is shown by the clear weight of evidence. The obligations it assumed are specified in the contract, and are as follows: "Now, therefore, if said company shall survey, grade, and improve the streets on said lands, make other valuable improvements thereon, and commence, within thirty days of the date hereof, to survey into lots and plat said lands, or so much thereof as said company may deem practicable, and deed to said Boyes one-tenth of said lots so platted, to be divided as follows, to wit," etc. It commenced within the 30 days to survey into lots and plat the land, and completed that work, and caused a plat thereof to be duly recorded on July 2, 1889. While it is true, as stated in the opinion of the court of appeals, that a fractional part of some of the lots as platted lapped over on the land owned by appellant, it does not follow that the lots so platted were not in conformity to the contract, or that such fact rendered the division provided for impracticable. To the contrary, it is shown that, owing to the formation of the ground, it was impossible to plat it in any other way, and that Boyes assented to the lots being platted in that manner. Mr. Dow's testimony on this point is as follows: "Q. You may state about the time that you commenced platting this property, or at any time during the platting or afterwards, you had any conversation with Mr. Boyes with reference to platting portions of your land in with this. A. Yes, sir. Mr. Boyes came to me, and said he didn't like the way we were platting it. I asked him why. He said, 'Some of the lots will be on your property, and some on the tract that I have sold you.' I told him it was impossible to plat it any other way; on account of the formation of the ground, we had to have the lots lap over; but told him, wherever they lapped a little on ours, he could choose them as if they were all on his, that we would make it perfectly satisfactory to him. Then he said, 'That is all right.' Those are the exact words he used. I told him of course we had to do that in platting. Q. Acting upon that, did you plat them? A. Yes, sir." It is not

geous to appellees, since it gave ground additional to the amount they were entitled to out of the tract conveyed. Furthermore, the objection to the manner in which the lots were platted is an afterthought, and was not relied on by Boyes as a reason for refusing to select the lots, but his objection was put exclusively upon the ground that the lots were not to be divided until the other improvements were made. He testifies: "Q. State what conversation you had with Mr. Dow, and when it was. A. After Mr. Sprague came up to divide the lots, I saw Mr. Dow the next evening, and he wanted to know what was the reason I had not divided the lots. I told him they had not fulfilled their contract. He said they had not agreed to make the improvements before we divided the lots. I told him I had not agreed to divide the lots until they were made. \* \* \* Q. Did he say anything concerning the grading of the streets? A. He said they were not under any obligations to grade the streets then. Q. Have they ever done any grading on these streets at all? A. No, sir. Q. Have they ever built that hotel? A. No, sir. Q. Have they done any other improvement on them? A. No improvements whatever, only the survey and what waterworks they have laid in there this winter."

The substantial controversy between the parties, and the sole ground upon which Boyes justified his refusal to divide the lots, was that at that time the streets were not graded and other improvements made. The time the grading was to be done and other improvements made not being specified in the written contract, we cannot agree with the learned writer of the opinion of the court of appeals that, because those things were not then done, it constituted such a failure to perform as worked an absolute failure of consideration, or that its avowal of willingness and the intention to lay out and grade the streets when they should be needed was of no value. Nor do we find any evidence in the case that justifies the assumption that appellant had failed to realize upon the enterprise, was unable to comply with the contract entered into, and upon the technical interpretation of which it was attempting to escape. Certainly, such a conclusion is unjustifiable in the light of the testimony and the acts of appellant evidencing its intention to prosecute such work in good faith. It had, within the time agreed upon, surveyed and platted so much of the land as was practicable, into lots, at an approximate cost of \$1,000, and, at the time of the trial of the cause, had let contracts for grading the streets and putting in the waterworks; thus refuting, by its acts as well as by the avowal of its intentions, the claim of appellees that, to induce Boyes to execute the deed, it prom-

ises the time for the commencement of the survey and platting of the lots, but does not limit the time in which the grading and other improvements should be entered upon or completed.

Upon an examination of all the testimony, we are unable to find any support for the conclusion that it was the understanding and intention of the parties that such work was to be done before a division of the lots should be made or until it was needed, or that Boyes was induced by any false representations to execute the conveyance in question, or any failure on the part of the company to conform to the letter and spirit of its agreement.

We think undue weight is given by the court of appeals to the alleged inadequacy of the consideration for the conveyance of the land. While the deed includes 160 acres, it is shown that only one 40 was susceptible of being platted into town lots, and but 3 or 4 acres of that could be plowed, the balance consisting of precipitous mountain cliffs, and valuable only for the purposes to which appellant has devoted it; and, although it is alleged that at the time of the conveyance it was worth \$7,000, the evidence is substantially uncontradicted that its value then did not exceed \$1,000, that being the most liberal estimate placed upon it by any witness except the plaintiff and the witness Florence, who shows by his examination that he was incompetent to estimate its value. Aside from these two witnesses, those testifying to the value at the time of the conveyance were Mr. Sprague, who put its value at \$1,000; Mr. Dow, at \$500; Mr. Woodworth, at \$5 or \$6 per acre; Mr. Nordhoff, at \$700 to \$800; Mr. Riddick, at \$500 to \$1,000; Mr. Garland, at \$500 to \$1,000; Mr. Wright, at \$400 to \$500. And, by reason of the improvements made thereon by appellant, they fixed the value at the time of the trial at from \$8,000 to \$10,000; thus showing that, by the expenditure and the improvements made and contracted for, the value of the land was greatly enhanced, and was not in the same condition as at the time of the conveyance. It is apparent, therefore, that the anticipated benefits which constituted the main consideration that induced Boyes to execute the conveyance were substantially realized, and his refusal to select the lots cannot be justified under the well-established facts of the case; and the district court properly dismissed the complaint "for want of equity," and granted the relief prayed in appellant's cross complaint. It follows, therefore, that the judgment of the court of appeals must be reversed, and the cause remanded, with directions to affirm the judgment of the district court. Reversed.

## TYNON v. DESPAIN et al.

(Supreme Court of Colorado. Feb. 17, 1896.)

IRRIGATION—TRIAL—LICENSE TO CONSTRUCT DITCH—RIGHT OF WAY OVER GOVERNMENT LANDS—PACIFIC RAILROAD GRANT—GRANTOR FROM PATENTEE.

1. In an action to recover for injuries to an irrigation ditch by its being broken and the water diverted by the owner of land over which it passed, the defendant cannot, under a general denial of plaintiff's right to maintain the ditch, introduce evidence of its enlargement, or of its want of uniformity of grade.

2. A parol license to construct and maintain an irrigating ditch over the lands of the licensor, when executed by the construction of the ditch, is not revocable.

3. Rev. St. U. S. 1873-74, § 2339, enacted in 1866, providing that whenever by priority of possession water rights have vested and accrued under local customs, laws, and decisions of courts, such rights shall be maintained and protected, and right of way for canals and ditches for such purposes is acknowledged and confirmed, together with the amendment of 1870 (Rev. St. U. S. § 2340), providing that all patents granted or pre-emptions or homesteads allowed shall be subject to any water rights or rights to ditches acquired under or recognized by section 2339, operate as a grant of the right of way for the construction of irrigating canals or ditches over any lands owned by the United States and unoccupied in 1866, whenever the right to build such ditch should accrue under the local customs, laws, or decisions of courts, and such right continued so long as title remained in the government, subject only to payment of damages to the possessory right of the occupying claimant, stipulated for in a proviso of said section 2339.

4. Rev. St. U. S. 1873-74, §§ 2339, 2340, are a recognition of the legality of water rights given by local customs and laws, and the lands granted to the Pacific railroads continued subject to the rights and easements given by such customs and laws, including right of way for irrigating ditches, such rights being embraced within the reservation of "other lawful claims" contained in the act of July 2, 1864 (13 Stat. 356), subject to which said grants were made.

5. Where an irrigating ditch is constructed over lands while the title thereto is in the United States, and the occupant, whose possession afterwards ripens into a patent, conveys the lands, his grantor takes them subject to the easement of the ditch, although no reservation is made in his deed.

Appeal from district court, Jefferson county.

Action by Benjamin Despain and others against James Tynon. Judgment for plaintiffs, and defendant appeals. Affirmed.

To this action, as originally instituted, there was but one party plaintiff, who sued in his own behalf and for the benefit of all others interested with him. Before the issues were made up, however, those jointly interested were made, by order of the court, parties plaintiff. The averments of the complaint, as the action was thus tried, are to the effect that the plaintiffs were the joint owners and in possession of the Despain irrigating ditch, situate in the county of Jefferson, which was constructed in the year 1874, and since that time has been continuously used by plaintiffs for the purpose of irrigating their lands; that in the year 1890, in the spring season of the year, and while

the crops upon the lands of plaintiffs were needing water, the defendant broke down a portion of the ditch, placed therein a box which allowed the water to escape, and so interfered therewith as to cause the water which the ditch otherwise would have carried to overflow and waste over the adjoining lands, and prevented the full and sufficient flow of the water therein to irrigate the lands of the plaintiffs. The injury to plaintiffs' crops and the ditch, as it is said, is \$5,000. To the complaint an answer was filed, containing: First. A general denial. Second. A defense interposed by way of counterclaim, wherein it is alleged that the defendant is the owner and in possession of certain lands in Jefferson county over which the ditch in question was built; that while the defendant was the owner and in possession the plaintiffs forcibly and against his will entered upon the lands and constructed the ditch, and since that time have forcibly and against his will operated and maintained the same, to his injury; and that plaintiffs have repeatedly, during the six years then last past, forcibly and against the will of the defendant broken into and entered upon defendant's lands, and enlarged the ditch, and interfered with and obstructed defendant's flumes and ditches, and otherwise damaged him, and willfully, maliciously, and riotously torn down and removed from their ditch a bridge which the defendant, as was his right, had erected over the said ditch, and upon his own premises, for his own convenience. It is further alleged that the ditch was without any proper or uniform grade, and by reason of its maintenance upon the premises, and the aforesaid willful and forcible acts of the plaintiffs, the defendant has sustained damages in the sum of \$10,000, judgment for which he prays. To this answer there was a replication denying such affirmative matters, and by a supplemental replication there are three separate replies to the defenses interposed, the first of which is a plea of the statute of limitations; the second, an equitable estoppel; the third, a plea of adverse possession. A demurrer to such new matters, set up in the replication on the ground that they were insufficient to constitute a reply to the affirmative matters set up in the answer, was overruled by the court. Upon the issues thus joined there was a trial to the court before a jury, which returned a verdict in favor of the plaintiffs, assessing their damages at \$15. The court refused to submit to the jury the issue as to damages to the crops of the plaintiffs, because there was no joint ownership thereof,—this claim for such damages having been inserted in the complaint as originally framed by the single plaintiff,—but the only question submitted was as to the injury of the common property of the plaintiffs, viz. the ditch, by reason of the alleged wrongs of the defendant. A motion for a new trial was overruled by the court,

A H. De France, for appellant. Morrison, De Soto & Macon, for appellees.

CAMPBELL, J. (after stating the facts). The numerous errors assigned may be discussed under two general heads:

1. Many of the assignments pertain to rulings of the court excluding the offer of the defendant to prove the capacity of the ditch at the time of the alleged trespasses, and the lack of uniformity in its grade. This offer was predicated upon the notion that, if originally permission from the owners of the servient estates to build a ditch was obtained, this gave to its builders the right to maintain and operate a ditch only of the size originally constructed, and of a uniform and reasonable grade; but that if, thereafter, without express permission so to do, these ditch owners enlarged its capacity, or departed from a uniform grade, these acts could be set up as a defense to a cause of action by the ditch owners based upon injuries to the ditch committed by the defendant after such enlargement or change of grade was made. Such evidence is not proper under the general denial, for that denies the right of the plaintiffs to maintain any ditch upon the land. If, in any event, it could be material in this action, it was necessary for the defendant, by a proper affirmative defense, consisting of new matter, to set it up. Certainly it could be made available only by such a defense, expressly or impliedly admitting the original right to build the ditch, but denying the right to make an enlargement or change the grade, and showing that such changes resulted to the defendant's injury. As this was not done, the court properly excluded the evidence offered, particularly as there was not coupled with such offer a claim that such changes or enlargements added to the burdens of defendant, or in any way injured him.

For another reason this evidence was inadmissible. If the defendant might prevent plaintiffs from carrying in the ditch water beyond its original capacity, still he could not interfere with their right to use the ditch up to that limit; and when, as in this case, the same act of the defendant which was employed to restrict the quantity of water also infringed plaintiffs' right to use the ditch for any purpose, an action for such injury accrued to plaintiffs, which is not barred or abated by their act in enlarging the capacity of the ditch or changing its grade.

2. There remains for consideration the principal question in the case, about which all other assignments of error may be grouped. The title of the land now belonging to the defendant, across which plaintiffs claim this right of way for the ditch, was in the United States government at the time the ditch was constructed, in the year 1874. Then, also, all

pre-emption acts of congress, long after the year 1866, and were in the possession of the occupying claimants. Patents issued upon these entries in the years 1875 and 1887. The railroad tract was part of the grant of the federal government to the Denver Pacific Railway Company, which thereafter, and before patent, was acquired by the Union Pacific Railway Company, under the acts of congress approved respectively July 1, 1862, July 2, 1864, July 3, 1866, and March 3, 1869. These acts are commonly known as the "Pacific Railroad Acts." See 12 Stat. 489; 13 Stat. 356; 14 Stat. 79; 15 Stat. 324. To the building of the ditch across all of these lands except the railroad tract the occupying claimants gave their consent in consideration of the benefits which they considered the ditch for agricultural purposes would be to their holdings. No express consent was given for building across the railroad tract, for it was then unoccupied. No question, until about the time of the alleged trespasses of the defendant, has ever been raised by any of the owners or occupiers of these lands as to the plaintiffs' right to a ditch over the premises; and from the time of its construction until said trespasses the ditch was continuously maintained and operated by the plaintiffs with the knowledge, acquiescence, and consent of the defendant and his grantors; and defendant himself at one time expressly recognized the right of the owners of the ditch to maintain the same by an agreement in writing to pay, and by paying, five dollars for the use during one season of a certain quantity of water conveyed through the ditch for irrigating his land. It is true that at the trial an offer was made by the defendant to show that he objected to any enlargement of the ditch, and did not recognize that plaintiffs had any right to make any alteration therein, but this testimony as to enlargement, as we have elsewhere determined, was not pertinent to the issues. But, if it were, it would not be inconsistent with the fact of the defendant's recognition of the easement as originally existing. Before his purchase the defendant knew of the existence and use of this ditch by the plaintiffs, although in the deeds of conveyance to the defendant of the lands across which this ditch was built no exception of the right of way of the ditch was inserted, and no reference to the same, or reservation thereof, was made. It is now insisted that the plaintiffs have no right to any ditch across these lands, because the evidence discloses that the plaintiffs, at the time of its construction, had therefor only the verbal agreement, or parol license, of the defendant's grantors, and no permission at all as to the railroad tract. Thus are raised these propositions of law: First. May one acquire, for an irrigating ditch, the right of way across lands, the



legal title of which is in the United States, but which are then in the occupancy of another under entries upon said lands made since 1866, without the consent of such occupant, or with his verbal consent, given during his occupancy and before patent? Second. May such right, if it can thus be acquired, be asserted against the grantee of such patentee, whose deed contains no reservation of the right of way? It is contended by defendant that only by grant, or prescription presupposing a grant, can such an easement be created; that, plaintiffs relying only upon a parol license of defendant's grantors, that license, being revocable, was revoked when his grantors conveyed to him without reserving the easement. We are cited to the following cases as so deciding under our statute of frauds: *Yunker v. Nichols*, 1 Colo. 551, as modified or reversed by *Ward v. Farwell*, 6 Colo. 66; *Burnham v. Freeman*, 11 Colo. 601, 19 Pac. 761; *Stewart v. Stevens*, 10 Colo. 440, 15 Pac. 786. We might add *Openlander v. Ditch Co.*, 18 Colo. 142, 31 Pac. 854. Whatever the doctrine may be elsewhere, this court and the court of appeals have held that, unless the contract as set out in the complaint shows that it is in violation thereof, the statute of frauds must be specially pleaded in order to take advantage of it. *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233; *Hunt v. Hayt*, 10 Colo. 278, 15 Pac. 410; *Garbanati v. Fassbinder*, 15 Colo. 535, 25 Pac. 991. *Hamill v. Hall*, 4 Colo. App. 290, 35 Pac. 927. The complaint in this respect was good, and there was no pleading of the statute of frauds. Defendant's contention, therefore, might be dismissed upon this ground, but as the plaintiffs, in making out their case, saw fit to prove this oral agreement, or parol license, we shall assume that the defendant may still, if there is anything in it, press this point, and therefore we shall base our decision upon broader grounds. But the right to this easement does not rest upon a parol agreement between two private persons, or upon a parol license from one to the other, and so these authorities are not in point. If, however, the claim here rested upon such basis, it might be vindicated upon the principle that full performance of a parol contract respecting an interest in lands takes it out of the statute of frauds (*Schilling v. Rominger*, 4 Colo. 100), or that parol license to do an act upon the licensor's land is not revocable, in so far as it has been executed. *Washb. Easem.* (3d Ed.) p. 678 et seq.

In our opinion, the questions involved in this case have substantially been determined by the supreme court of the United States in the cases of *Jennison v. Kirk*, 98 U. S. 453, and *Broder v. Water Co.*, 101 U. S. 274. In 1866 congress passed an act, the ninth section of which contained this declaration: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are

recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed: provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." 14 Stat. 253; Rev. St. U. S. 1873-74, p. 432, § 2339. July 9, 1870, congress passed an act amendatory of the foregoing act of 1866, in which, *inter alia*, it was provided that "all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory." 16 Stat. 218, § 17; Rev. St. U. S. 1873-74, p. 432, § 2340. Ever since this date, all patents have contained reservations of ditches of the character designated. The entire section 9 was exhaustively discussed in *Jennison v. Kirk*, *supra*, and the section, without the proviso, was before the court in the case of *Broder v. Water Co.*, *supra*. In the latter case it was held that, as to ditches or canals in existence before or at the date of its passage, "this act was an unequivocal grant of the right of way, if it was no more. As the plaintiff's right to the lands patented to him and his brother commenced subsequently to this statute, he took the title subject to this right of way, and cannot now disturb it." It was further held that this section of the act "was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." As to lands granted under the provisions of the Pacific railroad acts, which are precisely the same in the case at bar as in that case, it was also held that under the reservation clause of the act of July 2, 1864, the railway company took the lands therein granted subject to "other lawful claims." Under the act of 1866 it was held that whenever the United States government had, by its conduct, recognized and encouraged such rights to the use of water for agricultural purposes, and the right of way for the construction of ditches therefor, as were recognized and acknowledged by the local customs, laws, and the decisions of the courts, the government was bound, even before the passage of the act, to protect those persons in whom such rights became vested. Under the Pacific railroad acts it was held that when such lawful claims, as the right of way for ditches for agricultural purposes had been so rec-

lawful claims are unaffected by the grant. That such rights as the use of water for irrigation and the right of way for ditches for carrying water have always been recognized by the local customs and laws of Colorado, needs at this day no argument or citation of authorities; but, if it did, we might refer to numerous decisions of this court to that effect. In *Jennison v. Kirk*, supra, in discussing the rights of owners of ditches constructed after this act of 1866 took effect, over lands also entered upon thereafter, Mr. Justice Field, who rendered the opinion of the court, said: "The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed. It simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States, by the section, said that whenever rights to the use of water by priority of possession had become vested and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them; and that the right of way for ditches and canals incident to such water rights, being recognized in the same manner, should be 'acknowledged and confirmed'; but where ditches subsequently constructed injured by their construction the possessions of others on the public domain, the owners of such ditches should be liable for the injuries sustained." It is clear, therefore, that the railway company took its lands subject to the burden of this easement. It is equally apparent that the act of 1866 operated as a grant to the owners of this ditch of a right of way across the lands of an occupying claimant, under the United States land laws, when the inception of the latter's rights accrued under filings made after the passage of the act. This right of way for the ditch, it is true, must be compensated for, if its construction injures the possession of those on the public domain; but so far as the right to burden the land with a ditch is concerned, by this act of congress the absolute right was granted by the government to build a ditch across it. When the occupant thereof voluntarily consents to the construction of a ditch, without exacting compensation, or permits it to be built in return for benefits to be enjoyed therefrom, the right by its owners to maintain and use the ditch as built is absolute against all persons.

It remains only to determine the rights, if any, of the defendant in this case. First it should be said that he knew that this ditch was built across these lands which he was about to buy, and he knew it before he bought, and parted with his money. Under the said acts of congress the grantees of the lands now owned by the defendant took them subject, by operation of law, to the

defendant; therefore, took these lands with the same burdens, and, as to the easement of this right of way, his estate is to the same extent servient as it was in the hands of his grantors. Such being our conclusion, it becomes unnecessary to pass upon the specifications relating to the counterclaim interposed by the defendant, for the acts of the plaintiffs set forth in this pleading and relied upon by the defendant as constituting causes of action in his favor were acts which the plaintiffs might lawfully do if they had a right of way across defendant's premises. Having determined this right in plaintiffs' favor, it follows that the defendant had no cause of action against the plaintiffs, even if (which we do not decide) one tort may be counterclaimed against another separate and distinct tort.

The foregoing considerations sufficiently dispose of all the questions involved. Indeed, upon the admitted facts, the court might well have directed the jury to find for the plaintiffs, submitting to them only the issue of the amount of damages for the injury to the ditch. The judgment should be affirmed, and it is so ordered. Affirmed.

#### WHITEHEAD v. JESSUP et al.

(Court of Appeals of Colorado. Feb. 10, 1896.)

APPEAL—EXCEPTION TO JUDGMENT—EQUITY—JURISDICTION—SETTING OFF JUDGMENTS—ATTORNEY'S LIEN.

1. Where the facts are agreed upon, and there is therefore no question of fact for the court to decide, an exception to the judgment is unnecessary.

2. The jurisdiction of courts of law to set off judgments against each other under the statute does not divest courts of equity of jurisdiction in the same cases.

3. Where plaintiff obtains judgment in an action for malicious prosecution, and defendant has an existing demand against him for a definite sum, which he cannot set off because the action is for a tort, one who takes an assignment of the judgment takes it subject to defendant's right of set-off on recovery by him of a judgment on his claim.

4. Where an attorney having a lien on a judgment takes an assignment thereof to himself, and claims the absolute ownership of the judgment, he relinquishes whatever equities he might have been entitled to by virtue of his lien.

Error to district court, Arapahoe county.

Bill by Andrew Whitehead against Alvin L. Jessup and Frederick A. Williams. Decree for defendants, and plaintiff brings error. Reversed.

Wells, Taylor & Taylor, for plaintiff in error. Frederick A. Williams, pro se.

THOMSON, J. This was a suit in equity for a set-off of mutual judgments. The defendants had judgment, and the plaintiff brings error. The cause was submitted to the trial court upon an agreed statement of

facts, substantially as follows: On March 20, 1888, the defendant Jessup sold to the plaintiff, Whitehead, all his shares of stock and his entire interest in the Colorado Insurance Company. In consideration of the sale, Whitehead paid Jessup \$375 in cash, and agreed to pay the further sum of \$625 upon arrangements being made to place Whitehead in possession of the office of the company. The shares of stock which were sold were in the hands of a third party, and the money was paid to Jessup upon his promise that he would not pay it over to the party holding the stock without obtaining possession of it, and that, having received it, he would immediately deliver it to Whitehead. Jessup paid the money, but failed to obtain the stock on account of some claim of title made by the holder. The stock never was delivered to Whitehead. Afterwards Whitehead instituted criminal proceedings against Jessup on account of the transaction, in which the defendant Williams was Jessup's attorney. The proceeding resulted in favor of Jessup, and he was discharged. He then commenced an action against Whitehead for malicious prosecution, and on June 6, 1888, recovered judgment for \$350. This suit was conducted for Jessup by Williams as his attorney. Whitehead appealed from the judgment to the supreme court, from which the case was transferred to this court, and the judgment was by this court affirmed at its April term, 1892. *Whitehead v. Jessup*, 2 Colo. App. 76, 29 Pac. 916. While the case was pending on appeal, Whitehead brought suit against Jessup to recover the money advanced on the sale, with interest, and on February 13, 1890, recovered judgment for \$441 and costs. At the time Jessup recovered his judgment, he was insolvent, and remained insolvent. On June 9, 1888, three days after the rendition of the judgment against Whitehead in the suit for malicious prosecution, Jessup assigned the judgment to the defendant Williams. Jessup was indebted to Williams for defending him in the criminal suit, and also for the management of the action against Whitehead for malicious prosecution. After the recovery of judgment in the latter case, Jessup inquired of Williams what was his charge for his services. Williams replied that they were worth at least one-fourth of the judgment. Williams at first "filed a lien" for his services, and an appeal being threatened by Whitehead, and Jessup alleging that he was unable to follow the case into the appellate court, it was agreed that he should assign the judgment absolutely to Williams in consideration of the former services of Williams, and in further consideration that he should defend the appeal and make the outlay of money necessary to the proper presentation of the case in Jessup's behalf in the appellate court. Accordingly, the judgment was assigned to Williams, and he paid Jessup's docket fee in the supreme court, prepared

Jessup's brief, and paid for printing it, and gave his personal attention to the case. There was no fraudulent intent in the assignment on the part of either Williams or Jessup, but Williams took it with full knowledge of the transaction between Whitehead and Jessup, although he did not know what course Whitehead would pursue in the assertion of his rights.

No exception was preserved to the judgment in this case, and it is contended on behalf of the defendants that for that reason it cannot be reviewed in this court. Where a cause has been tried without a jury, upon evidence heard, an exception to the judgment is necessary to enable the appellate court to review it upon the evidence; that is, to pass upon the question whether the evidence is sufficient to sustain it. *Phelps v. Spruance*, 1 Colo. 414; *Atkinson v. Atkinson*, 2 Colo. 381; *Patton v. Manufacturing Co.*, 3 Colo. 265; *Law v. Brinker*, 6 Colo. 555; *Poiré v. Transportation Co.*, 7 Colo. 589, 4 Pac. 1179. But this rule is applicable only where the facts are in dispute, and the correctness of the finding of the court upon the evidence is brought in question. Where the facts are agreed upon, and there is therefore no question of fact for the court to decide, an exception to the judgment is unnecessary. *Clayton v. Smith*, 1 Colo. 95; *George v. Tufts*, 5 Colo. 162. In *Lindsay v. Jackson*, 2 Paige, 581, Chancellor Walworth said, "There is a natural equity that cross demands should be offset against each other." The doctrine of set-off is of equitable origin, and was acted upon by courts of equity before the enactment of any statute permitting set-offs, in cases where one of the parties was insolvent, and the other was therefore unable otherwise to obtain satisfaction of his demand. After the enactment of the statute, courts of law, by virtue of their authority over their suitors, and proceeding upon the equity of the statute where the case was not within its letter, upon an application made for that purpose, directed the set-off of mutual judgments against each other. *Brown v. Hendrickson*, 39 N. J. Law, 239; *Simson v. Hart*, 14 Johns. 63. The jurisdiction of courts of law, derived from the statute, to set off judgments against each other, does not, however, divest courts of equity of their jurisdiction in such cases. Courts of law exercise the jurisdiction upon summary application, and courts of equity upon motion or upon bill filed. Where the proceeding is by an application to a court of law, or a motion to a court of equity, the right to a set-off does not exist, unless both demands have been reduced to judgment. A mere indebtedness cannot be set off against a judgment. But it is otherwise in equity, in an original proceeding instituted for the purpose, where there are grounds for the exercise of equitable jurisdiction. *Lindsay v. Jackson*, supra; *Gay v. Gay*, 10 Paige, 369; *Pignolet v. Geer*, 1 Rob. (N. Y.) 626; *Marshall v. Cooper*, 43 Md. 46; *Levy v. Stein-*

bach, Id. 212. In *Gay v. Gay*, the chancellor said: "The right to set off one judgment or decree against another, by a motion to this court, or by a summary application to the equitable powers of a court of law, only exists in those cases where the debts on both sides have been finally liquidated, by judgment or decree, before the assignment of either to a third party. \* \* \* Upon a bill filed in this court for a set-off, the right of set-off does not always depend upon the statute, nor upon the question whether both demands are liquidated by judgment or decree. But if an equitable right of set-off exists, while the parties have mutual demands against each other, because the debt due to the party claiming the set-off is so situated that it is impossible for him to obtain satisfaction of such debt by an ordinary suit at law or in equity, to recover the same, this court, upon a bill filed, will compel an equitable set-off of one debt against the other. And the insolvency of the party against whom the set-off is claimed is a sufficient ground for the exercise of the jurisdiction of a court of chancery in allowing a set-off in cases unprovided for by the statute, although the demands on both sides are not liquidated by judgment or decree, so as to authorize a set-off upon a summary application or by motion.

In this case, if there had been no assignment of the Jessup judgment to Williams, it is manifest that there would have been no impediment to the allowance of the set-off as prayed. On the other hand, if the record showed nothing further than the recovery of the judgments and the assignment to Williams, it is equally manifest that the set-off could not be allowed, because Williams was not a debtor of Whitehead, and Whitehead's judgment was recovered a considerable time after Williams became the owner of Jessup's judgment. But, before Jessup recovered his judgment, Whitehead had a cause of action against him for the money advanced upon the purchase. Jessup was unable to deliver what he had sold, and therefore owed Whitehead the amount which the latter had paid him on the faith of his title to the property, and his ability to make delivery of it. It is, perhaps, true that Whitehead might have brought his action for breach of the contract of sale, and recovered damages which would not necessarily be measured by the money advanced; but the only claim which he asserted was for the return of his money, with interest, and this claim was a subsisting demand against Jessup at the time the latter recovered his judgment. The demand was not in the nature of unliquidated damages; it was as definite and certain as if it had been evidenced by a promissory note. Whitehead could not make it a set-off in the suit by Jessup, because that suit was for a tort. A debt cannot be set off against a claim for damages growing out of a wrong. After

Jessup's judgment was recovered, Whitehead's demand was still unavailable at law as a set-off. It must be reduced to judgment first. But the moment Jessup recovered his judgment, Whitehead's right in equity to offset it by the debt owing to him attached. By reason of Jessup's insolvency, the demand of Whitehead could not be otherwise satisfied, and upon this ground equity would at that time have entertained jurisdiction to set off the demand against the judgment in so far as they would balance each other. It is the same demand, in the form of a judgment, that is involved in this suit. The position occupied by Williams in this case is that of assignee of the judgment. When he took the assignment, Whitehead's claim was a subsisting demand, and the judgment passed to Williams subject to Whitehead's right of set-off. In *Warner v. Whittaker*, 6 Mich. 133, the court said: "No rule is better settled than that the assignee of a chose in action takes it subject to all equities existing between the debtor and creditor. It is not necessary that the equities should exist at the inception of the debt or contract. It is sufficient that they exist prior to the assignment; for the reason of the rule is as applicable to one case as the other, which is that the assignee has it in his power to protect himself against them by inquiry of the debtor before the assignment." The following is from the opinion in *Brown v. Hendrickson*, *supra*: "Nor will the general doctrine be controverted that where, at the time of the assignment of a chose in action, an equitable right of set-off exists against the assignor, the assignee takes the chose in action subject to such right of set-off, even though he is without knowledge of its existence. No reason appears why the assignee of a judgment should be held to occupy a position superior to that of the assignee of any other chose in action, whereby he may take it free from existing equities, and withdraw it from the operation of a set-off, which, in the absence of such transfer, would, without question, be enforced." See, also, *Levy v. Steinbach*, *supra*. The question of notice, however, is not in this case, because Williams admits that he took the assignment with full knowledge of the transaction between Whitehead and Jessup.

Williams was Jessup's attorney in the litigation growing out of the transaction between Jessup and Whitehead, and the assignment was made in consideration of his services as attorney and his payment of the expenses rendered necessary by the appeal. It is suggested that these facts impress upon the assignment a character different from that which it would have if it had been made to a stranger, and that, by reason of Williams' relation to the litigation, there is some superior equity in him, entitling him to a consideration which could not be accorded to an ordinary assignee. Williams says that he first "filed a lien" on the judgment.

The statute makes no provision for filing a lien. It gives an attorney a lien for his services upon a judgment recovered by him, which, without the preliminary execution or filing of any paper, is valid against the judgment plaintiff; but the only method provided for the formal assertion of the lien is a suit for its enforcement. But if Williams had relied upon his lien, and followed it with the proper proceedings to make it available, we do not think it could have been asserted against Whitehead. In *Nicoll v. Nicoll*, 16 Wend. 445, it was decided that the lien of an attorney is not available against a party proceeding by a bill in chancery to obtain a set-off against a judgment, on a cross demand existing when the judgment was rendered. See, also, *Marshall v. Cooper*, supra, where the question is discussed. But the question of the effect of an attorney's lien is not before us. Williams never took the steps necessary to make his lien effective. He abandoned it by taking an assignment of the judgment to himself, and is now claiming, not a right to a certain amount out of the judgment in payment for his services, but the absolute ownership of the entire judgment. He has relinquished whatever equities he might have been entitled to by virtue of his lien, and his position in this proceeding is simply that of assignee. It appears that Williams paid the expenses necessary in defending against the appeal. He is entitled to have these refunded to him. It would be inequitable to embrace them in the set-off.

The judgment will be reversed, with instructions to decree the set-off so as to cancel Jessup's judgment, and apply its amount as a credit on the judgment of Whitehead, leaving the unpaid balance of the latter judgment to be collected by the ordinary legal methods, and providing for the payment by Whitehead of the costs expended by Williams on account of the appeal. Reversed.

# JENKS v. LEHMAN.

(Court of Appeals of Colorado. Feb. 10, 1896.)

EQUITABLE ISSUES—TRIAL BY JURY—EXTENSION OF TIME OF PAYMENT—CONSIDERATION—EVIDENCE—INSTRUCTION.

1. An action to recover the amount remaining due on a note after applying thereto the proceeds of sale under trust deed executed to secure the same, wherein defendant answered, alleging premature and fraudulent foreclosure, and praying that the trust deed be set aside, and that plaintiff be compelled to reconvey and accept what was due on the note, can be tried by jury only by submitting to them special inquiries; and a general verdict cannot be taken on all the matters involved.

2. A finding by the jury that the time to pay a certain note secured by trust deed was extended for a definite time should not be sustained where the only testimony in support thereof was that of a witness who stated that the time had been so extended, but on cross-examination testified that no specified time was mentioned, but that the agreement was to extend the time as long as the

interest was promptly paid, and the jury were instructed only that, if they should find that a new consideration for an extension moved between the parties, then the right to foreclose the trust deed was thereby suspended, but were not required to find an extension for a definite period.

3. An agreement to extend the time of payment of a note secured by trust deed so long as the maker of the note, or the person bound thereon, should pay the interest promptly, is not a valid contract.

Error to county court, Arapahoe county.

Action by James S. Jenks against Maggie Lehman to recover the balance due on a trust deed and note. From the judgment rendered, plaintiff brings error. Reversed.

Wm. T. Rogers, for plaintiff in error. J. A. Deweese (G. Q. Richmond, of counsel), for defendant in error.

BISSELL, J. This was an action to recover the balance due on a trust deed and note which had been given by W. H. McClure on some property in the city of Denver, in 1889. McClure had the title when he gave the trust deed, but, less than a year afterwards, conveyed it to Daniel Butt, who assumed and agreed to pay the incumbrance. In about six months, Butt conveyed to the appellee, Mrs. Lehman, subject to the trust deed, which the purchaser assumed and agreed to pay. The note was not paid at maturity; there was a default in the payment of interest; and Jenks, the holder of the paper, advertised and sold the property, and applied the proceeds, so far as might be, to the payment of the taxes and other charges on the property. This left a balance of nearly \$1,500, and Jenks sued Mrs. Lehman to recover this amount. Mrs. Lehman defended, and set up that after the expiration of the three years, which was the life of the note, Jenks, for a good and sufficient consideration, extended the time of payment for three years, and averred the note was not due when the suit was commenced. She likewise set up a fraudulent foreclosure and secret advertisement of the property in an obscure paper, for the purpose of wrongfully acquiring title. The sale was likewise attacked on the basis of a prearrangement for the absence of bidders, and set up the value of the property, and then she sought to have the trust deed set aside, and Jenks compelled to reconvey, and accept what was due on the note. The case thus had, under the pleadings, a double aspect. The affirmative relief which the defendant sought was of an equitable character, and could only be afforded by a decree canceling the sale, and setting aside the transaction whereby Jenks presumptively acquired title, and compelling a reconveyance of the property. This could not have been obtained as the result of a jury trial. The plaintiff's action was one at law. This the defendant contested, because of an alleged agreement for an extension of time, and on that issue the jury would have a right gen-

erally to pass, but they could not determine whether Mrs. Lehman was entitled to the relief which she prayed. With reference to the equitable defense, the only method of taking the advice of the jury was by special inquiries which the court might propound to them, taking their answers, if it chose, as a basis for its action. Usually, in matters of this description, the equitable side of the case is first tried, and then the law issue is subsequently submitted. There can be no objection, however, to the method of trial suggested, but a general verdict may not be taken on all of the matters involved. This is suggested because the case must go back for another trial, and the court can then determine what course it will pursue. There was a general verdict for the defendant, and she was permitted to go hence without day, but the court did not undertake to dispose of the issues which she tendered. This might not disturb the judgment, as the appellant was not harmed thereby; but, in view of the succeeding trial, we are bound to suggest these difficulties.

Two questions are presented by counsel in their briefs. One relates to the character of the consideration which she claimed to have paid for the extension, and the other to what is stated concerning the agreement for the extension of time. We are not largely concerned with the first, because, whether it be or be not true that the payment of interest in advance will be an adequate consideration, and deemed sufficient to support an agreement for an extension of time, there was no evidence of the making of any such agreement. We cannot exactly understand how the jury ever arrived at the verdict, but we assume it must have been because of the troublesome times through which the country had passed just prior to the trial of the case. We should not disturb the verdict, but would accept it as conclusive according to our usual rule, and take Lehman's statement of the extension to the 5th of December, 1895, as adequately supported by the verdict, if the record contained any other evidence on the subject, or if his statement in that regard had been allowed to stand. On cross-examination, however, he entirely destroyed the force and effect of his original testimony, and put the agreement as one for no definite period, but simply for a time which should be coincident with the prompt payment of the interest on the note. Lehman swears: "I had a talk with Mr. Jenks about giving time on the note. He gave no specified time,—so long as I paid up prompt the interest. No specified time was mentioned, nor did I ask him for it." This is all the testimony on the subject. Mrs. Lehman was not offered; nobody else was produced; and the whole thing was denied by Jenks, except, as he admitted, the collection of interest in June, and an extension of the note until the

ensuing December. There were some subsequent payments of interest, but the only ones of any value, and upon which the appellee could rely, were made after they had become due, and seemed to be in accord with the general provisions of the paper with respect to the terms and conditions under which the interest was paid. Even under these circumstances, the judgment would not be disturbed if the matter had been so left to the jury as to make their verdict a specific finding on this subject. The jury were not aptly instructed, nor were they told, either in terms or in substance, the duty devolved on them to find whether there was an agreement, and, if so, for what period, and whether the time had elapsed when the foreclosure was begun or concluded by Jenks. Practically, this was the only question which ought to have been submitted. In reality, no such matter was suggested for their consideration. They were simply told a defense was presented of an extension for a new and valuable consideration, and, if they should find a new consideration did move between the owner and holder, then the right of foreclosure was thereby taken away. This in no manner put the issue in an intelligible form, and the verdict does not necessarily include the finding of an agreement to extend the time of payment for a definite period. There was no evidence whatever of a new consideration, or of any other consideration than what might be found in the payment of the interest. This the appellee was bound to pay, and the payment in advance, if made, only covered a very limited period, which had long gone by when the foreclosure was attempted. It is probably true, if the interest was paid in advance on the agreement that such payment should be a consideration for the extension, and the parties agreed that the time should be extended accordingly for a fixed period, then the right of foreclosure would not remain with the holder of the paper. We cannot accede to the position that an agreement to extend the time so long as the maker of the note or the person bound thereon should pay the interest promptly would be a valid and operative contract. It would not be in accord with the general business habits of the community, nor do we know of any rule of law which would make an agreement of that sort binding to the extent of a perpetual extension of the time of payment of commercial paper. At all events, there is nothing in the record to show a contract to extend the time other than what was executed and carried out, and there is absolutely nothing in the record on which the verdict of the jury can rest. Of course, if the evidence was in conflict, the matter would be a totally different one. But where the difficulty proceeds from the defendant's own testimony, and on this testimony the case has been left entirely unsupported, we

The jury were erroneously instructed. The issues were not properly put before them. The verdict is wholly unsupported by any testimony in the record, and for these reasons cannot be upheld. The judgment will be reversed, and the case sent back for a new trial. Reversed.

### HAINES v. PEOPLE.

(Court of Appeals of Colorado. Feb. 10, 1896.)

#### OLEOMARGARINE—SALE—LICENSE.

Act April 12, 1893, §§ 4, 8, provide that, before any person can sell oleomargarine, he shall mark the packages, in two conspicuous places, in bold-faced English letters, etc., and prescribe a punishment for violation of the act. *Held*, that the sale of oleomargarine in unmarked packages is not a lawful occupation, so that cities, having the power to license all lawful occupations carried on within their limits, may license and regulate the sale of oleomargarine therein in respect of such act.

Error to district court, Arapahoe county.

C. D. Haines was convicted of selling oleomargarine in violation of law, and brings error. Affirmed.

Geo. A. Smith, for plaintiff in error. Byron L. Carr, Atty. Gen., and L. W. Dolloff (F. P. Secor, of counsel), for the People.

THOMSON, J. The plaintiff in error was indicted, tried, and convicted in the district court of Arapahoe county of selling oleomargarine in the city of Denver in violation of the provisions of section 4 of an act entitled "An act to regulate the manufacture and sale of oleomargarine," etc., approved April 12, 1893. The following is the section referred to: "Sec. 4. Before any person shall sell, or offer to sell any oleomargarine as aforesaid, he shall mark and brand, or cause to be marked and branded, each package, roll or parcel thereof, in ordinary bold-faced capital letters in English, not less than five lines high, distinctly and durably printed or painted on each and every package, wrapper or vessel containing the same, on the outside thereof, in two of the most conspicuous places thereon, the true and appropriate name of such oleomargarine as aforesaid, together with the name of the manufacturer and place of business." Sess. Laws 1893, p. 352. Section 8 makes offenses against any of the provisions of the act misdemeanors, and prescribes their punishment. The amended charter of the city of Denver, approved April 3, 1893, confers upon the city council the exclusive power to provide for the licensing, regulating, and taxing of all lawful occupations, business places, trades, etc. Sess. Laws 1893, p. 146.

A general act of the legislature, approved March 18, 1885, created and established in a class of cities which included the city of

original jurisdiction over all cases arising under the ordinances of the city within which it might be organized, and all necessary power to carry into effect the jurisdiction conferred. Sess. Laws 1885, p. 290. The defendant interposed a plea to the jurisdiction of the trial court, for that the offense charged was committed within the corporate limits of the city of Denver, and the city of Denver had, in pursuance of the powers granted by its charter, enacted and adopted an ordinance licensing and regulating the business of manufacturing and selling oleomargarine within its corporate limits, wherefore the act of the legislature was inoperative within the city, and the offense was a violation of the city ordinance, and not of the state law. The plea was overruled, and the decision upon it gives rise to the only question in the case. The argument for the defendant may be summarized briefly as follows: The selling of oleomargarine is a lawful occupation. The power to license and regulate all lawful occupations carried on within the city belongs exclusively to the city council, and has been exercised by it. Therefore the defendant is not subject to prosecution under the state law. If the major premise may be admitted, the argument is sound. But the assumption that the sale of oleomargarine is a lawful occupation must be qualified before it can be accepted, and the qualification defeats the argument. The selling of oleomargarine is a lawful occupation, provided the packages containing it are marked and branded as the statute requires; otherwise, it is not a lawful occupation, because the statute makes it unlawful. In virtue of its power to license and regulate lawful occupations, the city may license and regulate the sale of oleomargarine properly marked and branded; but it has no authority to license or regulate unlawful occupations, and therefore an attempt by it to license or regulate the selling of oleomargarine without the required marks and brands would be nugatory. The state law does not trench upon any prerogative of the city, and the city tribunals have no jurisdiction over offenses against it. If it is enforced at all, it must be enforced by the proper state courts. The trial court had undoubted jurisdiction of the case. The judgment is affirmed. Affirmed.

### HEIVNER v. PEOPLE.

(Court of Appeals of Colorado. Feb. 10, 1896.)

#### CRIMINAL LAW—INSTRUCTIONS—ACCOMPLICE.

An instruction, in regard to a witness testifying that he aided defendant in the theft, that such witness "is" an accomplice, and that, while a person may be convicted on the testimony of an accomplice, still the jury should act on such testimony with caution, etc., is erroneous, as assuming as a fact that the witness was an accom-

Error to district court, Jefferson county.  
Frank Heivner was convicted of a crime, and brings error. Reversed.

H. G. Benson and S. W. Johnson, for plaintiff in error. Byron Carr, Atty. Gen. (Calvin E. Reed, of counsel), for the People.

THOMSON, J. The plaintiff in error was tried and convicted of larceny of a cow. Outside of the testimony of one Ira Stewart, evidence pointing towards the guilt of the defendant was meager, and insufficient to sustain a verdict of guilty. Stewart testified that he helped the defendant in stealing the cow, and made statements which, if true, were amply sufficient to convict both of them of larceny. He also testified that he had been convicted and sentenced to the penitentiary for stealing cattle, upon the testimony of the defendant. Stewart's testimony, even on paper, betrays a vindictiveness against the defendant, sufficient to throw doubt upon his statements as consisting of unvarnished facts. The defendant, as a witness for himself, denied all of Stewart's statements which tended to fasten the charge upon him, and denied his guilt. The court, among its other instructions, gave the following: "The court instructs the jury that the witness Ira Stewart is what is known in law as an accomplice; and that, while it is a rule of law that a person accused of crime may be convicted upon the testimony of an accomplice, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all the other evidence in the case, and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, they are satisfied beyond a reasonable doubt of its truth and sufficiency to convict, as explained in these instructions; and, if you are so satisfied, then you will find the defendant guilty." This instruction was erroneous. It assumed as a fact something which should have been left to the jury to determine from the evidence. It stated, without qualification, that Stewart was an accomplice. He could not be an accomplice unless there was a principal. If the defendant was not guilty, Stewart was not an accessory. The statement that Stewart was an accomplice therefore assumed the guilt of the defendant, and its effect must have been pernicious. The caution in the instruction against accepting Stewart's testimony except upon careful examination and comparison with the other evidence did not cure the error. The jury were directed to subject the testimony to examination and comparison to satisfy themselves "of its truth and sufficiency to convict." Under the other instructions it was amply sufficient to

well have concluded that the question of the defendant's guilt was settled in the mind of the court, and that, in its opinion, Stewart's testimony was substantially true. If they accepted the declaration as the court's conclusion upon the evidence, their own conclusion must have been materially influenced by it. The judgment will be reversed. Reversed.

#### CENTRAL NAT. BANK OF PUEBLO v. SPRATLEN et al.

(Court of Appeals of Colorado. Feb. 10, 1896.)

##### ASSIGNMENT—WHAT CONSTITUTES.

An order to a bank to pay, to persons named, a specified sum, out of a special fund, belonging to the drawer, in the hands of such bank, constitutes an assignment of such fund, to the persons named in the order, to the amount specified, whether the bank accepts the order or not.

Appeal from district court, Pueblo county.

Action by L. F. Spratlen and others against the Central National Bank of Pueblo. From a judgment for plaintiffs, defendant appeals. Affirmed.

One L. C. Lane was a contractor, grading streets in the city of Pueblo. From the city there was due, or to become due, something over \$2,300, to be paid in city warrants. On June 22, 1893, Lane, being indebted to appellant in the sum of \$1,198.37, assigned to it all money due and to become due from the city, the bank to convert the city warrants into money at the best advantage, pay itself all indebtedness from Lane, and the balance remaining to be the property of Lane, the assignor. On the 19th day of July, the bank was garnished, in the suit of Doyle & Co. v. Lane, for the sum of \$496.93. On the same day Lane made the following paper, and delivered it to appellees: "Pueblo, Colo., July 19th, 1893. The Central National Bank, D. L. Holden, Pres.: Please pay to Spratlen & Anderson out of money due me from city, assigned to you, \$500.00, and oblige, L. C. Lane." Which paper was delivered to the bank on July 19th, immediately after the service of the writ of garnishment at the suit of Doyle & Co., and was taken, and for the time being retained, by the bank without its objecting to it in any way. On the same date, and after the delivery to the bank of the order of Lane in favor of Spratlen & Anderson, the bank was notified that Lane had assigned to A. McClelland all the residue of the fund belonging to him in the bank's possession. Subsequently, on the same day, the bank was garnished, in a suit before a justice of the peace, to collect a debt of \$295. In the garnishee proceedings in both suits appellant answered: "This bank holds an assignment of a certain contract between the city of Pueblo with said Lane, upon which I am informed and believe there is



due, or to grow due, from said city about \$2,300, for grading West Fourth street in the said city. Said assignment was executed by said Lane on June 22, 1893, to secure to said bank all of said Lane's liabilities, amounting to \$1,198.57 and interest. This bank was garnished by W. E. Doyle & Co., for \$496.93, notified of an assignment of \$500 by said Lane to Spratlen & Anderson, and all the balance due said Lane from proceeds of said contract to A. McClelland, garnished by H. S. Beatty for \$295, and by A. McClelland for \$300,—all on July 19, 1893, and in the order named." In the case of *Beatty v. Lane*, the justice of the peace entered judgment as follows: "The premises considered, the court adjudges that said plaintiff do have and recover of and from said defendant the sum of \$295 and his costs herein, taxed at \$——. It is further adjudged that said garnishee do pay to this court, for the use and benefit of said plaintiff, any proceeds arising out of said described contract, after deducting all liabilities, direct and indirect, from said Lane to said garnishee." Appellant answered the complaint by alleging (1) that the pretended assignment to appellees was null and void; (2) without consideration; (3) that it never accepted the order; (4) that appellees took the order back to Lane, and it was destroyed, and a new one made, which was not presented to appellant until 6:45 p. m., after the two writs of garnishment were served; (5) that appellant at all times refused to accept any assignment or order drawn by Lane in favor of appellees. Plaintiffs demurred to the answer of the defendant, generally, that it did not state facts sufficient to constitute a defense. Demurrer sustained, and defendant elected to stand upon its answer. Judgment for plaintiffs for \$508.68, and an appeal by the defendant to this court.

George Salisbury, for appellant. John R. Dixon, for appellees.

REED, P. J. (after stating the facts). This court must again protest against abstracts of the character of that filed in the present case. It is a mere index, and we are compelled to resort to the record for most of the important facts.

The judgment of the district court must be affirmed. Appellant was a bank, engaged in business. Lane, being indebted to it, assigned his entire claim against the city to it—First, to secure the indebtedness; second, as his agent, to collect for him the entire claim, pay itself, and hold the balance to be disposed of as directed by him. The assignment was only for the amount of the indebtedness; the balance, for collection. The amount of the claim against the city is said to have been \$2,300; appellant's claim against Lane, \$1,198.57; balance belonging to Lane, \$1,101.43; the Doyle attachment, \$496.93; balance after Doyle attachment, \$604.50. This

was the condition of affairs on July 19th, when the order of Lane in favor of appellees for \$500 was presented. The attachments of Beatty and McClelland were later in the day, and after the transfer of the \$500 by Lane to appellees. The sworn answer of appellant, as garnishee in the different proceedings, set up this condition, and admitted the transfer of \$500 to appellees from Lane, which it was to pay over. There was a full recognition of the transfer, its validity, and the legal liability of the bank to pay the amount, which it could not subsequently change and invalidate. It is clear that, so far as the excess over the indebtedness was concerned, appellant was only the agent or trustee, to apply the money as ordered by Lane. The trust was accepted, and it was its duty to apply the money as ordered by Lane. It was not invested with any discretion or power of adjudicating between the different claimants, and if in doubt it could only await the decree of a competent court. The question of the legality of the transfer of \$500 from Lane to appellees was entirely between them, and, if challenged, it could only be by rival claimants for the same fund. The residue, after payment of the indebtedness to the bank, was a specific trust fund. Of that fund \$500 was assigned to appellees. That such a transfer was a legal and equitable assignment of so much of the fund, whether the fund was in hand or to be received, is well settled by authority. It was an assignment, of the date of the order, and, if the money was not in hand, became operative when the money was received. In *Christmas v. Russell*, 14 Wall. 84, it is said: "A bill of exchange or a check is not an equitable assignment pro tanto of the funds of the drawer in the hands of the drawee. But an order to pay out of a special fund has always been held to be a valid assignment in equity, and to fulfill all the requirements of the law," and that such an assignment is good at law. See *Pom. Rem. & Rem Rights*, §§ 77, 85; *Drake, Attachm.* §§ 527, 528; 2 *Wade, Attachm.* § 537; *McDaniel v. Maxwell* (Or.) 27 Pac. 952, where the almost identical question involved in this case received careful attention. See, also, *Trist v. Child*, 21 Wall. 441; *Christmas v. Russell*, supra; *Lapping v. Duffy*, 47 Ind. 51; *Brill v. Tuttle*, 81 N. Y. 454; *Peugh v. Porter*, 112 U. S. 737, 5 Sup. Ct. 361; *Wright v. Ellison*, 1 Wall. 16; *Fordyce v. Nelson*, 91 Ind. 447; *Legro v. Staples*, 16 Me. 252. Consequently, if appellant attempted to exercise any discretion, or adjudicate the rights of rival claimants, and made a mistake, it must suffer the consequences. Its answer in this suit was at variance with its answer in the attachments, and it was bound by its answer in those. Neither of the matters set up in the answer was available to it as a disinterested custodian or agent, and could only be made available by some rival claimant to the same fund. It is clear that, at the time of the transfer from Lane to appellees of the

\$500, it was subject to the disposition of Lane, and, he having transferred it to appellees while he had legal right to do so, they became the owners. Hence, any diversion of the fund by appellant was at its own risk. It follows that the district court properly sustained the demurrer to defendant's answer, and that the judgment must be affirmed. Affirmed.

**STATE BANK OF MONTE VISTA v.  
BRENNAN et al.**

(Court of Appeals of Colorado. Feb. 10, 1896.)

**SHERIFF—CHARGING EXCESSIVE FEES—LIABILITY  
—SURETIES.**

1. Under Act of 1891, § 1 (Sess. Laws 1891, p. 323), providing that, when a custodian is required for property levied on, the court shall allow proper compensation therefor, not exceeding \$2.50 per day, a sheriff who appoints two custodians for property, each serving 12 hours out of the 24 each day, and who charges and retains therefor from the proceeds of the property \$5 per day, in the absence of any order of court fixing the compensation, cannot be subjected to the penalty of treble damages under Mills' Ann. St. § 865, for demanding and receiving "greater fees than are allowed by law," nor under section 1301, for "willfully and knowingly" receiving such fees, although in the particular case the fees charged may have been excessive, and properly reduced by the court on a motion to retax.

2. Mills' Ann. St. §§ 865, 1301, subjecting an officer who demands or receives illegal fees, respectively, to a fine and imprisonment, in addition to a liability for treble damages, are both penal in their nature, contemplating a trial and conviction; and the sureties on a sheriff's bond are not liable for penalties imposed on their principal thereunder.

Error to district court, Rio Grande county.

Action by the State Bank of Monte Vista against Terry Brennan and others. From a judgment for less than the amount claimed, plaintiff brings error. Affirmed.

C. M. Corlett, for plaintiff in error. G. Q. Richmond, for defendants in error.

REED, P. The defendant in error Brennan was sheriff of Hinsdale county. The other parties impleaded with him were the sureties on his official bond. Suit was brought by plaintiff in error against Brainerd & Beebe. An attachment levied upon an hotel and furniture. Judgment obtained, with cost and interest, for \$2,749.81. The property sold for \$3,600. The sheriff charged fees for custodian \$1,300.25, which he retained, leaving a deficit on the judgment of \$534.66. The time charged for was 258 days, by two custodians,—Thorman, 181 days; Buckles, the balance. The amount charged was the maximum or limit allowed by statute, \$5 for each 24 hours; two days, of 12 hours each, at \$2.50. The fees were allowed and paid under protest by appellant. Application was made to the district court, and the cost retaxed, and the sheriff ordered to refund \$534.20. Failing to refund, this suit was brought against Brennan

and his sureties on his official bond, and treble damage (\$1,502.60) claimed, under Mills' Ann. St. §§ 865, 1301 (Gen. St. §§ 610, 817), as follows: "No sheriff shall directly or indirectly ask, demand or receive for any service to be by him performed in the discharge of any of his official duties any greater fees than are allowed by law, on pain or forfeiture of treble damages to the party aggrieved, and being fined in a sum not less than twenty-five dollars and not more than two hundred dollars." "Any judge, justice of the peace, clerk, sheriff, constable, city marshal, or other public officer, who for the performance of an official duty, for which a fee or compensation is allowed or provided by law, shall wilfully and knowingly demand or receive any greater fee or compensation either in money or other thing of value than what is allowed or provided by law for the same, or who shall wilfully and knowingly demand or receive any such fee or compensation where no fee or compensation whatever is authorized or prescribed by law, shall be guilty of a misdemeanor, and upon conviction thereof shall be confined in jail not less than one nor more than six months, and shall be fined not less than one hundred nor more than five hundred dollars, besides being liable on a civil action to the person or persons from whom such fee or compensation is thus knowingly and illegally demanded or received, for three times the value or amount thereof, and upon the examination or trial of such offense, the defendant shall be presumed to have acted wilfully and knowingly until the contrary is shown." Judgment was entered against the defendants for \$534.20, interest and costs. Plaintiff below brings the matter here for review, claiming that the district court erred in not awarding treble damages. The only question presented for determination is the one mentioned above. Whether a custodian was necessary and properly appointed we are not called upon to decide, as the question was not raised. In regard to the length of time of the service of a custodian, there is no controversy. The length of service was established by competent testimony.

Section 1 of the act of 1891 (Sess. Laws 1891, p. 323) is as follows: "Whenever it shall be the duty of any sheriff or constable to appoint a custodian to take charge of any property levied upon by virtue of a writ of attachment or execution, the court shall allow such compensation for the services of the custodian as shall be proper, not exceeding two and one-half dollars per day, to be taxed as costs, and such officer shall not demand or receive any greater sum,"—by which it will be seen that the officer cannot charge, nor the court allow, a greater sum than was charged and collected. It would probably have been the better course for the sheriff to have had his bill for compensation of a custodian allowed and fixed. Failing to do so, charging the maximum allowed

taken, an application to have the costs retaxed. It cannot be said under section 865 that the sheriff demanded and received greater fees than were allowed by law, nor that under section 1301 he willfully and knowingly did demand and receive any greater fee or compensation than was allowed and provided by law.

2. Both sections above referred to, and upon which counsel rely, make the demand or receipt of greater fees than allowed by law a misdemeanor. The penalty in section 865 is a judgment in treble damages, and a fine. Section 1301 provides for conviction, imprisonment, a fine, and that he shall also be liable in treble damages to the party aggrieved. Both are penal, and evidently contemplate criminal proceedings and conviction. This suit was brought against the sheriff and his sureties on his official bond. The sureties upon the bond cannot be subjected to the penalty. Under both sections, the proceedings are against the sheriff personally. There is no provision making the sureties liable upon the official bond in treble damages for a crime or misdemeanor of the principal. It is a well-settled rule of law that the liability of sureties cannot be extended by implication, and they be required to respond in matters not embraced in nor contemplated in law, and beyond the written obligation. Consequently, the sureties on the official bond were not liable. See *Murfree, Off. Bonds*, § 678; *Holt v. McLean*, 75 N. C. 347; *Moretz v. Ray*, Id. 170; *Throop, Pub. Off.* § 258; *Brooks v. Governor*, 17 Ala. 306; *Casper v. People*, 6 Ill. App. 28; *Tappan v. People*, 67 Ill. 339; *State v. Baker*, 47 Miss. 88; *Mechem, Pub. Off.* § 295; *Bank v. Ziegler*, 49 Mich. 157, 13 N. W. 496; *U. S. v. Boyd*, 15 Pet. 187; *Taylor v. Parker*, 43 Wis. 78; *State v. Conover*, 28 N. J. Law, 224.

It follows that, in the adjudication below, there was no serious error, warranting reversal, and the judgment of the district court will be affirmed. Affirmed.

#### FOX, Treasurer, v. TRINIDAD WATERWORKS CO. et al.

(Court of Appeals of Colorado. Feb. 10, 1896.)

#### MANDAMUS — JURISDICTION — JUDGMENT AGAINST OFFICER AFTER TERM EXPIRES.

1. In mandamus to compel a city treasurer to pay to the holder of city warrants money on hand in a special fund for that purpose, where defendant's term of office expires pending the proceeding, judgment cannot be rendered against his successor unless he is made a party, or in some way brought within the jurisdiction of the court, and has an opportunity to pay the money.

2. In mandamus against a city treasurer to compel him to pay money on hand in a special fund to the holder of city warrants against such fund, where defendant's term of office expires pending the proceeding, judgment cannot be rendered against him.

Two mandamus proceedings, consolidated and tried together,—one by the Trinidad Waterworks Company against John H. Fox, treasurer of the city of Trinidad, Colo., and the other by the First National Bank of Central City, Colo., against the same defendant, to compel such treasurer to pay to such waterworks company and to such bank money on hand in a special fund for the purpose of paying city warrants held by them. From a judgment directing a writ to be issued addressed to defendant and to A. L. Branson, his successor in office, commanding them and each of them to pay the warrants described in the alternative writs from money in such special fund in the order of their registration, Fox appeals. Reversed.

Joseph C. Helm and Everett Bell, for appellant. Yeaman & Gove, for appellees.

BISSELL, J. The water supply of the city of Trinidad is furnished by the Trinidad waterworks. According to the usual practice of cities and waterworks companies, hydrants were placed at various points, and in other ways water was furnished for the use of the municipality. From time to time, the company rendered bills to the city, which were passed on by the common council, which issued warrants on the treasury in payment. Only two lots of warrants are involved in this litigation. There were 25, numbered from 5,896 to 5,920, for \$500 each, issued in November, 1892, to the Trinidad Waterworks Company. This lot of warrants was turned over to F. D. Wight as security on some transaction between the company and other parties. There was another series, 7 in number, numbered from 6,144 to 6,150, issued in March, 1893, in liquidation of bills of the waterworks company rendered to the city, which were purchased by the First National Bank of Central City, and held by them at the time this litigation started. The warrants were presented for payment, and, there being no funds in the treasury, were properly indorsed to insure interest to the holder, and held until the latter part of 1894, when the holders demanded payment of the appellant, Fox, who was then the city treasurer. At the time of the demand there was, in the treasury, \$16,510.43, which was properly applicable to the liquidation of these claims. The treasurer refused payment. It seems there was some controversy between the waterworks company and the city, respecting the terms and the performance of the contract, which led to a suit by the city against the company to cancel the warrants. The city failed in the suit, and prosecuted a writ of error to the supreme court, which is now pending. The disagreement led the city administration to resist the payment of these claims until the question at issue between the city and

tral City instituted proceedings by way of mandamus, recited the issuance of the warrants, their title, the demand for payment and the presence of funds in the treasury to pay the claims. About the same time, the waterworks company started similar proceedings on the 25 warrants which they held, alleging whatever was necessary to make out a case on paper. The proceedings were begun in Trinidad, but by stipulation both were removed to Arapahoe county, there consolidated, and tried as one suit. Evidence was introduced to show the rendition of the bills to the city, their acceptance and allowance by the city government, the order of the council directing the warrants to issue, the issue, and presentation for payment, with the requisite proof respecting the condition of the city treasury. It was clearly shown there was money in the treasury applicable to the payment of such claims, and the treasurer, Fox, turned over to his successor \$17,818.24.

It will be assumed nothing was lacking in the proof to show the petitioners' right to a writ, and the judgment directing it would, of necessity, be affirmed, had it been duly entered against the proper parties. The trial disclosed the fact that Fox was not then city treasurer. He held the office at the time of the demand and the commencement of the proceeding. The relators, however, put him on the stand, and, so far as might be, by that kind of testimony, proved that he had gone out of office on the 24th of April preceding, and had been succeeded by A. L. Branson, who was, on the 7th of May, 1895, the date of the hearing, then city treasurer of Trinidad. Fox testified to his proceedings when he went out of office, which included the turning over to his successor, Branson, of the specific fund which was alleged to be applicable to the payment of these claims. The only reason which he gives for refusing to pay the warrants is found in his statement of the policy of the city government, which was to refuse to pay any of the waterworks company's claims until the validity of these warrants should be finally settled by the supreme court in the litigation which was then pending. On the conclusion of the testimony, the court, being sufficiently advised, found the facts to be as stated in the petitions. There was likewise a finding that Fox's term of office as treasurer had expired on the 23d of April, 1895, and that he had been succeeded by Branson, who was, in fact, the city treasurer of Trinidad at the time the judgment was rendered, and that he then held all the moneys in the water fund of the city. On this basis, the court rendered judgment that a peremptory writ be issued, addressed to the defendant, John H. Fox, and to his successor, A. L. Branson, commanding them, and each of them, to pay the warrants de-

of their registration. No attempt was made to bring Branson into the litigation, notwithstanding it clearly appeared, on the hearing, that Fox was out of office, and Branson in, and in custody of the particular fund which was sought to be reached by these proceedings. The necessity of some judgment against Branson must have been apparent to the court and counsel, or the judgment would not have run against him. Why the writ was directed to issue as against Fox, who was shown not to have custody of the funds, and to be unable to answer the judgment, is not apparent. According to our views of the law, the whole case turns upon what has just been stated respecting the judgment.

Service of process of some description, either actual or constructive, is by all courts held indispensable to the exercise of jurisdiction over the person. A constructive service may be sometimes as effectual, to confer upon the court power to enforce its judgments, as the actual service of a writ. If this be ever true, the present case presents none of the conditions essential to the application of the principle. These proceedings were by way of mandamus, to compel the custodian of a particular fund to apply it to the satisfaction of warrants which the petitioners held. The existence of the fund was established. The regularity of the warrants cannot be questioned on this hearing, the title of the petitioners is not disputed, and it therefore follows the claimants were entitled to relief; and the only inquiry is whether they succeeded in giving the court jurisdiction to enforce that relief by the appropriate judgment. We recognize a very wide distinction between certain decisions of the supreme court of the United States and those of some state courts under analogous conditions. Wherever the duty to be performed is a personal one, and the thing is to be done on behalf of a corporation, over which the court may exercise jurisdiction, the supreme court undoubtedly holds the end of the officer's term abates the suit which has been begun to enforce his performance of the particular duty. It has accordingly been held, in several well-considered cases, that, since the government cannot be coerced, the official of that government who goes out of office is no longer subject to the operation of the writ of mandamus. *Secretary v. McGarrahan*, 9 Wall. 298; *U. S. v. Boutwell*, 17 Wall. 604. A very broad distinction is recognized even by that court, between cases where the duty is a personal one, and where it is to be performed in a representative capacity, and the person on whom the writ is served really stands as and for the corporation, whose officer he is and whose duty may be termed a continuing one, and therefore enforceable against the successor in office, as well as against the individual towards whom the writ was original-

a rule, recognize the distinction which is thoroughly settled in the federal jurisdiction by these adjudications. It must be conceded, as a general proposition, the state courts hold the suits do not abate, whether the duty be a personal one, or one to be performed on behalf of a corporation, whose representative the individual may be against whom the suit is brought. We are not particularly concerned with this very close and narrow distinction between the cases, since, according to our view, whether the suits do or do not abate, a judgment may not be rendered against the successor, unless, in some way, he is brought within the jurisdiction of the court and has an opportunity to perform the act which he will be ultimately adjudged to do if the judgment go against him. We think the present case falls very clearly within the distinction recognized in 103 U. S. 480, and the act to be performed is to be done by the treasurer as the representative of the municipality, and the suit is really, though indirectly, one to compel the city authorities to perform the contract into which they entered. The treasurer is the person who is the custodian of the fund, and who can be directly reached by the process, and be compelled to pay the money to the individuals entitled to it. It is the only substantial relief which the petitioners can obtain. The case, therefore, comes very clearly within nearly all the authorities on this question.

The only remaining inquiry is whether it was essential to make Branson a party to the proceedings in order to obtain a judgment against him. We cannot conclude otherwise. No argument ab inconvenienti can be drawn from the situation. The suit was begun during the continuance of Fox's term, but the actual trial was had after he had gone out of office, and after his successor had come into the possession of the funds sought to be reached by the proceeding. All these facts appeared on the trial, and were probably known to the litigants before the case was actually heard. The possibility of issuing a second alternative writ, and bringing Branson in, was clearly open to the petitioners. To pursue this course would neither have deprived them of a remedy nor resulted in any substantial delay. Under the existing circumstances, the court would have ordered him to answer instant, and the case would have proceeded to judgment with all reasonable and convenient speed. A critical examination of the authorities which have been cited shows an almost universal admission of the propriety and the necessity of pursuing this course in cases of this description. High, Extr. Rem. § 440 et seq.; Mech. Pub. Off. § 940; *People v. Supervisor of Barnett Tp.*, 100 Ill. 332; *Hardee v. Gibbs*, 50 Miss. 802; *Lindsey v. Auditor*, 3 Bush, 231; 2 Dill. Mun. Corp. § 884; *State's Attorney*

concurring with the general principle involved in the present decision. It has seldom happened, however, that the decisions have turned on the particular proposition respecting the necessity to make the successor a party in order to obtain a valid judgment. The necessity is recognized in many cases which hold the suit does not abate by the expiration of the term of office, though they only apparently refer to the continuance of the proceedings against the successors who are charged with the duty. It might almost be called a construction established by concession, rather than by specific judgment on the especial point. Since all courts agree that no person may be bound save him against whom process has actually or constructively run, we are bound to hold it necessary to bring the successor in, in order to compel him to perform the judgment by paying over the money. The duty is a personal one, operative only on the person then holding the office, and the judgment must be entered against him to be enforceable by ultimate proceedings. It logically follows there can be no such thing as a constructive service on which to base a judgment which the successor can be compelled to perform by proceedings in contempt or otherwise.

The judgment is likewise irregular in having been entered against Fox as well as against Branson, the successor. We do not hold some judgment might not be properly entered against Fox, on the showing that he had refused the demand, declined to pay the money, and had compelled the petitioners to incur costs in the establishment of their rights. This we do not decide. We simply hold no judgment directing him to pay over the money could properly be entered against him. It would be a vain order, which it would be impossible for him to execute, and therefore the judgment in that form should not go against him. *People v. Spruance*, 8 Colo. 319, 6 Pac. 831. For these reasons, we conclude there was error in the judgment, and it must be reversed, and sent back for further proceedings in conformity with this opinion. Reversed.

#### SAN JUAN HARDWARE CO. v. CARROTHERS et al.

(Court of Appeals of Colorado. Feb. 10, 1896.)

#### MECHANICS' LIENS—ENFORCEMENT—LIMITATION—INCUMBRANCES.

Gen. St. § 2151, providing that no mechanic's lien shall hold the property longer than six months, unless an action be commenced within that time to enforce the same, and section 2152, providing that persons claiming liens on the property may be brought in at any time before trial, merely fix the time within which the action must be brought as against the owner of the land, and do not require, as against third per-

Error by district court, Ouray county.

Action by the San Juan Hardware Company against John F. Carrothers and others. From a judgment for defendants, plaintiff brings error. Reversed.

Emerson & Bradshaw, for plaintiff in error. R. D. Thompson and Story & Stevens, for defendants in error.

**RISSELL, J.** The San Juan Hardware Company claims a lien on the property of the Happy Jack Gold & Silver Mining Company for about \$1,600. A suit was commenced on the 9th of November, 1892, in the county court of Ouray, to foreclose it. This suit went to judgment, whereby, according to the plaintiff's contention, the lien was established, and he acquired the right to file his present bill. The only averments respecting the lien, other than a narration of what the statement contained, are substantially that the hardware company sold goods, wares, and merchandise to the mining company between the 1st day of June, 1891, and the 12th day of July, 1892. There is no attempt to state the kind of goods, the circumstances under which they were furnished, the purposes to which they were put, nor anything which would tend to show it to be possible for the hardware company to acquire a mechanic's lien on the realty belonging to the mining corporation. The pleader then proceeds to state that Russell, as trustee, has some sort of a title by a trust deed on the property to secure some mortgage bonds or other evidences of indebtedness, but states the plaintiff is advised that the indebtedness has been paid, and he requires that Russell be made a party, and brought in and required to set up his lien, if he has any, or, in default thereof, that his lien be barred. The pleader does not otherwise than by this suggestion set up the character of Russell's claim, the nature of the indebtedness which was to be secured, nor aver an absolute payment or facts from which a payment would be presumed, nor state other facts on which, if proven, the court would have a right to adjudge the claim of the San Juan Hardware Company superior in right or prior in time to that of the trustee, Russell. In like manner, but with even more indefiniteness of statement, he sets up that four or five other parties claim to have some interest in the premises by reason of asserted liens; but he does not state what the liens are, when they were acquired, in what form they exist, nor allege those matters which, if sustained, would show the claim of the hardware company to be superior to that of the persons named. In a like indefinite fashion, and with like absence of averments requisite to the successful assertion of a priority of right as

judgment and sale; but in no manner does he allege the requisite particulars to establish the superiority of his own title or right. He likewise alleges that Carrothers claims a lien to secure notes and bonds of the company, and requires Carrothers to come in and set up what his title may be. After all of these indefinite allegations respecting the claims of the defendants, the extraordinary relief of a judgment settling the status of all the lien claimants with reference to each other, and particularly with reference to the mechanic's lien of the hardware company, is prayed. There is also a prayer for the foreclosure of this lien as against these other people. This is the only thing that saves the bill from absolute wreck, and the only relief to which under any circumstances, according to the allegations, the plaintiff could be entitled. The complaint was demurred to, and the demurrer was overruled.

The demurrer should have been sustained. If the case had not gone off on some other theory than the one adopted by the court, and on a defense ultimately put in by some of the parties, we should have no hesitancy in holding the complaint to be fundamentally bad. The defendants in error, however, do not raise the question by cross assignments of error; and, since we can by astute and strained search find enough in the complaint to suggest an attempt to state the existence of a mechanic's lien and facts on which the right to foreclose might be predicated, we do not propose otherwise than by this suggestion to attack its sufficiency.

All of the defendants answered who are concerned with this review, and set up the nature of their own titles, and alleged as a kind of "special defense," if such it might be termed, the failure on the part of the hardware company to bring suit as against them to foreclose the lien within six months from the time the statement was filed. The court regarded this as fatal to the action, and held the statute respecting the commencement of suits to enforce mechanics' liens applicable to those cases wherein rights were asserted against the owner and the property, as well as where a foreclosure was sought against third persons claiming liens thereon. The plaintiff demurred to this portion of the answer, and the demurrer was possibly well taken; but the conclusion of the court on the general question was erroneous, and, since the case went off on that hypothesis, we feel under obligations to dispose of the case. Under other circumstances we might possibly refuse to consider it at all.

This somewhat lengthy statement brings into plain view the radical difficulties with the plaintiff's conception of the action. A right to maintain a suit to foreclose this lien against the claims of third persons will

such a complaint and can on the defendants to come in and set up their liens when the complaint contained no statement whatever to show a right or title superior to theirs, or any right or claim as against them by reason of what had been done. Although the hardware company had obtained a judgment against the mining corporation, and had the right to issue process and sell the realty and acquire whatever title they might thereunder, and might possibly thereafter have brought suit to remove the apparent clouds cast by the outstanding liens, there was a complete neglect to proceed to this extent. The hardware company were simply the owners of a judgment which, as between them and the owners of the Happy Jack Gold & Silver Mining Company, established a lien against the realty in favor of the creditors who sold the goods. Such a condition does not, according to any principle to which our attention has been called or with which we are familiar, give the hardware company the right to maintain a suit to marshal the liens. This may sometimes exist where two creditors have claims on the same fund and on different funds, whereby the one having a claim on two funds may be compelled to resort to that on which the first has no claim, and exhaust it before coming in on the other. Neither does the situation entitle the plaintiff to maintain what is well known as a "bill quia timet," or a bill of peace, or the analogous one to remove a cloud upon a title. There seems to be no recognized ground of equitable jurisdiction which would permit the filing of a bill like that which is before us. As has been suggested, however, it may possibly contain the elements of a bill to foreclose a lien as against these third parties. Assuming it to be such, the bill may be maintained and the proper relief obtained on sufficient proof of the facts which must exist to entitle the plaintiffs to recover. Of course, the plaintiff would be bound to allege all the matters which would establish a right to file a lien claim in exact and literal compliance with the statute as against these other lien claimants, and the acquirement of a right superior and prior in time to those possessed by the defendants. Therefore, the only question which remains respects the proposition on which the court below, as we conceive, erred in its attempt to settle the rights of the parties.

In the allegations of the answers respecting the failure of the plaintiff to bring suit to foreclose the lien as against the defendants within six months from the time the statement or claim was filed in the proper office, there are, of course, some matters which can be made the proper subject of a defensive plea. It is probably true that these affirmative matters were legitimate in-

dent reasons, the defendants saw fit to aver this specific fact, we may take the pleadings as presenting the issue on which the court expressed its opinion when it sustained the demurrer. The opinion of the court is set out in the abstract, whereby we are enabled to get at the real reason assigned for the ruling. The trial court, undoubtedly, held the lien claimant obligated to bring suit against third persons who might claim liens on the property within the time which the statute prescribes as a condition to the maintenance of lien rights against the owner. These conclusions do not seem to harmonize with the statute. There is a wide difference between the classes of persons to whom the right to obtain a mechanic's lien has been extended in later times and those which could acquire such rights under the earlier legislation, as well as marked differences in the methods of procedure and in divers limitations contained in the different acts. Liens are almost coequal with the territorial organization. In the earlier times, and as far down as the Revision of 1868, the actions were essentially chancery suits, and governed by the general rules which controlled that class of suits, and there was a specific provision conferring upon the court power to permit amendments, and to order brought in, if the plaintiff failed to bring them in of his own accord, all persons who had any interest in the property. The first definite prescription respecting parties is found in the act of 1876. Under section 5 of the act passed that year, all persons interested in the property must be made parties defendant. This is the precise provision of the statute; and, of course, the rights of the lien claimant being subject to that condition, it must have been strictly observed to secure what was granted by the act. In this direction, and in almost its terms, the act of 1876 was closely analogous to the Illinois statute, which has for a long time prevailed in that jurisdiction, and from which many of our laws have been taken. Under the Illinois act, the creditor is not allowed to enforce his lien to the prejudice of any other creditor or incumbrancer, unless he observe the limitation, and bring his suit within the specified period. The act of 1876, however, was materially changed and as it now exists appears in the General Statutes of 1883, §§ 2151, 2152. According to that act, no lien claim shall hold the property longer than six months after, etc., unless an action be commenced within that time to enforce it. Taken by itself, this would seem to be a sweeping clause, which might possibly be held broad enough to necessitate the commencement of a suit against all persons to be affected by the foreclosure. The section 2152 removes any question respecting it. It designates what per-

tue of the act, are bound to be brought in. Under the very well-established doctrine, "Expressio unius est exclusio alterius," the expression of the necessity to make lien claimants parties excludes any idea that the legislature intended by the preceding section to compel the claimant, in order to establish his rights, to bring a suit within the time limited against third persons who were interested in the property. A very strong argument is likewise found in the difference between the earlier and later legislation on this subject. We likewise find a subsequent section in the same act which expressly preserves to the plaintiff any other remedy which he may have under the general law. Gen. St. § 2161.

The only case to which we have been referred by either side which bears on the question seems to sustain the court in its conclusions. *De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co.*, 6 C. C. A. 272, 57 Fed. 111. The defendants in error rely very much on a case recently decided by this court, —*Johnson v. Bennett*, 40 Pac. 847. This certainly contains some expressions which seem to support their views. It was not, however, the intention of the court to pass directly on the proposition involved in the present litigation, and what was said by the learned jurist who wrote the opinion was written with reference to the specific litigation then in hand. That suit only concerned the irregularities which had obtained in the inception and enforcement of a mechanic's lien on several distinct pieces of property in Pueblo. The case turned on the facts which existed as to the title, and the attempt on the part of the claimant to get a blanket lien on four different pieces of property belonging to four separate persons on a contract made with one, which resulted in a judgment enforcing the entire lien on one unfortunate owner. There was a trust deed on the property which had been foreclosed, and the plaintiff had become the owner of that title, and a suit was brought to remove the cloud created by the judgment enforcing the liens. The judgment very correctly resolved the various questions against the lien claimants, and the discussion which occurs in the latter part of the opinion respecting the rights of the lien claimant as against the holder of the title on a trust deed or a subsequent transferee very properly held the trustee, as well as the cestui que trust, indispensable parties, if any rights were sought to be enforced against them. The opinion cites the Illinois cases which undoubtedly hold the suit must be brought against third persons who claim liens by independent contracts within the time expressed in the act; otherwise, the right of enforcement is gone. This, taken in connection with the failure to limit the decision with exactness to the case in hand, led the court into

cases, the present decision is to be taken as our matured conclusion respecting the proper construction of the statute. The precise matter was not argued in that case, nor was our attention called to the difference in the statutes of Illinois and Colorado, nor to the question of the proper construction of the sections now under consideration. The present suit involves the exact point; the question has been very elaborately and carefully argued; and we must agree with the plaintiff in error in his conclusions.

The very radical defects in the complaint which were discussed at the commencement of the opinion will be corrected in the lower court when the case goes back for a new trial. The plaintiff should be compelled to amend and to state all the facts showing the company's right to enforce a lien on the property, the steps taken with reference to its initiation under the statute, its claim and contentions respecting the liens of the persons selected as defendants, that a sharply-defined issue may be presented in the complaint and the respective answers of the rights and interests of all the persons. The only relief to which the plaintiff is entitled, if any, is for the foreclosure of his lien as against such of the defendants as have claims and liens which are inferior in right and subsequent in time to his own, obtaining as to such the proper decree. Should it transpire that his lien is found to be maintainable, and that some of the claimants whom he makes defendants are prior in right and in time, the only relief which he can obtain against them, if any, is the right to redeem and satisfy these prior claims. This right may not exist, but it would be the only one which could be asserted against the prior lien.

For the error committed in overruling the demurrer to the defendants' answer on the pleadings as they then stood, the case must be reversed, and remanded for further proceedings not inconsistent with this opinion. Reversed.

#### PUTNAM v. CURTIS et al.

(Court of Appeals of Colorado. Feb. 10, 1896.)

#### IRRIGATION DITCHES—PRIORITIES—ADJUDICATION OF INTERESTS—ABANDONMENT—EVIDENCE.

1. The respective interests of different persons in the same irrigation ditch cannot be adjudicated in a proceeding under Gen. St. § 1766, authorizing proceedings to determine the priority of right of appropriation of water as between different ditches in the same water district.

2. Nonappearance of the owners of an interest in an irrigation ditch in a proceeding under Gen. St. § 1766, to determine the priority of right of appropriation between it and other ditches in the same water district, does not show an abandonment by the owner of his interest.

3. In an action to quiet title to an interest in an irrigation ditch, evidence that plaintiff's grantors failed to pay any of the expenses of a



ditches; that neither plaintiff nor his grantors had contributed to the maintenance of the ditch; that, though plaintiff purchased from his grantors their interests, respectively, in 1890, 1891, and 1892, he made no attempt to use the water till 1893,—is insufficient to show an abandonment by plaintiff where it is not shown that there was any expense incurred in the statutory action, or any demand on them to contribute to its maintenance, and it appears that plaintiff's failure to use the water was caused by his being unable to rent the land because defendants cut off the supply of water.

Error to district court, Chaffee county.

Action by Henry J. Putnam against George Curtis and others to quiet title to an interest in an irrigation ditch, and to enjoin defendants from interfering therewith. From a judgment for defendants, plaintiff brings error. Reversed.

Libby & Martin, for plaintiff in error.  
John S. Mosby, Jr., *amicus curiæ*.

THOMSON, J. In the year 1883, Mr. Craig and Mr. Johnson were the owners of a ditch taking its supply of water from the North Fork of the South Arkansas river, in Chaffee county. Mr. Johnson afterwards abandoned the land upon which he used the water, and it reverted to the United States, leaving Mr. Craig in the sole possession of the ditch. Craig's title was purchased by W. H. Allen. In 1888, D. P. Owen, Samuel Groover, Wesley King, B. J. King, Wilford King, and George Curtis, occupants of land which could be irrigated from the ditch, in pursuance of an agreement with Mr. Allen, enlarged the ditch, and received interests therein as follows: Owen one-fifth, Groover one-fifth, Curtis one-fifth, and the three Kings one-fifth, or one-fifteenth each; the remaining one-fifth being retained by Allen. The ditch, after being enlarged, was called the "Hoosier Ditch." On March 7, 1889, a receiver's duplicate receipt was issued to Mr. Allen for his land, and on the 27th day of August, 1889, receiver's receipts were issued to the three Kings for the tracts occupied by them respectively. On March 18, 1889, Allen executed a deed of trust, conveying his land and water rights to C. N. Greig, trustee, to secure his promissory note to Crippen, Lawrence & Co. for \$67.50; and on the 3d day of September, 1889, each of the three Kings executed a deed of trust, conveying his land and water rights to the same trustee to secure his promissory note to the same firm for \$105. Default was made by each of the parties in the payment of his note, and his land was sold in pursuance of his deed of trust, Henry J. Putnam, the plaintiff in error, being the purchaser. The deed to him for the Allen tract was executed November 15, 1890, the deeds for the tracts of Wilford E. and B. J. King on December 16, 1891, and the deed for the Wesley King tract on November 23, 1892. On the 18th of February, 1893, the defendant in error, Kate

pany seems to have succeeded to the title of Groover, but at what time does not appear. In 1890, in a proceeding instituted in the district court of Chaffee county, in pursuance of section 1766 of the General Statutes, a decree was rendered determining and establishing the relative priority of right by appropriation of water of the Hoosier ditch as between it and other ditches in the same water district, and the amount of water to which, by such appropriation, it was entitled. No part of the expense of the decree was borne by Allen and the Kings, or either of them, and it may be inferred that none of them were present at the hearing. Each of the three Kings used water from the ditch to irrigate his land from the time when he acquired his water interest, down to and including the year immediately preceding that in which his title was divested, the last year of use of water by any of them being 1891. Allen used the water every year from 1885 to and including 1889. After 1889 neither the Kings, nor any person or persons claiming under them, contributed towards maintaining the ditch; but it does not appear that they were ever requested to do so. During 1891, 1892, and 1893 the plaintiff made continuous effort to rent his land, but on account of the declarations of Curtis that it had no water he failed until 1893, when he procured a tenant for a portion of it. The crop of this tenant, by reason of the acts of Curtis in depriving him of water, was a failure. The complaint set forth the respective rights of Allen and the Kings in the ditch and in the water flowing through it, the conveyance to the plaintiff, Putnam, of their lands and their ditch interests and water rights, and averred that during the irrigating season of 1893 his tenant was violently prevented from taking water from the ditch by the defendants, who threatened a continuance of their acts; so that the plaintiff was and would be unable to raise a crop on his land. The prayer was for a decree establishing the plaintiff's right to an interest of two-fifths in the ditch and in the water which it carried, and for an injunction restraining the defendants from depriving him of the use of the water. The answer of Curtis and Finley, after denying the plaintiff's title, set up the decree in the priority proceeding, averring that in that proceeding the same cause of action involved in this suit was adjudicated and determined by awarding to the defendants the entire ditch and all its water, and alleging that whatever rights the plaintiff or his grantors may have had were lost by abandonment. The Rollins Investment Company disclaimed, averring that it had conveyed its entire interest to Caroline Lovejoy. The plaintiff's replication admitted the conveyance, and it was thereupon stipulated that neither the company nor its grantee had done any act in

denial of the plaintiff's rights. Upon the hearing the court found the issues against the plaintiff, and dismissed his bill. He has prosecuted error to this court from the judgment rendered.

None of the defendants are represented here. A brief has been filed by John S. Mosby, Jr., Esq., as attorney for one J. Trefethan, who is said to have succeeded to the interest of Owen pending the suit. The record shows Finley to be the owner of the Owen title. No mention is anywhere made of Trefethan, and he is a stranger to the case; but Mr. Mosby's argument is the only one in opposition to the claim of the plaintiff that has been presented, and we shall regard him as appearing *amicus curiæ*, and give his argument due consideration. There is no material conflict in the evidence, and the question is whether, upon the undisputed facts, the judgment is right. The answer sets up the former decree as an adjudication of the questions involved in this suit, and by which the plaintiff is barred; in other words, it is claimed that by reason of that decree this cause of action is *res adjudicata*. The further defense is that whatever rights the plaintiff or his grantors may have had have been extinguished by abandonment. Mr. Mosby does not insist that the decree determined the rights of the owners of the Hoosier ditch as among themselves, although he refuses to concede that it did not, but he urges the failure of the plaintiff's grantors to appear and claim their rights in that proceeding as a fact tending to prove an abandonment. That decree was not, and could not be, an adjudication of any right or claim of the plaintiff's grantors, as between them and the other owners of the same ditch. It does not purport to determine what persons owned the ditch, or what their respective interests in it, or the water which it carried, were; but if the court had, in that proceeding, undertaken to adjust the rights and proportionate interests of the several claimants of the ditch as against each other, its judgment would have been to that extent a nullity. The proceeding in which the decree was rendered was a special one, provided by the statute for the sole purpose of ascertaining and adjudicating the priorities of right to the use of water between the several ditches, canals, and reservoirs in the same water district. The statute invests the court with jurisdiction to establish the rank of the several ditches with relation to each other, based upon the different dates of appropriation of water, the quantity appropriated, and the means employed to utilize it; and to award to each, the priority to which it may be entitled; but it does not authorize inquiry into the relative rights of coclaimants in the same ditch, or any adjustment of their disputes amongst themselves. The nonappearance of the plaintiff's grantors in the proceeding is not evidence of an abandonment of any right which they had previously pos-

sessed. The statute requires notice to be given to all persons interested as owners in any ditch, canal, or reservoir, to appear and file a statement of claim under oath, showing the ditch, canal, or reservoir, or two or more such, in which he, she, or they claim an interest. Mr. Mosby refers us to this provision, and argues from it that the failure of the parties to appear in obedience to the requirements of the notice indicates their intention to abandon their claims. We are unable to appreciate his logic. If all the owners of the ditch had absented themselves from the adjudication, and there had been no statement filed showing their ditch, no evidence would have been heard in their behalf, and no priority would have been awarded to it; and if the other ditches to which priorities were given, exhausted all the available water, theirs would have been dry and useless; but their rights in the ditch and in any water which it might obtain, as between themselves, would not have been affected. But the statute further provides that the statement required may be made by any one of the owners for and in behalf of all, and accordingly we find that the statement in behalf of the Hoosier ditch was made by the defendant Curtis, in which he set forth that it was owned in common by himself, one-fifth, two others, one-fifth each, and others two-fifths. Every share in the ditch was represented in his statement, and the court seems to have regarded it as sufficient for the purposes of the adjudication. The rights of the ditch were preserved in the decree, and the fact that the grantors of the plaintiff were not personally present has no significance, and justifies no inference whatever, unfavorable to them.

Whether an act of a party constitutes an abandonment of property previously occupied by him depends entirely upon the intention with which it is done. An abandonment of property held by possessory title takes place instantly when the occupant deserts it without an intention of ever reclaiming it for himself, and careless of what may thereafter become of it. A single act may be of such character, and done in such manner, and under such circumstances, that an intention to abandon may be inferred from it. But mere absence from and nonuser of the property do not prove an intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis. *Derry v. Ross*, 5 Colo. 295; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *Richardson v. McNulty*, 24 Cal. 339; *Judson v. Malloy*, 40 Cal. 299; *Mallett v. Mining Co.*, 1 Nev. 188. It devolves upon the party alleging an abandonment, and setting up a claim in virtue of it, to establish the facts from which it may be deduced. *Oreamuno v. Mining Co.*, 1 Nev. 215.

We shall now briefly examine the evidence which is specially relied upon to prove that

part of the expenses of the proceeding in which the ditch priorities were adjudicated. Whether this fact would, under any circumstances, even have a tendency towards proving an abandonment, we shall not inquire. There is no evidence that there was any expense in the proceeding chargeable against the Hoosier ditch. By the terms of the statute all the expenses are payable by the county or counties in which the water district lies, except the fees of witnesses, which must be paid by the parties calling them. It does not appear that there was any testimony on behalf of the Hoosier ditch, unless it might have been that of the owners who were present. But, aside from these considerations, the fact that the Kings continued to use the water for the purposes of irrigation after the rendition of the decree is a conclusive answer to the charge of abandonment made against them on account of their alleged neglect of payment. Second. Since 1889 neither the plaintiff nor his grantors contributed towards the maintenance of the ditch. The record does not show either that there was any necessity for such contribution, or that any of them was ever requested to contribute for that purpose. If there was such necessity, and any co-owner, upon proper demand, refused to contribute his proportion, the owner or owners paying his part of the expense, or doing his share of the work, would not have been without a remedy, and in a proper proceeding could have made themselves whole; but an indebtedness by him for his share of the work would not divest him of his interest, or, unconnected with any other fact or circumstance, be evidence of an intention to abandon it. Third. The plaintiff's grantors removed from their land at different times after 1889, and before 1893, and after removal never asserted any right in the land or the ditch; and the plaintiff, until 1893, made no attempt to use the water. These facts, when considered in connection with concurrent events, are not even suggestive of difficulty. The title of Allen and the Kings in the land and ditch rights passed to the plaintiff, Allen's in 1890, Wilford E. and B. J. King's in 1891, and Wesley King's in 1892. Each claimed and used his rights in the water during the years preceding the one in which his property passed from his ownership and possession. There was no abandonment by him down to the time when the plaintiff succeeded to his title. The plaintiff, after becoming the owner, made diligent and continuous effort to rent the land, but was unsuccessful until 1893, when he leased a portion of it. The evidence tends to show that the defendant Curtis was responsible for his failure to obtain tenants, and the one he did obtain lost his crop because Curtis and Finley cut off his supply of water. In the entire record there is nothing to indicate an intention of aban-

donment, the opposite intention affirmatively and abundantly appears. Upon the case made by this record the plaintiff was entitled to the relief prayed, and the court erred in denying it. The judgment must be reversed. Reversed.

#### PADEN et al. v. WORRELL.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

##### APPEAL—BRIEFS—DISMISSAL.

Rule 6 of the rules of practice of the supreme court of this territory provides that, "in each civil cause, counsel for plaintiff in error shall furnish a copy of his brief to counsel for defendant in error at least thirty days before the first day of court, and the counsel for defendant in error shall furnish a copy of his brief to counsel for plaintiff in error at least ten days before the first day of said term. \* \* \* In case of a failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or affirm or reverse the judgment." Counsel for plaintiff in error having failed to comply with this rule, the case is dismissed.

(Syllabus by the Court.)

Error to probate court, Garfield county. Action between Paden Bros. and L. F. Worrell. From a judgment for the latter, the former brings error. Dismissed.

Denton & Chambers and Roberts & Brownlee, for plaintiffs in error.

BIERER, J. This cause was filed in this court on March 2, 1895, and no briefs have been filed by counsel for plaintiffs in error. This is the second term of the supreme court since the cause was filed. Rule 6 of the rules of practice of the supreme court of this territory provides: "In each civil cause, counsel for plaintiff in error shall furnish a copy of his brief to counsel for defendant in error at least thirty days before the first day of court, and the counsel for defendant in error shall furnish a copy of his brief to counsel for plaintiff in error at least ten days before the first day of said term. Proof of service of the briefs must be filed with the clerk of the supreme court seven days prior to the first day of said term. In case of a failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or affirm or reverse the judgment." These briefs should have been filed before the June, 1895, term of this court, and the cause is dismissed for failure to comply with this rule. All the justices concurring.

#### SHOEMAKER v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

##### ALIBI—BURDEN OF PROOF—REASONABLE DOUBT.

An instruction to the jury that the burden is upon the defendant to prove an alibi by a preponderance of the evidence,—that is, by greater and superior evidence,—and that the defense of alibi, to be entitled to consideration, must be such as to show that at the very time of the com-

circumstances, that he could not, with all the means of travel within his control, have reached the place where the crime was committed so as to have participated in the commission thereof; and that, if the jury believe that the territory has made out such a case as, under such instruction as to an alibi, will sustain a verdict of guilty of the crime of murder charged in the indictment, then the burden is upon the defendant to make out his defense of alibi,—is erroneous, and is sufficient ground for a reversal of the cause, although the court also instructed the jury, in the same connection, that, all the evidence being considered, as well that touching the question of an alibi as the criminating evidence introduced by the prosecution, if the jury entertain a reasonable doubt of the guilt of the accused, they should acquit him.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John L. McAtee.

The defendant, Henry M. Shoemaker, was, in September, 1894, indicted by the grand jury of Blaine county, Okla., charged with the murder of one Edward H. Townsend on the 28th day of March, 1894, and on his application the venue of the cause was changed to Kingfisher county, where the defendant was convicted, and the punishment assessed by the jury and adjudged by the court at imprisonment at hard labor in the penitentiary for life. Defendant appeals. Reversed.

Buckner & Son, for appellant. C. A. Galbraith, Atty. Gen., for the Territory.

BIERER, J. The appellant has assigned numerous errors for a reversal of the judgment of the district court, but only two are relied upon by counsel for appellant in their brief, and only one is necessary for our consideration. On the question of alibi the court instructed the jury as follows: "(30) The defendant claims as his defense what is known in law as an 'alibi'; that is, that at the time the murder with which he is charged was being committed he was at a different place, so that he could not have participated in its commission. (31) The burden is upon the defendant to prove this defense for himself by the preponderance of the evidence; that is, by the greater and superior evidence. The defense of alibi, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused was at another place, so far away, or under such circumstances, that he could not, with all the means of travel within his control, have reached the place where the crime was committed so as to have participated in the commission thereof. (32) The jury is instructed that if they believe that the territory has made out such a case as, under this instruction herein given, will sustain a verdict of guilty of the crime charged in the indictment, then the burden is upon the defendant to make out his defense of an alibi; and upon all the evidence, then the primary question is, the whole of the evidence being considered, both that given by the defendant and that given for the territory, is the de-

ferred all the evidence, as well that touching the question of the alibi as the criminating evidence introduced by the prosecution, then, if they have any reasonable doubt of the guilt of the accused of the offense of which he stands charged, they should acquit; but, if they have no such reasonable doubt, then they should not acquit, but should find the defendant guilty." Exceptions were saved to the giving of instructions 31 and 32, and one of the grounds upon which appellant relies for a reversal of the case is the assignment of error committed in giving instruction 31. We have set out the three instructions, as they all go together, and are the entire instructions of the court on this question. Instruction 31 is erroneous. The general provision of our statute places the burden of proof upon the territory, and we have no provision which changes or limits this general provision with reference to proving an alibi. Section 5201, St. 1893, provides: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted." This section is identical in substance with section 228 of the Criminal Code of Kansas, which was held by the supreme court of that state, in the case of *State v. Child*, 40 Kan. 482, 20 Pac. 275, "to cast the burden of proof on the state"; and where it is further held: "There is a presumption that clings to a person charged with crime, through every successive step of his trial, that he is innocent; and this presumption is never weakened, relaxed, or destroyed until there is a judgment or conviction. The state is required to prove his guilt beyond any reasonable doubt, and all the defendant has ever been required to do is to produce evidence that creates such a doubt as to entitle him to an acquittal. He is not required to prove his innocence; all that is demanded of him is to show such a state of facts as to create a reasonable doubt of his guilt. This defense of alibi is peculiar in this respect, so far as this case is concerned: that the state is bound to prove, in making its case, that the defendant was present at the commission of the crime; and this material fact it must prove beyond any reasonable doubt. The defendant alleges he was not present, and he offers evidence to sustain this allegation. The trial court said he must prove it by a preponderance of the evidence, while the general rule of law outside of the statutory requirement casts the burden of proving that fact on the state." The court in that case reversed the judgment because the trial court had given instructions, in not nearly as strong language as that in which the instruction in question is couched, to the effect that the burden of proving an alibi is on the defendant to establish the same by a preponderance of the evidence, but directing the jury to acquit the

defendant unless, from all the circumstances surrounding the case, they were satisfied of his guilt beyond a reasonable doubt. The offer of evidence by the defendant tending to prove an alibi does not change the burden of proof, and shift it upon the defendant. And this principle has been vigorously maintained even in the absence of, or at least without reliance upon, such a statute as that of ours referred to. *Walters v. State*, 39 Ohio St. 215; *State v. Chee Gong* (Or.) 19 Pac. 607; *Turner v. Com.*, 27 Am. Rep. 683; 1 Greenl. Ev. § 74, note. In Mr. Greenleaf's note, just cited, he uses this positive language in expressing the rule: "In criminal cases the weight of evidence or burden of proof never shifts upon the defendant, but is upon the government throughout." In *Wisdom v. People* (Colo. Sup.) 17 Pac. 519, the instruction that: "To render proof of an alibi satisfactory, the evidence must cover the whole time of the transaction in question, so as to render it impossible that the defendant setting up such defense could have committed the act,"—was held reversible error. In *French v. State*, 12 Ind. 670, reversible error was held to have been committed by giving the instruction: "Evidence which tends to establish the defendant's guilt also tends in an equal degree to prove that he was present at the time and place when and where the deed was committed; and if he seeks to prove an alibi he must do it by evidence which outweighs that given for the state, tending to fix his presence at the time and place of the crime." In this case, which is a well-considered opinion, approved by all the judges, it is held that the rule is nowise different in a case where the defendant sets up an alibi from what it is where other affirmative matter is relied on. In the opinion the court says with reference to the instruction given: "This instruction is not in accordance with the general rule of law as applied either in civil or criminal cases, for in the former the defendant is not bound to produce evidence which outweighs that of the plaintiff. If he produces evidence which exactly balances it, so as to leave no preponderance, he defeats the suit against him." In *People v. Fong Ah Sing*, 64 Cal. 253, 28 Pac. 233, the court held it erroneous to give an instruction on alibi which directed the jury to acquit the defendant if they found him to have been at another place at the time of the commission of the homicide. The instruction here in question is very much like that in this California case, for it tells the jury that the alibi, to be entitled to consideration, must be such as to show that, at the very time of the commission of the crime charged, the accused was at another place, so far away, or under such circumstances, that he could not, with all the means of travel within his control, have reached the place where the crime was committed so as to have participated in the commission thereof. Of course, under this instruction, the jury could only consider an alibi in case it

was shown or proven as a fact, and this was too great an obligation to place upon the defendant in any event. He was not bound to prove an alibi. He was not bound to prove that he was at some other place at the time of the commission of the crime, no matter what the evidence of the territory against him might be. If he offered such evidence as would create in the minds of the jury a reasonable doubt as to his presence at the time of the commission of the crime, his burden was fully borne, and it was the duty of the jury to acquit him, although the evidence so offered might fall very far short of proving as a fact, by the greater weight of the evidence, that he was not at the scene of the crime at the time of its commission. There are some authorities holding the other way on this question; as, for instance, in Iowa, in the case of *State v. Hamilton*, 57 Iowa, 596, 11 N. W. 5, it is held that, where the defense of alibi is relied upon, the burden of proof is on the defendant to establish it by a preponderance of the evidence. But there is in this case a very strong and most able dissent by Adams, C. J., also concurred in by Mr. Justice Day; and, in our view of the law, the dissenting opinion is much the best law written in that case. It shows, indeed, how absolutely dangerous to liberty is the rule placing the burden of proof on the defendant. The dissent in this case also cites with particular approval the case of *French v. State*, 12 Ind. 670. Judges Adams and Day also dissent from the Iowa doctrine in the case of *State v. Reed*, 17 N. W. 150. We think the learned judge who tried the case below was misled into giving this instruction by following the precedents given in Sackett in his work on Instructions, where the doctrine is taken from the Illinois rule. It is true that the rule, as given, is supported by the Illinois decisions. The dangerous departure from the ancient and time-honored rule of presuming the innocence of the defendant, and lodging the burden of proof on the prosecution throughout all the stages of the case, could be no more forcibly exhibited than is done by the extraordinary rule finally reached by the supreme court of Illinois as expressed in the syllabus to the case of *Klein v. People*, 113 Ill. 596, which is: "A defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place." Such a rule as that has probably landed innocent men in the penitentiary or on the gallows, or else it has been refused enforcement by the juries of the very state that has adopted it.

In the case of *State v. Waterman*, 1 Nev. 543, which was cited by the attorney general, the supreme court of that state held it erroneous for the trial court to instruct the

jury that, to warrant the acquittal of the defendant on the proof of an alibi, they must be satisfied of its truth by the testimony. In that case, although the court said that when the defendant attempts to establish an alibi he takes on himself the affirmative of the proof, it also stated that "it is not necessary that he should establish his defense by a preponderance of the evidence." The argument is a strong one against placing the burden, to any extent, upon the defendant, and is in itself a refutation of the outward rule therein formed as to placing the burden of proof on the defendant on such an issue. We must admit that we are unable to understand how the burden of proof could be placed upon a party when he was not required to establish the same by even a preponderance of the evidence. A burden that need not be established by a preponderance of the evidence is, in law, no burden at all, for a preponderance of the evidence is the least degree of proof by which a proposition may be established. Nor can we consider the celebrated case of *Com. v. Webster*, 5 Cush. 295, as being an authority upon which we should lay down a different doctrine for the administration of the criminal law in this territory. The inaccurate language there used by Mr. Justice Shaw is spoken of in the case of *State v. Waterman*, supra, as being a "loose expression." Judge Beatty, in the *Waterman* Case, says that: "The only thing we find in the books at all tending to support the position taken by counsel for the state is a loose expression of Chief Justice Shaw in the charge he gave to the jury in the case of *Com. v. Webster*;" and the language which he thus referred to is as follows: "In the ordinary case of an alibi, when a party charged with a crime attempts to prove that he was in another place at the time, all the evidence tending to prove that he committed the offense tends in the same degree to prove that he was at the place when it was committed. If, therefore, the proof of an alibi does not outweigh the proof that he was at the place when the offense was committed, it is not sufficient." This language cannot bear the test of reason, or else it is a mistake to say that the burden of proof is upon the prosecution in a criminal cause. As is said in the first two sentences quoted, the evidence tending to prove a crime by the direct act of a party charged is divided into two primary facts,—the one, that he did the act which constituted the crime; the other, that he was there when he did it. Of course, these two propositions must be established, and must both be proved as against some one party, or there could be no crime committed, for no person could do the criminal act by which the crime was committed when such person was not present when he did it. And why should a person be required to sustain the burden of proof upon his claim as a de-

fense that he was not present at the place where the prosecution put him unless he was also required to sustain the burden of proof that he did not do it; that is, that he was not the person who did the criminal act charged and relied upon by the prosecution? The one fact is just as necessarily a part of the proof, and is just as much undertaken to be established by the prosecution, as the other; and, if either is wanting, the prosecution must fall, and the accused go free. Suppose the prosecution relies for the conviction of the defendant of murder on proof, however strong and positive it may be, that the defendant, at the particular time and place, shot and killed the deceased. The two primary facts are that a person at the time and place stated shot the deceased, and that that person was the defendant. Now, no person would contend that the burden of proof was on the defendant to show that the deceased was not shot by some one, but, in fact, came to his death some other way. Nor would they contend that the burden of proof was on the defendant to show that he was not the person who did the shooting. It will be admitted by every one that these two facts must be established by the prosecution. Now, the defendant is not precluded by the testimony of the prosecution, and he is not required to meet it by any particular form of proof. He may desire to meet it in the only way that many a person who is the victim of an honest mistake or a willful fabrication could meet the seemingly strong proof against him, and that is by evidence tending to show that he was not the person who did the shooting, because he was at some other place than the scene of the shooting when the shooting was done, so that he could not have been the person who did it; and he certainly, to our minds, no more undertakes the burden of proof in a case presenting his defense in this way than he would by any other form or name of proof which could be offered under the plea of not guilty. If the language of Mr. Justice Shaw states the principle correctly in declaring that proof of an alibi is not sufficient unless it outweighs the proof that he was at the place where the offense was committed, then we see no reason why the courts, by mere judicial decree, might not go a step further, and say that the proof that the defendant did not commit the criminal act could not be sufficient unless it outweighs the proof that he did commit it. And we would change the legal presumption that the defendant is innocent, although the grand jury has indicted him, to one holding him guilty until he has proved the indictment false. We are unwilling to take a single step in this direction, and must, therefore, for the error committed, reverse the judgment, and order the cause remanded for a new trial. All the justices concurring, except Justice McATEE, who tried the case below, not sitting.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

Error to district court, Oklahoma county.

Action by the Pabst Brewing Company against N. R. Snyder and others. Snyder filed in the district court a complaint for review. Pabst Brewing Company demurs, and Snyder brings error from a judgment sustaining the demurrer. Affirmed.

Treadwell & Wilkinson, for appellant. Stone & Lewis, for appellee.

**PER CURIAM.** October 15, 1891, the Pabst Brewing Company commenced an action in the district court of Oklahoma county against H. Lamar, N. R. Snyder, and G. W. Spencer, to recover judgment upon a contract previously entered into between the parties, June 13, 1892. The Pabst Brewing Company obtained a judgment against defendants Snyder and Spencer by default. February 15, 1893, Snyder filed in the district court a complaint for review, and on March 20, 1893, the Pabst Brewing Company filed a demurrer to such complaint, which demurrer was by the trial court sustained. To reverse the ruling of the trial court upon the demurrer, Snyder brings up the case. The petition in error was filed in this court February 20, 1895. No briefs have been filed by appellant. After an examination of the record, we find no apparent error, and we therefore affirm the judgment of the court below.

### LOWE v. BLUM et al

(Supreme Court of Oklahoma. Feb. 13, 1896.)

#### NOVATION—WHAT CONSTITUTES.

In order to complete the contract of novation, it is necessary that the party seeking to show that he is entitled to the benefit of such a contract, and to be released from liability, shall be able to show, not only that the new party undertaking to assume the liability shall have completed such a contract with him (the debtor), but that such new party shall also have so sufficiently and fully contracted with the creditor, and that the creditor shall have plainly signified his assent to the discharge of the debtor, but also his assent to the new liability, and that such new liability shall be so understood and perfected as that the creditor shall be able to hold the new debtor legally liable thereupon.

(Syllabus by the Court.)

Error to district court, Logan county; before Chief Justice Dale.

Action by Leon & H. Blum against T. J. Lowe. Judgment for plaintiffs, and defendant brings error. Affirmed.

Huston & Huston, for plaintiff in error. Keaton & Cotteral, for defendants in error.

**McATEE, J.** This was an action begun on the 18th day of May, 1892, by the plaintiffs below, defendants in error here, against the plaintiff in error, defendant below, to recover the amount due upon three several promissory notes and upon an open account, aggregating the sum of \$5,475.46. The notes were executed at Texarkana, Tex., September 1, 1886, for the sum of \$1,517.34, payable 90 days after date, with 12 per cent. interest from maturity until paid; at Galveston, Tex., June 11, 1886, for the sum of \$657.70, pay-

able November 1, 1886, for the sum of \$657.70, payable November 1, 1886, with interest at the rate of 10 per cent. per annum from maturity until paid. Each of said notes provided that 10 per cent. attorney's fees should be paid by the maker, if the notes were placed in the hands of attorneys for collection. The notes were indorsed by Mungeshelmer & Klein. The open account was for merchandise furnished in June of 1886, upon which a credit appeared, dated June 26, 1886. Judgment was demanded by the plaintiffs for the face of said notes, with accrued interest, and 10 per cent. attorney's fees, together with the amount due on said open account, with interest until paid. The defendant answered, and, with other defenses, pleaded payment of the notes sued upon to the firm of Mungeshelmer & Klein, alleging that Mungeshelmer & Klein were the agents of plaintiffs, and that the plaintiffs had ratified a settlement alleged to have been made by the plaintiff in error with Mungeshelmer & Klein. The case came on for hearing in the district court upon the 19th day of October, 1894, and was tried by the court.

The following findings of fact and conclusions of law were made by the court, and judgment thereupon was rendered against the plaintiff in error, defendant below:

"(1) That the notes sued upon in this action were given at the time indicated on the face of the notes.

"(2) That the notes were given in payment for goods, wares, and merchandise, purchased by the defendant of the plaintiffs, and that such purchases were made through Mungeshelmer & Klein, but that the payments on such notes were made directly to Leon & H. Blum.

"(3) That, prior to the time said notes became due, the defendant in this case became insolvent.

"(4) That Mungeshelmer & Klein were indorsers upon the notes given by the defendant to the plaintiffs, which notes are the basis of this suit, and that such indorsements were made at the time the notes were executed.

"(5) That, prior to the time the notes became due, the defendant became insolvent, and, to secure the payment of these notes and other notes upon which Mungeshelmer & Klein were sureties, the said Mungeshelmer & Klein and one Joseph Marx entered into a contract with the defendant, wherein, for a valuable consideration, they agreed to pay all of the notes upon which Mungeshelmer & Klein were indorsers or sureties, and said agreement included the notes sued upon in this action. The following is a true and correct copy of said agreement:

"State of Texas, County of Bowie. We, the undersigned, Mungeshelmer & Klein and Joseph Marx, of Bowie county, Texas, said firm composed of (Mungeshelmer & Klein)

Max Mungesheimer and L. Klein, each for ourselves, individually, said Mungesheimer & Klein as a firm and copartnership, and the said Joseph Marx, as president of the Citizens' Bank of Texarkana, Texas, for and in consideration of the transfer to the said Joseph Marx of a certain stock of goods, wares, and merchandise, situated in the town of Texarkana, Texas, and also a certain stock of goods, wares, and merchandise at Bettie Station, Upshur county, Texas, also what is known as "Bettie Mill," in said county, with appurtenances, fixtures, etc., thereto belonging, and all lumber belonging to T. J. Lowe on the yards of said mill, and also certain real estate in the county of Upshur, and timber in the counties of Upshur and Bowie, and also any and all moneys that may be now due or become due from the Arkansas, St. Louis & Texas Railroad Company, which transfer is evidenced by bills of sale and deeds of conveyance, bearing this date, by the said T. J. Lowe, acting through his agent and attorney, J. L. Camp, Jr.,—we, the said Mungesheimer & Klein, as a firm as aforesaid, and each individually, and the said Joseph Marx, for himself, and as president of the Citizens' Bank of Texarkana, do hereby obligate and bind ourselves, as aforesaid, to release and relieve the said T. J. Lowe from any and all obligations unto us, either individually, as a firm of Mungesheimer & Klein, as aforesaid, and the said Joseph Marx, either individually or as president of the Citizens' Bank of Texarkana, Texas, as aforesaid; and we hereby give this unto the said T. J. Lowe, our full and complete receipt for the consideration aforesaid, to the said T. J. Lowe, in settlement to this date of all notes, dues, and obligations to us, or either of us, either individually, as said firm, or to the said Marx, as president of the said bank. We hereby, also, for the consideration aforesaid, the payment of which is fully acknowledged, each for ourselves, individually, and the said firm of Mungesheimer & Klein, and the said Joseph Marx, as president of said bank, do hereby obligate and bind ourselves unto the said T. J. Lowe to fully pay off and discharge all and every obligation, either by note, account, or bond, or otherwise, upon which the said T. J. Lowe is principal, and we are bound, either as sureties for the said T. J. Lowe, as indorsers, or otherwise, and each and all of said obligations, notes, bonds, or other evidences of indebtedness of the said T. J. Lowe to any and all persons, and upon which we may be bound, either as indorsers or security for the said Lowe, individually, as a firm of Mungesheimer & Klein, or said Marx as president of said bank. We obligate ourselves hereby, at maturity of the same, to take up, fully pay off, and discharge the original of said note or obligation, we, either, or all of us, may be so bound as indorsers, or in any manner security for the said T. J. Lowe as principal, the same to deliver unto the said T.

J. Lowe, and the same to cancel. Said amount due to the said Mungesheimer & Klein, and to the said Marx as president of said bank, and the amount for which the said persons are security for the said T. J. Lowe, and which they hereby obligate themselves to fully pay off and discharge, is estimated at \$85,000. And we further obligate ourselves to fully pay off and discharge such balance and balances as may be due upon any, or either, or all, of the property this day conveyed, and to release the said T. J. Lowe fully and completely from any liability therefor, or upon any other obligation whatsoever, of any character or kind, either due to us by him or upon any other demand or claim upon which we may be liable or bound, as security or otherwise, with the said T. J. Lowe. Witness our hands this the — day of September, 1886. Mungesheimer & Klein. Max Mungesheimer. Larry Klein. J. Marx, Pt. Citizens' Bank, Texarkana, Texas. J. Marx.'

"State of Texas, County of Bowie. Before me, A. J. Purcell, a notary public in and for said county and state, personally appeared Max Mungesheimer and Larry Klein, in and for themselves individually, and each for the firm of Mungesheimer & Klein, and Joseph Marx, for himself, and as president of the Citizens' Bank of Texarkana, Texas, well known to me to be the persons whose names are signed to the foregoing, and acknowledged to me that they, for the said firm of Mungesheimer & Klein and individually, and the said Joseph Marx as president of said bank and individually, signed and executed the same for the purposes and consideration therein expressed. A. J. Purcell, Notary Public, Bowie Co., Texas. [Seal.]"

"(6) That the said contract was entered into by the parties named at a time when Mungesheimer & Klein and Joseph Marx were solvent, and amply able to carry out the agreement entered into, and that all of said parties were solvent for one year after the execution of said contract; that, shortly after such agreement was entered into, the defendant in this case, in a conversation with Leon Blum, one of the partners of the firm of Leon & H. Blum, advised said Leon Blum of the contract, and of the steps he had taken to secure to them the payment of the notes sued upon in this case; that, in such conversation, said Leon Blum stated to the defendant that that was all right, that he knew the parties, and that they were good, and that he was well satisfied with the arrangement made. The evidence in this case further shows that, about the maturity of said notes, the same were forwarded to a bank located at the place where the defendant had formerly been engaged in business for collection; that, at that time, the defendant was not living at that place; that the notes were presented to Mungesheimer & Klein, indorsers upon said notes, for payment, and that payment was refused, and the notes returned to the plaintiffs; that on



of the notes, and the promise therefor made of a settlement; that, two days thereafter, the defendant wrote plaintiffs a letter, both of which letters are attached hereto, and made a part of these findings of fact, and marked Exhibits 'A' and 'B'; that it does not appear, from the evidence, that any further or other communications were made by the plaintiffs to the defendant, or attempted to be so made until a short time prior to the bringing of this action, at which time the notes were received by the attorneys for the plaintiffs at this place, and at this place presented to the defendant for payment. It does not appear, from the evidence, that the account sued upon was ever presented to the defendant for collection until the same was received by the attorneys for plaintiffs at this place. Such time was long subsequent to the date when the statute of limitations of the state of Texas operated in favor of the defendant to bar said account. The court further finds that, after the notes were given by the defendant, and indorsed by Mungeshelmer & Klein, the same were, by the defendant, turned over to the plaintiffs, and at all times since the notes have been in the possession, owned, and under the control of the plaintiffs, that they had not in any manner parted with their interest or title to said notes."

From the above findings of fact, the court concludes, as a matter of law, that the contract entered into between the defendant and Mungeshelmer & Klein and Joseph Marx was not binding upon the plaintiffs, Leon & H. Blum; that, before said contract could be binding upon said parties, they must have agreed to have released the defendant from any obligation which the defendant was under to have paid such sum of money as indicated by the notes; that, no part of said notes having been paid, the defendant is still liable for the full sum stated in the notes, together with interest at the rate called for in said notes, and that he is not liable upon that portion of the suit for the account; that judgment be rendered in favor of the plaintiffs in the sum of \$6,037.27 and costs of suit. Counsel for the plaintiffs requests that the court render judgment for an additional sum of 10 per cent. of the amount of said notes as attorney's fees, as stipulated therein, which request the court refuses to grant, to which action of the court plaintiffs then and there excepted. Plaintiffs also except to that part of the judgment of the court which disallows the account, and which refuses recovery upon the account sued upon. To all of which findings of fact and conclusions of law, the defendant then and there excepted. Whereupon the defendant filed his motion for judgment upon the findings of fact, which motion was by the court overruled, and excepted to. Thereupon the court rendered judgment in favor of the plaintiffs for

the notes, and the promise therefor made of a settlement, from the time interest became due under the terms of said notes.

The following are copies of Exhibits A and B:

Exhibit A: "Galveston, Tex., May 22, 1888. Mr. T. J. Lowe, Gllmer—Dear Sir: Our Mr. Sylvian Blum begs to remind you of your kind promise, made to him while in the city, in connection with your notes held by us. We have been expecting to hear from you with an offer of a settlement, but so far nothing has been received, and we would be pleased to receive a reply in conformity with your promise. Yours, truly, Leon & H. Blum."

Exhibit B: "Messrs. Leon & H. Blum, Galveston, Texas—Gentlemen: Yours received, and contents noted, and will say, in answer, I have been in no condition to offer any settlement of any kind, but think I can this fall. I wish to make an equitable and fair settlement with you gentlemen, and you need have no fears but that I will. I am doing all I can to get around, and you can rest assured I fully appreciate your kindness. I hope to be down next month, and will see you in person. I am, truly yours, T. J. Lowe."

Plaintiffs also excepted to that part of the judgment of the court which disallowed the account, and which refused recovery upon the account sued upon. The defendant excepted to all the findings of fact and conclusions of law, and moved for judgment upon the findings of fact, which motion the court overruled, and this was excepted to; and thereupon judgment was entered up for the principal sum named in the notes, as set forth therein, with interest at the rate named, from the time interest became due upon the terms stated in the notes. Motion for a new trial was duly made by the defendant, and overruled. No motion for a new trial was made by the plaintiffs, the defendants in error.

Various assignments of error—to the effect that the judgment was inconsistent with the findings of fact, contrary to law, and that the court erred in finding that the contract entered into was not binding upon the plaintiffs, and in overruling the defendant's motion for judgment and motion for a new trial—have all been treated in oral argument, and in the brief of plaintiff in error, upon the proposition that the contract set forth in the findings of fact was one of novation, in which the contracting parties, Mungeshelmer & Klein and Marx, were substituted and taken in lieu of the plaintiff in error, and were so accepted by the defendants in error, and that the plaintiff in error was thereby released and discharged from liability on account of the notes and accounts sued on. In order to sustain this contention, it is argued that "a new party, in the person of J.

ment to "release the said T. J. Lowe fully and completely from any liability upon" the notes sued upon," and that, shortly after the contract was made between Lowe and Mungeshelmer & Klein and J. Marx, concerning Blum, Lowe advised Leon Blum of all the terms thereof, and he, in reply, stated that "that was all right, that he knew the parties, and that they were good, and that he was well satisfied with the arrangement made," and that, thereby, Blum and his firm became parties to that contract, and were bound by its terms to the same extent as though he had signed the firm name to the written contract. Upon this contention, it is to be observed that the contract was the contract of Mungeshelmer & Klein, as a partnership and individually, and of J. Marx, as president of the Citizens' Bank of Texarkana, and of J. Marx individually, with the plaintiff in error, and provided that "we do hereby obligate and bind ourselves, as aforesaid, to release and relieve the said T. J. Lowe from any and all obligations unto us, either individually, as the firm of Mungeshelmer & Klein, as aforesaid, and the said Joseph Marx, individually or as president of the Citizens' Bank of Texarkana, Texas, as aforesaid, and we hereby give this unto the said T. J. Lowe, our full and complete receipt, for the consideration aforesaid, to the said T. J. Lowe, in settlement of all notes and dues and obligations to us, or to either of us, either individually, as said firm, or to the said Marx as president of the said bank, \* \* \* and do hereby obligate and bind ourselves unto the said T. J. Lowe to fully pay off and discharge all and every obligation, either by note, account, or bond, or otherwise, upon which the said T. J. Lowe is principal and we are bound, either as sureties for the said T. J. Lowe, as indorsers, or otherwise, and each and all of said obligations, notes, bonds, or other conveyances or indebtedness of the said T. J. Lowe to any and all persons, and upon which we may be bound, either as indorsers or sureties for the said Lowe, individually, or as a firm of Mungeshelmer & Klein, or said Marx, as president of said bank. \* \* \* And we further obligate ourselves to fully pay off and discharge such balance or balances as may be due upon any or either or all of the property this day conveyed, and to release the said T. J. Lowe fully and completely from any liability therefor, or upon any other obligations whatsoever, of any character or kind, either due to us by him, or upon any other demand or claim upon which we may be liable or bound, as sureties or otherwise, with the said T. J. Lowe." These obligations, as well as all the obligations of the contract, were made directly by the contracting parties to the plaintiff in error. In consideration of them, he had conveyed his property to Mungeshelmer & Klein and J. Marx. The convey-

or Marx, in order to insure them from losses liable to inure to them, on account of advances and as security. The contract was not made with the defendants in error. The obligations of the contract run to the plaintiff in error. The defendants in error are not mentioned in the contract. They appear to have been, at the time the contract was made, not otherwise considered in it than as they may have been included with other creditors of the plaintiff in error to whom Mungeshelmer & Klein had become sureties for the plaintiff in error. So far as the terms of the contract are concerned, the defendants in error do not appear to have been consulted. The whole arrangement was completed before they were advised of it. The contract does not provide that they should release the plaintiff in error, and accept Mungeshelmer & Klein and J. Marx as their debtors upon the notes and accounts sued upon in lieu of the plaintiff in error. The stipulations for the protection and release of the plaintiff in error from any further obligations run from the parties who made the contract. The defendants in error, by the terms of the contract, in no way sought to be precluded from any remedy against the plaintiff in error. When the defendant in error Leon Blum was subsequently informed of the arrangement, he stated to the plaintiff in error that "that was all right, that he knew the parties, and that they were good, and that he was well satisfied with the arrangement made." But there are no words here, any otherwise than the contract itself, by which it can be shown that the defendants in error ever agreed to release the plaintiff in error upon the notes sued upon, or that the possession of the notes ever changed, or was sought to be changed, from the defendants in error, or that Mungeshelmer & Klein and J. Marx ever met the defendants in error, and agreed, with them, to pay off the notes and accounts sued upon, provided the defendants in error would release the plaintiff in error from any further obligation thereupon,—all of which would have been necessary in order to constitute a new contract, the contract of novation, in which the liability of the plaintiff in error upon the notes and accounts sued upon to the defendants in error was obliterated, and Mungeshelmer & Klein and J. Marx accepted, in his lieu and stead, in such a manner, as that suit might be brought against them upon the notes and accounts sued upon in this case. The findings of fact by the court include no statement whatever that the debt represented by the notes and contract sued upon was discharged, and that Mungeshelmer & Klein and J. Marx had become liable therefor. 1 Pars. Cont. 219; Campbell v. Clay (Colo. App.) 36 Pac. 909; Ferguson v. McBean (Cal.) 35 Pac. 560; Black v. De Camp, 78 Iowa, 718, 43 N. W. 625; Cornwell v. Megins, 39 Minn. 407, 40 N. W. 610; Johnson

v. Rumsey, 28 Minn. 531, 11 N. W. 69; Haubert v. Mausshardt (Cal.) 26 Pac. 899.

It is contended, in the brief of the defendants in error, that the court below erred in disallowing the 10 per cent. attorney's fees upon the amount of the notes at the time judgment was rendered as provided in each of said notes. No motion was made by the defendants in error for a new trial, and no assignments of error have been made by the defendants in error; and the application of the defendants in error, asking that the judgment of the court below be increased so as to contain 10 per cent. upon the amount thereof as attorney's fees cannot be sustained. The judgment of the court is affirmed. All of the justices concur, except DALE, C. J., who presided in the case below, and BIERER, J., who was of counsel in the case.

### MARTIN v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 13, 1896.)  
LARCENY—INDICTMENT—VARIANCE—IDEM SONANS.

1. Our statute authorizes the charging of different offenses to have been committed by the same act, in different counts in the indictment; and it is not error to overrule a demurrer on the ground that more than one offense is charged in the different counts in the indictment, where the different counts refer to the same criminal transaction, but charge different crimes, to admit of the different characters of proof, where the proof may be uncertain.

2. Under our statute, which defines larceny to be the taking of personal property by fraud or stealth, and with intent to deprive another thereof, a charge that the defendant did, at a time stated, in the county and territory of the indictment, unlawfully, willfully, and feloniously, take the personal property of another, and describing it, and that the taking was accomplished by false statements as to the name of the party procuring the property, and as to his residence, and as to property owned by him, by which false statements, relied upon by the person parting with the possession, the person is charged with procuring the possession of the property under a contract of sale, whereby the title of the property was to remain in the person parting with it until the purchase money was paid, which purchase money was evidenced by two promissory notes made in the assumed name of the defendant, and attempted to be secured by a chattel mortgage, in the same name, upon property not owned by him, and that the person so procuring the possession converted the property to his own use, with the intent to deprive the owner (the person from whom the property was procured) thereof, sufficiently charges the crime of larceny; and, the value of the property in this case being charged to be more than \$20, the indictment charges grand larceny.

3. Section 5073 of the Laws of Oklahoma of 1893 provides: "When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured, is not material." And under this statute it is not a fatal variance because the proof shows that the property was taken from J. S. Lyon, as agent of the owner, while the indictment charges that J. S. Lyon was the owner of the property.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice Frank Dale.

In March, 1895, the defendant, Charles Martin, was indicted by the grand jury of Logan county; the indictment being in three counts,—the first two charging grand larceny, and the third charging an obtaining of the property under false pretenses. On the trial of the case the jury, on March 16, 1895, returned a verdict of guilty of grand larceny against the defendant, and judgment was rendered upon the verdict sentencing the defendant to imprisonment in the penitentiary for four years. From this judgment the defendant appeals. Affirmed.

H. R. Thurston, for appellant. Huston & Huston, for the Territory.

BIERER, J. The defendant relies upon two assignments of error for a reversal of the judgment of the district court: First, that the court erred in overruling defendant's demurrer to the indictment; second, that the court erred in instructing the jury that there was not a fatal variance between the indictment and the proof on the question of the ownership of the property stolen.

The demurrer interposed to the indictment was upon two grounds: First, that the indictment charges more than one offense; second, that the indictment does not state facts sufficient to constitute a public offense. The indictment charges the defendant with the wrongful appropriation of the property of another, in three different forms. The different counts all show the wrongful acts to have been committed by the same party, on the same day, and specify the same property of the same value as being the subject of the crime, and the person injured being the same person. They all refer to the same criminal transaction committed by the defendant, but charge it in different forms. The second count charges specifically, by a detail of the facts of the transaction, the crime of grand larceny. The third count, by an equally specific detail, charges the commission of the crime of obtaining the same property described in the second count, by false pretenses. The court committed no error in holding the demurrer bad on the ground that more than one offense is stated in the indictment. Section 18, c. 41, p. 195, of the Session Laws of Oklahoma of 1895, is an amendment of section 5071 of the Statutes of Oklahoma of 1893, and, as amended, provides: "The indictment must charge but one offense, but where the same acts may constitute different offenses, or the proof may be uncertain as to which of two or more offenses the accused may be guilty of, the different offenses may be set forth in separate counts in the same indictment and the accused may be convicted of either offense, and the court or jury trying the cause may find all or either of the persons guilty of either of the offenses charged, and the same offense may be set forth in different forms or degrees under different counts; and where the offense may be committed by the

cutor in this case came squarely within this provision of our criminal procedure, and was fully authorized by it. There was nothing in the second ground of the demurrer. The second count of the indictment specifically charged the fraudulent acts by virtue of which the defendant procured the possession of the property stolen. It alleged that by certain false pretenses—which were that the defendant's name was John Cogdell, and that he resided upon a specific tract of land mentioned in the indictment, and that he had growing thereon 20 acres of cotton—the defendant procured possession of the wagon which is the subject of the larceny, and of the value of \$65, under a contract of purchase by which the defendant, in the assumed name, gave his two promissory notes therefor, and, to secure the same, gave a chattel mortgage, also in the assumed name, and under which the wagon sold was to remain the property of J. S. Lyon until the notes were paid. And it alleged that, Lyon believing and relying upon these various statements of the defendant,—all of which were stated, in detail and separately, to have been false and untrue,—and believing and relying upon such statements, he parted with the possession of the wagon, which wagon the defendant appropriated to his own use with the felonious intent to deprive J. S. Lyon of the same. Under our statute, which makes the taking of personal property by fraud, with the intention of depriving the owner thereof, larceny, this count was amply sufficient to charge the crime. This court has already passed upon this question, in the case of *Devore v. Territory*, 2 Okl. 562, 37 Pac. 1092, and it needs no further discussion here.

It is shown in the record that the proof on the trial tended to show that the property was taken from the possession of J. S. Lyon, who was not the actual owner of the property, but was the agent of the owner; and the court instructed the jury on the question of variance between the indictment and the proof as follows: "(4) The indictment charges that the property obtained by the defendant was the personal property of J. S. Lyon, while the proof shows that J. S. Lyon was the agent of the owner of the property alleged to have been stolen. You are instructed that the variance between the indictment and the proof is, under our statute, not material." The appellant claims that this was error, and that the variance which is stated in the instruction to have been shown by the proof entitled the defendant to an acquittal, and to a new trial upon his motion based upon this ground of variance. Ordinarily, and in the absence of a statute like ours, the appellant's contention would be good; for, as a general proposition, the allegations as to ownership, in an indictment and in the proof, must correspond, and

named in the indictment, no special ownership therein, the variance is fatal. But our statute has changed this rule. St. 1893, § 5073, provides: "When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." The evidence not being in the record, we must presume that it was sufficient to support the verdict in all respects, as to sufficient certainty to establish the identity of the acts charged in the indictment, and that there was a variance, not in the identity of the acts charged, but as to the allegation of the party injured. The crime of larceny is one which involves the commission of, or an attempt to commit, a private injury. The taking and converting by one party of the property of another is a private injury, and the offense of larceny comes within this provision of the statute. And the fact that J. S. Lyon, from whom the property was taken, was the agent of, instead of, the real owner, did not constitute a variance. Finding no error in the judgment of the court, it is affirmed. All the justices concurring, except DALE, C. J., not sitting.

#### CITY OF KINGFISHER v. PRATT.

(Supreme Court of Oklahoma. Feb. 13, 1896.)  
RECORD ON APPEAL—MUNICIPAL CORPORATIONS—  
MISNOMER IN PLEADINGS.

1. Matters which are not, by statute, authorized to be made a part of the record, except by case made or bill of exceptions, cannot be brought to this court on a certificate of the clerk, and errors assigned thereon.

2. While a municipal corporation should always be sued in its proper name, where it is not so sued, but is sued by an incorrect name, and the defendant answers, and goes to trial without objection, and judgment is rendered, without objection, against the municipal corporation in its proper name, there is no error.

(Syllabus by the Court.)

Error to district court, Kingfisher county; before Justice John H. Burford.

Action by Wilson S. Pratt against the city of Kingfisher. Judgment for plaintiff, and defendant brings error. Affirmed.

Boynton & Smith and F. L. Boynton, City Atty., for plaintiff in error. James A. Morris, for defendant in error.

BIERER, J. This cause is brought here by petition in error to reverse the judgment rendered by the district court of Kingfisher county, in favor of Wilson S. Pratt, and against the city of Kingfisher, in the sum of \$500, for damages which the plaintiff sustained by reason of falling into a deep and dangerous hole and excavation in the streets of said city. The plaintiff filed his complaint

in the cause on March 4, 1893, answer was filed on March 16, 1893, and judgment rendered on the 21st day of February, 1894.

The plaintiff assigns 11 different errors for a reversal of the judgment of the trial court; but, if any error was committed, there is not a single one shown by the record in the case. No case made or bill of exceptions was ever filed, and the record could, therefore, by transcript, as the case is attempted to be brought here, only bring such matters as could properly appear upon the record of the cause without a bill of exceptions (*McMeachan v. Christy* [Okl.] 41 Pac. 382); and the questions sought to be presented are not of this character.

The plaintiff in error complains because he alleges the suit was brought by Pratt against Gage, Callahan, and others, as president and board of trustees of the village of Kingfisher City, and he claims that the corporation could not be sued as such. The complaint, as it appears in the record, shows that the suit was brought by Wilson S. Pratt against the village of Kingfisher City. It is true it also shows that the names of those who were the trustees were also at one time contained in the complaint; but these names appear to have been erased at some time, whether before or after the complaint was filed does not appear in it. Although it would seem to be shown, by numerous affidavits which are contained in the transcript, that it was done after the suit was brought, yet these affidavits cannot be considered, because they were never made a part of the record. The complaint alleged that the village of Kingfisher City was a municipal corporation. The answer of the defendant was a general denial, excepting that it specifically admitted that the defendant was a municipal corporation as charged in the complaint, and styled itself, also, as the "Village of Kingfisher City," in the same manner as it was named in the complaint; and the record, properly considered, shows that this answer was filed without any objection whatever to the complaint. And the only part of the record that we can consider also shows that the cause proceeded to trial in this form, without any objection whatever, and that a judgment was rendered against the village of Kingfisher City, now the city of Kingfisher, also without any objection on the part of the defendant. There was, undoubtedly, a mistake in the name of the defendant; for, by the law as it existed in 1893, when the suit was brought, the corporation could not have been the village of Kingfisher City. Whether it was a city of the first class, or whether it was governed by chapter 15 of the Laws of 1893, relating to cities, towns, and villages, this would not have been its proper name. If it was a city of the first class the name of the defendant should have been "City of Kingfisher." Section 540 of the Statutes. If it was a corporation, under chapter 15, relating to cities,

towns, and villages, it should have been sued by the name of "Town of Kingfisher." Section 658. But the defendant waived any objection to this defect by filing its answer, and going to trial, and letting judgment be rendered in its proper name without objection. We say "in its proper name" because there is no contention but that, at the time the judgment was rendered, the defendant's name was "City of Kingfisher."

There was a motion to set aside this judgment on account of various defects and irregularities in the proceedings, but this was never incorporated into the record by case made or bill of exceptions, and the rulings thereon cannot be reviewed. No reversible error appearing in the record of the cause, the judgment must be affirmed, which is accordingly done, at the cost of the plaintiff in error. All the justices concurring.

BURFORD, J., not sitting.

#### DIGGS v. LOBITZ, City Treasurer.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

##### MUNICIPAL CORPORATIONS—TREASURY WARRANTS—PAYMENT—FUNDING BONDS.

1. Treasury warrants, issued by a city of the first class, and duly registered, and not paid for want of funds, and subsequently included in an issue of funding bonds regularly issued by said city, are payable only from funds realized from the sale of said bonds, and are not payable from funds in the treasury applicable to current expenses.

2. When bonds are issued for the purpose of funding outstanding warrant indebtedness, the warrants embraced within such bonds, and for the payment of which said bonds are issued, become merged in said bonds, and the fund realized from the sale of such bonds is a special trust fund for the payment of the warrants so merged, and said fund cannot be diverted to, or used for, any other purpose; and, until said bonds are sold, payment of such warrants is necessarily suspended.

3. One who deals with a municipal corporation deals with it with reference to the laws regulating the manner in which such corporation shall pay its obligations; and when such person takes a warrant on the city treasury, he is bound to know the law authorizing such city to bond said warrant, and that payment of his warrant may be postponed thereby.

4. The laws regulating the issue and registration of warrants, and for issue and sale of bonds for the purpose of realizing a fund out of which to pay such warrants, are *pari materia*, and must be construed with reference to each other.

5. The statute prohibits the payment of warrants not embraced in the funding bonds from the funds realized from sale of bonds, and a violation of this statute is made a misdemeanor.

(Syllabus by the Court.)

Original petition by James B. Diggs against James Lobitz, treasurer of the city of Perry, for mandamus. Writ denied.

J. B. Diggs, for appellant. W. M. Bowles, for appellee.

BURFORD, J. This is an original action in this court, brought by the plaintiff to pro-

of which the plaintiff alleges he is the owner. The alternative writ and the return constitute the pleadings. It appears from the alternative writ that the city of Perry is a city of the first class, under the laws of the territory of Oklahoma, and has been ever since October, 1893; that the defendant, Lobitz, is the treasurer of said city of Perry, and, as such officer, has in his possession, belonging to said city, a sufficient amount of money in the general fund to pay all the registered outstanding warrants of said city up to and including registered No. 624, of which the plaintiff, Diggs, is the owner; that the plaintiff, Diggs, presented said warrant No. 624 to the said Lobitz for payment on the 2d day of December, 1895, and that said payment was refused by said treasurer; that said warrant is for a valid indebtedness of said city, and was, on the 28th day of March, 1894, presented to the treasurer for payment, and payment refused for want of funds, at which time said warrant was duly registered, and became entitled to payment out of the general funds of said city in the order of its registration. An alternative writ was allowed by Associate Justice BIERER, returnable before this court. The city treasurer filed his return to the alternative writ on the 7th day of January, 1896, in which it is alleged, in substance, that on the 9th day of November, 1895, the city of Perry funded its outstanding warrant indebtedness, and issued bonds therefor, which bonds were approved, signed, and delivered by the district court to said treasurer; that the warrant in question is one of the warrants embraced within said bonds, and for the payment of which said bonds were issued; that said bonds are now in the hands of the city treasurer for sale, but unsold at the date of said return. Said treasurer further alleges that he has no authority to pay any warrant, for the payment of which said bonds were issued, from any funds in his hands at this time, but is required to pay the same from the proceeds of the sale of said bonds only. Upon the facts shown by the writ and return, the plaintiff has moved for judgment on the pleadings.

But one question is presented for our consideration. The case has not been briefed, and in the oral argument no authorities were cited bearing upon the identical question here presented. The question calls for an interpretation of our statutes relating to warrant and bonded indebtedness of cities of the first class. It is conceded that the warrant in question was for a valid claim, and regularly issued, and registered for the lack of funds to meet its payment at the time of the presentation. It is also conceded, in the argument, that, in the month of November, 1895, the city of Perry, by its proper officers, went before the district court of that county, and proceeded to and did issue bonds

embraced within said bonds, and for the payment of which said bonds were issued. It is contended by the plaintiff that, inasmuch as the statute which provides for the issuance of warrants on the city treasury requires that said warrants shall be paid in the order of their registration, whenever funds are in the hands of the treasurer sufficient to meet the same, the issuance of funding bonds does not defeat this right, but that the warrants embraced within the funding bonds are still payable, within the order of their registration, from any funds in the hands of the treasurer, and that, when said bonds are sold, the funds realized from such sale should be applied to the payment of an equal amount of outstanding warrants, in the order of their registration, without any reference to the question as to whether or not such warrants were in existence at the time of the issuance of such bonds. This contention is untenable, under the provisions of the statute relating to the subject of municipal indebtedness. These bonds were issued under an act of the legislative assembly, approved March 8, 1895. Sess. Laws 1895, c. 7, p. 63. By the provisions of said act, any city of the first class is authorized and empowered to refund its outstanding legal warrant indebtedness in the order of registration, and to issue bonds for that purpose in a sum not exceeding the amount of such indebtedness, nor in excess of 4 per cent. of the assessed valuation, according to the last preceding assessment of such municipality. The act further provides the means of determining the amount of indebtedness, the manner in which the officers shall proceed, and how the bonds shall be signed, issued, and delivered to the treasurer, and sold. It is provided in section 4, among other things, that "the proceeds of such bonds shall be applied to the payment of the outstanding warrant indebtedness and the interest upon the same, and for no other purpose." The act further provides for the levy of a sufficient amount of tax each year to pay the annual interest upon the bonds, and, at the proper time, a levy sufficient to pay the principal of said bonds as the same becomes due. Section 9 of said act is as follows: "Any person who shall appropriate, use, aid or abet in the appropriation or using any of the funds mentioned in this act for any other purpose than as in this act provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum double the amount of money so appropriated or used, and imprisoned in the county jail for not less than three months, nor more than one year, and he and his bondsmen shall also be liable in a civil action for the amount so appropriated or used to be prosecuted by any bondholder or other party entitled thereto." By section 10,

the interest coupons upon such bonds, so soon as they become due, are made receivable in payment, the same as money, for taxes due the city.

A person who deals with a municipal corporation deals with it with reference to the law governing such corporation, and is bound by such law. The law providing the means and manner of payment by a municipal corporation is incorporated into, and becomes a part of, any contract between such corporation and any other person. When the plaintiff in this case accepted his warrant from the municipal authorities, he took it subject to the conditions and on the terms prescribed by law for its payment. The law at that time provided that, when such warrant was issued, it should be presented to the treasurer for payment; and, if no funds were in the treasury for the payment of the same, the treasurer was required to indorse the same, "Not paid for want of funds," and register the same in a book kept for that purpose, and the payment of said warrant was then postponed until such time as it could be paid from funds to come into the treasury, in the order of its registration. The law at that time authorized cities of the first class (St. 1893, art. 6, c. 9, p. 137), to issue bonds for the purpose of funding the warrant indebtedness incurred in the necessary operation of such city. The mode of procedure, the manner of determining the amount of the indebtedness, and the class of indebtedness for which bonds might be issued, were the same as under the present statute; the only difference being the time for which said bonds may run. Under that law, the bonds were required to be sold at not less than par, and the proceeds held as a special fund in the hands of the treasurer for the payment of the indebtedness for which said bonds were issued. These provisions of law, together with those heretofore mentioned, entered into and became part of plaintiff's contract with the city of Perry. He accepted his warrant with notice of the fact that the city might fund the same, together with other warrants, by issuing bonds for the payment thereof, and, if such power was exercised by the city, he must then look solely to the fund arising from the sale of such bonds for the payment of his warrant. It was evidently the purpose of the legislature to provide a means by which municipal corporations of this character might be as near as possible placed upon a cash basis. The manner in which our cities were settled and organized made it necessary to incur considerable indebtedness prior to the time when any money, by operation of the revenue laws, would come into the treasury for the payment of current expenses. It was contemplated that warrants would be issued for such indebtedness, and that the same should be presented for payment, and registered in their order of presentation, after which time they would draw interest. It was further contemplated or intended that such corpora-

tions, so soon as it should be deemed expedient, should issue bonds for the purpose of funding said outstanding warrant indebtedness, and that the proceeds arising from the sale of such bonds should become a special fund for the payment of the warrants embraced within such bonds, or for which said bonds were issued. The revenues thereafter coming into the treasury from ordinary sources could be applied to the payment of current expenses, and, by the issue of the bonds, the payment of the prior indebtedness would be postponed to a time when the inhabitants of such municipality would be better able to meet the obligations incurred at a time when they had no means of payment. That it was intended that the proceeds of such bonds should only be applied to the payment of the warrants for which such bonds were issued is clear from the provision contained in section 4, c. 7, Acts 1895, to wit: "The proceeds of such bonds shall be applied to the payment of the outstanding warrant indebtedness and the interest upon the same, and for no other purpose." This provision refers to the outstanding warrant indebtedness embraced or included within the bonds, and does not refer to outstanding warrant indebtedness generally. This is further evidenced by the provisions of section 9, heretofore set out, which make it a misdemeanor to misappropriate or divert any of the funds arising from the sale of said bonds to any other purpose than that contemplated in the act. If, as contended by plaintiff, the treasurer of the city of Perry should continue to pay the warrants embraced in said bonds from current funds in the order of their registration, until such time as the proceeds of said bonds are available for such purpose, then it would be necessary to redeem, from the proceeds of said bonds, warrants issued since the issuing of said bonds, and thus apply the same to the payment of the indebtedness which was not in existence at the time said bonds were issued. This would defeat the purpose of the statute, and the intention of the legislature, and violate its express provisions.

It was contended in argument, that, inasmuch as the bonds had not been sold, the plaintiff had a right to the payment of his warrant out of the general fund. This, upon its face, would seem equitable and just, but we are not dealing with equity in this case, but with the interpretation of statutes; and, if the law under which he contracted, and which he was bound to know, works a hardship upon him, he is in no position to complain. There is no compulsion upon any one to contract with or serve a municipal corporation, but, when one does contract with or render services to such corporation, he must take his pay in the manner provided by law.

It was further contended, in the argument, that the repeal of the act of 1890, providing for funding outstanding warrant indebtedness, and the substitution thereof of the act

of 1895, is in conflict with the constitutional provision that prohibits the legislature from enacting any law impairing the obligation of a contract. There is no force in this contention. A careful comparison of the two statutes will reveal the fact that there is no material difference in the mode of payment prescribed by the two acts. In each the city of Perry was authorized to fund its outstanding warrant indebtedness by issuing interest-bearing bonds, from the proceeds of the sale of which such warrant indebtedness was payable. Each constituted the funds arising from the sale of the bonds a special trust fund for the payment of such warrants. Each provided for the levy of a special tax to be applied to the payment of the bonds and interest. Each contemplated a sale of the bonds for cash, and the payment of the warrants in cash. The argument made, that a holder of warrants might be permitted to exchange with the treasurer for bonds of an equal amount, and, under the old law, get a bond running 10 years, while, under the later law, he would be required to take a bond running 20 or 30 years, is not tenable, for the reason that such action is not contemplated by either statute. While there would be no irregularity in the city treasurer accepting \$100 in warrants, and delivering to the holder thereof a \$100 bond, or any other equal amounts, such transaction would, under the law, be classed as a cash sale of the bond, and a cash redemption of the warrants; and there is no obligation upon a warrant holder to exchange his warrants for bonds, and none on the treasurer to exchange a bond for warrants, but the treasurer is bound to sell the bonds whenever he can realize cash, and is then bound to apply the cash realized from the sale of the bonds to the payment of the identical warrants for which said bonds were issued; and, if he should apply the proceeds from the sale of the bonds to the payment of any other indebtedness than the warrants for which the bonds were issued, he would be guilty of a misdemeanor, as provided in section 9 of the act of 1895. As we have heretofore said, no authorities have been cited bearing upon the construction of these statutes, and we are left to gather the legislative intent from the several acts in relation to this matter, and from the general history of the matters to which such legislation relates. If, as complained by plaintiff, circumstances render it impossible for the city of Perry to sell her bonds, and he is thus postponed for an indefinite period for the payment of his warrant, this is a subject for future legislative action. It is the duty of courts to interpret and apply the law as they find it, and not encroach upon the province of the legislative branch of government, unless some organic law or constitutional provision has been violated by the legislative action. If legislative enactments work hardships upon individuals, they must look to such department for relief. It is, indeed, unfortunate, if our

local conditions and our financial standing abroad is such that municipal bonds can find no market; but, in the meantime, the law has fixed a rate of interest which a creditor of such municipality shall receive until such time as his obligation can be liquidated in the manner prescribed by the law under which he became a creditor of such municipality. When bonds are issued for the purpose of funding municipal indebtedness of a county or city, such bonds are issued for the purpose of realizing funds for the payment of certain specific warrant indebtedness, and such fund can be applied to no other purpose. Such warrants become merged within such bonds, and are not thereafter payable from any other fund or any other source, unless such bonds should in some proper manner be canceled. Nor can the fund arising from the sale of such bonds be applied to the payment of any other indebtedness than the warrants included within the bonds.

It appearing, from the facts in this case, that the plaintiff's warrant has been merged into the funding bonds issued by the city of Perry, he is not entitled to have said warrant paid out of the general fund in the hands of the treasurer. The general fund in the hands of the city treasurer is intended for the purpose of meeting current expenses, and is applicable to the payment of registered warrants, in the order of their registration, which are not embraced within the bonds. The peremptory writ is denied, at costs of the plaintiff. All the justices concurring.

#### JONES v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

HOMICIDE—INDICTMENT—VERDICT—SENTENCE—JUDGMENT—RENDITION AND ENTRY—TIME OF TAKING EFFECT—APPEAL—RECORD.

1. Every good charge in an indictment for murder embraces the crime of manslaughter, in some of its grades; and a verdict of a jury which finds "the defendant guilty, as charged in the indictment, of manslaughter in the first degree," is sufficiently certain to warrant a judgment of guilty of manslaughter in the first degree, and does not find the defendant guilty of two offenses.

2. A judgment in a criminal cause takes effect from the date of its entry, unless a different time is fixed by the court, and the person convicted cannot complain of the failure of the court to name a date at which his imprisonment shall commence.

3. All presumptions that may be rightfully entertained by an appellate court in a criminal cause are in favor of the regularity of the proceedings below, and one complaining of error in the trial court must bring enough of the record to the appellate court to make manifest such error. Where only a partial record is relied upon, every error complained of must be made to affirmatively appear. If the whole record is before the court, and from such record it does not affirmatively appear that essential requirements have been complied with in the trial court, then no presumptions can be entertained in favor of the regularity of such proceedings. But this rule does not prevail in the absence of the record.

4. No particular language or form of words is necessary in rendering and recording a judg-



ment of conviction in a criminal cause; and where the words "commanded by the court" are used, instead of the usual form, "considered and adjudged by the court," it is sufficient on appeal.

5. The prisoner may waive the statutory time allowed between time of trial and judgment; and where sentence was pronounced the next day after verdict, and the record does not show that objection was made, or additional time asked, we will presume that the prisoner waived such time.

6. An appellate court cannot say, as a matter of law, that a sentence to 50 years' imprisonment for manslaughter in the first degree is cruel and unusual punishment, the statute fixing the punishment at any period not less than four years; there being nothing in the record showing the age or previous character of the prisoner, or the circumstances under which the crime was committed.

7. There is no requirement that an indictment shall contain a recital of the drawing, selecting, and impaneling of the grand jury which found such indictment. Such proceedings are had prior to the finding of an indictment, by the court or its officers, and are proper to be recorded in the journals of the court. What reasons that may have once existed in olden times for the recital of these matters in an indictment have long since ceased.

8. This court will not review the action of the trial court in overruling a motion for new trial unless the motion for new trial is made part of the record in some of the modes prescribed by statute. Attaching it to the papers filed in this court does not make it part of the record.

9. The practice of presenting alleged errors for the consideration of this court, which have nothing in the record for a basis, is not to be commended, and should not be indulged in, as it consumes valuable time without profit.

(Syllabus by the Court.)

Appeal from district court, Payne county.

Tom Jones was convicted of manslaughter, and appeals. Affirmed.

C. R. Buckner & Son, for appellant. C. A. Galbraith, Atty. Gen., for the Territory.

BURFORD, J. The appellant, Tom Jones, was prosecuted in the district court of Payne county for the crime of murder, tried by jury, and convicted of manslaughter in the first degree, and sentenced to 50 years in the territorial penitentiary at Lansing, Kan. He brings the cause to this court upon certified copies of the indictment and journal entries, embracing the trial, verdict of the jury, and judgment and sentence of the court. No other parts of the record, or proceedings of the trial court, are before this court.

The assignment of error contains 13 alleged errors, the first of which is as follows: "The verdict of the jury finds the defendant guilty of two offenses, both of murder and manslaughter in the first degree." The verdict, as set out in the journal entry, is as follows: "Territory of Oklahoma vs. Tom Jones. Verdict of Jury. We, the jury in the above-entitled cause, do, upon our oaths, find the defendant guilty, in manner and form as charged in the indictment, of manslaughter in the first degree. N. S. Davis, Foreman." There is no merit in the contention that this verdict finds the defendant guilty of two crimes. The indictment charges murder in

the usual form, and embraces within its terms the charge of manslaughter in the first degree. It was proper, on a trial of the charge of murder, for the jury to find the defendant guilty of any charge necessarily embraced within that contained in the indictment; and the jury, in their verdict, make certain that which they intended to do, by finding the defendant guilty of manslaughter in the first degree, in manner and form as charged in the indictment.

The second alleged error is, "The judgment and sentence is erroneous, for being indefinite and uncertain." There are two journal entries in the record, each signed by the presiding judge, and each embracing in part the final judgment and sentence of the court; and these must be construed together, in determining what judgment the court rendered. From this record it appears that motions for a new trial and in arrest of judgment were filed by the defendant, and each overruled by the court, to which the defendant excepted, after which the court proceeded to pronounce judgment to the effect that the defendant was guilty of manslaughter in the first degree, as found by the jury, and that he be punished by confinement in the territorial penitentiary of Oklahoma, at Lansing, in the state of Kansas, for a period of 50 years, and that the sheriff of Payne county, Okla., transport the defendant, Tom Jones, to said penitentiary, and deliver him to the warden thereof, and that he be remanded to jail until such time as it should be convenient for the sheriff to execute the order. The defendant was then informed of his right of appeal, and bond fixed at the sum of \$10,000, and time given to make and serve a case for the supreme court. The judgment conforms to the usual requirements of law, and we find no cause for objection to the same.

The third assignment is, "The judgment fails to state the date at which the sentence shall commence." There is nothing in this objection. All judgments and sentences in criminal cases take effect and begin to operate from the date of their entry, unless a different time be fixed by the court in the judgment itself. There is no uncertainty, as appears from the record before us.

It is claimed in the fourth assignment of error that "the court failed to inform, or have the clerk inform, the defendant of the nature of the indictment and his plea and the verdict, as required by statute." Upon the record before us, we are unable to determine whether this objection is well taken or not. We will not presume that it was not done. All presumptions which the court may rightly entertain in a criminal cause are in favor of the record, and of the regularity of the proceedings before the trial court. One alleging error in an appellate court must make such error manifest, by bringing such parts of the record before the court as will disclose that the matters complained of were

rights of the parties complaining. There being nothing before us but the indictment and final judgment, we must presume that all intermediate steps necessary to support the judgment were regularly taken by the trial court. If the whole record was before us, and from such record there was no affirmative showing that essential requirements had been complied with, then no presumptions would be entertained in favor of the trial court, but this rule does not prevail in the absence of the record.

It is alleged in the fifth assignment that "the judgment does not state what crime the defendant is sentenced for." The judgment does state that he is sentenced for manslaughter in the first degree, as found in the verdict of the jury, and the verdict of the jury finds him guilty as charged in the indictment. This meets every requirement of law or practice, and the objection is without merit.

In the sixth assignment of error, complaint is made that in the judgment the language is used that it is "commanded by the court that the defendant," when the words should be, "It is considered by the court." In one of the journal entries the language is, "It is therefore commanded and ordered that the defendant," while in the other these words occur: "It is therefore considered, adjudged, and decreed by the court that the defendant." Either of these forms is sufficient, but, if the one complained of should be defective, it is cured by the other.

It is next contended, in the seventh assignment, that "the court erred in pronouncing sentence without having first set a day, as required by the statute." In the absence of any record before us, we will presume that this was done.

The eighth assignment of error is, "The court erred in pronouncing sentence the next day after the verdict was returned, when the court did not adjourn for ten days thereafter." There is nothing in the record showing when the court convened, or when it adjourned, nor was any objection made by the defendant at the time judgment was rendered, or any additional time asked for. The statutory time may be waived, and, in the absence of objection, we will presume that this was done.

The ninth assignment is, "The court erred in pronouncing a cruel and unusual punishment;" and in support of this objection it is contended that a 50-years sentence amounts to a sentence for life, and that, therefore, the punishment is cruel and unusual. The statute prescribing the punishment for manslaughter in the first degree (section 2089 St. Okla. 1893) fixes the punishment at imprisonment in the territorial prison for not less than four years. This leaves the maximum to be determined by the court, in the exercise of a sound discretion; having a

which the crime was committed. It is not unusual to fix the punishment at imprisonment for life for the killing of a human being. There is nothing in the record from which we can determine the age of the accused, his previous character, the circumstances under which the crime was committed, or his relations to the deceased; and we cannot say, as a matter of law, that a sentence of 50 years in the territorial prison for the crime of manslaughter in the first degree is per se cruel and inhuman. And while, under this statute, it is necessary for the court to fix the term of years for which one convicted of manslaughter in the first degree shall be imprisoned as a punishment for such crime, the legislature has not seen fit to fix the maximum at any determinate period, but leaves the matter wholly in the discretion of the trial court, and it may be any period within the probable lifetime of the person convicted.

The tenth assignment is to the effect: "The court erred in pronouncing sentence upon the defendant, the jury having found him guilty of murder. It was their province to lessen the punishment." This objection has already been sufficiently answered.

It is alleged in the eleventh assignment that "the indictment does not show that it was presented by a grand jury selected in and for Payne county." There is no reason in this contention. It is not necessary that all preliminary steps of drawing, selecting, and impanelling a grand jury shall appear in an indictment, nor would a statement in an indictment that such steps had been taken be in any manner conclusive. The selecting and impanelling of the grand jury are matters that are done in court, prior to the finding or presentation of any indictment, and such proceedings are recorded in the journals of the court; and the record of the court is the proper place to look for such proceedings, rather than in the formal parts of an indictment. The reasons that at one time existed for requiring these matters to be set forth in the indictment have long since ceased to exist, and in fact never did exist in this territory.

The twelfth assignment of error is to the effect, "The court erred in overruling defendant's motion for a new trial." The motion for a new trial is not before us, and, without a record of the proceedings in the trial court, we are unable to determine that there was any error in the proceedings prejudicial to the rights of the defendant.

The thirteenth and last assignment of error is as follows: "The court erred in overruling the defendant's motion in arrest of judgment. That judgment being defective, in not stating a proper venue." This is an objection that may properly be raised in this court for the first time. The court acquires jurisdiction from the indictment, and,

objection is without merit. The indictment substantially conforms to the requirements of the statute. It contains the title to the action, specifies the name of the court and the names of the parties, and embraces a good charge of murder.

We have now examined each of the several assignments of error submitted by the appellant, and we find nothing that merits a serious consideration. In this enlightened day and age, when the practice in criminal causes, both in the trial and appellate courts, is so well established and generally known, there is no excuse for claiming the valuable time and attention of this court in the investigation of objections which have nothing in the record for a basis, while such as do have are of such a trivial and gauzy character as to be undeserving of a place in the records of the court. Were it not for the fact that the charge in this case is of so grave a character, and the consequences to the appellant of so serious an import, we should feel constrained to dismiss the appeal without consideration, as being devoid of merit. But inasmuch as the appellant has been charged and convicted of a very serious crime, and sentenced to a long period of confinement in the penitentiary, we have waived all considerations, and examined in detail each objection set out. We find no error in the record. The judgment of the district court is affirmed. All the justices concurring, except DALE, C. J., who tried the case below.

#### BRUCE et al. v. DEBOLT.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

Error to district court, Oklahoma county.

Action by James M. Debolt against Coleman R. Bruce and others. Judgment for plaintiff, and defendants bring error. Dismissed.

Amos Green & Son, for plaintiff in error. Ransom & Bailey, for defendant in error.

PER CURIAM. February 12, 1895, the appellants filed this cause in the supreme court. June 12, 1895, appellee filed his motion to affirm the judgment of the lower court, for failure upon the part of appellants to serve and file their briefs as provided by rule 6 of the rules of practice of this court. The motion is sustained, and the judgment of the lower court is affirmed.

#### JEWELL v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

INDICTMENT FOR MURDER—SUFFICIENCY—AIDED BY VERDICT—DEMURRER.

1. An indictment which fails to charge that the homicidal act was perpetrated with a premeditated design to effect the death of the person killed, or of some other person, does not charge the crime of murder as defined in the first subdivision of section 2078, St. Okl. 1893.

2. The ordinary common-law charge of murder in an indictment is not sufficient to support a verdict and judgment for murder under the first subdivision of section 2078, defining murder.

thought," is not equivalent to the allegation that the fatal shot was fired "with the premeditated design to effect the death of the person killed."

4. An indictment must fully charge the crime, and set out all that the law requires to be proved; and want of averment cannot be supplied by an independent finding of fact not alleged in the indictment.

5. The material element necessary to constitute murder, under the first subdivision, is the "premeditated design to effect death," and must be alleged and proved as an independent fact, otherwise the killing is only manslaughter, unless it comes within one of the other definitions of murder as contained in the second and third subdivisions.

6. Homicide is murder, under the second subdivision, "when perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." And the homicidal act must be one imminently dangerous to more than the person killed. The class of cases intended to be embraced in this subdivision are such as where the acts by which the homicide is committed are directed against no particular person, but against a number of persons generally, or where the act is imminently dangerous to a number of persons, but directed against none, and in either case without any premeditated design to effect the death of any particular person. Proof of the felonious killing of a particular person by an assault directed specifically at the person killed will not support a judgment for murder under said second subdivision.

7. Homicide is murder, under the third subdivision, "when perpetrated without any design to effect death, by a person engaged in the commission of any felony"; and this means some felony as defined by statute other than that of the killing itself.

8. All other classes of homicide are manslaughter, unless justifiable or excusable.

9. The indictment charges that the prisoner unlawfully, feloniously, willfully, and with premeditated malice aforethought fired the fatal shot which resulted in the death of the deceased. The verdict was guilty of murder, and sentence of death. *Held*, the indictment is not sufficient to charge murder under subdivision 1, defining murder, for the reason that it is not alleged that the fatal shot was fired with the premeditated design to effect the death of the deceased; and that the verdict and judgment cannot be sustained under the second subdivision, for the reason that it does not appear that the homicidal act was dangerous to any person other than the deceased, or that it was perpetrated with a general deadly intent, regardless of human life.

10. While a count in an indictment may contain a good common-law charge of murder, it is not sufficient, under the first subdivision of murder defined in the Oklahoma Statutes. Yet, as every common-law charge of murder embraces some one of the grades of manslaughter, such indictment is good or demurrer.

(Syllabus by the Court.)

Appeal from district court, Woodward county; before Justice John L. McAttee.

Oliver P. Jewell was convicted of murder, and appeals. Reversed.

Robert J. Ray, for appellant. C. A. Galbraith, Atty. Gen., and B. B. Smith, Co. Atty., for the Territory.

BURFORD, J. The appellant was tried in the district court of Woodward county for the murder of one James McGuinn in the month of October, 1894. The jury returned a verdict of guilty of murder, and assessed the

overruled, and the court sentenced the appellant to be hanged. Appeal was prayed, and execution of sentence stayed pending appeal.

The indictment is in three counts, and in order to a better understanding of the questions herein involved we set out the same in full, as follows: "United States of America, County of Woodward—ss.: In the district court of the Fifth judicial district, in and for the county of Woodward, and territory of Oklahoma, at the December term thereof, begun and held on the fourth day of December in the year of our Lord one thousand eight hundred and ninety-four, in the city of Woodward, and territory of Oklahoma. The Territory of Oklahoma, Plaintiff, vs. Oliver P. Jewell, Defendant. Indicted for Murder. First count: The grand jurors duly summoned from the body of Woodward county and territory of Oklahoma, chosen, examined, selected, impaneled, sworn, and charged in and for the county and territory aforesaid to inquire into and true presentment make of crimes and offenses committed in the county and territory aforesaid, on their oaths do find and present: That one Oliver P. Jewell, late of the county and territory aforesaid, and on the twenty-ninth day of October, A. D. 1894, then and there being, with force and arms, in the county and territory aforesaid, in and upon the body of one James McGuinn, in the peace of the territory then and there being, feloniously, willfully, premeditatedly, and of his malice aforethought did make an assault; and that the said Oliver P. Jewell a certain pistol then and there discharged with gunpowder and leaden bullets, which said pistol, he, the said Oliver P. Jewell, in his right hand then and there held, and then and there feloniously, willfully, premeditatedly, and of his malice aforethought did discharge and shoot off, to, against, and upon the said James McGuinn; and that the said Oliver P. Jewell, with one of the leaden bullets aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid by the said Oliver P. Jewell discharged and set off as aforesaid, then and there feloniously, willfully, premeditatedly, and of his malice aforethought did strike, penetrate, and wound him, the said James McGuinn, in and upon the right side of the face of him, the said James McGuinn, giving to him, the said James McGuinn, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Oliver P. Jewell, in and upon the right side of the face of him, the said James McGuinn, one mortal wound of the depth of six inches and of the breadth of half an inch, of which said mortal wound he, the said James McGuinn, then and there instantly died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the

aforesaid, feloniously, willfully, premeditatedly, and of his malice aforethought did kill and murder, contrary to the statute in such case made and provided, and against the peace and dignity of the people of the territory of Oklahoma. Second count: And the grand jurors selected, examined, impaneled, and sworn as aforesaid, on their oaths as aforesaid, do further find and present that one Oliver P. Jewell, late of the county of Woodward and the territory of Oklahoma, on the twenty-ninth day of October, A. D. 1894, then and there being, with force and arms, at and in the county aforesaid, in and upon the body of one James McGuinn, in the peace of said territory then and there being, feloniously, willfully, with premeditation and malice aforethought did make an assault, and that the said Oliver P. Jewell a certain pistol then and there discharged, with gunpowder and two leaden bullets, which said pistol he, the said Oliver P. Jewell, in his right hand then and there had and held, then and there, feloniously, willfully, with premeditation, and of his malice aforethought did discharge and shoot off to, against, and upon the said James McGuinn; and that the said Oliver P. Jewell, with one of the leaden bullets aforesaid, out of the pistol aforesaid, then and there, by the force of the gunpowder aforesaid, by the said Oliver P. Jewell discharged and shot off as aforesaid, then and there feloniously, willfully, with premeditation, and of his malice aforethought did strike, penetrate, and wound him, the said James McGuinn, in and upon the back of him, the said James McGuinn, giving to him, the said James McGuinn, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Oliver P. Jewell, in and upon the back of him, the said James McGuinn, one mortal wound, of the depth of six inches and of the breadth of half an inch, of which said mortal would he, the said James McGuinn, then and there instantly died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Oliver P. Jewell, him, the said James McGuinn, in the manner and by the means aforesaid feloniously, willfully, with premeditation, and of his malice aforethought, did kill and murder contrary to the statute in such case made and provided, and against the peace and dignity of the territory of Oklahoma, and the people thereof. Third count. And the grand jurors selected, examined, impaneled, and sworn as aforesaid, on their oaths as aforesaid, do further find and present that one Oliver P. Jewell, late of the county of Woodward and the territory of Oklahoma, on the twenty-ninth day of October, A. D. 1894, then and there being, with force and arms in the county and territory aforesaid, in and upon one James McGuinn, then and there being in the peace of the ter-

deliberate and premeditated design to effect the death of said James McGuinn, did make an assault, and that the said Oliver P. Jewell a certain pistol, then and there charged and loaded with gunpowder and leaden bullets, which he, the said Oliver P. Jewell, then and there in his right hand had and held, at and against the said James McGuinn then and there feloniously, willfully, and of his malice aforethought, and from a deliberate and premeditated design to effect the death of the said James McGuinn, did shoot off and discharge, and that the said Oliver P. Jewell, with the leaden bullets aforesaid, by means of shooting off and discharging the said pistol so loaded and charged at and against the said James McGuinn, did then and there feloniously, willfully, and of his malice aforethought, and from a deliberate and premeditated design to effect the death of the said James McGuinn, strike, penetrate and wound the said James McGuinn in and upon the right side of the face, and in and upon the back of him, the said James McGuinn, giving to him, the said James McGuinn, then and there, with the leaden bullets aforesaid, by means of shooting off and discharging the said pistol, so loaded, at and against the said James McGuinn, and by such striking, penetrating, and wounding the said James McGuinn as aforesaid, two mortal wounds, one in the face and through the head of him, the said James McGuinn, and one in and upon the back and through the body of him, the said James McGuinn, of which said mortal wounds the said James McGuinn did then and there instantly die. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Oliver P. Jewell, him, the said James McGuinn, in the manner and by the means aforesaid, feloniously, willfully, of his malice aforethought, and from a deliberate and premeditated design to effect the death of the said James McGuinn, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the territory of Oklahoma. [Signed] B. B. Smith, County Attorney, Woodward Co., O. T." The cause was tried upon all three counts without an election, and the jury returned the following verdict: "In the District Court within and for Woodward County, Oklahoma. The Territory of Oklahoma vs. Oliver P. Jewell, Defendant. Verdict. We, the jury impaneled and sworn in the above-entitled cause, upon our oaths find the defendant, Oliver P. Jewell, guilty of murder as charged in the first count in the indictment, and not guilty as to the second and third counts thereof; and we determine that he shall be punished by death. [Signed] Asa L. Henson, Foreman." Judgment was rendered against the appellant upon this verdict, and this limits our examination of this phase of the case to the first count.

will not support a judgment for murder. This presents a grave and difficult question, involving as it does the construction of our statutes and the interpretation of common-law terms and phrases. The count contains a good common-law charge of murder, and, unless our statutes defining the various degrees of homicide have changed the common-law rule, then it is sufficient to support the verdict and judgment in this case. The trial courts have experienced no little difficulty in the trial of this class of cases in an attempt to properly define the degrees of homicide according to our statutes, and to apply the rules laid down in the text-books and adjudicated cases to crimes charged under our statute on the subject of homicide. I apprehend that this difficulty has arisen out of the attempt to apply common-law rules to our statutory definitions, upon the theory that no substantial difference exists. A careful analysis of the statute will make clear a manifest distinction. Murder is defined in our statutes (St. 1893) as follows:

"Sec. 2078. Homicide is murder in the following cases: First. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being. Second. When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. Third. When perpetrated without any design to effect death by a person engaged in the commission of any felony."

"Sec. 2089. Homicide is manslaughter in the first degree in the following cases: First. When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor. Second. When perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide. Third. When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed."

"Sec. 2090. Every killing of one human being by the act, procurement or culpable negligence of another, which, under the provisions of this chapter, is not murder, nor manslaughter in the first degree, nor excusable, nor justifiable homicide, is manslaughter in the second degree."

These statutes are intended to classify all grades of homicide, and to furnish a specific definition for each class. Under subdivision 1 of section 2078 the homicidal act must be done with a premeditated design to effect the death of the person killed, or some other person. The premeditated design to effect death is the material element of the offense, and

sufficient that the fatal shot was fired premeditatedly, for this only implies that the act is done in pursuance of a prior determination. This may be true, and yet the shot have been fired for the purpose of maiming or disabling the injured party. Nor is it sufficient to allege that the homicidal act was done with malice aforethought. In its legal sense, "malice" expresses the idea of a willingness to injure another, and, when qualified by the word "aforethought," it implies that the act was done on a previous determination. And one may shoot at another with malice aforethought, intending only to break his pistol arm, or disable him, yet with no design to effect the death of the person he desires to injure. Murder, at common law, was committed when a person of sound mind and discretion unlawfully killed any reasonable creature in being, in the peace of the sovereign, with malice aforethought, either express or implied. According to this rule, if one feloniously and with malice aforethought wounded another, from which wound death ensued within a year and a day, it was murder, unless excuse or justification was shown. Under our statute such act would not constitute an element of murder, unless perpetrated with a premeditated design to effect the death of the person killed, or of some other person; but would be embraced within some one of the lower degrees of homicide. In Iowa the statute makes murder in the first degree a willful, deliberate, and premeditated killing. In *State v. Boyle*, 28 Iowa, 522, an indictment in the common-law form was held insufficient to charge murder in the first degree because it omitted the word "deliberate," and it was held that neither of the common-law terms were equivalent to this word, and a conviction for murder was set aside. In the case of *State v. McCormick*, 27 Iowa, 402, it was held, Mr. Chief Justice Dillon speaking for the court, that a common-law count in an indictment would not support a conviction for murder in the first degree; and in that case it was said: "There is no principle in the law of criminal pleading more reasonable in itself, and none better understood, than the one that the indictment must fully charge the crime,—that it must set out all that the law requires to be proved before the penalty of the law can be inflicted; and consequently everything which changes the nature or increases the degree of the punishment is substantive, and ought to be alleged." In the case just quoted from it was contended that, inasmuch as the proof was sufficient to establish the deliberation and premeditated design to kill, the judgment ought to be sustained. Mr. Justice Dillon, on this point, says: "On principle, how can want of averment be supplied by an independent inquiry by the jury and a finding by them of a fact not alleged on the record against the prisoner, viz. that he intended to take the life

that he is guilty of murder in the first degree?" And this rule is undoubtedly sound. It would be an anomaly in criminal procedure that would permit a court to supplement the charge in the indictment with facts found by the jury, and not alleged in the indictment, and, putting the two together, determine that the crime is murder as defined in the statute. It will be observed that there is no allegation in the first count of the indictment in this case, on which the appellant was convicted, that the assault was committed with the premeditated design to effect the death of the deceased; nor does it contain equivalent language. In fact it is nowhere alleged that the shooting complained of was with any intent to effect death, except in so far as the same may be inferred from the words "willfully, premeditatedly, and with malice aforethought"; and, as we have before stated, these elements might all be present in an aggravated assault, and yet there be no premeditated design to effect death. The first count is therefore insufficient to support the judgment of murder, unless the charge is good under the second subdivision of section 2078, which provides that "homicide is murder when perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." It is contended by the attorney general that the indictment is good under this definition of murder, and that the case under consideration comes within this class. We are unable to adopt this view. The class of cases intended to be covered by this subdivision is where the acts by which the homicide is perpetrated are directed against no particular person, but against a number of persons generally; or where the act is imminently dangerous to a number of persons, but directed against none,—as where one rides a vicious horse into a crowd of persons with no intent to injure any person, but with a reckless disregard of human life; or where one throws a heavy stone into a crowded street, or blows up a building with dynamite, knowing there are persons in the building, but with no design to kill any one, but only with an intent to destroy the building. There are other cases that come within this class, but we use these as illustrations. And the statute has no application to a case where the act causing death is directed against some particular person, for then, if it is done with design to effect death, it comes within the class embraced in the first subdivision; or, if there is no premeditated design to effect death, then it is either one of the degrees of manslaughter or justifiable or excusable homicide.

The statute of Florida defining homicide is the same as ours, except that the class embraced in the second subdivision is made murder in the second degree, while we have

no such grade of homicide. In the case of *Johnson v. State*, reported in 4 South. 535, the supreme court of Florida, speaking by Chief Justice Maxwell on this subject, said: "The statute of this state in regard to homicide makes seven degrees of the offense,—three of murder and four of manslaughter. It is unnecessary to recite these in detail here, but it is not to be forgotten that every degree has its own distinguishing features, and that facts which bring a case within either must be met by a verdict of guilt in that special degree. The offense each degree marks out is a separate offense from that marked out by either of the other six, to be determined, as the statute prescribes, 'according to the facts and circumstances of each case.' In the present case the offense the jury found is defined in the statute thus: The killing of a human being, 'when perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree.' To understand what this means, let us consider it in connection with the other degrees of murder as defined in the statute. The killing of a human being 'when perpetrated from a premeditated design to effect the death of the person killed, or any human being, shall be murder in the first degree.' 'When perpetrated without any design to effect death, by a person engaged in the commission of any felony, it shall be murder in the third degree.' The first evidently requires that the killing should be in pursuance of a premeditated design to effect the death of some human being, though the person killed was not the one intended. Comparing this with the second, one chief difference is that the element of premeditation is essential in the former, but not in the latter, though, if it exists in the latter, it is not to be directed against any particular individual. Another difference is that the design in the first need not be directed against the person actually killed, but, nevertheless, must be against some particular individual; while in the second it is not only not necessary that the design should be aimed at any particular individual, but, if the design be to kill, it must come from a general deadly intent, and it must be executed by an act imminently dangerous to others, evincing a depraved mind, regardless of human life. But in the second it is not required, in all cases, that there should be an intent to kill. For instance, if a man, out of enmity to the owner of a vessel, and desiring to do him injury, should use dynamite or other explosive to destroy the vessel while he knew passengers were aboard, and death should ensue to one or more of them, that would be a case of murder in this degree. Every element of the degree, the imminently dangerous act, and the depraved mind, regardless of human

life, would be present, although the intent was to destroy property, not life." The Florida court has well stated the rule applicable in the case at bar, and the same result must follow. There is nothing in the charge to indicate that the case was one coming within the class embraced in the second subdivision, defining murder; nor is there anything in the proof to support a verdict under such a charge. It was evidently an afterthought of the attorney general to try to save his case by bringing it within this class. The first count of the indictment upon which appellant was convicted contains a good charge of manslaughter, and the demurrer was properly overruled, for, as we have said, it contains a good common-law charge of murder, and every charge of murder necessarily embraces the lower grades of homicide in some of its forms. But we hold that the charge was not sufficient to charge murder under subdivision 1 of section 2078, for the reason that the element of premeditated design to effect the death of the deceased or some other person was omitted, and that the charge will not support a conviction for murder under said subdivision. We further hold that the proof will not sustain a conviction under subdivision 2, for the reason that it does not appear that the act causing the death of the deceased was one imminently dangerous to any other person, or that the act was done regardless of human life generally.

The state of New York on an early day adopted a statute on homicide of which ours is almost a verbatim copy. There is some confusion in the earlier cases as to the proper interpretation of the statute, but in 1854 the court of appeals of that state for the first time had the question before it, and adopted the interpretation which has since been followed in that state. The case is reported in 10 N. Y. 120 (*Darry v. People*), and the opinion of the court is a lengthy and critical analysis of the common-law terms and the changes made by statute, and, as it expresses our views on the subject, we quote it at some length, and adopt it so far as it applies to the question before us. Mr. Justice Selden, speaking for the court, said: "In putting a construction, therefore, upon our statutes, we should lay aside entirely the common-law terms of 'express' and 'implied' malice, as calculated to mislead and to engender false ideas, and interpret the phraseology, as before insisted, according to its ordinary import. Looking, then, at the statute itself, and construing it in this spirit, what is its real scope and meaning? In endeavoring to answer this inquiry it is important to keep in view certain rules, which reason and experience have established, as calculated to aid in the just interpretation of statutes. If the enactment be subdivided, each subdivision should be construed so as to provide for a separate and distinct class of cases, and so as to include all the cases it is intended to

all the rest, and so as to give force and effect to every sentence and word; and such a construction is to be put upon the whole, if possible, that no case or class of cases will fall within more than one branch of the act. These rules are necessary in order to attain that precision and certainty which is the object of the subdivision. There is, I believe, no great contrariety of opinion as to the meaning of the first subdivision of section 5 [2 Rev. St. p. 657] of the statute in question. If there is any difficulty in this respect, it is in ascertaining whether the last clause of that subdivision, viz. 'or of any human being,' was intended to provide solely for cases where the premeditated design, although not aimed at the person actually killed, was nevertheless directed to some particular individual, or whether it also includes cases where it was aimed indiscriminately at a multitude of persons, or at human life in general. That the former is the true interpretation, was insisted by the prisoner's counsel upon the argument, for several reasons. He urged, first, that on comparison of section 5 of our statute with the description of murder from malice aforethought express, as given in East, P. C. p. 223, § 10, and considering that the revisers in their note to section 5 expressly say that it was compiled partly from East, it is apparent that the first two subdivisions of section 5 were copied substantially from the definition given by East; the only material difference being that the first two subdivisions of East are, in our statute, condensed into one; and that, as both subdivisions in East are plainly and expressly confined to cases of malice to a particular individual, the corresponding subdivision in our statute should receive the same construction. Again, he contended that, as the first clause of this subdivision was clearly confined to cases of particular malice, the last, being directly connected with it, should be held to belong to the same class, agreeable to the maxim, 'noscitur a sociis.' Broom, Leg. Max. 294; Evans v. Stevens, 4 Term R. 225. I have very little hesitation in adopting the construction of this subdivision thus contended for, not only for the reasons given by the counsel, but for others, which will appear when we take into consideration the second subdivision. This brings us to the difficult part of our task, that of interpreting the second subdivision of the section in question. This subdivision was incidentally and partially considered in *People v. White*, 24 Wend. 520, and in *People v. Rector*, 19 Wend. 569, but the examination given to it in those cases was cursory merely, and no attempt was made to subject it to that rigid analysis which is indispensable to the development of its true meaning. It becomes necessary, therefore, in my view, to look at the subject as an original question. In doing so, I shall inquire first whether an actual intent to de-

sion. The affirmative of this question was very strenuously contended for by the counsel for the prisoner upon the argument, and great learning and ability were displayed in the effort to maintain it. He contended that there was a substantial identity of design and object between our statute and that of Pennsylvania, passed in 1794; and that, as the latter statute had been construed to limit murder, as a capital crime, except in a few specified cases of constructive murder, to those cases in which an actual intent to take life exists, ours should receive the same construction; and insisted that, the first subdivision of section 5 being intended to provide for all cases where the hostile intent was specially aimed at the life of some one individual, the second subdivision was designed to embrace only those cases excluded from the first, where the intent, although deadly, does not single out its object. But there are serious objections to taking this view of the later subdivision, conceding the construction thus put upon the first to be, as I think it is, correct. Of what use, upon this supposition, are the words 'imminently dangerous to others'? Are they not rendered mere unmeaning verbiage by assuming that an actual intent to take life is essential to the crime under this subdivision? Again, if such an intent is necessary the requirement must be found in the definition of the crime given by the statute. The only affirmative words indicative of the intent required are these: 'A depraved mind, regardless of human life.' These words describe the state of mind which must accompany the act. Do they express a formed intent to destroy life? Clearly not. No sound reason can be given why the legislature should have resorted to such equivocal and circuitous phraseology to express that simple intent. Such an intent is expressed in clear terms in the subdivision which precedes, as well as that which follows, the one under review. Would they not have expressed the same intent in the same way in this, if that was what was meant? Would they have resorted to phraseology, not only peculiar, but such as does not import what, upon this supposition, they intended? It seems to me not. But this is not all: The phraseology of the subdivision is taken substantially from the writers upon the common law. An absolute intent to take life is not necessary, at common law, to constitute the crime described by this phraseology. As to this, there is no room for doubt. The first general subdivision of homicide, as given by East, is as follows: 'From malice aforethought; express; where the deliberate purpose of the perpetrator was to deprive another of life, or to do him some great bodily harm.' 1 East, P. C. p. 222, § 9. This general division of homicide is again divided by East into three subdivisions, in the next section, as follows: (1) From a particular malice to the person killed; (2)



from a particular malice to one which falls by mistake or accident on another; (3) from a general malice or depraved inclination to mischief, fall where it may. Now, as this third subdivision is obviously a specification of the nature of the cases falling within the last clause of the previous general division, it is entirely clear that it was intended to describe a class of cases in which a deadly intent is not required to make out the crime. It has been already intimated that the first subdivision of section 5 of our statute appears to be a virtual transcript of the first two subdivisions just given from East. It is, I think, equally apparent, that the second subdivision in our statute was taken substantially from the third subdivision of East, although not a literal transcript of it. The inference from this is very strong that it was intended to describe the same class of cases, and, if so, then it follows, from what has already been said, that a deadly intent is not necessary to constitute the crime of murder under it. But there is an important clause added to the second subdivision in our statute, which does not appear at all in East, and it becomes indispensable to ascertain its design and object. If we can discover the true object of introducing this clause, we have a key to the interpretation of the whole section. The words are, 'although without any premeditated design to effect the death of any particular individual.' These words must have been introduced for some purpose: what was it? I remark, first, that they were not designed to show that a particular deadly intent is not essential to constitute the crime, because they could not have been deemed at all necessary for that purpose. The idea of such a necessity seems, as we have already shown, to be excluded by the whole phraseology of the subdivision. No corresponding language is contained in East's definition of this class of murders. He evidently considered the definition complete and perfect without it. Besides, if this clause was introduced for that purpose, the plain implication would be that a general deadly intent, not aimed at any particular individual, is necessary. This would be repugnant to all our previous reasoning, and would exclude from the operation of the subdivision the very cases which, at common law, marked the class. This view of the clause would also effectually exclude the case at bar from the subdivision. But I consider it clear, from what has been heretofore said, that this could not have been the object of the clause. There is but one other purpose which this clause could have been intended to subserve. Although the terms of the second subdivision do not require a deadly intent to make out the crime, yet, independent of the clause in question, they do not exclude it. Hence the second subdivision might be construed to embrace most, if not all, the cases provided for in the first. This would defeat the very object of the classification, which was to draw a clear line of distinction between the dif-

ferent classes, and prevent confusion by their merger. The plain object, therefore, of the last clause of the second subdivision, and the only conceivable object, I hold to have been to mark the distinction between that subdivision and the first by at once excluding from the former all cases of particular, and at the same time stating that it was not intended to exclude cases of general, deadly intent. Assuming this to have been its object, it is apparent that force and significance are given to every word of the clause in question, and that each of these subdivisions is made to stand out, isolated and distinct, with boundaries clearly marked, and with no tendency to confusion with each other. It will be seen that this view necessarily limits the first subdivision to cases of particular malice from the antithetical relation between that subdivision and the last clause of the second. This will be made more apparent by reading the two clauses in connection, omitting the intermediate significant words, thus: 'When perpetrated from a premeditated design to effect the death of the person killed, or of any human being; or when perpetrated [in a certain way], although without any premeditated design to effect the death of any particular individual.' I doubt whether any other reading can be adopted which will at once give scope and meaning to every word of both subdivisions, and at the same time accomplish the object of drawing a definite and clear line of demarkation between the two. We have, then, the precise classification of East; the only difference being that in our statute it is simplified by reducing the first two subdivisions into one, and rendered a little more definite by the express exclusion from the last subdivision of all cases embraced in the first. What, then, are the cases which, upon this construction, were intended to be included in the second subdivision? In considering this question, it is clearly proper, in the first place, to inquire what kind of cases were embraced in the corresponding class, as defined by East. The words in East are: 'From a general malice, or depraved inclination to mischief, fall where it may.' The word 'general,' here used, and the last words of the sentence, leave no doubt as to the nature of the cases contemplated by this subdivision. They were cases of depraved and reckless conduct, aimed at no one in particular, but endangering indiscriminately the lives of many, and resulting in the death of one or more. If this be not clear upon the words themselves, the comments of Mr. East upon this subdivision would seem to put the matter at rest. 1 East, P. C. p. 231, § 18. In illustrating this subdivision he says: 'The act must be unlawful, attended with probable serious danger, and must be done with a mischievous intent to hurt people, in order to make the killing amount to murder in these cases.' And the instances he gives are as follows: 'If a person breaking in an unruly horse willfully rides among

the viciousness of the animal, it is murder. Again: 'So, if a man, knowing that people are passing along the street, throw a stone likely to create a danger, or shoot over the house or wall, with intent to do hurt to people, and one is thereby slain, it is murder.' These are the only examples given, and they accord perfectly with the language of the subdivision, and show that the latter was intended to embrace those cases of general malice only where the lives of many were or might be in jeopardy. The inference is very strong that the subdivision of our statute which we are considering was intended to provide for the same cases as that of East, from which it was substantially taken. But the argument in favor of this construction is by no means confined to this inference. It is clear, I think, from what has already been said, that the subdivision in question does embrace those cases where an intent to take life exists, which is not directed to any particular individual, but is general and indiscriminate. The language of the subdivision, however, at the same time shows that it was not intended to be confined to those cases, but was designed to include another class, closely akin to, and almost identical with, those in which death is produced by acts putting the lives of many in jeopardy, under circumstances evincing great depravity and utter recklessness in regard to human life. For instance, a man may fire into a crowd, with the view of destroying life, and he may do so for the mere purpose of producing alarm, although at the imminent hazard, as he knows, of killing some one. Again, he may open the drawbridge of a railroad, with intent to destroy the lives of the passengers, or he may do it for the sole purpose of effecting the destruction of the property of the railroad company. The subdivision in question was intended to provide for all these and similar cases indiscriminately, putting them upon the same footing, without regard to the particular intent. The phrases, 'imminently dangerous to others,' and 'depraved mind, regardless of human life,' have an apt and intelligent meaning when used in regard to such cases. If, then, the subdivision was intended to include cases of this description, it would seem to follow, upon the plainest principles of construction, that cases of death produced by acts affecting a single individual only are excluded. It would seem repugnant to all sound rules of interpretation to associate under the same clause of a statute groups of cases so dissimilar as those examples of which I have just given, and ordinary homicides; especially where, as in the present instance, an attempt has been made, in framing the statutes, at a precise classification of the cases arising under it. The examples which I have given as falling within the provision belong to a class having marked features, easily distinguishable from

other cases not belonging to this class, and at the same time so as to include all cases falling properly within it. For these reasons I am entirely satisfied that this subdivision was designed to provide for that class of cases, and no others, where the acts resulting in death are calculated to put the lives of many persons in jeopardy, without being aimed at any one in particular, and are perpetrated with a full consciousness of the probable consequences. Such acts may well be said to evince that reckless disregard of and indifference to human life which is fully equivalent to a direct design to destroy it. The moral sense of mankind distinguishes between acts of this sweeping and widely dangerous character and ordinary cases of individual homicide, and so, in my judgment, does the statute. But there is an additional reason for putting this construction upon the subdivision in question. If it can be so construed as to include the case at bar, and others of a similar description, we are left wholly without any line of distinction between murder and manslaughter, except the loose and uncertain opinion of a jury as to whether the act which produced death did or did not evince a 'depraved mind, regardless of human life.' There is scarcely a case of manslaughter which, upon this construction, may not be brought within the definition of murder, and punished as such, provided a jury can be found to say that the act which produced death evinced a 'depraved mind, regardless of human life,' because the other clause, to wit, 'imminently dangerous to others,' if it can apply to this, would apply to every case of homicide, as the result would always prove the imminently dangerous nature of the act; and because, upon this construction, cases of homicide, committed unintentionally, in the heat of passion, would not be excluded, as such a case might very well evince a depraved mind, regardless of human life, in the opinion of a jury. This construction, then, would throw us upon that sea of uncertainty which it was the special object of the revisers in framing, and of the legislature in adopting, the section in question, to avoid. My conclusion, therefore, is that the only construction which is consistent with the language of the section as a whole with the object aimed at in its adoption, with the precision and certainty of the law and with the convenient and safe administration of justice, is that which I have already given."

This construction—and we think it correct—disposes of the case at bar, and is in harmony with the Florida and Iowa courts where similar statutes exist.

There are a number of other errors alleged, but, inasmuch as they may not arise again, we will not consider them at this time. The judgment of the district court is reversed, a new trial ordered, and cause remanded for further proceedings. And it or-

to deliver the prisoner to the sheriff of Woodward county, and transmit same to the sheriff of said county, and that said sheriff retain said prisoner in custody until discharged by due process of law or the further order of the district court.

### HOLT v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

#### MURDER—INDICTMENT—INSUFFICIENCY.

An indictment which charged the making of an assault upon the deceased with premeditated malice and intent to kill, and which charged the shooting, striking, and penetrating and the mortally wounding of the deceased, all with the deliberate and premeditated malice of the defendant, is insufficient to sustain a conviction for murder. To be sufficient, it must charge that the unlawful acts by which the homicide was perpetrated, and the killing itself, were all done with the premeditated design or intention to effect the death of the deceased.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John L. McAtee.

William A. Holt was indicted by the grand jury of Kingfisher county, charged with the murder of one William Fowler, in that county, on the 12th day of July, 1894, and on trial before the jury he was convicted, and his punishment fixed by the jury at imprisonment at hard labor for life. Judgment was rendered accordingly upon the verdict, from which judgment the defendant appeals. Reversed.

D. K. Cunningham, for appellant. J. B. Moffitt, Co. Atty., and C. A. Galbraith, Atty. Gen., for the Territory.

BIERER, J. The defendant claims that he was erroneously convicted and sentenced for the commission of the crime of murder, and he alleges error in 58 different assignments; the most important question presented, and the one which is always entitled to primary consideration, being as to the sufficiency of the indictment to sustain the conviction had and the judgment entered. The indictment which was returned to the district court of Kingfisher county on October 12, 1894, and on which the defendant was convicted and sentenced for murder, is as follows: "In the District Court, Fifth Judicial District, Sitting in and for Kingfisher County, Oklahoma Territory. Territory of Oklahoma vs. William Holt. Indictment for Murder. Territory of Oklahoma, Kingfisher County—ss.: In the district court, Fifth judicial district, sitting in and for Kingfisher county Oklahoma Territory, in the October term, in the year of our Lord one thousand eight hundred and ninety-four. The grand jurors, being duly impaneled and sworn, in and for said county, in the name and by the authority of the territory of Oklahoma, upon their oaths do present and find: That William Holt, on the 12th day of July, A. D.

in and upon one William Fowler willfully, unlawfully, purposely, feloniously, and of his deliberate and premeditated malice make and assault, with the intent him, the said William Fowler, willfully, unlawfully, purposely, feloniously, and of his deliberate and premeditated malice, to kill and murder; and that the said William Holt a certain shotgun then and there charged with gunpowder and leaden bullets, which the said shotgun he, the said William Holt, in his hands then and there had and held, then and there willfully, unlawfully, purposely, and of his deliberate and premeditated malice did discharge and shoot off to, at, against, and upon the left side of the said William Fowler, and that the said William Holt, with the leaden bullets aforesaid, out of the shotgun aforesaid, then and there by force of the gunpowder aforesaid, by the said William Holt discharged and shot off, as aforesaid, then and there willfully, unlawfully, purposely, feloniously, and of his deliberate and premeditated malice did strike, penetrate, and wound, with the intent aforesaid, thereby then and there giving to the said William Fowler, in and upon the left side of the body of him, the said William Fowler, then and there, with the said bullets aforesaid, so as aforesaid discharged and shot out of the gun aforesaid, by the force of the gunpowder aforesaid, by the said William Holt, in and upon the left side of him, the said William Fowler, one mortal wound, of which mortal wound he, the said William Fowler, then and there died; and so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said William Holt him, the said William Fowler, willfully, unlawfully, purposely, feloniously, and of his deliberate and premeditated malice, did kill and murder, contrary to the statute in such cases made and provided, and against the peace and dignity of the territory of Oklahoma." It is claimed that this indictment is insufficient, because it does not charge that the killing of the deceased by the defendant was done with a premeditated design to effect death. The evidence shows that the case is one in which, if the defendant is guilty at all, he is guilty because he killed William Fowler with the unlawful design and purpose directed towards William Fowler alone, and not in the doing of any other unlawful act, excepting the killing of Fowler with the evil purpose directed towards Fowler. If the defendant is guilty of murder under the facts of this case, it is because he committed it within the meaning of the definition of murder as contained in the first paragraph of section 2078, defining murder under our statutes, which is: "Homicide is murder in the following cases: First. When perpetrated without authority of law and with a premeditated design to effect the death of the

person killed, or of any other human being." In the case of *Jewell v. Territory*, 43 Pac. 1075, the opinion in which is delivered at the present session of the court, and which case is, and no doubt will remain, a precedent on this question, we have held that an indictment for murder, in order to be sufficient in this class of cases, must charge that the unlawful killing must have been accompanied with a premeditated design on the part of the slayer to effect the death of the person killed, and that an indictment charging that the act was committed with malice aforethought is not sufficient. "Malice aforethought," and "deliberate and premeditated malice," as the language is used in the *Jewell Case* by the first expression and by the second in the case at bar, are substantially the same thing. So that, unless this indictment has some language expressive of a premeditated design to kill the person alleged to have been murdered which is more expressive of that design than the terms "malice aforethought" and "deliberate and premeditated malice," following the decision in the *Jewell Case*, this indictment must be held insufficient. Has this indictment any such language? With reference to the charge that the defendant committed an assault upon the deceased, it will be observed that there is language expressive of the intent or the design to kill. It charges that the assault was made by William Holt "of his deliberate and premeditated malice," and "with the intent him, the said William Fowler, to kill and murder"; and if this language was carried by any appropriately expressive terms throughout the indictment in charging the other acts committed by which the crime of murder was sought to be stated, we would have no hesitancy in holding the indictment sufficient, for language that expresses premeditated intent to kill sufficiently charges a premeditated design to effect death, for to kill one and to effect his death is the same thing. With reference to the other acts charged to have been committed by the defendant, however, the design to kill is not connected. The different acts charged in the indictment as having been committed by the defendant upon William Fowler are: First, the assault; second, the shooting with a shotgun charged with gunpowder and leaden bullets; third, the striking William Fowler by such leaden bullets so shot from the shotgun; and, fourth, the mortally wounding William Fowler by the means stated, and from which mortal wounding William Fowler died. And after these acts the grand jury sums up and concludes the charge which it desires to prefer against the defendant, Holt, by reason of the acts charged, by saying that "William Holt him, the said William Fowler, willfully, unlawfully, purposely, feloniously, and of his deliberate and premeditated malice did kill and murder." Thus it will be seen that the indictment nowhere contains any charge that

any unlawful act was done by the defendant with the premeditated intent to kill William Fowler, excepting the act of the unlawful assault. All of the other acts are charged to have been done with deliberate and premeditated malice towards William Fowler, and the grand jury sums up its charge by concluding that the murder was committed with deliberate and premeditated malice. It is true, the striking and wounding of William Fowler by William Holt were charged to have been done "willfully, unlawfully, purposely, feloniously, and of his deliberate and premeditated malice, and with intent aforesaid," but it will be observed that there are two intents aforesaid charged in the indictment,—the one with reference to the assault, which is sufficiently charged to have been done with premeditated intent to kill; and the other with reference to the shooting, which is only charged to have been done willfully, unlawfully, purposely, and of his deliberate and premeditated malice,—and if the language is construed in accordance with its order (and it can be properly construed in no other way), the intent aforesaid must be held to relate to and refer to the last intent expressed, and that is charged to be the deliberate and premeditated malice of William Holt towards William Fowler. The concluding portion of the indictment, too, shows that this was what the grand jury meant, for they charge that the killing and murdering was of the deliberate and premeditated malice of William Holt. The indictment, stripped of its verbiage, simply charges that William Holt did, of his deliberate and premeditated malice, with intent to kill, assault William Fowler, and that he did unlawfully and of his deliberate and premeditated malice shoot and strike and wound William Fowler, by which the grand jury concluded that the defendant did kill and murder William Fowler with his, William Holt's, deliberate and premeditated malice. We are unable to read this indictment to mean anything else, for any other meaning cannot be drawn from the language of the charge, and this is insufficient to sustain a conviction of murder.

The conclusion we have reached as to the insufficiency of this indictment is fully borne out by the authorities touching upon the principle which governs the case. Wharton, in his work on *Criminal Pleading and Practice* (section 163, subd. 1) says: "Where the intent is to be proved in order to indicate the character of the act, as when there is an attempt or assault to commit an offense, in which cases the intent must be averred, and must be attached to all the material allegations." In *Com. v. Boynton*, 12 Cush. 490, the court lays down this rule of criminal pleading: "It is a familiar rule of criminal pleading that wherever the intention of a party is necessary to constitute an offense such intent must be alleged in every material part of the description where it so constitutes it.

Thus, where a forged order was presented, and money obtained thereby, and the indictment alleged that the defendant, with intent to cheat, knowingly pretended it to be genuine, but did not aver the obtaining money thereby to have been done knowingly, it was held bad." In *Hagan v. State*, 10 Ohio St. 459, it was held by the court that: "Intent or purpose to kill is essential to constitute the crime of murder in the first or second degree, as defined by the statutes of Ohio; and this intent must be specifically and directly averred as part of the description of the offense in every indictment for either of these crimes. An averment that the accused 'purposely and of deliberate and premeditated malice' 'did strike' the deceased, thereby inflicting a mortal wound, of which the deceased afterwards died, does not satisfy the requirements of the law; for, though the accused may have purposely and maliciously struck the deceased, it does not follow that the stroke was given with a design to produce death." The Iowa statute was under consideration in *State v. McCormick*, 27 Iowa, 402, where the opinion was delivered by that able jurist, Chief Justice Dillon, and it was held that a willful, deliberate, and premeditated killing constituted murder; but the court decided that, although the indictment charged that the assault was willful, deliberate, and premeditated, as it did not charge that the blow was dealt for the purpose or with the intent to kill, or that the killing was willful, deliberate, and premeditated, the indictment was bad. The opinion of the learned chief justice contains the following language: "The killing, then, to make murder in the first degree (and the kind of killing which was relied on below) is one which is willful, deliberate, and premeditated. \* \* \* The indictment does, indeed, charge that the assault was willful, deliberate, and premeditated; that the blow was dealt purposely, deliberately, with premeditation; but it does not charge that it was thus dealt for the purpose or with the intent to kill, or that the killing, the taking of the life of the deceased, was willful, deliberate, and premeditated. It needs no argument to show that an assault may be willful, deliberate, and premeditated without there being any intent whatever on the part of the assailant to kill or take the life of the person assaulted. And it is just here that the indictment, considered as one charging murder in the first degree, is defective. This appears from the statute, which is that 'the killing,' and not simply the assault, must be willful, deliberate, and premeditated in order to constitute murder in the first degree." And that is exactly the fault with this indictment. It charges an assault with premeditated intent to kill, which, as we have said, is equivalent to charging premeditated design to effect death; but it does not charge that the shooting was done, or that the striking, penetrating, or mortally wounding, or the killing of William

Fowler, was done or accomplished with this design or intent to effect his death, or to kill him. The indictment was undoubtedly sufficient as a charge of manslaughter, and it undoubtedly charged an assault with the premeditated intent to kill, but it did not charge a killing, or a taking of life, with the premeditated intent to kill. For aught the indictment charges, the intent to kill entertained by the defendant towards the deceased ceased as soon as the assault was committed, and the assault was committed as soon as the defendant unlawfully and willfully drew the loaded shotgun in a threatening manner upon the deceased, in near proximity to him, with an offer or attempt to do a corporal hurt. To make an assault with intent to kill complete, it was entirely unnecessary that the deceased should have been shot or struck at all. The use of the weapon in this manner, although no striking and wounding were done, or any personal injury actually inflicted, would be an assault. Our statute (section 2140, St. 1893) defines an assault to be "any willful and unlawful attempt or offer with force or violence, to do a corporal hurt to another." In Washington territory the statute required that, in order to constitute murder in the first degree, the killing must be done purposely and of deliberate and premeditated malice; and in *Leonard v. Territory*, 7 Pac. 872, the indictment, which charged that the assault and the shooting and the penetrating and wounding of the deceased, Ambrose Patton, were all done with deliberate and premeditated malice, was held insufficient because it did not charge that the killing or mortally wounding was done with deliberate and premeditated malice. It was held in that case, with numerous citations of authorities in its support, and which included *State v. McCormick*, supra, that this defect was not cured by the summing up or concluding part of the indictment which did charge that the defendant did kill and murder the deceased of his deliberate and premeditated malice. As the indictment was insufficient to sustain the conviction of murder, the judgment must be reversed, and remanded for further proceedings in accordance with this opinion. All the justices concurring; Justice McATEE not sitting.

#### AMERICAN FIRE INS. CO. OF PHILADELPHIA v. PAPPE.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

PROBATE COURT—PROCEDURE—RECORD—TERMS—JURISDICTION BY STIPULATION.

1. Article 15, c. 18, Laws Okl., extending the jurisdiction of probate courts, provides for holding regular terms of the probate court for the trial of all civil cases wherein concurrent jurisdiction is given with the district court, where the sum in controversy exceeds the jurisdiction of a justice of the peace; and in such cases the pleadings and practice and procedure in the probate court must conform to the procedure of the territory governing pleadings and practice and proceedings in the district court.

convened on the day named, and it is admitted by the judge that "there was no entry in the journal or records of the court showing that the court had been opened at any time prior to February 1st, held that, in the absence of such record, it must be presumed that the court did not convene at the time fixed by law.

3. A judgment of the probate court rendered in a civil action wherein the sum in controversy exceeds the jurisdiction of a justice of the peace, and which judgment was so rendered at a time when the court was not legally in session, is void for want of jurisdiction.

4. Judgments rendered by a court not legally in session are void.

5. Where terms of court are, under the law, fixed at stated periods, and the court fails to convene at the time so fixed, and by reason thereof the court is not legally in session, the parties to an action cannot, by agreement, confer jurisdiction upon the court to render a judgment binding upon the parties.

(Syllabus by the Court.)

Error from probate court, Kingfisher county.

Action by Richard Pappe against the American Fire Insurance Company of Philadelphia. There was a judgment for plaintiff, and defendant brings error. Reversed.

Boynton & Smith and Leake, Henry & Reeves, for plaintiff in error. James A. Morris, for defendant in error.

DALE, C. J. November 15, 1893, Richard Pappe commenced an action in the probate court of Kingfisher county against the American Fire Insurance Company of Philadelphia, to recover a judgment in the sum of \$1,000 upon a contract of insurance, wherein defendant below agreed to insure against fire a certain building and contents belonging to plaintiff below. After issues were duly joined, the cause was called for trial in the probate court, sitting with the powers of a district court. On January 31, 1894, the judge issued an open venire for 12 jurors; and on February 1st, over the objection of defendant below, called the case for trial, and, on such trial below, the plaintiff obtained a judgment in the sum of \$705. To reverse the judgment, appellant assigns 99 errors, and, in support thereof, files a brief specifically calling attention to and arguing each alleged error. We find, after an examination of the record and authorities, that it will be unnecessary to consider but one of the errors assigned.

It appears that on February 1st, when the case was called for trial, defendant filed a motion to quash the venire, and among the objections urged was one alleging the fact that the court was not legally in session; that it had never been legally opened or proclaimed to be open, nor had any session of the January, 1894, term been opened or continued open. The court overruled the motion, and the jury was then examined, and the panel completed, after which defendant below objected to the introduction of evidence, alleging, among other reasons, as

term of the court was never properly opened nor convened in session up to that date, and the call of the court in attempting to open court by a proclamation of the sheriff for the first time at the January term on that date was without authority of statute, and void; that any agreement for the trial of the action upon that particular day could not authorize the court to summon a jury. This objection was also overruled. Immediately following this ruling, in the record, appears the following statement: "And the court, on said 1st day of February, 1894, at ten o'clock a. m., directed the sheriff to duly open court by proclamation of such officer at the door of the court room, and such sheriff did so open court on said 1st day of February, 1894, before the transaction of any court business by said court. And the court record and journal does not show that it was opened on the first Monday in January, 1894, by proclamation of the sheriff or other officer of the court, and there is no entry in the journal or record of the court showing that it had been so opened at any time previous to February 1st, 1894, in a legal or regular manner. And the court, then and there, in open court, stated that the court or judge could not recollect that such court had been opened or attempted to be opened in such manner on the first Monday in January, 1894; that it might or might not have been; but it was the custom of the court, on the first day prescribed by the statute as the first day of the term of such probate court, to have it opened by an officer, if one happened to be present, and, if one was not present, to regard and consider the court as open, and to open court by proclamation on all days when cases were heard; and that the court had considered itself in session since the first Monday in January, 1894, and had done business as an open court, and tried causes as such; and that whether it had been regularly opened or not the journal did not say, nor any other record, and the court could not then say. And the court now certifies that the foregoing is true." After which the court directed the trial to proceed, which was done, and a verdict rendered, and judgment obtained as above stated. In the judgment appears the following: "Now, on this, the first day of February, 1894, this cause became on to be heard, in pursuance of an agreement of the parties heretofore made, in open court. The plaintiff appeared in person and by his attorney, James A. Morris, and the defendant appeared by its attorneys, Boynton & Smith." Under this state of the record, we are called upon to determine whether or not the court below had jurisdiction to render a judgment in the case at the time such judgment was obtained.

1. Article 15, c. 18, Laws Okl., passed by our territorial legislature, approved December 25, 1890, and entitled "An act extending

therefrom," is the authority under which the probate courts of this territory obtained jurisdiction to hear and determine causes between parties other than causes of the character usually heard in probate courts. Section 1 of the act is as follows: "Probate Courts. Probate courts in their respective counties shall, in addition to the powers conferred upon them by the probate chapter of the territory, have and exercise the ordinary powers and jurisdiction of justices of the peace, and shall, in civil cases, have concurrent jurisdiction with the district court, in all civil cases in any sum not exceeding one thousand dollars, exclusive of costs, and in action of replevin where the appraiser's value of the property does not exceed that sum, and the provisions of the chapter on civil procedure relative to justices of the peace and to practice and proceedings in the district court shall apply to the proceedings in all civil actions prosecuted before said probate courts." This section confers the jurisdiction. Following, in section 2, we find the manner in which such jurisdiction shall be exercised, and in such section it expressly provides that, "In all cases commenced in said probate courts wherein the sum exceeds the jurisdiction of justices of the peace, the pleadings and practice and proceedings in said court, both before and after judgment, shall be governed by the chapter on civil procedure of the territory governing pleadings and practice and procedure in the district court." This language is conclusive. It means that, in all cases wherein the amount in controversy exceeds the sum of \$100, the probate court is sitting as a district court, and is governed by the same procedure. Section 3 of the same act provides for holding terms of the probate court, and, on the first day of the term, preparing a calendar of the cases standing for trial at said term. And section 4, following section 3, *supra*, expressly declares what business may be transacted by the probate court when not in session as a district court, and the language used is such as prohibits the court from trying causes of the character of the one under consideration except at a regular term. Section 2 of article 17 makes provision for terms of court "beginning on the first Mondays in January, March, May, July, September, and November of each year." From these provisions we reach the conclusion that the legislature intended—First, to create a court with jurisdiction, in certain classes of cases concurrent with the district court; second, to provide that, when the probate court exercised such jurisdiction, the procedure should in all respects conform to that of the district court; and, third, for regular terms of court while engaged in the trial of causes wherein the sum in controversy exceeds the jurisdiction of a justice of the peace.

January, and, in fact, that no attempt was made to so open the court until the 1st day of February. It is true, the judge, in ruling upon the objections of counsel for defendant, stated that "he could not recollect that the court had been opened on the first Monday in January; that it might or might not have been so opened." But it was admitted by all parties that "there was no entry in the journal or records of the court showing that the court had been opened at any time prior to Feb. 1st"; and, in the absence of any record, we are bound to say that the act was not performed, as the probate courts of this territory are courts of record, and they can only speak by the records.

3. It is, we think, quite clear, both in reason and authority, that a judgment of the character appealed from, if rendered at a time when the court was not in session, is not binding upon the parties. Under the organic act of this territory, section 9 provides that the judicial power of the territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. There is a well-defined distinction between the act of a judge and the act of a court. The law has placed the jurisdiction to pronounce judgment in a court, not in a judge. Except at regular sessions, as fixed by law, a judge of a district court has no jurisdiction to render a final judgment other than in habeas corpus and mandamus proceedings, and an attempt so to do would at once be recognized as an act beyond his judicial authority. The same rule is applicable to probate judges. And we think it true that, where the statute provides for regular terms of court, to be held for the trial of causes and rendering of judgment, it is only during term time that the judges are invested with their full judicial power. 1 Black, Judgm. § 179; *Earls v. Earls*, 27 Kan. 538; *Galusha v. Butterfield*, 2 Scam. 227; *Balm v. Nunn*, 63 Iowa, 641, 19 N. W. 810; *Laughlin v. Peckham*, 66 Iowa, 121, 23 N. W. 294; *Filley v. Cody*, 4 Colo. 109; *Kirtley v. Mining Co.*, Id. 111; *Francis v. Wells*, Id. 274.

4. Inasmuch as the court failed to convene on the first Monday in January for the purpose of holding a term of court for the trial of causes wherein the procedure of the district court governed, any judgment in such causes which the court might render is *coram non iudice*; and it is unnecessary for us to discuss this proposition, as the supreme court of this territory has heretofore passed upon this question, in *Re McClaskey*, 2 Okl. 568, 37 Pac. 854. And, to the same effect, see *In re McClaskey* (Kan. Sup.) 34 Pac. 459; *In re Terril*, Id. 457; *Earls v. Earls and Galusha v. Butterfield*, *supra*; *In re Millington* 24 Kan. 214.

5. It is claimed by defendant in error that appellant consented that the trial might pro-

ceed in the court below at the time the cause was heard, and that he is concluded by his agreement. The only mention of an agreement of the character indicated appears in the judgment. There is no stipulation or other evidence of an agreement found in the record. As against this allegation of an agreement, the record shows that an objection was duly made before the jury was impaneled, in which objection it was urged that the court was not legally in session, because the court had not therefore been in session for the January term. This objection was overruled, and to such ruling an exception was taken. After the jury was impaneled, the same objection was renewed, and again overruled, and an exception saved. As against this record, we could hardly accept the statement of the court to the effect that the cause proceeded to trial upon agreement. But, conceding that such trial was had by agreement, such fact would not give the court jurisdiction. Judicial power cannot be conferred upon a court by consent. 1 Freem. Judgm. 121. And this doctrine is quoted with approval in *Earls v. Earls*, *Galusha v. Butterfield*, and *Francis v. Wells*, supra, and the cases in those decisions.

The judgment of the lower court is reversed, and the court below is directed to grant a new trial to appellant. All the justices concurring.

#### BLANKINSHIP v. OKLAHOMA CITY LIGHT & WATER POWER CO. et al.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

##### STIPULATIONS AS TO FACTS—EFFECT—ADMISSIBILITY.

1. In a cause begun in the probate court, a written stipulation was agreed upon between the plaintiffs and the defendants, "that the facts in the above-entitled cause are as follows." The cause was tried upon this stipulation, containing the agreed statement of facts, in the probate court, and finding had for the plaintiff. The case was appealed to the district court upon law and facts, and tried by the court without a jury. The stipulation was objected to at the trial in the district court, and the objection sustained, and the stipulation, and the agreed statement of facts contained in it, thereupon excluded from the testimony then produced in the case. *Held*, this was error.

2. A written statement of facts, claiming to be the "facts in the above-entitled cause," properly entitled, and signed by the parties to a cause, or their attorneys, and filed in the cause for use as evidence, and thereafter so used at the hearing in the probate court, is a general and solemn admission of the facts, and binding upon the district court upon appeal, and conclusive in all further proceedings in the cause, unless some portions thereof are uncertain and of doubtful interpretation, in which case evidence aliunde will be received upon such points of doubtful and uncertain interpretation.

(Syllabus by the Court.)

Error to probate court, Oklahoma county.

Action by E. N. Tilman and another, partners as the Southern Distilling Company, for whom were substituted B. Blankinship, receiver, against the Oklahoma City Light &

Water Power Company and others. There was a judgment for defendants, and plaintiff brings error. Reversed.

R. G. Hays and J. S. Jenkins, for plaintiff in error. J. W. Johnson, for defendants in error.

McATEE, J. This suit was brought by the Southern Distilling Company in the probate court of Oklahoma county on the 6th day of July, 1893, against the defendants, to recover two barrels of whisky, or their value, alleged at \$160. A general denial was filed by all the defendants except Clark and White, who answered that they held the whisky in controversy by reason of writs of attachment placed in their hands as constables of Oklahoma county, Oklahoma territory, and that the property in said whisky was in M. Winter. It was admitted, in the reply, that defendants Clark and White were constables, and held the whisky by virtue of the writs of attachment mentioned. All other allegations in the said answers were denied, except as stated. The issues having been made up, the plaintiffs and defendants thereupon filed an agreed statement of facts in the cause on the 22d day of July, 1893, as follows: "Territory of Oklahoma, Oklahoma County—ss.: In Probate Court. Before S. A. Steward, Judge. Southern Distilling Co., Plaintiff, vs. Oklahoma City Light & Water Power Co., Charles Clark, as Constable, T. C. Rice, M. R. Krausnick, and G. W. White, as Constables, Defendants. Stipulation. It is hereby agreed, by and between the above-named plaintiff and the defendants, and each and all of them, that the facts in the above-entitled cause are as follows, and that the said court may enter judgment accordingly, the same as if such facts had appeared from the preponderance of the testimony, duly and properly given in said court upon the trial of this cause, and that such judgment may be made and entered, without reference to formality as to the time of settling said cause,—such facts so agreed upon being these, to wit: That the property in controversy, to wit, two barrels of whisky, were sold by the plaintiff to one Myer Winter for a consideration of \$165, and a few days prior to the commencement of this action, and said goods are of the value of said sum; that the plaintiff is a nonresident and is doing business in Dallas, in the state of Texas, and was doing business when said goods were so sold, and that said Myer Winter was doing business in said Oklahoma City, said county and territory at the same time, and that said goods were sold on credit, and were shipped by the plaintiff to said Myer Winter at Oklahoma City, and there received by him, and kept unopened and unused for some four or five days; that the said Winter, being unable to pay all of his lawful debts as they fell due, and not having the ready money for that purpose, placed said goods in the hands of a drayman in Oklahoma City for the purpose



for some time, and then, under the express directions of said Winter, were taken to the Atchison, Topeka & Santa Fé depot in said city, and delivered to said railroad company, to be shipped to the plaintiff at Dallas, in the state of Texas, and that evidence may be taken that a bill of lading therefor was executed by the agent of said company and delivered to said drayman, and said goods left in the custody, possession, and charge of said railroad company, so consigned by said Winter to the plaintiff; that the consignment of said goods, by said Winter, to the plaintiff, was agreeable and acceptable to the plaintiff in payment of the purchase price therefor, and that, from the time said goods were so delivered to said drayman, they were never returned to the possession of said Winter, he having immediately quit the country, and exercised no further control or authority over the same; that said indebtedness was bona fide, and said sum a fair value and consideration for said goods, and all of said transactions were had, and said acts done, before any actions were brought by any of the creditors of said Myer Winter. But afterwards actions in attachment were brought by several of the creditors of said Myer Winter, among whom are some of the defendants herein, and orders in attachment were issued and levied on the goods here in question, which were taken into the possession of the constables above named, who are defendants herein, and were in their possession, at the time this action was brought; under such order in attachment, and that this action is brought by the plaintiff, after demand, to recover the possession from the defendants of said goods; the contention of the plaintiff being that its rights in the premises to the possession of said property are superior to the rights of said officers under said order of attachment. Dated this 22d day of July, 1893. Southern Distilling Co., Plaintiff, by Rogers & Howard, Their Attorneys Oklahoma City Light & Water Power Co., by Selwyn Douglas, Attorney. Clark & Burwell, Attys. for Krausnick." Upon which said agreed statement of facts trial was had, and judgment rendered in favor of the plaintiff, plaintiff in error here, for the possession of said whisky and costs of suit. Defendants in error appealed to the district court of Oklahoma county, and a trial was there had before the court without a jury, upon the same pleadings as in the probate court, with the exception that B. Blankinship, receiver of the Southern Distilling Company, was substituted for the plaintiff by order of the district court, and a finding made for defendants in error. At the hearing of the cause in the district court on March 15, 1896, the plaintiff, in order to maintain the issues on his part, offered to introduce to the court, as evidence of the

probate court, and the introduction of which the defendants objected, which objection was by the court sustained, and to which ruling of the court the plaintiff excepted. The court thereupon proceeded to hear testimony in the case, contradictory to material statements made in the written statement of facts, as agreed upon in the probate court. No motion or application was made by the defendants in error to amend or strike out the statement of facts, as filed in the probate court, before the trial began. The cause went to trial without such motion, the written stipulation still standing upon the record unchallenged, and no application up to that time having been made for its exclusion on the ground of newly-discovered evidence, or because its statements were contrary to the facts. The court found for the defendants in error, and the plaintiff brings the case here for review, assigning as error that the court erred (1) in permitting illegal and incompetent testimony to be given on the hearing of the case, over the objection of the plaintiff in error, to which plaintiff in error at the time excepted; (2) in excluding relevant and competent testimony offered in behalf of the plaintiff, on the trial of said action, to which ruling the plaintiff in error at the time excepted; and (3) in refusing to receive in evidence and consider the agreed statement of facts, signed by the attorneys in said action, and filed in said action, and offered by the plaintiff as the facts in said case, to which ruling the plaintiff in error at the time excepted; and (4) in overruling the motion for a new trial, and because the judgment was contrary to the law and evidence.

The principal proposition of the plaintiff in error is that, the written stipulation having been agreed upon by the attorneys for defendants, and signed by them as the "facts in the above-entitled cause, \* \* \* the same as if such facts had appeared from the preponderance of testimony upon the trial of the cause," the defendants in error were bound by them, upon appeal to the district court, in all matters relating to the progress and trial of the cause in the district court, to the same extent as in the probate court. The law is that, if it plainly appear that an admission be made for the purposes of a particular trial alone, it cannot be used at any subsequent trial, but that, if the statement appears to be made as a general admission, in that case the party or parties making it will be bound by it, in all subsequent proceedings, or upon a new trial. And it is contended by the defendants in error that, whether or not "an oral admission made by counsel is a general admission, or intended only for the particular trial then pending, is a question of fact to be determined by the jury"; and that, although the agreed state-

ment of facts in question here was incorporated in writing, the rule should be the same, the rule applying, in reason, as well to written as to oral admissions; and that the fact that the admission or statement is in writing gives to it no more force; and that, in either case, the question as to whether the admission was a general admission, or an admission intended only for the cause then pending, is a question of fact to be determined by the jury, or by the court sitting as a jury, as in this case. We do not understand this proposition of the defendants in error to be the law. The language of the stipulation is that "the facts in the above-entitled cause are as follows." The statement of facts is clear and definite. There is no obscurity in it. It is not susceptible of a doubtful interpretation. It is declared, in *Greenleaf on Evidence* (volume 1, § 186), that "the admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause. But, to this end, they must be distinct and formal, or such as are termed 'solemn admissions,' made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial. In such cases, they are, in general, conclusive, and may be given in evidence, even upon a new trial." And in *Gres. Eq. Ev.* 458, it is said that, "for the purpose of the suit, an admission made by counsel is conclusive, and in subsequent proceedings or on rehearing, if the court is satisfied that they were really made, they cannot be retracted." And it is declared, in the syllabus of the court in *Railroad Co. v. Shoup*, 28 Kan. 304, in which an oral admission had been made by an attorney during the trial of the cause, that even such oral admission might be proved in the subsequent trial of the case, "if it should appear to be intended as a general admission of the fact, and that, upon such subsequent trial, it would be as binding as though made at that trial." And it is said by *Brewer, J.*, who wrote the opinion, that "it may also be so obviously intended as a general admission that the court may instruct the jury to treat it as such; as, for instance, where the parties sign an agreed statement of facts." And it is said in *Ex parte Hayes*, 92 Ala. 120, 9 South. 156, that, "when an agreed statement of facts is reduced to writing, signed by the attorneys of the respective parties, and not limited to use on one trial only, a party cannot be relieved from an admission therein contained, on a subsequent trial, after a reversal and remandment of the cause, except for some cause which would authorize the rescission of the contract; and neither the attorney's understanding that the agreement was for the purpose of one trial only, nor his opinion that the admitted facts were immaterial, is sufficient cause to set it aside. If the court refuses to receive the admissions contained in the agreed case as evidence on a

second trial, an exception may be reserved, and the ruling revised on appeal." And it is said, in — v. —, 44 N. Y. 486, by the court, that "the effect of the admission is to conclude the parties. This admission belongs to that class of solemn judicial admissions which are made as a substitute for proof of the fact admitted. They dispense with proof as to such fact, and, although there may appear in the case evidence casting doubt on the truth of such matter admitted, it is to be presumed that there is other evidence not produced, or other reasons which induce the admissions. If the admissions were improvidently made, the injured party has his remedy by motion to strike out or amend the admission; but, while it exists in the case, it would appear to be conclusive." There was no admission that it was for use in the probate court only. It was, indeed, provided that "the said court may enter judgment accordingly, the same as if such facts had appeared from the preponderance of testimony duly and properly given in said court upon the trial of this cause." But, after the stipulation, properly entitled in the probate court, properly stating the parties to the cause, and a written agreement that "it is hereby agreed, by and between the above-named plaintiff and defendants, and each of them, that the facts in the above-entitled cause are as follows," and the stipulation having been formally signed by the plaintiff and by the defendants, by their attorneys, and having been filed in the case, the further provision that the "said court may enter judgment accordingly," etc., was unnecessary and superfluous, and will be treated as surplusage. Upon the presentation of the written statement of facts, the court would pass upon the facts so presented, and enter judgment thereupon, as a matter of course, as required by law, and no provisions in the written agreement could have any additional effect to place the discharge of the judicial function, upon the case thus presented, within the duty or jurisdiction of the court. The facts in the cause having been incorporated in writing, executed and filed in the cause, they became "the facts in the above-entitled cause" for all purposes, and are solemn admissions, made by the defendants in error, and, if made erroneously, were made so that the plaintiff in error relied upon them, and had a right to rely upon them; and, if a wrong has been done, the defendants in error must look to their attorneys. No motion was made before the trial came on to strike out or amend the admissions of fact, and inasmuch as they existed in the cause as general and solemn admissions for all purposes, they are conclusive. The cause will therefore be reversed, and remanded to the district court, with direction to grant a new trial in accordance with the views here expressed. All the justices concurring, except *SCOTT, J.*, who sat in the case below.

**CRIMINAL LAW—APPEAL—REVIEW—EVIDENCE—  
TRIAL—HOMICIDE—SELF-DEFENSE—RIGHT OF  
DEFENDANT TO SUBPOENA FOR WITNESSES.**

1. Under Pen. Code 1895, § 2321, providing that on appeal from a judgment the court may review any intermediate "order or ruling" on appeal from the judgment alone, errors in the admission and exclusion of evidence may be reviewed though no motion for new trial was made.

2. In a criminal case, in order to impeach a witness by statements in her testimony at the coroner's inquest, which was taken down in writing, and signed by the witness, it is necessary, as required by Code Civ. Proc. § 2380, that the writing be shown the witness when interrogated as to whether she made such statements.

3. Testimony of accused at the coroner's inquest is inadmissible against him, he having testified under the belief that he was required to answer the questions put to him.

4. A person, when assailed in his own house, is not required to retreat out of his house, if a retreat may be safely made, to enable him to avail himself of the defense of self-defense.

5. Pol. Code, § 4656, providing, in criminal cases, that the clerk must not issue subpoenas for more than six witnesses for each side except on order of court is constitutional, and authorizes the court to refuse defendant an order for subpoenas for additional witnesses unless he discloses the materiality of their expected testimony.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Edward J. O'Brien was convicted of manslaughter, and appeals. Reversed.

The defendant was indicted for murder in the first degree, and convicted of manslaughter, in the killing of one Frank Bixby, in Cascade county, on August 18, 1895. He appeals from the final judgment of conviction. The information charges that the killing was done with a rifle.

Leslie & Downing, for appellant. H. J. Haskell and Ella Knowles Haskell, for the State.

HUNT, J. 1. This appeal being from a judgment, and the record containing bills of exception, but no motion for a new trial, it is argued in behalf of the state that this court has no jurisdiction to pass upon the errors alleged in the exclusion and admission of certain testimony during the progress of the trial. But this appeal is taken since the adoption of the Penal Code of 1895. Under the former Code (section 394, p. 476, Comp. St. 1887), an appeal to the supreme court could be taken by the defendant as a matter of right from any judgment against him, and upon appeal any decision of the court or intermediate order made in the progress of the case could be reviewed. The interpretation placed upon that statute was that errors of law in the admission or exclusion of illegal or legal evidence must have been called to the attention of the district court by motion for new trial, to the end that that court should thereby first have an opportunity to

—, 41 Pac. 852. But the Penal Code of 1895 provides as follows: Section 2270: "An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him." Section 2321: "Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment." Section 2321 is identical with section 1259 of the Penal Code of California. The difference between section 394 of the Code of 1887 and section 2321 of the Code of 1895, consists in this: Under the old Code, the appellate court was limited in its review to any decision of the court or any intermediate order made in the progress of the case; under the new Code, upon appeal from a judgment, the court may review not only any intermediate order, but likewise a ruling involving the merits, or which may have affected the judgment. In the use of the word "ruling" the legislature evidently intended to permit a review of the actions of the district court upon matters of law in the exclusion or admission of testimony involving the merits of the case on an appeal from the judgment only. Such rulings had not been included in the interpretation of the words "decision or intermediate order" in the older statute; that is, a distinction has been recognized between a decision and a ruling. The older statute is therefore to be distinguished from the new. In the one, a decision or order was regarded as a determination by the court in the settlement of the controversy or matter before it; while in the new Code a ruling means generally a settlement or decision of a point of law arising upon the trial of the case, without necessarily the force or solemnity of a judgment or order. Black, Law Dict.; Cent. Dict. We do not hold that under section 2321, above cited, matters may be reviewed on appeal from a judgment only when they are embraced within any of the provisions of the law made for granting new trials (section 2192), except errors in the decision of questions of law arising during the course of the trial. The latter errors can, however, be reviewed either upon appeal from the judgment, or from an order overruling a motion for a new trial. This is the practice in California, and, having taken section 2321 verbatim from the Code of that state, we adopt the constructions placed upon it in the decision of *People v. Keyser*, 53 Cal. 184, where it was said: "The defendant may appeal from the judgment without having made a motion for a new trial. \* \* \* If, for instance, one ground of the motion be that the court erred in the decision of a question of law, and the particular alleged error relied upon be the exclusion of certain testimony, the bill should set out the offered testimony, its exclusion, and the exception to

sary in order to give point to the exception. The errors alleged by bills of exception are therefore properly before us.

2. So far as the testimony is before us by the bills of exception, it appears that the defendant lived with a woman whom he said was his wife, but to whom it is doubtful if he had ever been married. The defendant seems to have been jealous of this woman, and particularly of the attentions paid to her by the deceased. About 11 o'clock on the night of the killing, certain witnesses went to the house of the defendant, unlocked the door, lighted a lamp, and found the body of deceased lying on the floor, on his left side, with his head towards the south and his feet towards the north. The door was on the south side of the house. There was a rocking chair near to the feet of the deceased, and a knife close to his hands. The coroner noticed a hole through the cabin, said to be a bullet hole, and found a bullet on the floor about 18 inches from the left leg of a chair in which the deceased was supposed to have been sitting when shot. The coroner found two empty cartridges, one outside of the door, and one in the gun. On the trial, a board with a bullet hole in it was introduced, said to have been found opposite where the chair was standing on the north side of the feet of the deceased, and about 25 inches above the floor of the cabin. Blood was found in the seat of the chair, and upon the back of the chair. The clothing on the body was perforated. The wounds on the deceased showed that two bullets passed from one side of the body to the other. The theory of the state was evidently that the defendant shot the deceased from the outside of the cabin, and while the deceased was sitting in the chair. Defendant admitted the killing, and attempted to prove that it was impossible for a person to shoot from the outside of the house, and strike the body as the deceased's body was struck, and make the bullet hole that was shown in the wall of the cabin. His own evidence was to the effect that he was in his house, remonstrating with the deceased concerning his visits to the woman; that they had some words; and that deceased, who was sitting in a rocking chair, grabbed a knife from the window; that thereupon defendant grabbed the gun, whereupon deceased squatted, and then the defendant shot twice. Defendant further said that he shot the deceased because he was afraid he was going to cut him to pieces with the knife he had in his hands.

During the trial, the defendant called Mrs. Minnie O'Brien, who was the only witness to the killing. She said: That, upon the night of the killing, O'Brien brought the gun into the house, and then went out to do the chores. While he was out, the deceased came in. When O'Brien came back, and found deceased there, he remonstrated with him concerning his frequent visits at the

you keep me away. That O'Brien then shot. The witness then testified in relation to a conversation which took place between O'Brien and the deceased shortly before the killing. The defendant objected, for the reason that it was not proper cross-examination, and called for a conversation that had not been gone into. The prosecuting attorney then asked the witness, "Did you testify to that conversation at the coroner's inquest?" Answer: "I don't remember what I testified to there." After various questions as to the condition of affairs just preceding the killing, the county attorney asked the witness to examine Exhibit R, and state whether or not, on the occasion referred to [meaning, doubtless, the examination of the witness before the coroner], she made the following statement: "'The first I knew of any difficulty between Mr. O'Brien and the deceased was Saturday evening, the 17th of August, 1895.' Did you so state upon that occasion?" The defendant objected to the question. The record discloses no answer, but the objection was overruled. As appears by the record, no further questions, material to the homicide, were put to the witness, relating her statements before the coroner to her, and asking her whether she had made them as related. On rebuttal, the county attorney testified to the effect that he had taken down the testimony at the coroner's inquest, and took the deposition of Mrs. Minnie O'Brien, which was Exhibit R; that such testimony was taken down, and afterwards read to the witness, before she was asked to sign it. Thereupon the assistant to the county attorney, against the objection of the defendant, asked the county attorney to examine Exhibit R, and state whether or not, on an examination thereof, the witness testified or did not testify upon that occasion to the "following statement." Thereupon the assistant to the county attorney would read portions of the deposition to the jury, and the county attorney would answer affirmatively, "She did." Then, by the direction of the assistant prosecuting counsel, the county attorney would again read the statement of the witness made at the coroner's inquest. This line of examination was kept up by repeated questions to the county attorney, the form of the question generally being to "state whether or not the witness Minnie Warren did or did not testify on that occasion to the following," giving her original testimony before the coroner. The matters which the questions referred to were the witness' statements before the coroner concerning the acts and conduct of the defendant and the deceased just prior to the killing, and at the time of the killing. The object of the examination was evidently to impeach the witness Minnie O'Brien, by showing that she made inconsistent statements concerning the material facts. The defendant preserved his objections all through, but the court uniformly overruled such objections, and permitted

It is provided by section 2018 of the Penal Code that the rules of evidence generally applicable to civil cases are to be applied in the trial of criminal cases. Section 3380 of the Code of Civil Procedure provides as follows: "Sec. 3380. A witness may also be impeached by evidence that he has made at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them." No authorities are needed further than the statute itself. It is but the expression of the reason of judicial decisions for years and years. By disregarding its requirements, well-established principles of the law of cross-examination were violated. Whart. Cr. Ev. § 483; Thomp. Trials, § 502.

As the case must be tried again, we will briefly indicate our views upon a few of the more important points raised by the record.

The relations existing between the defendant and the woman Minnie O'Brien at and before the homicide should properly go before the jury, as bearing, perhaps, upon the question of the motives which guided the conduct of the defendant in the killing, and whether or not he acted as a reasonable man under all the circumstances of the case.

The court ought not to have permitted any of the evidence given by the defendant before the coroner to be introduced. It plainly appears that the defendant was called before the coroner by that official immediately after the homicide, and testified without any knowledge of his lawful rights, without the aid of counsel, and under a belief that he had to answer the questions put to him.

The record shows that almost every question asked the witnesses for the defendant was objected to by the counsel for the state. Many of these objections were wholly without merit, as they sought to exclude from the jury matters directly connected with the scene of the homicide, the conduct of the parties, and the homicide itself. This practice is to be censured, and we quote the following language of the supreme court of California (*People v. Williams*, 18 Cal. 193) as particularly applicable to the conduct of this case: "As no man ought to be convicted unless, on a full exposure of the merits of the case, he is really guilty, it would seem that little or nothing is to be gained by interposing technical objections to keep a knowledge of the whole case on its legal merits from the jury. Questions as to the admissibility of evidence frequently arise, and, in the hurry of a nisi prius trial, the best judge may err, especially when sudden-

usual grounds of reversal. Whenever there is any doubt of the question, or, rather, whenever the evidence proposed by the defense is not plainly inadmissible, it is better to let it go in, since, in nine cases out of ten, a single equivocal fact, of doubtful bearing upon the case, would have no effect upon the judgment of the jurors, who are usually disposed to pass, and do pass, upon the general merits. Not unfrequently the offer to make the proof and the exclusion of it have about the same effect on the minds of the jury—though it should not—as if the proof were introduced. If the course here suggested were pursued by the prosecuting attorneys, we are convinced that the number of convictions would not be less than at present, while the number of appeals, or, at least, the number of those successfully prosecuted, would be greatly diminished."

In several of the instructions, the court, in its statement of the law of justifiable homicide and self-defense, departed from the terms of the statute. It certainly is safer for a judge to adhere to statutory definitions where they cover the law of homicide as fully as the new Codes do.

We disapprove of instruction No. 16, where the court uses this language: "And if the jury, or any one of them, entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the prisoner the benefit of such doubt, and acquit him." It cannot be that the court meant that if one juror has a reasonable doubt, and eleven have not, the eleven must concur in an acquittal; but the language of the instruction seems to imply that they should so deliberate.

Many of the instructions asked by the defense are embraced within those given, and the law of justifiable homicide as approved by this court in *Territory v. Burgess*, 8 Mont. 58, 19 Pac. 558, was followed. We understand the general doctrine of the right of a man to defend himself, if assailed in his own house, to be that he need retreat no further. As said by Wharton on Criminal Law (section 502): "Here he stands at bay, and may turn on and kill his assailant if this be apparently necessary to save his own life; nor is he bound to escape from his house in order to avoid his assailant. In this sense, and in this sense alone, are we to understand the maxim that 'every man's house is his castle.' An assailed person, so we may paraphrase the maxim, is not bound to retreat out of his house to avoid violence, even though a retreat may be safely made. But he is not entitled, either in the one case or the other, to kill his assailant unless he honestly and nonnegligently believes that he is in danger of his life from the assault." Under this view, certain instructions given should be modified.

Section 4656 of the Political Code provides

must not issue a subpoena duces tecum of the state or defendant for more than six witnesses, except upon the order of the court or judge, and such order may be made upon proper showing by affidavit or otherwise." The defendant asked for a subpoena for more than six witnesses. The clerk refused to issue the subpoena. The judge required defendant's counsel to show that the testimony of the additional witnesses was material, and offered to allow the defendant's counsel to orally show such materiality by stating the substance of their proposed testimony, and even offered to not disclose such statement to the counsel for the state. Counsel for defendant declined to disclose or intimate what he expected to prove by said witnesses, contending that he had a constitutional right to these subpoenas without the showing. The statute seems to be very reasonable, and the action of the court requiring the showing was not improper.

Judgment reversed, and case remanded, with directions to grant a new trial. Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

#### POWER et al. v. BURD et al.

(Supreme Court of Montana. March 9, 1896.)

##### HOMESTEAD—WHAT CONSTITUTES—NECESSARY PARTIES.

1. Under Code Civ. Proc. § 322, providing that a homestead consisting of a certain quantity of land owned and occupied by any resident of the territory shall be exempt from forced sale, the mere declaration of an intention to claim land as a homestead, without improvement or occupancy thereof, is insufficient to constitute the land a homestead.

2. In an action by a purchaser of land at a sheriff's sale to reform a deed to the land to the judgment debtor, the wife of the judgment debtor, who was a party to the suit in which the judgment was rendered under which the land was sold, is not a necessary party.

Appeal from district court, Teton county; Dudley Du Bose, Judge.

Action by Thomas C. Power and others against Julian F. Burd and others. There was a judgment for plaintiffs, and defendant Burd appeals. Affirmed.

This is an action to reform a conveyance to certain real estate. From the record it appears that on the 20th day of May, 1890, a judgment was entered in the district court of Choteau county in favor of these plaintiffs and against defendant Julian F. Burd and others foreclosing a mortgage executed theretofore by Julian F. Burd and wife on certain real estate for the sum of \$4,547.40, and the lands described in said mortgage were ordered sold to satisfy the mortgage debt. In and by said judgment it was also adjudged and decreed that, if the moneys

interest, and costs, the plaintiffs should have a deficiency judgment for the balance certified by the sheriff. There was a deficiency of \$2,797.44, as shown by the return of the sheriff. Execution was issued on the deficiency judgment, and levied on the real estate in controversy, which was sold to the plaintiffs by the sheriff on the 13th day of October, 1890. The defendant Julian F. Burd having failed to redeem the real estate, on the 1st day of July, 1891, the sheriff executed his deed thereto to the plaintiffs. About the time the sheriff levied the execution on the land in controversy to satisfy the deficiency judgment the defendant Julian F. Burd served a written notice on him that he claimed the same to be exempt from execution as his homestead. It seems that defendant Julian F. Burd purchased the real estate in controversy from defendant William Turner, and that Turner executed a deed thereto to Samuel Burd, as trustee for Julian F. Burd. This deed was executed June 5, 1886. The deed, by mistake, described the land as the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of section 9, township 28 N., range 7 W.; whereas the land should have been described as the S. E.  $\frac{1}{4}$  of said section 9. The case was tried to the court without a jury. The court entered judgment reforming the deed from Turner to Samuel Burd, and decreeing title to the land in controversy in the plaintiffs, and that defendant Julian F. Burd and those claiming under him have no title whatever in or to said land. From the judgment defendant Julian F. Burd appeals.

James Donovan, for appellant. Walsh & Newman, for respondents.

PEMBERTON, C. J. (after stating the facts). The mistake in the description of the land in the deed from Turner to Samuel Burd is admitted. It is conceded that Samuel Burd held the land in trust for Julian F. Burd. Both parties to this appeal ask that the deed be reformed. The plaintiffs ask that after the reformation of the deed the title thereto be decreed to be in them, while the defendant Julian F. Burd asks that he be decreed the title thereto as a homestead. We think the only question of any materiality or merit involved in this appeal is as to whether defendant Julian F. Burd is entitled to have the land in controversy adjudged to him as a homestead. Although the defendant Julian F. Burd claims in his answer to have occupied the land in controversy since June 5, 1886, as a homestead, still, on the trial of the case, as shown by the record, he admitted that neither he nor his family ever resided on or occupied the land, or any part thereof. It is further shown that defendant Burd, on the 20th day of May, 1887, made a homestead entry of public land under the laws of the United

States. It is conclusively shown that the defendant Burd never made any kind of improvement on the land in controversy, and that neither he nor his family ever occupied any part of it in any manner or for any purpose whatever. The statute of this state in relation to homesteads (Code Civ. Proc.) under which this case was tried is as follows: "Sec. 322. A homestead consisting of any quantity of land not exceeding one hundred and sixty acres used for agricultural purposes, and the dwelling house thereon, and its appurtenances, to be selected by the owner thereof, and not included in any town plot, city, or village; or, instead thereof, at the option of the owner, a quantity of land not exceeding in amount one-fourth of an acre, being within a town plot, city, or village, and the dwelling house thereon, and its appurtenances, owned and occupied by any resident of this territory, shall not be subject to forced sale on execution or any other final process from a court: provided, such homestead shall not exceed in value the sum of two thousand five hundred dollars." Our statute is exactly the same as that of Minnesota. The courts of that state hold that actual occupancy is necessary to constitute a homestead in land. *Quehl v. Peterson*, 47 Minn. 13, 49 N. W. 390; *Tillotson v. Millard*, 6 Minn. 513 (Gil. 419); *Sumner v. Sawtelle*, 8 Minn. 309 (Gil. 272); *Kelly v. Baker*, 10 Minn. 124 (Gil. 154); *Kresin v. Mau*, 15 Minn. 87 (Gil. 116); *Kelly v. Dill*, 23 Minn. 435. Under a similar statute to ours the supreme court of California, in many decisions, holds that actual occupancy is necessary to acquire a homestead in land. *Gregg v. Bostwick*, 32 Cal. 220; *Villa v. Pico*, 41 Cal. 469; *Babcock v. Gibbs*, 52 Cal. 629; *Lubbock v. McMann*, 82 Cal. 228, 22 Pac. 1145; *Tromans v. Mahlman* (Cal.) 27 Pac. 1094. See, also, *Tillar v. Bass* (Ark.) 21 S. W. 34; *Hotchkiss v. Brooks*, 93 Ill. 386; *Thomp. Homest. & Ex.* §§ 100-105; *Wap. Homest. & Ex.* pp. 176-186. In *Bonner v. Minnier*, 13 Mont. 269, 34 Pac. 30, the authorities are collated on this subject. While in this case there was a dissenting opinion, there was no difference of opinion that under our statute occupancy was necessary to acquiring a homestead in land. The authorities are too numerous to cite which hold that an intention to claim and occupy land as a homestead is not sufficient to constitute a homestead. Counsel for appellant rely upon *Reske v. Reske*, 51 Mich. 541, 16 N. W. 895, in which case actual occupancy was not required. But in *Reske v. Reske* the claimants had fenced the lot which was procured for a home. They were proceeding to improve and occupy it to the extent of their means; they had their domestic animals on it; they came to live in the immediate vicinity of the lot; they dug a well; they put up outbuildings. Everything but building the dwelling was done before levy. Here something more had been

done and was being done by the claimants than merely declaring their intention to claim and occupy the land in question as a homestead. So in the other cases cited by appellant. In the case at bar appellant had done, at the time of levy, nothing, except to declare his intention to claim and occupy the land in controversy as a homestead, nor does it appear that he has done anything since towards improving or occupying the land as a homestead. We think it may be said that, according to the great weight of authority under statutes like ours, the mere declaration of an intention to claim land as a homestead is insufficient to constitute the land a homestead. The appellant, during the trial, objected to the introduction in evidence of the papers constituting the judgment roll in the suit to foreclose the mortgage mentioned in the statement, and assigns their admission as error. It was competent to introduce these papers to show the indebtedness of defendant Julian F. Burd to the plaintiffs as alleged in the complaint. Counsel for appellant contends that, as Julian F. Burd's wife was a party to the suit to foreclose the mortgage, she should also have been a party to this suit. We do not think so. Since we have seen that the claim of homestead in the lands in controversy made by defendant Burd cannot be sustained, his wife has no interest in this suit which renders her a necessary party. It is not contended that the judgment in the mortgage suit, spoken of above, is void, or that any of the proceedings to carry said judgment into effect were void. The judgment and proceedings in that case cannot, therefore, be collaterally attacked in this case.

The judgment roll in the mortgage case was admitted in evidence in this case to establish the indebtedness of defendant Julian F. Burd to plaintiffs. For that purpose it was competent.

The homestead filing on public lands by defendant Burd, made in 1887, was properly admitted in evidence, as tending to show whether or not appellant's claim of homestead in the lands in controversy was made in good faith.

We are of the opinion that this case was fairly tried, and the proper result reached. The judgment appealed from is affirmed.

DE WITT and HUNT, JJ., concur.

GRAY'S HARBOR COMMERCIAL CO. v.  
WOTTON et al.

(Supreme Court of Washington. Feb. 24, 1896.)

APPEAL—NOTICE TO INTERVENER.

One who, without leave of court, intervened in an action to foreclose a mechanic's lien, is nevertheless a party, so as to be entitled to notice of appeal, where no motion was made to strike out the complaint in intervention, and no action taken on the demurrers interposed there-

to, and in an order made in the cause the title included the name of intervenor.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by the Gray's Harbor Commercial Company, a corporation, against M. B. Wotton and others, to foreclose a mechanic's lien. From the judgment rendered, certain of defendants appeal. Dismissed.

H. W. Lueders and J. B. Bridges, for appellants. Austin E. Griffiths, for respondent.

SCOTT, J. This action was brought to foreclose a mechanic's lien, and, judgment being rendered for the plaintiff, certain of the defendants appealed. Respondent moves to dismiss on the ground that the notice of appeal was not served upon one Carlson, who had intervened in the action. It is conceded by appellants that Carlson was not served, but it is claimed that his attempted intervention was without leave of court, and was disallowed, and that he never became a party; but the record fails to substantiate this claim. While no formal order allowing Carlson to intervene appears, his complaint in intervention was filed, alleging that leave of court had been obtained; and no motion was made to strike the same, by appellants or any one. The record shows that several demurrers were filed to this complaint on the ground that it did not state a cause of action, and there is nothing to show that these demurrers have ever been disposed of, nor does it appear that the court has taken any action upon said complaint in intervention in any way. The only reference thereto which we have found in any order of the court—and none has been called to our attention by the parties—is in an order made by the superior court of King county allowing an assignee of certain of the defendants, who had instituted proceedings in insolvency, to appear in the superior court of Chehalis county, and defend said action, and in giving the title of the cause in said order the original plaintiffs and defendants are mentioned, and also C. F. Carlson as intervening defendant. Here was a direct recognition by the court, if any further was needed, that Carlson was a party to the case, and as such his claim should have been disposed of before an appeal was prosecuted, and notice of appeal should have been served upon him. Dismissed.

HOYT, C. J., and DUNBAR, J., concur. GORDON, J., took no part.

SMITHSON LAND CO. v. BRAUTIGAM  
et ux.

(Supreme Court of Washington. Feb. 24, 1896.)

ESTOPPEL IN PAIS.

Purchasers of land at foreclosure sale conveyed it by warranty deed to N., who, by like deed, conveyed it to plaintiff. The mortgagor obtained a decree setting aside the decree of fore-

closure, the sheriff's deed, and the deed to N., for want of jurisdiction by the court rendering such decree; paying into court the amount due on the mortgage, which sum was received by N. and paid to plaintiff. Held, that plaintiff and N. were estopped from maintaining an action on the warranty in the deed by N.'s grantors.

Appeal from superior court, King county; R. Osborn, Judge.

Action by the Smithson Land Company against John C. Brautigam and Janet Brautigam for breach of covenant of warranty. From a judgment for plaintiff, defendants appeal. Reversed.

J. R. & R. M. Kinnear, for appellants. Blaine & Devries, for respondent.

HOYT, C. J. One A. E. McEachern was the owner of certain real estate situated in King county, upon which there was an outstanding mortgage held by John C. Brautigam, one of the appellants. This mortgage was not paid when due, and suit was brought to foreclose it; and under a decree rendered therein the property was sold and bid in by said appellant, who thereafter obtained a sheriff's deed therefor. Afterwards he and his wife, the other appellant, for the consideration of \$600, conveyed it by warranty deed to one Nicholas, who went into possession under said deed. McEachern brought an action to set aside the decree in the foreclosure suit, the sheriff's deed to appellant John C. Brautigam, and the deed of said Brautigam and his wife to Nicholas, on the ground that the court which rendered the decree had no jurisdiction so to do. To this action the appellants and said Nicholas were made parties defendant, and the sum of \$525—the same being the amount of the mortgage debt, with interest—was paid into court by McEachern. In said action it was adjudged that the decree of foreclosure was void for want of jurisdiction; that, by reason of its invalidity, the title of McEachern had not been divested by the sale of the property thereunder; and that, by the payment into court, the mortgage on the property was satisfied. Pending this litigation the property was conveyed by Nicholas and wife to respondent. Upon the rendition of the decree setting aside the one rendered in the foreclosure proceeding, the \$525 paid into court by McEachern was paid over to Nicholas, or his attorney, and by him received and transferred to the respondent. The present action was brought to recover damages for a breach of the warranties in the deed from appellants to Nicholas, caused by failure of title upon the setting aside of the foreclosure proceedings. The appellants claimed in the court below, and claim here, that, when Nicholas and the respondent received the \$525 paid into court by McEachern, they elected to waive their right of action upon the warranties, growing out of the failure of title by reason of the decree in the action in which such money had been deposited. The superior court held to the contrary, and in



claimed the money, or it would not have been paid over to him, and that respondent acquiesced in what was done by Nicholai, and is bound by his acts. The only theory upon which Nicholai's claim to the money could have been founded was that, by reason of appellants' deed of the premises to him, he had been subrogated to their rights. But this could have been so only by force of the covenants of warranty in the deed. Hence the liability of appellants upon these covenants was the ground upon which he claimed and received the money. And, having availed himself of the force of such covenants for that purpose, he is estopped from maintaining an action for damages upon such covenants. He could not make use of the covenants in the deed to reach the money in the registry of the court, and at the same time maintain an action for their breach. If no consideration had been received by Nicholai for the money paid appellants, so that, without anything being done by him, he could have maintained an action for money had and received, it might be successfully contended that his claim therefor would not be satisfied by the receipt of a less amount than was due. But the delivery of the deed with covenants of warranty, and the taking possession of the property thereunder, was the consideration for the money paid; and the only remedy of the grantor in the deed, or those holding under him, was upon the covenants therein. This being so, he or they, after the breach of these covenants, could not make use of them to obtain valuable benefits, and thereafter maintain an action for damages for such breach. When they made such use of the covenants, they elected to waive any right of action on account of the breach.

Some other questions have been raised in the briefs, but it is not necessary that they should be considered. The judgment will be reversed, and the cause remanded, with instructions to dismiss the action.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

#### FRYE et ux. v. HILL et al.

(Supreme Court of Washington. Feb. 24, 1896.)

#### WAIVER OF RIGHT TO JURY TRIAL—ASSIGNEE OF LEASE.

1. A defendant, by allowing, without objection, equitable issues to be made up by the cross complaints of his codefendants, waives any right to demand a jury trial.

2. Where a lease is assigned by the lessee as additional security for a loan used in the erection by him of a building upon the premises, the assignee being also secured by a chattel mortgage on the building, and is subsequently absolutely assigned to others, who assumed all payments of rent, the latter cannot, in action by the landlord on default to sell the building, claim, as against the first assignee, that the proceeds

Appeal from superior court, King county; J. W. Langley, Judge.

Action by George H. Frye and wife against Homer M. Hill and others. Thomas P. Gleason intervened. From a judgment for plaintiffs and for defendant Waterman, defendants John Collins and others and intervener appeal. Affirmed.

William Martin and Crews & Gleason, for appellants Collins and Gleason. Stratton, Lewis & Gilman, for appellants Sander. G. H. Fortson, for respondents Frye. Blaine & Devries, for respondent Hill. Carr & Preston, for respondent Waterman.

SCOTT, J. The respondents Frye, in July, 1889, executed a lease of a certain lot in the city of Seattle to respondent Homer M. Hill, for a term of years, for which said Hill was to pay a certain monthly rental, and he also agreed to erect a brick building upon the lot which at the expiration of the term was to be appraised, and the value thereof was to be paid to him by the lessors. Hill and wife obtained a loan of \$4,000 of respondent Waterman, which was used in the erection of this building, and they gave a chattel mortgage thereon to said Waterman to secure the same, and subsequently, with the consent of the lessors, assigned said lease to her as an additional means of securing the payment of the loan. Thereafter, Hill and wife made another assignment of said lease to the appellants John Collins and Fred E. Sander, by the terms of which Collins and Sander agreed to pay the rent for the premises as stipulated in the lease. The Waterman loan was made in March, 1890, to run one year. The rent was paid up to September, 1892, after which time default was made, and the respondents Frye brought this action on the equity side of the court to recover the same, then amounting to upward of \$4,000, and to have the lease forfeited, and the amount of rent recovered declared a first lien upon the building, and to have the building sold, and the proceeds applied in payment of said rent. The respondents Hill and wife answered, and also filed a cross complaint against said Collins and Sander, setting up the assignment of the lease to respondent Waterman as a mortgage, and an absolute assignment of the same later to appellants Collins and Sander, as aforesaid, and asked that judgment be rendered against them for the back rent as assignees of the lease and tenants in possession of the premises; and they also set forth certain articles of agreement which they claimed to have entered into with Collins and Sander for the purpose of conducting a newspaper, alleging several thousand dollars to be due them thereon, and asked for an accounting. Mrs. Waterman filed a cross complaint, setting up her interests; and

lease, Sander and wife having previously assigned their interest to Collins.

We have only attempted in the foregoing to state enough to show the general nature of the issues involved. A trial was had, findings of fact were made, and a decree rendered awarding certain relief to the plaintiffs, and giving them judgment for the amount of the rent due, finding that the Waterman loan was the first lien upon the building, and finding that intervener, Gleason, had no interest in the premises. Collins and wife and Sander and wife and Gleason appealed therefrom. The facts were not settled, and but two matters are presented for our consideration.

It is contended that the court erred in refusing to grant appellants Collins and Sander a trial by jury, and, in support of this, it is claimed that they objected to the various matters brought into the case by the cross complaints of the other defendants, and moved to strike the same from the records. No page of the record is called to our attention where such a motion appears, and we have failed to find any. It appears that demurrers were filed to these cross complaints, on the ground that they did not state a cause of action; that the same were overruled; and that thereafter said appellants took issue as to the matters alleged. The action as it stood was properly triable in equity, and the appellants, conceding that they would have had a right to a trial by jury had they preserved their rights, waived the same by allowing the various equitable issues to be made up without objection.

It is next contended by them that the court erred in not finding that the claim of respondent Waterman upon the building was subject to plaintiffs' lien for the rent due, and that the court should have decreed that the proceeds of the building be first applied in payment of the rent, and it is contended that this is apparent from the pleadings. It is insisted that appellants took no interest by the assignment of the lease to them, and that they never went into possession of the premises, but the court found otherwise, and found that they did go into possession, and that they had agreed to pay the rent as stipulated in the lease. The assignment of the lease to them so provided, and there was no such provision in the assignment to respondent Waterman. Said appellants are in no position to urge that the rent due should have been decreed a first lien upon the building. The plaintiffs might have had some ground for urging this, but they, evidently satisfied with the judgment rendered, have not appealed; and, under the circumstances of the case, the rights of respondent Waterman were superior to those of these appellants, and, as against them, she was entitled to the decree requiring them to pay the back rent under

As to appellant Gleason, the court found that the assignment to him was made without consideration, and without his knowledge or consent; and, furthermore, that he was not a citizen of this country, but was a resident of Australia, and not capable of taking any interest under and by virtue of said assignment; and that he did not take any. The facts not being brought here, this finding must stand.

There being no error in the record, the judgment is affirmed.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

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COGSWELL v. FORREST, Commissioner of Public Lands, et al.

(Supreme Court of Washington. Feb. 15, 1896.)

TIDE LANDS—PATENT BY UNITED STATES—TITLE OF STATE.

As the state, in Const. art. 17, § 2, disclaims all title to tide lands patented by the United States, it cannot assert title to land situated below the line of ordinary high tide, but within the meander line, which was patented to plaintiff by the United States; said land being within the calls of the patent, and described in the official plat, and the survey and field notes accompanying the same, by courses and distances.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Action by Myron J. Cogswell against William T. Forrest, commissioner of public lands, etc., and others, members of the board of state land commissioners, to enjoin defendants from selling certain land. There was a judgment for plaintiff, and defendants appeal. Affirmed.

W. C. Jones and James A. Haight, for appellants. Parsons, Corell & Parsons, for respondent.

DUNBAR, J. The complaint in this action shows that the plaintiff was the owner, under a patent from the United States, of certain lands, specifically described in the complaint. The land is described in the official plat of the survey returned to the general land office by the surveyor general pursuant to the provisions of an act of congress of the 24th of April, 1820. This particular land is described in said plat and survey, and field notes accompanying the same, by courses and distances. The defendants platted and appraised a part of the lands described in said patent, claiming the same as the property of the state of Washington, and threatened to offer the same for sale as such; and the plaintiff seeks to have said commissioners restrained and enjoined from so doing, contending that thereby a cloud will be created on his title under said patent. To this

complaint the defendants filed a general demurrer. The demurrer was overruled by the trial court, and a judgment entered in accordance with the prayer of the complaint.

The complaint shows that the land in controversy was within the calls of the patent, and was situated below the line of ordinary high tide, but within the meander line. It is contended by the appellants that the meander lines run along the shores of bodies of water by the United States surveyors are not lines of boundary, but lines run merely to locate the shore line and determine the area of the upland from which the price is computed, and that the body of water along which the meander lines are run is the true boundary, and that in this state the boundary line of lands adjoining tidal waters is that prevailing at common law, to wit, mean high-water mark. The appellants cite many cases to sustain their contention, but we think there are none of them in point. We do not question the general rule in this respect, but that rule has been changed by section 2 of article 17 of the constitution, which provides that "the state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: provided, the same is not impeached for fraud." This question, we think, was virtually before this court in the case of *Scurry v. Jones*, 4 Wash. 468, 30 Pac. 726, and there decided adversely to appellants' contention. This is tide land patented by the United States, and it is not impeached for fraud, and no matter whether the meander line or the body of water along which the meander line runs is the true boundary. The boundaries of this particular tract of land are settled by the grant in the plat and field notes. The land was granted according to the official grant of the survey of such lands, and the plat itself, and its notes, lines, and descriptions, become a part of the grant or deed by which they are conveyed, as much as if the description was written out on the face of the deed itself. See *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203. The constitutional convention of this state, with a commendable sense of honor, thought it but simple justice to disclaim title to all tide lands patented by the United States, without regard to the technical right of the general government to convey the same; and there is nothing in the language of the constitution that would indicate that the convention intended to make any distinction between lands which had been patented through the medium of the donation act, and those which had been patented under the pre-emption or commutation acts, or even of private entry. The principle involved in this case, we think, was identical with the principle involved in *Scurry v. Jones*, supra; and the judgment will therefore, in all respects, be affirmed.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

# FORREST v. GILCHRIST et al.

(Supreme Court of Washington. Feb. 15, 1896.)

## APPEAL—EVIDENCE—REVIEW—RECORD.

Where no exception is taken to findings of fact, or different findings requested, evidence on which the findings were based will not be reviewed.

Appeal from superior court, Lewis county; W. W. Langhorne, Judge.

Action by John T. Forrest against Charles Gilchrist and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Elliott & Forney and Edward F. Hunter, for appellant. Arthur, Lindsay & King, for respondents.

PER CURIAM. This action was tried to the court below, without a jury, and, from the judgment entered upon its findings, the case has been appealed to this court. It appears from the record that although written notice was given to the appellant, by respondents' attorneys, of the time of filing the findings of fact and conclusions of law, and also of the judgment, no exceptions were taken to said findings or conclusions; neither were other or different findings requested by the appellant. Under such circumstances, this court has uniformly held that it will not review the evidence upon which the findings were based. *Stoddard v. Bank* (Wash.) 40 Pac. 730; *Cook v. Tibbals*, Id. 935; *Milling Co. v. Denny*, Id. 1062; *City of Montesano v. Blair*, 731; *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440. See, also, *Donovan v. Clark* (N. Y. App.) 33 N. E. 1066. No question arises upon the pleadings in this case. We think that the conclusions of law made by the lower court were right, and its judgment is affirmed.

# BOLSTER et al v. STOCKS et al.

(Supreme Court of Washington. Feb. 17, 1896.)

## DECREE—ERRONEOUS ENTRY—REMEDY ON APPEAL.

Where, on petition for rehearing of an appeal in equity, after an affirmation of the judgment, respondent admits that, through error in computation, the decree of the lower court was entered for an excessive amount, the former opinion on appeal will be modified by deducting from the judgment below the amount of the excess, although the error was not formally presented.

On petition for rehearing. Modified and affirmed.

For former opinions, see 43 Pac. 532, 534.

S. A. Callvert, Jerry Neterir, and Black & Leaming, for appellants. J. J. Welsenberger, John R. Crites, Kerr & McCord, Bruce, Brown & Cleveland, and Hudson & Holt, for respondents.

PER CURIAM. A claim was made in the brief of appellants, in the case of *Whittier, Fuller & Co. v. Lighthouse et ux.*, one of the above consolidated cases, that the attorney's

fee of \$165 had been twice taxed, and that the statutory fee of \$10 had also been included in the judgment for costs. This statement was admitted in the brief of the respondents, and an offer of remittance of \$175 was made in the brief. It appears now, however, by the petition, that this double taxation was remedied when the consolidated decree was entered in response to the judgment of this court, when the cause was here before, but that the briefs on the present appeal, which were the same briefs used on the first appeal, had not been corrected in this respect. Hence the court was misled in this particular. It also appears now, by a showing made by appellants, which was not called to the attention of the court upon the trial, that, when the consolidated decree was entered, a mistake of \$30 was made in the computation, against the interests of the appellants, and, as the respondents concede the correctness of this statement, we think it but justice, this being an equity case, that this mistake should be rectified, although informally presented. The opinion of the court heretofore filed will be corrected to the extent that the judgment of the lower court will be modified by deducting from the judgment obtained by the respondents the sum of \$30, and, as so modified, it will be affirmed, the respondents to recover their costs in this court and the court below.

#### KEMP v. FOLSOM et al.

(Supreme Court of Washington. Feb. 18, 1896.)

FRAUDULENT CONVEYANCE—PROPERTY OF WIFE—EVIDENCE.

A wife is entitled to hold as her separate property, as against an execution creditor of her husband, land purchased by means of money bequeathed to her by her mother, the legal title to which land was in her husband at the time he contracted the indebtedness on account of which the judgment in question was rendered, and which land he had conveyed to the wife prior to the rendition of such judgment, where the money invested in such land was of the separate estate of the wife, and kept distinct from her husband's and the community estate; the deed had been made to the husband merely for convenience in transferring the land in case of a sale; the husband at no time represented himself to be the owner of such land; and his creditors, in giving him credit, did not rely on his ownership thereof. *Frederick v. Shorey*, 29 Pac. 766, 4 Wash. 75, distinguished.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Mary C. Kemp against George F. Folsom, Henry R. Kemp, and James H. Woolery, as sheriff of King county, to restrain by injunction the sale, on execution against defendant Kemp in favor of defendant Folsom, of certain land alleged to be the separate property of plaintiff, and to establish plaintiff's title thereto as against defendants. From a judgment entered in favor of plaintiff, defendant Folsom appeals. Affirmed.

Hastings & Stedman and Coleman & Quinby, for appellant. F. H. Hinckley and Jacobs & Jacobs, for respondent.

DUNBAR, J. The first error complained of by the appellant is the refusal of the lower court to sustain his objection to the introduction of testimony on account of the defective complaint, for the alleged reason that there was no allegation in the complaint which would show that the property in controversy was the separate property of the respondent. The allegation of the complaint is that the plaintiff is the owner, and that the property is her sole and separate property. This, it is contended by the appellant, is a conclusion of law, and is not an allegation of the existence of one of the conditions necessary to make the land respondent's individual property. We think this criticism of the complaint is hypercritical. Ordinarily, of course, it is not proper to plead conclusions of law, but sometimes it is difficult to distinguish between a conclusion and a fact; and in this instance that was all that could have been pleaded without interjecting into the complaint evidentiary matters such as the deraignment of title, etc., which, in our judgment, was not necessary. The other technical objections, we think, are equally trivial. In our judgment, the complaint was sufficient, the action was necessary to maintain respondent's rights, and the appellant was in no way injured by the entry of the judgment in the manner and at the time it was entered. So that, if there is any case here worthy of discussion, it is upon the merits.

In this case the record shows that the respondent, a married woman, had left her, by her mother's will, a certain amount of money; that, during the time her husband was engaged in the mercantile business in Seattle, she invested this money, by his advice, in the land in question, the deed to which was made out in his name, and so recorded. During the time the record title remained in the husband, he contracted certain debts which he was unable to pay, and closed up his mercantile business. After the debts were incurred, and about six months prior to the commencement of the suit to collect the same, the husband deeded the property to his wife (respondent here). So that the question is, is the wife estopped from claiming land, the record title of which was in her husband at the time he contracted the debts which are sought to be collected from the proceeds of the land? This is a question that has never been decided by this court. The appellant cites *Frederick v. Shorey*, 4 Wash. 75, 29 Pac. 766, where we decided that where a husband, with the knowledge and consent of the wife, holds himself out to the world as the owner of certain realty, and where he obtains credit by reason of such supposed ownership, such property is subject to the rights of bona fide creditors, if the wife's ownership therein is not clear and convin

cing. In that case, however, the transfer from the husband to the wife was made after judgment obtained against him, and all the circumstances of the case convinced us that the transaction was a dishonest one, and that the wife was not, bona fide, the owner of the property. We think, however, that it would be too harsh a rule to announce that under any circumstances the wife should be estopped from claiming her interest in realty which had been held in the name of the husband, as against the creditors of the husband, for credit obtained during the time such land was so held, notwithstanding the fact that the intimate relations existing between husband and wife render the perpetration of a fraud upon creditors, in this sort of a transaction, more probable than in cases where the parties did not sustain towards each other such relations. We think a better rule would be that the court should insist upon the most clear and convincing proof of the bona fides of the transaction, but that, when it did conclusively appear from the testimony that the property in dispute was actually the separate property of the wife, her interests ought to be protected by the court, notwithstanding the fact that the record title was allowed to remain for a while in the husband; and, if there ever was a case that came within the provisions of such a rule, we think it is the case at bar. The testimony shows conclusively, if testimony can be relied upon at all, that the money which was invested in this land was the separate estate of the wife; and there is nothing in the record to create a suspicion, even, that such is not the case, either by cross-examination, which was rigid, or by contradictory testimony. The uncontradicted testimony showed that this money had come to the respondent from her mother's estate a few years ago; that it had been kept separate and distinct from her husband's estate; that when she received it she deposited it in a bank, and took a certificate of deposit in her own name; that she had invested it in real estate in Le Grande, Or., and took the deed in her own name; that she sold the property at Le Grande, and went to California, where the money was again deposited in the bank by her, and a certificate issued to her individually; that after she came to Seattle the money was again deposited in the bank, and a certificate of deposit issued to her; that it was uniformly treated, both by her and her husband, as her separate property, over which neither the husband nor the community had any control; that at the time the purchase of this land was made the deed was made to the husband simply for the purpose of convenience, as she expected to sell it again in a short time. And there is no indication of fraud or unfairness anywhere to be discovered. There is some testimony showing that the wife of the respondent demanded of her husband either that the land be deeded to her, or that she be paid her money

back; and it is contended by the appellant that this testimony shows that her husband was her creditor, and that the land did not actually belong to the respondent. We do not think that the testimony bears this construction, but, in any event, the husband would have the same right to prefer a wife as he would any other creditor.

The appellant insists that it would be a monstrous doctrine to permit community property to be taken to satisfy a debt due from one member of the community to another, in a case where there were community creditors, and no property to satisfy such creditors except the property so transferred; but, even if the testimony should bear the construction that is claimed for it by the appellant, it would not be community property, but it would be the separate property of the husband. There is no testimony at all tending to show that there was ever any intention on the part of the respondent or her husband to merge this property into the community estate. We are also satisfied from the testimony that the finding of the court that the husband did not, at any time while the legal title of said amount remained in his name, hold himself out, or represent himself, either expressly or indirectly, to the assignors of defendant Folsom, or to any of them, or to any other person or persons, to be the owner of said land, and that the creditors did not give him credit relying upon his ownership of said land, is entirely justified. The testimony shows that the husband, Mr. Kemp, had been buying goods of these parties for a long time, and had been paying the cash for the same until a short time prior to his failure. The amounts of credit extended to him were exceedingly small, and we are satisfied that they were extended to him by reason of his prompt and fair dealings in former transactions, instead of by reason of the record title of this piece of land resting in him. The judgment will be affirmed.

ANDERS, SCOTT, and GORDON, JJ., concur.

#### SAWTELLE v. WEYMOUTH et al.

(Supreme Court of Washington. Feb. 19, 1896.)  
APPEAL—NOTICE—JURISDICTION—JUDGMENT LIEN  
—FRAUDULENT CONVEYANCES.

1. The statutory provision for notice of appeal to the supreme court is jurisdictional, and cannot be waived by a stipulation of the parties.

2. 2 Hill's Code, § 460, providing that, "from and after said filing of transcript [of the judgment] by the county auditor of any county in the state, such judgment shall be a lien upon all real estate of the judgment debtor in such county," does not extend the lien to property previously conveyed by the debtor to his wife, by deed valid and binding between the parties.

3. Where, at the entry of judgment, the legal title to lands is in the debtor's wife, by deed from the husband, their conveyance to a purchaser for value, and without notice, passes a good title, which cannot be attacked in a subse-

quent proceeding to set aside the deed from husband to wife, as in fraud of the judgment creditor.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Action by Marcus A. Sawtelle, receiver of the Port Townsend National Bank, against Andrew Weymouth, Margaret E. Weymouth, William De Lanty, Kate De Lanty, William G. Strong, and Nellie Strong, to set aside deeds as in fraud of creditors. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Warren Carroll and J. C. Phillips, for appellant. Morris B. Sachs and George H. Jones, for respondents.

GORDON, J. The respondents Andrew Weymouth and Margaret E. Weymouth are, and for upward of 20 years last past have been, husband and wife. On April 18, 1890, the respondent Andrew Weymouth, with one George Moffatt, executed and delivered a promissory note to the Port Townsend National Bank, of which the appellant, Marcus A. Sawtelle, is receiver. The indebtedness thus incurred by said Andrew Weymouth was for the benefit of the community consisting of himself and wife. On July 21, 1892, said community was the owner of various town lots in and adjacent to the city of Port Townsend, in Jefferson county, and also of 80 acres of land in Clallam county, in this state. On said last-mentioned day, the said Andrew Weymouth executed to the said Margaret E. Weymouth a deed of conveyance to the premises which are the subject of this litigation; and, on the 1st of June thereafter, judgment was rendered against the said Andrew Weymouth in favor of said Port Townsend National Bank upon the indebtedness heretofore mentioned, which judgment amounted to the sum of \$1,375. On June 7, 1893, the judgment creditor caused a transcript of said judgment to be filed in the offices of the county auditors of said Jefferson and Clallam counties. On December 11, 1893, the respondent Margaret Weymouth, her husband joining with her, conveyed a part of this property to the respondent William De Lanty; and on the following day, viz. December 12, 1893, the remainder of said property in dispute was conveyed by the respondents Weymouth to the respondent William G. Strong. The conveyances herein referred to were duly recorded. This action was commenced by the appellant, as receiver, to set aside as fraudulent said conveyances, viz. the conveyance from Andrew to Margaret E. Weymouth, also the conveyances from respondent Margaret E. Weymouth and her husband to the respondents William De Lanty and William G. Strong, and to subject the property to levy and sale for the purpose of satisfying the judgment obtained by said bank against said respondent Andrew Weymouth. In the court below, the cause was sent to a referee, to

take and report the testimony; and thereafter the court, having made its findings and conclusions, rendered its judgment and decree in favor of respondents, from which appellant has appealed.

The respondents Andrew and Margaret E. Weymouth excepted to certain portions of the findings and conclusions of the trial court, and the record contains the following stipulation of the parties, omitting title, viz.: "It is hereby stipulated and agreed by the parties to this action, through their respective attorneys, that notice of appeal and bond for costs on appeal is hereby waived on the part of the plaintiff of the defendants herein, to wit, Andrew Weymouth Margaret E. Weymouth; and that, upon the trial and hearing of this cause in the supreme court of the state of Washington, the appeal of said defendants shall be heard the same as if said notice of appeal and bond for costs on appeal had been duly given and filed herein,"—signed by the respective counsel. For want of jurisdiction, we must decline to review the findings and conclusions upon the attempted appeal of the Weymouths. We hold that the notice of appeal prescribed by the statute is essential to confer jurisdiction upon this court, and it is not competent for the parties to waive it: *Kelsey v. Forsyth*, 21 How. 85; *Sampson v. Welsh*, 24 How. 207; *People v. Eldridge*, 7 How. Prac. 108. "Such waiver by any stipulation of the parties is insufficient; for consent, though it may waive error, cannot confer jurisdiction." *Gold Street v. Newton*, 2 Dak. 39, 3 N. W. 311.

In addition to what has already been stated, the court below found that "the conveyance of the property by Andrew Weymouth to Margaret E. Weymouth was a voluntary conveyance, and without consideration"; further, "that, at the time of the conveyance \* \* \* from said Andrew Weymouth and Margaret E. Weymouth to William De Lanty, the said defendants Andrew Weymouth and Margaret E. Weymouth were, and had been for a long time prior thereto, indebted to said William De Lanty in a large sum of money, to wit, about the sum of \$1,400, which said sum was the consideration for said conveyance, and said indebtedness was canceled and paid by said conveyance"; further, "that, at the time of the conveyance by Andrew Weymouth and Margaret E. Weymouth to defendant William G. Strong, \* \* \* the said defendants Andrew Weymouth and Margaret E. Weymouth were, and had for a long time prior thereto been, indebted to the defendant William G. Strong in a large sum of money, to wit, the sum of \$1,200, and that said conveyance was made in consideration of said indebtedness, and said indebtedness was canceled and paid thereby." The court also found that De Lanty is an uncle of the defendant Margaret E. Weymouth, and defendant Strong is a son-in-law of the said Weymouths. The court concluded, as matters of law, that, by vir-

tue of the conveyance from Andrew to Margaret E. Weymouth, the property described therein "became the separate property of Margaret E. Weymouth"; also, that the conveyance from respondents Margaret E. Weymouth and Andrew Weymouth, her husband, to De Lanty, "was upon a valuable consideration, and that said De Lanty has ever since been, and now is, the sole owner of said property, free from all claims of the plaintiff [appellant] made in this cause." A like conclusion was reached concerning the conveyance from the respondent Margaret E. Weymouth and her husband to the respondent Strong; also, "that at the time of the conveyances from said defendants Andrew Weymouth and Margaret E. Weymouth to William De Lanty and William G. Strong, respectively, the said plaintiff [appellant] had no lien upon the land described in said conveyances by virtue of the judgment referred to [recovered by the bank against Andrew Weymouth], or by virtue of any proceedings therein, or at all." To each of the foregoing findings and conclusions, the appellant excepted, and predicates assignments of error upon them.

As to the findings, we are entirely satisfied that they are fully supported by the evidence. A more important question is, did the findings warrant the conclusions which we have noticed? The respondents contend that the conveyances to De Lanty and Strong, having been executed six months after the rendition of the judgment and filing of the transcript, were subject to the prior lien of the bank's judgment. 2 Hill's Code, § 460, provides that, "from and after said filing of transcript [of the judgment] by the county auditor of any county in the state, such judgment shall be a lien upon all real estate of the judgment debtor in such county, for the period of five years, commencing from the date on which said judgment was rendered." Appellant further contends that the debt for which the judgment was obtained against the husband, being a community debt, constituted "an existing equity," and could not be affected by the subsequent transfer of the property to the respondent Margaret E. Weymouth; that the property in the hands of the husband was, by operation of law, impressed and charged with the trust in favor of community creditors, of which trust the wife became charged with full notice; that the property in her hands was still impressed with that trust, and subject to sale to satisfy the community debts incurred before its transfer; that, by the transfer, she "became the trustee, and it was her duty to hold the property subject to the obligations of the trust." Assuming these positions to be well taken, in what way do they affect the respondents De Lanty and Strong? Certainly not at all, unless, by the entry of the judgment and filing of the transcript, the appellant obtained some lien upon the

premises. The question is not whether this land could be subjected to sale for the purpose of satisfying appellant's judgment had the title remained in the Weymouths, or either of them, but we have now to deal with the rights of parties who, for a full and adequate consideration, purchased the property from one who was apparently clothed with the full legal title and authority to convey. But appellant insists that the conveyance from the husband to the wife was without consideration, and in fraud of creditors. Supposing that we concede all this, such a conveyance is not absolutely void, but only voidable as to creditors. It "is good as against the grantor, and, as respects himself, vests all his interest in the land, equitable as well as legal, in the grantee." *Rappleye v. Bank*, 93 Ill. 396; *Lyon v. Robbins*, 46 Ill. 276; *Thames v. Rembert's Adm'r*, 63 Ala. 561; *Mansfield v. Dyer*, 131 Mass. 200; *Dunn v. Dunn*, 82 Ind. 42; *Hill v. Bank*, 45 N. H. 300; *Walton v. Tusten*, 49 Miss. 569. As between the parties, such a conveyance is as if a full and adequate consideration had been paid. *Walt, Fraud. Conv.* (2d Ed.) § 395. The conveyance from Andrew and Margaret E. Weymouth was in form legally sufficient to pass all of the title and interest of the husband to the lands in question. As between, the parties the conveyance was absolute and good as against the grantor, and no interest, legal or equitable, remained in the grantor upon which a lien of a judgment subsequently rendered could attach. *Miller v. Sherry*, 2 Wall. 237; *Howland v. Knox* (Iowa) 12 N. W. 777; *Lippencott v. Wilson*, 40 Iowa, 425; *Shorten v. Drake*, 38 Ohio St. 76; *In re Estes*, 3 Fed. 134; *Bump, Fraud. Conv.* (3d Ed.) p. 496; *Fletcher v. Peck*, 6 Cranch, 87. In *Miller v. Sherry*, supra, the court say: "The judgment obtained by Mills & Bliss was the elder one, but it was subsequent to the conveyance from Miller to Williams. It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law." In *Fletcher v. Peck*, supra, the supreme court of the United States, speaking by Chief Justice Marshall, at page 133, say: "If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him." In

judgment against the grantor is not constructive notice to a purchaser from the grantee, for, upon searching the records and finding the transfer, the person who is about to purchase is not bound to go further and search the records for the purpose of ascertaining whether subsequent judgments may not have been recovered against the debtor." In *re Estes*, supra, Judge Deady, after a full review of the authorities upon the question, says, at page 141: "In my own opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing does not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another, by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is, nevertheless, valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee; and a bona fide purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title." At the date of the entry of the judgment in favor of the bank and the filing of the transcript, the legal title to the premises in question was in Margaret E. Weymouth, and not in the judgment debtor. Hence no lien attached to the land as a consequence of said judgment or of the filing of the transcript, and the subsequent conveyances by the respondent Margaret E. Weymouth and her husband to De Lanty and Strong, for value, prior to any proceedings taken by said judgment creditor attacking the transfer from the husband to the wife, were sufficient, and must be upheld.

For these reasons, the decree will be in all things affirmed.

ANDERS and DUNBAR, JJ., concur.

#### ALBERT v. HOBLER. (No. 19,589.)

(Supreme Court of California. Feb. 28, 1896.)

STATE LANDS—RIGHT TO PURCHASE—WHAT LAND IS "SUITABLE FOR CULTIVATION"—QUESTION OF FACT.

1. Whether land is "suitable for cultivation" within Const. art. 17, § 3, allowing state lands suitable for cultivation to be granted to actual settlers only, is a question of fact.

2. The fact that land does not produce "ordinary agricultural crops in average quantities" does not render it unsuitable for cultivation, within Const. art. 17, § 3, impliedly allowing lands of such character to be granted to persons not actual settlers, but expressly providing that state lands "suitable for cultivation" can be granted only to actual settlers.

Action by Charles C. Albert against Charles J. Hobler. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

J. A. Haunch, for appellant. E. T. Casper, and J. W. Wiley, for respondent.

HAYNES, C. This action is prosecuted to determine the conflicting claims of plaintiff and defendant as to their respective rights to purchase from the state of California certain school lands, viz. the N. E.  $\frac{1}{4}$  of section 8, township 25 S., range 26 E., M. D. B. and M., and arises upon a contest initiated in the office of the surveyor-general of said state, and by him referred to the superior court of Kern county for trial. Findings and judgment went in favor of the plaintiff, and the defendant appeals from the judgment and from an order denying his motion for a new trial.

Both parties applied to purchase the land in question, and both applications were regular and sufficient in form; and the question as to which party is entitled to purchase it depends upon the character of the land. The defendant's application was first in point of time, and if the land "is not suitable for cultivation," as he alleged in his application, he was entitled to purchase without being an actual settler thereon; but, if said land "is suitable for cultivation," as plaintiff alleged in his application, he, having settled upon and occupied it, is entitled to purchase it. But two questions are discussed in appellant's brief: (1) That the evidence is insufficient to justify the finding that the land in question "is suitable for cultivation"; and (2) that the township plat put in evidence by the plaintiff did not prove that said land had been sectionized and selected by the state more than three months before his application to purchase, as alleged in the complaint.

1. Whether said land "is suitable for cultivation" is a question of fact. *Dillon v. Saloude*, 68 Cal. 271, 9 Pac. 162; *Fulton v. Brannan*, 88 Cal. 456, 28 Pac. 506. Several witnesses called by the plaintiff testified that it was, while witnesses called for defendant testified that it had been cultivated for seven successive years, and that it would not, by the ordinary processes of tillage, produce ordinary agricultural crops in average quantities. That the land in question is suitable for cultivation is therefore clearly proved, unless the production of ordinary agricultural crops in average quantities by the ordinary processes of tillage is the test by which it is to be determined. That is the test prescribed in section 3495 of the Political Code; but in *Fulton v. Brannan*, supra, after quoting sections 2 and 3 of article 17 of the constitution of this state, and declaring the general policy to be that lands should be held in small tracts, and constitute homes for its owners, it was said



"No narrow construction of the only words in the section [article 17, § 3] open to construction—'suitable for cultivation'—should limit this policy. The effort should be rather to extend than to restrict, for the policy is plainly that the section should include all, so far as possible. The constitution classifies all lands as suitable or not suitable for cultivation. For the purposes of this section neither the legislature nor the courts can classify them otherwise, and it must follow that whether a particular tract belongs to the one class or the other must always be a question of fact." In *Manley v. Cunningham*, 72 Cal. 236, 13 Pac. 622, it was said: "The phrase, 'suitable for cultivation,' includes all lands ready for occupation, and which, by ordinary farming processes, are fit for agricultural purposes." But the precise question here made was decided in *Jacobs v. Walker*, 90 Cal. 43, 48, 27 Pac. 48. It was there said: "Nor did the fact that it would not, when cleared, produce ordinary agricultural crops in average quantities, render it so. To make an average, some lands must necessarily produce less than the average, while others produce more; and it would seem absurd to say that all lands producing less than the average must for that reason be held unsuitable for cultivation." In view of these decisions, it is not necessary to comment upon the inference which might be drawn from the actual cultivation of the land for seven consecutive years, and which included five seasons before and two seasons after defendant's application to purchase.

As to appellant's second point, it could only be material for the plaintiff to state in his application to purchase, or to allege in his complaint, or prove upon the trial, that the township in which the land in controversy is situated had been sectionized more than 60 days before his application was made, where there was an "adverse occupant" at the time of his application to purchase; and, as there was no adverse "occupant," the statement that the township had been sectionized and the plat filed more than 60 days before his application was wholly immaterial, and the allegation of that fact in his complaint, and proof thereof upon the trial, was unnecessary. However, that allegation in the complaint was expressly admitted in the answer. The evidence that plaintiff was entitled to purchase and that the defendant was not is satisfactory, and the general findings of the court, as well as the special findings, noticed by appellant, are therefore justified by the evidence; nor do we find any errors in rulings upon the trial of which appellant could complain. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

v.43r.no.9—70

# **BABCOCK v. CHASE et al. (S. F. 8.)**

(Supreme Court of California. Feb. 25, 1896.)

## **CANCELLATION OF VOLUNTARY DEED—ACTION BY ASSIGNEE.**

An assignee in insolvency has no standing to maintain an action to set aside an absolute deed, made without consideration, by the insolvent, at a time when he had no creditors, there being no allegations of fraud, nor any upon which to found an express or implied trust.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Henry C. Babcock, assignee in insolvency of William I. Wilson, against James P. Chase and another, to set aside certain deeds to real property. From the judgment rendered, plaintiff appeals. Affirmed.

Wells Whitmore, for appellant. Henry Miller, for respondents.

GAROUTTE, J. Plaintiff, as the assignee of one William I. Wilson, an insolvent debtor, brings this action to set aside two certain deeds of real property, and to have it adjudged that said real property is the property of said insolvent. As shown by the complaint, some five years prior to the adjudication that Wilson was an insolvent debtor, and at a time when he had no creditors, as far as the pleading indicates, he made and delivered a deed absolute in form to one Priscilla Burtch of the aforesaid real estate, this deed expressing a consideration therein of five dollars. It is further alleged that subsequently thereto said Priscilla Burtch, by a deed absolute on its face, and for an expressed consideration of five dollars, deeded all of said property to the defendants Martenstein and Chase. The complaint also alleges that both of these deeds were made without consideration, and that neither Priscilla Burtch nor her vendees, Chase and Martenstein, acquired any title, either equitable or legal, to the lands included therein; but that said deeds were given at the request of said insolvent, Wilson, and that said property might be held for said Wilson. This, in its substantial, is the complaint upon which relief is asked. Judgment went against the plaintiff, and this appeal is brought to this court.

Without considering other questions raised upon this record, we are prepared to say the case must fall by reason of a failure to state a cause of action. The assignee of the insolvent, in a case like the present one, stands in no better or different position than the insolvent debtor himself. He can do nothing as assignee that the insolvent could not do if plaintiff, and is entitled to no relief that the insolvent would not be entitled to if prosecuting this action individually and for himself alone. *Francisco v. Aguirre*, 94 Cal. 180, 29 Pac. 496. Upon the allegations of this complaint these deeds cannot be successfully

attacked by the grantor, Wilson, or his assignee in insolvency. No express trust is charged, and there is nothing recited in the pleading that would authorize the introduction of evidence to establish a trust in parol. It was said in *Jackson v. Cleveland*, 15 Mich. 102: "A voluntary deed, which purports to be for the beneficial use of the grantee, and which was made deliberately and without mistake or contrivance, does not differ from any other deed binding on the grantor, and can only be attacked by those having superior equities, which the grantor had no right to cut off, as creditors and the like." There is no actual fraud charged. Neither is there any claim of constructive fraud arising from fiduciary relations existing between the parties. As directly in line, and fully supporting the principles of law which are absolutely fatal to plaintiff's alleged cause of action, we cite *Barr v. O'Donnell*, 76 Cal. 471, 18 Pac. 429, and *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984. No express trust is declared upon by the pleading, and neither is any implied trust indicated by its allegations. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

McGEE et al. v. SAN FRANCISCO & N. P. RY. CO. (S. F. 231.)

(Supreme Court of California. Feb. 25, 1896.)

APPEAL—REVIEW—EVIDENCE.

A verdict based on conflicting evidence will not be disturbed.

Department 1. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Action by Charles McGee and others, by their guardian, James W. Collins, and another against the San Francisco & North Pacific Railway Company, a corporation. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

Sidney V. Smith, for appellant. Shadburne & Herrin, for respondents.

PER CURIAM. This is an action for damages for personal injuries. The defendant appeals from the judgment and order denying its motion for a new trial, and by the record the sole question presents itself, was the evidence sufficient to support the verdict of the jury? The action is brought by the guardian of certain minor children. The father of these minors was a passenger upon a train belonging to defendant, and, it is claimed by defendant, acted in a disorderly and boisterous manner while traveling upon said train. Defendant's servant, a brakeman, attempted to quiet this passenger, and, it is now claimed, used unnecessary force and violence in so doing. As a result of the

difficulty arising at that time, the passenger received injuries from which he died within a few days. There were many eyewitnesses at the scene of trouble, who testified at the trial as to all the circumstances, showing the cause and manner of the passenger's injury. Counsel for appellant, by his brief, admits that such testimony was hopelessly contradictory, but insists that the evidence of certain physicians who professionally waited upon the deceased after the injury was received and prior to his death, and who also conducted the autopsy upon the body, plainly shows that the deceased could not have been injured as testified to by the witnesses introduced at the trial upon the part of the plaintiffs. While the evidence of the physicians may be strong in support of defendant's theory as to the manner in which the injury was received, still we cannot hold it conclusive, for there was direct and positive evidence from the lips of eyewitnesses to the contrary. Thus a substantial and material conflict upon the evidence was created, and this material and substantial conflict was a matter which it was peculiarly and essentially within the province of the jury to solve and determine. For the foregoing reasons, the judgment and order are affirmed.

BOGGS et al. v. LAKEPORT AGRICULTURAL PARK ASS'N et al.  
(S. F. 286.)

(Supreme Court of California. Feb. 25, 1896.)

CORPORATION MORTGAGE—AUTHORITY TO EXECUTE—PAROL PROOF—SUFFICIENCY OF RESOLUTION—RATIFICATION—PLEADING.

1. Where it appeared that the directors of a corporation adopted a resolution authorizing the president "to make arrangements for paying off a debt by giving a mortgage or any other means," and that at a subsequent meeting the directors ratified the action of its officers in executing such mortgage, but no entry of either resolution was made in the record book of the corporation, though minutes of the proceedings were made on slips of paper which were afterwards lost, parol evidence is admissible, in an action against the corporation to foreclose the mortgage, to show the proceedings of the board authorizing and ratifying the execution of said mortgage, and it was not limited to showing merely the contents of the lost memoranda.

2. The resolution purporting to authorize the execution of said mortgage was sufficient in form; but, if not, the subsequent ratification was equivalent to precedent authority.

3. It was not necessary to specially plead such ratification.

Department 1. Appeal from superior court, Lake county; R. McGarvey, Judge.

Action by Boggs and others against the Lakeport Agricultural Park Association and others to foreclose a mortgage. From a judgment against defendants, and an order denying its motion for a new trial, defendant park association appeals. Appeal from the judgment dismissed. Order affirmed.

Hudson & Sayre, for appellant. F. E. Johnson and T. J. Sheridan, for respondents.

VAN FLEET J. Appeal by the defendant Lakeport Agricultural Park Association from a judgment against it and an order denying its motion for a new trial in an action to foreclose a mortgage on real property. The appeal from the judgment was taken more than one year from its entry, and is therefore ineffectual, and must be dismissed.

Upon the appeal from the order but one point is made,—that the note and mortgage in suit were not made or authorized by the appellant corporation. The question really presented, however, is as to the propriety of the ruling of the court below upon the admissibility of the evidence offered to prove the authority of the officers of the corporation to execute the instruments in question; since, if properly admitted, it was amply sufficient to sustain the finding that the appellant both authorized and ratified their execution. Appellant was indebted to the party from whom it had purchased certain real estate for a portion of the purchase price thereof, which it was called upon to pay immediately to avoid suit to foreclose a mortgage given to secure the same. A meeting of the directors of the corporation was held to devise means to meet said obligation, and a resolution was thereat adopted providing "that the president make all necessary arrangements for paying off the debt by giving a mortgage, or any other means." In pursuance of this authority the president negotiated a loan of the necessary amount to satisfy the debt referred to, and as security for such loan the president and secretary executed the note and mortgage in suit to the plaintiffs. The mortgage was not under seal, the corporation having adopted none. At a subsequent meeting of the directors of the corporation the action of its officers in giving the note and mortgage was reported to the board, and thereupon a resolution was adopted fully ratifying their action in the premises. It does not clearly appear whether either of these meetings of the board of directors was regularly called, but it was shown that at both meetings all the members of the board were present. There was evidence tending to show that at each meeting a rough minute of the proceedings of the board was kept on slips of paper, but in neither instance, from some neglect or oversight, was any record of the action of the board made or entered in the regular minute or record book of the corporation, and the rough minutes could not be found, and were not produced at the trial. Upon this showing the court below permitted plaintiffs to show the proceedings of the board of directors by parol, and in this we think it committed no error. One of the objections was that, although no regular record was kept, the rough minutes of the meeting were not sufficiently accounted for to admit of the introduction of parol proof; and that, if admitted, it should have been confined to a showing of what was contained in those rough notes or minutes. We think the showing was quite sufficient to admit of parol

proof, and that plaintiffs were properly permitted to show what in fact took place at the meetings, without reference to what may have been the contents of the lost memorandums. It is the duly-authenticated record in the books of the corporation which is the best evidence, and, in the absence of such, any competent secondary evidence may be admitted to show what the act of the board was. The rough notes of the meetings were as much secondary evidence as the testimony of the witnesses, and, if produced, would only have been admissible, like any other secondary fact, as tending to show what took place. "While the records of the corporation are usually regarded as the best evidence of the action of the board, yet, upon an issue whether a resolution was passed authorizing a given contract or conveyance, the fact may be proved by parol. Again, it will happen in some cases that the resolution may be passed, but not noted of record, in which case the fact may be proved by witnesses who can testify to it, as in other cases." 4 Thomp. Corp. § 1016. And see *Bank v. Weaver* (Cal.) 31 Pac. 180; *Wat. Corp.* § 295.

The objection that the resolution purporting to authorize the execution of the note and mortgage is not sufficient in form to justify the acts of the officers of the corporation under it is untenable; but, if otherwise, the subsequent ratification of the action of the president and secretary was equivalent to precedent authority. It was not necessary to specially plead such ratification. It was involved in the issue of whether the instruments were executed by the corporation.

The other grounds of objection do not require special notice. The appeal from the judgment is dismissed, and the order is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

FLADUNG v. DAWSON et al. (S. F. 289.)  
(Supreme Court of California. Feb. 25, 1896.)

#### ACTION ON CONTRACT—PLEADING AND PROOF.

Where a complaint in an action to recover for work and materials alleges that they were furnished under a contract, which fact is not denied by defendant, the only issue made being as to the contract price, it is error to admit evidence of reasonable value.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by one Fladung against Dawson and others and J. G. Adams. From a judgment for plaintiff against him, defendant Adams appeals. Reversed.

Smith & Murasky, for appellant. C. S. Hemphill, for respondent.

HARRISON, J. The plaintiff brought this action to recover from the defendant Adams for certain labor and materials furnished by

and to have the same declared a lien upon a certain building belonging to the defendant Dawson. The plaintiff, as a subcontractor, had furnished the materials and labor to Adams, who had contracted with Dawson for the construction of the building, and the materials and labor were furnished and used in such construction. At the trial it was shown that the building had been completed more than 30 days prior to the plaintiff's filing of his claim of lien, and he was denied a lien against the building, and judgment was rendered in favor of Dawson. The plaintiff, however, recovered judgment against Adams for the sum of \$1,015, from which, and an order denying a new trial, Adams has appealed.

The finding of the court that no special contract was made and entered into between the plaintiff and the appellant as to the amount that the appellant should pay plaintiff for his work and material is not only not sustained by the evidence, but is in direct opposition to all the evidence on the subject. The real issue which was contested at the trial was the price that had been agreed upon between them for the work, and not that there was no contract with reference to the amount to be paid therefor. The plaintiff testified: "We met, and went into the saloon, and he told me that he would give me \$3,335 to do the brickwork and the stonework and set the ironwork." "I gave Mr. Adams one written bid on this building, and I don't know now where it is. The amount was \$3,535." And, in explanation of the averment in the complaint that the sum of \$3,200 was agreed upon between them as the price of the work, he said: "It was at the suggestion of Mr. Adams that I charged \$3,200 for the work that I did. He told me that I had to take off a little. My written bid was \$3,535, and by an agreement with Mr. Adams it was changed to \$3,200." There was no testimony in the case that the work was to be done for what it might be worth, or that the plaintiff agreed to do the work without any agreement as to its price. On the contrary, the appellant offered in evidence a written bid for doing the work, with the plaintiff's name signed thereto, which he testified was received by him from the plaintiff, and had been written by the plaintiff upon one of his business cards, and signed by him, wherein he offered to do the work for \$2,226. The entire evidence on this point was that the price at which the work was to be done was fixed by the bid of the plaintiff, and the court should have determined the amount of this bid, even though the testimony of the parties thereto was diametrically opposed. See *Leviston v. Ryan*, 75 Cal. 293, 17 Pac. 239. Instead of so doing, the court admitted evidence, against the objection of the appellant, of the value of the labor and material furnished by the plaintiff, and found that this value was \$3,160, of which the plaintiff had been paid a portion,

and made this value the basis of its judgment. This finding was also outside of the issues made by the pleadings. The plaintiff had alleged in his complaint that he had entered into a contract with Adams to do certain work upon the building, "for which defendant Adams was to pay and agreed to pay to plaintiff the sum of \$3,200." The appellant did not deny the agreement, except as to the amount, which he alleged was the sum of \$2,226. The only issue before the court in this respect was, therefore, the amount which the appellant had agreed to pay for the work, and the court erred in admitting evidence of the value of the work done by the plaintiff, and in rendering its judgment in accordance with the value found upon this testimony. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

HEARNE v. DE YOUNG et al. (L. A. 59.)  
(Supreme Court of California. Feb. 27, 1896.)

CHANGE OF VENUE—RESIDENCE OF PARTIES—BURDEN OF PROOF—WAIVER OF OBJECTIONS TO PLACE OF TRIAL—STIPULATIONS—CONCLUSIVENESS.

1. Where the action is one which is entitled to be tried in the county in which defendants or some of them reside, and the complaint fails to show their residence, a defendant who seeks a change of venue must show that neither he nor his codefendants reside in the county in which suit was brought.

2. A party may waive, expressly or by implication, the right to have a cause tried in a particular county.

3. Code Civ. Proc. § 283, providing that an attorney can only bind his client in an action by an agreement filed with the clerk or entered on the minutes of the court, and not otherwise, does not apply to an agreement which is admitted on the hearing.

4. A fact admitted on the hearing, and acted on by the court, cannot thereafter be denied.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by J. C. Hearne against M. H. De Young and another for libel. From an order denying a motion by defendant De Young for a change of venue, said defendant appeals. Affirmed.

Lloyd & Wood and W. J. Hunsaker, for appellant. Works & Works, E. W. Hendrick, and W. J. Murphy, for respondent.

SEARLS, C. This is an appeal from an order of the superior court of the county of San Diego denying a motion by defendant De Young to change the place of trial to the city and county of his residence, viz. the city and county of San Francisco. The action is brought in the county of San Diego, to recover from the defendants M. H. De Young and J. F. Blunt, and each of them, the sum of \$100,000 as damages sustained by plaintiff, by reason of an alleged libel published by

said defendants of and concerning plaintiff in the San Francisco Chronicle. The complaint avers that, during all the times therein mentioned, M. H. De Young was the proprietor, and the defendant Blunt was the San Diego correspondent, of a certain daily newspaper known as the "San Francisco Chronicle," which said newspaper had, and still has, a large circulation in the city of San Diego, state of California; that on the 27th day of August, 1894, the said defendants, and each of them, did maliciously and falsely print and publish in said San Francisco Chronicle, and did maliciously, willfully, and falsely cause to be printed, published, and circulated in said paper, in said county of San Diego, a certain false and defamatory article of and concerning the plaintiff, a copy of which article is made a part of the complaint. The complaint contains no allegations, other than as above, in reference to the place of publication of said newspaper, or of said article, or as to the relations existing between said defendants, or in reference to the residence of either of them. Defendant De Young alone moved in due time and form for a change of the place of trial, as aforesaid, showing that during all the times mentioned in the complaint he was, and still is, a resident of the city and county of San Francisco, and a nonresident of the county of San Diego; that he had a meritorious defense, etc. Defendant Blunt consented in writing that the place of trial be changed as prayed by his codefendant. It was admitted at the argument of the motion that defendant Blunt was, at the commencement of the action, a resident of the county of San Diego, Cal. The motion was denied, and defendant De Young alone appeals.

This action is one which, under section 395 of the Code of Civil Procedure, the plaintiff had a right to have tried in the county in which the defendants or some of them resided at the commencement of the action. If, therefore, J. F. Blunt, one of the defendants, at the time of the commencement of the action, was a resident of the county of San Diego, the court below was correct in refusing to change the place of trial, although M. H. De Young, his codefendant, was a resident of the city and county of San Francisco. The right to have a cause tried in a particular county is one which a party may waive either expressly or by implication. *Pearkes v. Freer*, 9 Cal. 642; *Jones v. Frost*, 28 Cal. 246; *Cook v. Pendergast*, 61 Cal. 72; Code Civ. Proc. § 396. If a complaint in an action which defendant has a right to have tried in the county of his residence fails to show the residence of the defendant, the onus probandi is cast upon such defendant to show the county of his residence, if he would secure a change of the venue. And, by parity of reasoning, if there are several defendants in a like case, he who would procure a change of the place of trial must show that none of them are residents of the coun-

ty in which the action is brought. This the record failed to show.

Again, it was admitted at the hearing, as appears by the record, "that the defendant Blunt was at the commencement of the action a resident of the county of San Diego, in this state." Appellant contends that this admission is not binding, for the reason that it does not appear that the agreement was filed with the clerk or entered upon the minutes of the court, and is therefore not within the purview of section 283 of the Code of Civil Procedure.<sup>1</sup> Where the stipulation or admission of an attorney for and on behalf of his client, and being as yet executory, is denied, the only proof of its validity rests upon a compliance with the Code provision, and no other proof can be received. But where the stipulation, agreement, or admission is admitted, as in this case, there is no occasion to resort to other proof. For the purposes of the motion, the residence of defendant Blunt was an admitted fact, avoiding the necessity of other proof, and, having been acted upon by the court, cannot now be traversed. *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Himmelmann v. Sullivan*, 40 Cal. 125; *Hawes v. Clark*, 84 Cal. 272, 24 Pac. 116; *Patterson v. Ely*, 19 Cal. 36; *Reese v. Mahoney*, 21 Cal. 306.

For these reasons, we are of opinion the court did not err in refusing to change the place of trial, and the order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

SINSHEIMER et al. v. WHITELEY et al.  
(No. 19,518.)<sup>2</sup>

(Supreme Court of California. Feb. 27, 1896.)

#### WAREHOUSEMEN—RECEIPTS—PLEDGE.

Where produce is left with a weigher, who stores it without charge, a receipt given by the weigher merely reciting that the produce had been weighed, and stating its weight, is not a "warehouse receipt," the transfer of which as security constitutes a delivery of the produce, rendering the pledge valid as against attaching creditors of the pledgor.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Replevin by B. Sinsheimer and others against Thomas Whitely and others. There was a judgment for plaintiffs, and defendants appeal. Reversed.

William Shipsey and F. A. Dorn, for appellants. Wilcoxon & Bouldin, for respondents.

<sup>1</sup> Code Civ. Proc. § 283, provides that an attorney may bind his client in an action by his agreement, filed with the clerk or entered on the minutes of the court, "and not otherwise."

<sup>2</sup> Rehearing denied.

BRITT, C. Replevin for 217 sacks of beans. Defendant Whitely is constable of a certain township in San Luis Obispo county, and, as such, levied on the beans as the property of one Costa, in virtue of a writ of attachment to him issued out of the justice's court of said township, at the suit of one Lial against said Costa. At the time of the levy the beans were stored in a warehouse at Pismo, in said county, owned by the Jordan Bituminous Rock & Paving Company, a corporation, which is joined with the constable as a defendant in this action. In November, 1893, said Costa, who was then the owner of the beans, caused them to be weighed at said warehouse, and deposited therein; receiving from said paving company at that time five certain instruments, which plaintiffs style "warehouse receipts," and which defendants call "weighing tags." These were in the following form, varying as to the number of sacks specified: "Jordan Bit. Rock and Pav. Co.'s Scales. Pismo, Cal., 11-2, 1893. Weighed for F. J. Silva. Gross, 5,080. Tare, 1,570. 40 sks. beans. Net wt., 3,510. Marked, F. J. S. A. Klatt, Weigher." They were issued at Costa's request in the name of one F. J. Silva, with consent of the latter, but were delivered to Costa. Silva never had possession of them, and had no interest in the beans. A Mr. Stevens, agent of said company, and who had charge of the warehouse, testified at the trial: "The tags in evidence were issued by our company at Pismo, and are the only kind issued by our company; the only receipts given. They are given by the weigher. The tags, or whatever you call them, are given by the weigher at the scales when the beans were weighed and were placed in the warehouse;" also, that the company took the beans as a warehouseman, but had no charge against them; that it does not charge storage. On December 6, 1893, Costa delivered said instruments, though without indorsement, to plaintiffs, as security for a debt then owed by him to them. He also gave them a written order for the beans, addressed to "Agent Pismo Wharf Warehouse." December 11th, following, the constable seized the beans pursuant to said writ in Lial's suit against Costa. Lial obtained judgment in that action, and an execution issued thereon, under which the constable was about to sell the beans when plaintiffs, for the first time, notified him and also the paving company of their claim to the property in virtue of the transfer to them of said alleged warehouse receipts. Their demand for release of the property being refused, they brought this action.

A warehouse receipt has been denied to be a written contract between the owner of the goods and the warehouseman, the latter to store the goods, and the former to pay for that service. *Hale v. Dock Co.*, 29 Wis. 488. Perhaps some of the terms of this contract

may be implied. See forms of such receipts construed in *Lowrie v. Salz*, 75 Cal. 349, 17 Pac. 232, and *Bishop v. Fulkerth*, 68 Cal. 607, 10 Pac. 122. But surely there ought to be something on the face of the instrument to indicate that a contract of storage has been entered into. Our statute on the subject requires that much,—act in relation to warehouse receipts, etc. (St. 1877-78, p. 949, § 5). The language in the documents here, "Weighed for F. J. Silva forty sacks beans," no more signifies that the paving company received or held the beans as a warehouseman than that it bought or sold the same, or shipped them to a distant port. On their face, the papers plainly are not warehouse receipts. *Cathart v. Snow*, 64 Iowa, 584, 21 N. W. 94; *Robson v. Swart*, 14 Minn. 371 (Gil. 287). But it is said that the tickets were the only vouchers issued by the defendant company, and hence must be treated as warehouse receipts. Rather, it seems to us, that circumstance tends to show that said company was not a "warehouseman" at all in the sense which the law attributes to that term,—an inference strongly corroborated by the fact that it makes no charge for storage. It is only persons who pursue the calling of warehousemen—that is, receive and store goods in a warehouse as a business for profit—that have power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it. *Shepardson v. Cary*, 29 Wis. 42; *Bucher v. Com.*, 103 Pa. St. 534; *Edw. Ballm.* § 332. Since there was nothing equivalent to delivery of the beans in the transaction between Costa and plaintiffs, the rights of the attaching officer are not affected by the attempted transfer.

The court found that the constable made no valid levy of the writ; and some slight effort is made here to justify the finding. It seems to us a mere conclusion of law; but, admitting it to be a finding of ultimate fact, it is not sustained by the evidence. It appears from the constable's return and certain parol evidence, which was admissible in aid of the return (*Brusie v. Gates*, 80 Cal. 462, 22 Pac. 284), that he took actual possession of the beans in the warehouse, and placed said Stevens in charge thereof as keeper. There were some further proceedings by him to charge both Silva and the paving company as garnishees, but the sufficiency of these need not be looked to. His possession by his keeper was a compliance with the statute (Code Civ. Proc. § 542, subd. 3).

The judgment and order denying defendants' motion for new trial should be reversed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying defendants' motion for new trial are reversed.

**KIMBALL v. RICHARDSON-KIMBALL  
CO. (WILLIAM DEERING & CO.,  
Intervener. No. 19,568).**

(Supreme Court of California. Feb. 27, 1896.)

**ATTACHMENT—INTERVENTION—LIEN—WHEAT CON-  
STITUTES—PRIORITY—GARNISHMENT—AP-  
PEAL—OBJECTIONS WAIVED.**

1. A subsequent attachment creditor has such interest in the matter in litigation in a prior attachment of the same property as entitles him to intervene, under Code Civ. Proc. § 387. *Horn v. Water Co.*, 13 Cal. 62, distinguished.

2. Where, in an attachment, a person who has in his possession property or money of defendant is garnished, such garnishment constitutes an attachment lien on such property or money.

3. Where plaintiff in a bill of interpleader deposits the money or property in dispute with the clerk, without any order of the court permitting him to do so, such money and property are not in the custody of the law, so as to render unavailable a subsequent garnishment of plaintiff by the party entitled thereto.

4. Where an insolvent stockholder of an insolvent corporation is indebted on his subscription for stock to an amount in excess of a sum due him on a note of the corporation, an attachment lien procured by him in an action on his note against the corporation will be postponed in equity to a subsequent attachment lien of other creditors of the corporation.

5. Where a material fact found is merely defectively pleaded, objection that the finding is not supported by the pleadings is not available on appeal, in the absence of objection to the pleading by demurrer or objection to evidence.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action in attachment by George H. Kimball against the Richardson-Kimball Company, in which William Deering & Co., a corporation, intervened, and claimed a prior lien on the attached property. From a judgment in favor of the intervener, plaintiff appeals. Affirmed.

C. A. Miller, for appellant. Carver & Pres-ton, for respondent.

SEARLS, C. The action was brought by the plaintiff upon a promissory note to recover from defendant \$1,500 and interest. Plaintiff issued an attachment, which was levied upon certain property and moneys of defendant in the hands of the Los Angeles National Bank. Defendant made default, and no question was made as to plaintiff's right to a judgment against defendant. William Deering & Co. (a corporation) also brought an action against the same defendant (a corporation) to recover money due it from said defendant; issued a writ of attachment, which was subsequently levied upon the same property and money previously levied upon by plaintiff. William Deering & Co. took judgment against defendant for \$1,372.69. After levying its attachment, William Deering & Co. intervened in this action, and set up facts claiming to show that the lien of plaintiff's attachment should be postponed and held subordinate to the lien of its subsequent attachment. The cause was

tried by the court, written findings filed, and judgment rendered, adjudging the lien of intervener's attachment superior to that of the attachment lien of plaintiff, and adjudging the former to be first paid out of the attached property. Plaintiff appeals from the judgment, and the cause comes up without a bill of exceptions or statement, upon so much of the judgment roll as by the stipulation of the parties is deemed sufficient to illustrate the questions in dispute. The points made by appellant in favor of reversal are: (1) That the findings do not support the decree. (2) That finding 11 is not supported by the pleadings.

It would be more satisfactory to set out the findings in full, but their great length precludes our doing so. The following is believed to be a fair synopsis of them, and to lead to an understanding of the questions involved: (1) That William Deering & Co. is, and for more than five years past has been, a corporation organized under the laws of Illinois. (2) The Richardson-Kimball Company is, and since 1887 has been, a corporation under the laws of California. (3) The plaintiff, George H. Kimball, is, and has been, secretary, treasurer, and a stockholder of said Richardson-Kimball Company since 1887. (4) Intervener, William Deering & Co., has been since 1888 a creditor of the Richardson-Kimball Company (hereinafter called "defendant"); and on the 6th day of September, 1888, defendant had certain moneys of William Deering Company (hereinafter called "intervener") which it held for intervener's use, viz. \$2,507.43, which it acknowledged in writing, but which it failed to turn over to intervener, and there is due intervener on account thereof \$1,418.74. (5) That since 1889 defendant has been, and still is, insolvent, which was well known to plaintiff and defendant. (6) The attached property, money, etc., was on the 9th of May, 1891, in the hands of the Los Angeles National Bank, subject to its certain liens thereon, which was known to plaintiff and defendant. (7) On said May 9th, defendant made the note in suit to plaintiff, which was not made to defraud intervener or other creditors, but was for a consideration of \$1,500, and was made without fraud or collusion. (8) On the 18th of August, 1891, plaintiff brought this action, and attached all the property and money of defendant in the hands of said bank. (9) On the 5th day of September, 1891, intervener brought suit against the defendant, and attached the same property. (10) The property so attached by plaintiff and intervener was, and now is, the only property and assets of the defendant. (11) Upon the incorporation of defendant, in 1887, plaintiff subscribed \$22,400 to its capital stock, upon which he has not paid more than \$2,400, and he still owes on account thereof \$20,000. No calls or assessments have ever been made by defendant on account of the sum due and owing by plaintiff on account

times insolvent. (12) After intervenor filed its complaint of intervention herein, viz. on the 3d day of November, 1891, the attachment in its suit against defendant was discharged by order of the court, and thereafter, and on the 7th day of November, 1891, intervenor sued out a second writ of attachment in the same cause, which on the 9th and 11th days of November, 1891, was served upon the said Los Angeles National Bank, in the usual form, with notice, etc., attaching all the property, money, etc., of defendant in its hands. This attachment was also served in like manner upon T. H. Ward, as bailee of said bank, and the sheriff has since that time held the money and property so by him attached. Intervenor obtained judgment in its action against defendant on the 16th day of January, 1892, for \$1,372.69, and the property and money is held by the sheriff for the satisfaction thereof. On the 21st day of September, 1891, the Los Angeles National Bank commenced an action against F. A. Carter and others, including all the parties to this action, in a complaint of interpleader, requiring them to litigate their claims, etc., and at the same time deposited with T. H. Ward, the clerk of the superior court, all the property and money of defendant in its hands subject to the determination of the action of interpleader. Such deposit was made without order of the court, and without the knowledge or consent of defendant or intervenor herein, and such action of interpleader is still pending and undetermined. On the 16th of January, 1892, intervenor filed a supplemental complaint in intervention, setting out the order dissolving its attachment and the issuing and service of the writ of attachment of November 7, 1891, etc. This last fact is admitted in the record. It also appears that plaintiff interposed a general demurrer to intervenor's complaint in intervention, which was overruled by the court.

The theory of appellant is that the findings do not support the decree for the reasons:

(a) That intervenor, as an attachment creditor in another suit against defendant, has no such "interest in the matter in litigation" as entitles him, under section 387, Code Civ. Proc., to intervene. In support of this first contention, he cites *Horn v. Water Co.*, 13 Cal. 62. The intervenors in that case were general creditors of the defendant, without any lien, either general or specific, on the property involved in the action. In speaking to this point, the court said: "To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation. No such claim or lien is asserted in the petition of Rawle, and his right to intervene must, in consequence, fail." The court

ties. That case clearly intimates that a creditor having a lien upon the property there sought to be foreclosed under mortgages was entitled to intervene. That, under our Code, an attachment or execution creditor has a right to intervene, and upon a proper showing defeat the lien of a prior attaching creditor, we regard as too well settled to need further discussion. *Davis v. Eppinger*, 18 Cal. 378; *Speyer v. Ihmels*, 21 Cal. 280; *Coghill v. Marks*, 29 Cal. 673; *Coffey v. Greenfield*, 55 Cal. 382.

(b) It is further contended that, if a lien by direct attachment were sufficient to give intervenor a standing in court, he claimed no such lien, but only to have a garnishment, which creates no lien on the property. Garnishment under our law is but another name for the service of a writ of attachment upon personal property in the possession of persons other than the defendant in the writ, and also to secure debts, credits, etc., in the hands of such third persons. By the service in the manner provided by statute, whether it be termed "garnishment" or "service of the attachment," while the possession is not necessarily disturbed, "a lien is obtained on defendant's title to the property in the hands of the garnishee." *Wade, Attachm.* § 338.

(c) It is further urged that intervenor had no lien, for the reason that his attachment was dissolved, and, before the second writ of attachment issued, the bank had commenced a suit in interpleader, and had deposited the money and property with T. H. Ward, clerk of the superior court, and that the money, being in the custody of the law, was not subject to attachment. The first clause of section 386 of the Code of Civil Procedure provides that a defendant against whom an action is pending, upon a contract or for specific personal property, may at any time before answer, upon making the showing therein provided for, and upon notice to the parties, apply to the court for an order substituting the third party who makes claim to the property as a defendant in his place, and he may be discharged from liability to either party, "on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order." The Los Angeles National Bank was not the defendant in any pending action, and hence was not within the purview of the first clause of section 386, *supra*, but instituted on its own account an action to compel the parties to interplead under the latter clause of the same section, with a view to being discharged from liability to any or all of the conflicting claimants. This clause makes no provision for an order permitting the plaintiff in the action of interpleader to pay into court or deliver the prop-



erty claimed. We may suppose the court possesses the power to make the order permitting a party in a proper case to do so, but in the present case no such order was made or asked for, and, until it was obtained, the bank could not, on its own volition, relieve itself from responsibility, by voluntarily placing the property and money in the hands of the clerk; and, when so placed, it was in no proper sense in the custody of the law. Where property is lawfully taken, by virtue of legal process, it is in the custody of the law, and not otherwise. *Gilman v. Williams*, 7 Wis. 334. Money deposited by a defendant with the sheriff for the release of an attachment is in the custody of the law. *Hathaway v. Brady*, 26 Cal. 581. But this is because it is a symbol of, and stands in place of, the attached property. Other cases might be mentioned of like import. It is sufficient to say that the property in question was not in the custody of the law, and, whether in the hands of the bank or of Ward, it was subject to attachment. We are of opinion, therefore, that intervenor acquired a valid lien by his second attachment.

(d) The only remaining question relates to the sufficiency of the finding to warrant the postponement of plaintiff's lien to that of intervenor. The proceeding on the part of intervenor is an equitable one to prevent the sole assets of the corporation, which is insolvent, from going to the plaintiff, who is also insolvent, who is a large owner of stock in the corporation, and whose liabilities to the corporation are in excess of \$20,000. It may be true that plaintiff is not in a legal sense indebted to the corporation, for the reason that no assessment has been levied or call made on account of his subscription. It is, nevertheless, a liability which a court of equity, for the purpose of meeting the obligations of the corporation, could enforce, either by the direct levy of an assessment, or by requiring the directors of the corporation to do so. This course would be of no avail as against the insolvent plaintiff. It would be in the highest sense inequitable to permit one thus situated to avoid his liability by reason of his insolvency, and at the same time swallow up the entire assets of the concern, to the exclusion of creditors who have an equitable right to have the entire property and assets of the company appropriated to the satisfaction of their demands. Plaintiff's liability is an asset, which, but for his insolvency would go to swell the property of the corporation pro tanto. His share or interest in the corporation is his proportion, measured by his stock, in the residuum, after the payment of all demands due and owing by the company. "After actual insolvency, however, unpaid capital becomes a trust fund, to reach which creditors are not required first to reduce their claims to judgment." *Spell. Corp.* § 821, and cases there cited. Some of the cases

go to the extent of holding that a stockholder of an insolvent corporation cannot offset an individual claim against the corporation in proceedings to enforce his liability for unpaid subscription for stock, but that he must pay in full and receive his pro rata share with other creditors on his demand. *Id.* § 818. However this may be in a proceeding to wind up the affairs of a corporation, we are of opinion that in an action like the present, where both the corporation and the stockholder are insolvent, and the latter is liable upon his subscription for stock of the company in an amount greatly in excess of all the claims in question, he cannot, upon any equitable principle, be permitted to enforce an individual claim against the corporation, to the exclusion of other creditors, and that his prior attachment lien should be postponed to that of subsequent attaching creditors where necessary to their payment, and in cases where, without such postponement, they must inevitably lose their demands, and the entire assets of the corporation go to satisfy the individual debt of the stockholder thus insolvent and thus liable on account of his subscription. *Hatch v. Dana*, 101 U. S. 205; *Harmon v. Page*, 62 Cal. 448. The fact that this is a proceeding of intervention is no reason why the equitable rights of the parties should not be adjusted on the same principle as the court would do in a direct action for that purpose, and the fact that intervenor might have brought an action and obtained relief therein is no argument against his right here. *Coffey v. Greenfield*, 55 Cal. 382.

The order of the court, ex parte, allowing an intervention was proper *Spanagel v. Reay*, 47 Cal. 608.

As the complaint in intervention is not set out in the record, we must presume the demurrer thereto was properly overruled.

The only other objection necessary to be noticed is that finding 11 is not supported by the pleadings. So much of the complaint in intervention as related directly to finding 11 is set out in the record, and is to the effect that defendant was not indebted to plaintiff in any amount, but that, on the contrary, plaintiff is, and since May, 1891, has been at all times, indebted to defendant in the sum of more than \$2,500, and that he (the said plaintiff) has been at all times since May 1, 1891, and now is, insolvent. These allegations are contained in an amendment to intervenor's complaint. No objection was made thereto by way of demurrer or to the introduction of evidence thereunder in the court below. We cannot see how appellant can successfully urge his objection here for the first time. There was an attempt to plead the substance of the finding, and plaintiff having gone to trial thereon, and evidence having been introduced without objection in support of the finding, it is too late to object here. *Tynan v. Walker*, 35 Cal. 645; *Cave v. Crafts*, 53 Cal. 141; *Crowley v. Railroad*

which is fatal. *Richards v. Insurance Co.*, 80 Cal. 505, 22 Pac. 939; *Wilson v. White*, 84 Cal. 239, 24 Pac. 114; *Greiss v. Insurance Co.*, 98 Cal. 241, 33 Pac. 195; *City and County of San Francisco v. Pennie*, 93 Cal. 465, 29 Pac. 66; *Lee v. Figg*, 37 Cal. 328.

Upon the whole record as presented, we are of opinion the judgment appealed from should be affirmed, and so recommend.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

#### PEOPLE v. WEBSTER. (Cr. 104.)

(Supreme Court of California. Feb. 27, 1896.)

##### ASSAULT WITH INTENT TO COMMIT RAPE—AGE OF CONSENT—PROVINCE OF JURY.

1. In a prosecution for assault with intent to commit rape, the intent with which the assault was committed is a question for the jury.

2. On the trial of a defendant for assault with intent to commit rape, it is error for the court to assume, in its rulings or instructions, that the prosecutrix was under the age of consent.

Department 1. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Warren Webster was convicted of an assault with intent to commit rape, and appeals. Reversed.

A. Ruef, for appellant. Atty Gen. Fitzgerald, for the People.

GAROUTTE, J. Appellant was convicted of an assault with intent to commit rape. He appeals from the judgment and order denying his motion for a new trial.

1. It is first insisted that the evidence was insufficient to support the verdict; but we cannot agree with this contention. The question as to the specific intent with which appellant did the acts proven against him was a matter entirely for the jury to pass upon, under the evidence; and by that evidence the jury were fully justified in finding the intent as charged in the information.

2. The prosecutrix in this case took the stand, and testified that she was only 12 years of age, and then related the occurrences which took place between her and the appellant upon which this information is based. Upon cross-examination, she was asked if she did not consent to all that was done by appellant; and an objection was sustained to the question, upon the ground that her consent was immaterial, the trial court at the time stating: "I shall instruct the jury she cannot consent, and, that being so, it is of no legal consequence." When the time arrived to charge the jury as to the law

an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: '(1) Where the female is under the age of fourteen years.' Under the evidence, it is not necessary to mention the other circumstances here. \* \* \* And this offense, if proved at all, comes within the section of the statute I have just read." In the case of *People v. Verdegreen*, 106 Cal. 212, 39 Pac. 607, this court held that a female under the age of 14 years cannot even consent to an assault with intent to commit rape, the identical offense here charged. The evidence in this case may well be said to be conflicting upon the fact as to whether or not this prosecutrix consented, although probably greatly preponderating to that effect. Hence, her age was a vital question in the case. It may be said to have been the fact upon which the whole case rested. Indeed, as we have seen, the trial judge so construed it. And we think it was clearly wrong upon his part to instruct the jury, in effect, that this girl was under 14 years of age. This is exactly what he said he would do, and is substantially what he did do. The court in so instructing passed upon a question of fact. The girl's age, as we have suggested, was a prominent fact in the case, and essentially one for the jury to pass upon. The court had no more right to tell the jury that, under the evidence, the girl was under 14 years of age, than it had to tell the jury that, under the evidence, the offense charged had been proven. The court appears to have assumed that, the prosecutrix having testified that she was but 12 years of age, and no contradictory evidence having been offered, the fact was conclusively established as a matter of law, and therefore it was justified in so telling the jury. But such principle is wholly unsound. If the girl had testified to a state of facts showing that the offense here charged had been committed, and no contradictory evidence thereof had been offered, certainly the court would have had no right to tell the jury appellant's guilt was established. Yet it could lawfully have done this if it was justified in instructing them as to the age of the prosecutrix. A jury in a criminal case is not bound to believe the uncontradicted statement of a witness as to a fact. This court in *People v. Murray*, 86 Cal. 34, 24 Pac. 802, said: "The jury were not bound to take the testimony of any witness as true. From the manner of the prosecuting witness, and the nature of his whole testimony, the jury might have disbelieved him if the defendant had not introduced any evidence at all. This whole matter was for the jury, and not for the court." Again, this court said in *People v. Casey*, 65 Cal. 261, 3 Pac. 874, that the trial court had no right even to tell the jury what the evidence

"shows." The province of the jury in passing upon the facts of a case is a broad one. It is practically unlimited. It is a constitutional right given to the jurors. It is a constitutional duty imposed upon them. They were not bound to take this witness' statement of her age as true. They had the right to disbelieve it, and were not beholden to any court for dereliction of duty in not believing it. It would be a matter between them and their consciences alone. It is for the jury to say when truth and when falsehood come from the mouth of the witness. The conduct of this witness when upon the stand may have shown her to have been lying. Her appearance may have shown her to have been of mature years. The inherent improbabilities of her testimony may have placed it beyond the pale of belief. Would such uncontradicted testimony be conclusive if the witness by her appearance was shown to be wrinkled and gray with age? These were matters for the jury to sift and weigh and measure, and matters with which the court had no right to deal, and, above all things, an examination upon which by the jury the court had no right to foreclose. The trial court, in assuming the testimony of the prosecutrix in this regard to have been true, committed an error which compels a reversal of the judgment and a new trial of the case. The court should have declared the law as laid down in the *Verdegreen Case*, and also have submitted to the jurors the question of fact as to whether or not the prosecutrix was under the age of 14 years at the time the assault is claimed to have been committed.

3. Counsel for appellant insists that the court committed an error in its instructions to the jury, wherein the jurors were told that, in order to convict, "you are not bound to be absolutely sure that the defendant is guilty." A new trial being necessary for the reasons already given, we will simply say the language here used is a departure from the common and usual instruction upon reasonable doubt. Such departures are always dangerous, and, being dangerous, resort should not be had to them. Mistrials often result thereby. There is no good reason for using untried and dangerous paths when safe and well-traveled roads are equal-ly at hand.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

DAVIS v. PHOENIX INS. CO. (L. A. 65.)  
(Supreme Court of California, Feb. 28, 1896.)  
INSURANCE — CONTRACT — INSURABLE INTEREST —  
AMOUNT OF INTEREST.

1. Where a policy of insurance is based on the condition that the assured is the owner in

fee simple, but makes the application a part of the policy, and the insurer accepts a risk, though the application shows that the assured is not the owner in fee, the insurer cannot set up a want of such title to defeat an action on the policy.

2. One who is in the full possession of property under a contract on which he has in part paid the purchase price, and which on his volition and completion of the contract will entitle him to a conveyance of the legal title, has an insurable interest equal to the amount of payments he has made.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by J. D. Davis against the Phoenix Insurance Company on a policy of fire insurance. From a judgment in favor of plaintiff, defendant appeals. Modified.

E. J. Ensign and Rippey & Nutt, for appellant. F. P. Willard, for respondent.

SEARLS, C. This is an action to recover upon a policy insuring against loss by fire. Plaintiff had judgment for \$1,200, from which judgment defendant appeals. The cause comes up on the judgment roll, and is not supported by a statement or bill of exceptions. It appears from the pleadings and findings that the defendant is, and was at all the times mentioned in the case, a duly organized and acting fire insurance corporation; that the plaintiff, on the 26th day of February, 1894, and at all the times mentioned in the complaint, was in the actual, peaceable, and undisturbed possession of 80 acres of land, known as the "W. W. Borden Farm," fully described in the pleadings, findings, and policy of insurance hereinafter mentioned, and was in like possession of a "one-story frame dwelling house situate thereon, and described in said policy, under and by virtue of a partially executed contract and agreement to purchase said land and premises, and a written option thereon (upon which had been paid the sum of one hundred [\$100] dollars), made and delivered to him by W. W. Borden and Millie L. Borden, in whom was vested the fee and legal title thereto." On the 14th day of June, 1894, and within the time limited by his contract, plaintiff received a deed of conveyance of the premises, whereby the entire legal title thereto vested in him. Prior to June 14, 1894, the fee and legal title of the land and premises in question was in W. W. Borden and Minnie L. Borden. On the 26th day of February, 1894, plaintiff made an application to defendant for a policy of insurance upon said dwelling house for \$800, and upon certain personal property therein for various sums aggregating \$400, but which need not be further mentioned, as appellant admits the validity of the judgment to the extent of the \$400 insurance on such personal property. In his application plaintiff "fully and explicitly informed defendant and set forth his interest in and title to said premises and property." The application "was written out by and delivered to A. H. Beach, the duly authorized agent of defendant, and is referred to

premium of \$11.10, defendant made and delivered to plaintiff and the latter accepted its policy No. 11,116, which is made a part of the findings, whereby defendant agreed to indemnify plaintiff against loss or damage by fire upon receipt of the proofs of loss, etc., not exceeding the actual cash value thereof, in the sum of \$800 on said dwelling house. On the 10th day of April, 1894, the dwelling house and all the personal property were wholly destroyed by fire. The actual cash value of the dwelling house exceeded the amount of insurance thereon, viz. \$800. Due proof of loss was made, and the court finds that plaintiff has complied with and duly performed all the conditions required of him by said policy. The court found that plaintiff had, prior to the issue of the policy, paid to his grantors in all on account of the purchase of said premises \$450, viz. \$100 in cash paid on the option to purchase, and \$350 by a sale of personal property to be applied on such purchase.

Upon the pleadings and findings of the court two questions arise: (1) Had the plaintiff an insurable interest in the dwelling house covered by the policy upon which he can recover? (2) If the first question is answered in the affirmative, what was the extent of that interest?

Section 2587 of the Civil Code is as follows: "A policy of insurance must specify: (1) The parties between whom the contract is made; (2) the rate of premium; (3) the property or life insured; (4) the interest of the insured in property insured, if he is not the absolute owner thereof; (5) the risk insured against; and (6) the period during which the insurance is to continue." The contention of appellant is that, as the policy, which is made a part of the findings, describes plaintiff as the absolute owner of the property, and contains a condition that, "if the assured shall not be the sole and unconditional owner in fee of said property, \* \* \* this policy shall be null and void," and that, as the findings show that plaintiff only had an option to purchase the property, and was not vested with any title therein, there can be no recovery. Were this the entire showing of the record, we should concur in the views of the appellant; but when we review the whole record other factors appear, which affect the problem. Plaintiff, in his complaint avers (to state it in brief) that in his application for a policy he fully and explicitly informed defendant of the nature of his title, etc., and delivered said application to defendant; that it is now in the possession of defendant, who is better informed as to its contents than plaintiff, and he therefore refers to it as though fully set forth, and makes it a part of his complaint as though it appeared therein. Plaintiff also makes the policy a part of his complaint. Turning to the policy, and we find that it recites that: "This indemnity contract is based upon the valuations and representations contained in

ed, and permitted to be submitted to the company, and which are hereby made a warranty, and a part hereof." The court finds in consonance with the allegations of the complaint. If, then, the application of plaintiff stated fully the nature of his title, and if that application is a part of the policy, it is a sufficient compliance with section 2587 of the Civil Code in specifying the interest of the insured in the property.

But suppose we are not to treat the application as a part of the policy,—and there are respectable authorities to the effect that it will not usually be so treated,—and still the fact remains that defendant was fully informed as to plaintiff's title, and with full knowledge that such title did not amount to an ownership of the property (for it so affirms in its answer) deliberately described plaintiff in its policy as the owner, and a proviso that, "if the assured shall not be the sole and unconditional owner in fee of said property, \* \* \* this policy shall be null and void." Where, as in the present case, a policy of insurance is based upon the condition that the insured is the owner in fee simple, but containing a provision that the application of the insured is to be considered a part of the policy, such application clearly showing that the insured is not the owner in fee simple, the insurer, by thus accepting the risk, waives the condition in the policy as to the title, and cannot set up the want of such fee-simple title to defeat an action on the policy. *Beach, Ins. § 409; Lamb v. Insurance Co., 70 Iowa, 238, 30 N. W. 497; Insurance Co. v. Ende, 65 Tex. 118; Insurance Co. v. Camp, 71 Tex. 503, 9 S. W. 473; Van Scholck v. Insurance Co., 68 N. Y. 434; Insurance Co. v. Hick, 125 Ill. 361, 17 N. E. 792; Smith v. Insurance Co., 91 Cal. 323, 27 Pac. 738.* Either the insertion by the defendant of the statement in its policy that plaintiff was the owner of the property was a mistake on its part or a deliberate fraud upon the plaintiff. There is no imputation of fraud, and we shall not assume any such intention on the part of the defendant. Treated as a mistake of defendant, and the latter is not in a position to take advantage of it.

Holding, then, as we do, that there is nothing in the policy to prevent a recovery, provided it appears that plaintiff had an insurable interest, we address ourselves to that branch of the inquiry. It is said by law writers on the subject of insurance that "it is difficult to define accurately in what an insurable interest consists." *Bid. Ins. § 136.* It is admitted on all hands that it is not necessary that the insurer have a legal interest, but that an equitable interest is sufficient. The title, whether legal or equitable, may be defective, or even bad, provided the insurer has possession and use; even a valid equitable title is not requisite. It is held sufficient that the insured has a direct pecun-

lary interest in the preservation of the property, and that he will suffer a pecuniary loss as an immediate and proximate result of its destruction. *Bid. Ins. supra*; *Merrett v. Insurance Co.*, 42 Iowa, 11; *Herkimer v. Rice*, 27 N. Y. 173; *Riggs v. Insurance Co.*, 125 N. Y. 7, 25 N. E. 1058. In common parlance we speak of a house as being insured, but, strictly speaking, it is not the house, but the interest of the owner therein, that is insured; and whether that interest is founded upon a legal title, an equitable title, a lien, or such other lawful interest therein as will produce a direct and certain pecuniary loss to the insurer by its destruction, he has an insurable interest therein. *Tyler v. Insurance Co.*, 12 Wend. 507. Actual possession by consent of the owner, with the beneficial use of the property, has been held an insurable interest. *Horsch v. Insurance Co.*, 77 Wis. 4, 6, 7, 45 N. W. 945. In the present case the plaintiff was in the full possession and enjoyment of the property under a contract upon which he had in part paid the purchase price, and which upon his volition and completion of the contract would entitle him to a conveyance of the legal title. This enjoyment and expenditure gave him an insurable interest in the property.

2. What is the extent of plaintiff's insurable interest? Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. It is a contract of indemnity. "This principle underlies the contract, and it can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guaranty against loss or damage." *May, Ins. § 2*. It is a contract with a party to secure him against apprehended loss on account of his interest in a particular subject-matter, and not at all incidental to or transferable with the subject-matter. *Carpenter v. Insurance Co.*, 16 Pet. 495. It does not, in the absence of special contract, run with the title or possession of the subject-matter. Under such a contract reparation must be made to the insured for the loss which he has suffered through his interest in the subject-matter, and to the extent of that interest, not exceeding the limit fixed by the policy. If his interest extends to the whole of the subject-matter of the property, its value up to the sum named in the policy is the measure of his right to recover. If his interest falls short of the whole, his right is limited, not by the value of the property, but by the value of his interest. The very meaning of the term "indemnity" excludes all idea of profit to the insured. Plaintiff's insurable interest then is to be measured by the advances he had made upon his contract of purchase, viz. \$450. Had he entered into an ordinary contract to purchase the property, binding himself to pay the whole purchase price, his position would have been very different. But his contract was an option, up-

on which he had paid \$450, and which he was at liberty to abandon at any time. To the extent of his payments he had an insurable interest in the property; beyond that he was not bound. If he could insure for the full value of the property, and, in case of loss, recover such value, he could thereupon decline to purchase under his option, and thus speculate and make a profit on the transaction in violation of a fundamental law of insurance. To permit such a recovery would greatly tend to the destruction of like property under like circumstances, and open the door and tempt men to enter therein for fraudulent purposes. As the plaintiff, by his judgment, recovered \$800 on account of the loss of the house, where his interest therein was shown by the findings to be but \$450, the cause should be remanded, and the court below directed to amend the judgment by deducting therefrom the sum of \$350, and, as thus amended, the judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, and the court below directed to amend the judgment by deducting therefrom the sum of \$350, and, as thus amended, the judgment appealed from is affirmed.

# REDFIELD v. OAKLAND CONSOL. ST. RY. CO. (S. F. 106.)<sup>1</sup>

(Supreme Court of California. Feb. 28, 1896.)

NEGLIGENCE — OPINION EVIDENCE — INJURY TO WIFE — DAMAGES — INSTRUCTIONS — RECORD.

1. A question asking a witness, in an action based on the contention that defendant was negligent in operating an electric car with but one person in charge, to state from his experience what the general custom was among electric roads, as to the number of men found necessary to manage a car under similar circumstances, does not call for the opinion of witness as an expert, but practically for the opinion of others as inferred from their conduct.

2. Where the question is whether an electric railway company was negligent in operating a car with but one man in charge, it being necessary for him to get off, at the top of a grade, to change the trolley to another wire, and all the circumstances are established by unconflicting evidence, opinion evidence is not admissible.

3. The overruling of an objection to an irrelevant and immaterial question will not be held prejudicial, it not appearing what answer was given.

4. In an action by a husband for loss of his wife's services, there being evidence that before the injury she had cared for their children, refusal of an instruction that the jury could not consider the loss of service or of protection which plaintiff's children suffered by reason of the injury is not error; it being misleading, and instructions having been given clearly limiting recovery to damages suffered by plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Horace A. Redfield against the

<sup>1</sup> Rehearing granted.

Oakland Consolidated Street-Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Chickering, Thomas & Gregory, R. M. Fitzgerald, and Carl H. Abbott, for appellant. Hall & Earl, for respondent.

HAYNES, C. Upon the trial of this cause, plaintiff had judgment, and the defendant appeals therefrom and from an order denying its motion for a new trial. The action was brought by plaintiff, the husband of Adeline B. Redfield, to recover for the loss of the service of his wife from May 6 to June 29, 1893, and for necessary medical and surgical attendance during said period, resulting from an injury to the wife alleged to have been caused by the negligence of the defendant. The jury returned a verdict for \$1,700, and judgment was entered for that sum. The errors relied upon by appellant relate to the admission and exclusion of evidence, and the refusal of the court to give to the jury an instruction requested by the defendant. A brief statement of facts is necessary.

The plaintiff and his wife had two children. The wife and children visited Mountain View Cemetery on May 6, 1893, and took one of defendant's cars to return to the city of Oakland. The road upon which this car ran was a branch of defendant's main line, and the cars thereon were operated by one man, and had been for about a year, the electric motor being on the front platform, where there was also a brake. The platforms were separated from the body of the car by glass partitions extending across the car, as did also the seats, and the only way to pass from one end of the car to the other was by a step extending from one end to the other along the side of the car. For a considerable distance from the cemetery, the road consisted of a single track, and the grade was comparatively level; but, near the southerly end of the single track, there was an up grade, and at the top a switch, from which point there was a double track extending to the city. At or near the top of the grade, and before reaching the switch, the motorman shut off the power, the car having sufficient momentum to carry it past the switch, and jumped off the front platform, and got upon the rear platform, to change the trolley to the proper wire when passing the switch; and from that point there was a down grade for about half a mile to Booth street, where the track turned to the west. After adjusting the trolley at the switch, the motorman attempted to return to the front platform, but fell to the ground, and, when he got up, he was unable to catch the car, which ran with great speed down the grade to the turn at Booth street, at which point it left the track, and ran into a field, and Mrs. Redfield was thrown off, and received injuries from which she died on June 29, 1893.

Plaintiff's principal contention was that defendant was negligent in operating said car with but one man in charge. To rebut this charge of negligence, the defendant called one Leland, whose qualifications as an expert were not disputed, and put to him the following question: "If it appeared that the grade where the

accident in question occurred was about a three per cent. grade, and upon that same line, can you state what experience has shown electric street-railway companies as to the number of men requisite in handling such a car in such a place and under such conditions?" The defendant also called Mr. Grim, who was familiar with the road and car in question, and had long experience in operating electric roads, and put the following question: "From that experience, are you now able to state to this jury what the general custom is among electric roads as to the number of men found requisite and necessary to manage such a car upon such a track as this, and under the conditions under which this car was operated?" Objections to these questions were sustained. These questions called for testimony as to the experience and custom of electric street-railway companies as to whether one man was sufficient to operate such cars upon such roads. If these witnesses were regarded as experts, and their individual opinions were required, the questions were too general, and did not embrace particulars which should have been stated; and so, if custom could be shown, it must appear that the cars used, the switch to be passed, and the grade of the road at the place where the motorman was required to leave his post to change the switch, were similar. But, aside from these criticisms upon the interrogatories, customs may originate in motives of economy, or the stress of pecuniary affairs, or in recklessness, and not from considerations based upon the proper discharge of their duty towards others using their cars. These witnesses could speak only from their observation of the fact that certain roads did operate certain cars with but one man in charge, and not as to the reason or motive for doing so. But, conceding that many roads did so because they believed one man sufficient, it would still be but the testimony of the witness that the several companies indulging in the custom were of the opinion that it was not negligent to do so. These questions did not call for the opinions of these witnesses as experts, but practically called for the opinions of others as inferred from their conduct; while, if those others were called and examined, they might admit that, while indulging in the custom, they knew it was dangerous. But it was not a case where opinions were admissible as evidence. All the circumstances from which the ultimate fact of negligence upon the one hand, or due care upon the other, must be found, were established by unconflicting evidence, and such ultimate fact was a matter to be inferred by the jury from the evidence. In *Shafter v. Evans*, 53 Cal. 32, it was said: "The ultimate fact of negligence in such a case is not one to be established by the mere opinions of witnesses called to testify. The evidence of experts is not admissible." In that case this court quoted from the opinion of Chief Justice Shaw in *Glass Co. v. Lovell*, 7 Cush. 321, as follows: "In applying circumstantial evidence which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two distinct duties to perform: First, to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends upon experi-

ence. When this experience is of such a nature that it may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference." In *Sappenfield v. Railroad Co.*, 91 Cal. 49, 59, 27 Pac. 590, a witness was asked: "From your experience in driving those cars and using those pins would you say that was a safe pin,—the straight pin?" The pin was used on a horse car. An objection that it was not a proper subject for expert testimony was overruled, and the ruling was held erroneous. The court said: "When the inquiry relates to a subject whose nature is not such as to require any peculiar habits or study in order to qualify one to understand it, or when all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of the witness is not to be received in evidence. If the relation between the facts and their probable results can be determined without any special skill or training, the facts themselves must be given in evidence and the conclusions or inferences must be drawn by the jury. If the circumstances out of which the negligence is said to arise have been established by proof, or can be shown, the ultimate fact of negligence is an inference to be drawn by the jury, and is not to be established by the opinions of others." See, also, the cases there cited, and *Kauffman v. Maier*, 94 Cal. 280, par. 4, 29 Pac. 481. It is true this car had been operated by one man without accident for about a year prior to the injury to Mrs. Redfield; but as was said by Mr. Justice McFarland in *Monaghan v. Mill Co.*, 81 Cal. 193, 22 Pac. 590, where a chain suspended from a hook fell upon the plaintiff: "It is argued that it had hung suspended there for some years without accident; but that circumstance is only a matter of wonderment, and is an instance of how good luck will sometimes protect carelessness for long periods." The case of *Railway Co. v. Novak*, 9 O. C. A. 629, 61 Fed. 573, cited by appellant, is distinguishable from this case. The case there was whether one brakeman was sufficient to check or control the speed of a train by means of hand brakes. That question could only be answered correctly by one who had experience; but it would hardly require more than ordinary intelligence and observation to determine whether a railroad company would be guilty of negligence to passengers upon its road if it should impose upon the engineer the performance of a duty which would compel him to leave his engine while the train was in motion. These experts were, however, permitted, without objection, to testify that, in their opinion, one man could operate the car in question, at the place in question, with a requisite degree of safety to the passengers; and it is not perceived that evidence as to the custom of electric roads would have added to the weight of this testimony, if it were competent.

One of defendant's witnesses was asked upon cross-examination the following: "Don't you know that there are more women visit that cemetery than men?" An objection thereto by the defendant that it was immaterial and irrelevant was overruled, and an exception taken. The witness answered, "Yes, sir." The objec-

tion should have been sustained. Not only is it immaterial whether more women than men ride upon the cars of the defendant upon that part of its road, but the question was not restricted to those who used defendant's cars in visiting the cemetery, but was so general as to include all modes or means of going there. It is not every error, in ruling upon questions of evidence, however, that will justify a reversal of the judgment. If it were otherwise, affirmances upon appeal would be comparatively rare. Section 475, Code Civ. Proc., provides that: "The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." The question involved was the alleged negligence of the defendant in operating its cars with only one man in charge. All the circumstances connected with the accident were shown by the evidence, and were such as to show conclusively that it was liable to occur at any time. Whether the passengers were all men or all women could not avoid or affect the necessity of the motorman leaving his post, and going to the other end of the car, to adjust the trolley in passing the switch. If the question had not been put to the witness, or if defendant's objection had been sustained, the result could not have been different. It is not argued that the amount of damages awarded was or could have been affected by the answer of the witness, nor that the damages are excessive; but the argument is that it could not legitimately affect the question of negligence. We are convinced that not only could it not legitimately affect the question of negligence, but that it did not affect it, and that defendant was not prejudiced by the error complained of.

Appellant also contends that the court erred in refusing to give the following instruction to the jury, as requested by the defendant: "In this action you are hereby instructed that you cannot consider the loss of service or of protection which the plaintiff's children suffered by reason of the injury to Mrs. Redfield." This contention is based upon the fact that the plaintiff testified that his wife was manager of his household, and did all the housework, cared for the children, made their clothing and hats, kept them clean, neat, and tidy, gave them piano lessons, and, to some extent, vocal lessons and lessons in drawing and painting, all which she was competent to do, attended to their moral training and habits, corrected them for their faults, taught them their prayers, and assisted them to some extent in their studies. It is true that no injury sustained by the children could be compensated or considered in this action; but as the duty of caring for and educating his children would devolve upon the plaintiff during her disability, and for which he was at all times responsible, it was competent for him to show, in estimating the value of the wife's services to him, the character of his household, the fact that he had children, and the character of her services to and for them; just as it would have been competent for the defendant to show that plaintiff kept servants who attended to all housekeeping affairs, a competent governess who attended to the training

do all the family sewing, and that the wife's position was merely ornamental. It is not contended that the evidence above stated was incompetent, or that it did not tend to show the value of the wife's services to the plaintiff, and therefore it cannot be assumed that the jury considered it for any other purpose. Besides, in regard to this element of the plaintiff's injury, the court instructed the jury that, if they found the wife had been injured through the negligence of the defendant, the plaintiff "is entitled to recover such damages, and such damages only, as he may have suffered, if any, through the loss of the services of his wife, if any, resulting from such injuries, as well as such reasonable costs and expenses, etc. \* \* \* You are permitted to determine what pecuniary loss the plaintiff suffered by the illness of the deceased from the 6th day of May to the 29th day of June, and to find in that amount, and in no greater amount. \* \* \* You are to find the actual pecuniary damage sustained by him, and no more." If there was anything in the evidence which might have misled the jury,—and I think there was not,—these instructions specifically confined their estimate of damages to such as the husband sustained, and rendered the instruction requested to be given wholly unnecessary. But the instruction as requested would have been misleading. The jury might readily have inferred from it that all the evidence relating to the wife's services to the children was not to be considered for any purpose. If the instruction had been that they could not consider any injury or damage suffered by the children resulting from the loss of service to them, but that such loss of service could only be considered so far as it affected the value of her services to the plaintiff, it would have been unobjectionable, though unnecessary in view of the instructions given.

No other questions are made by counsel for appellant. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, O.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

# **EAMES v. HAVER. (L. A. 50.) 1**

(Supreme Court of California. Feb. 28, 1896.)

## **NEW TRIAL—REMITTITUR IN APPELLATE COURT—CONTRACT—TENDER OF PERFORMANCE.**

1. A new trial should not be ordered for an error in an instruction as to the measure of damages, by the omission of a credit admitted by the pleadings, where the successful party offers to remit the amount of the credit from the recovery, though such offer is made for the first time in the appellate court.

2. Under a contract for the exchange of stocks on the demand of one party, his demand and offer to produce the stocks on his part—his ability to do so being shown—is a sufficient tender of performance, where the other party refuses the exchange and denies the contract.

<sup>1</sup> Rehearing denied.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by A. W. Eames against S. C. Haver. From an order granting a new trial, plaintiff appeals. Modified.

Frank A. Prescott, for appellant. C. C. Bennett, for respondent.

**VANOLIEF, C.** The complaint in this action may be stated substantially as follows: In May, 1893, the defendant purchased from plaintiff 20 acres of land with orange grove thereon, for which he was to pay \$8,000 in cash, and assign and deliver to plaintiff 100 shares of the capital stock of a corporation named Bear Valley & Alessandro Development Company. As a part of the transaction, however, it was agreed that on demand of the plaintiff the defendant would exchange for said stock an equal number of shares of the stock of a corporation named Bear Valley Irrigation Company; the expense of such exchange, not exceeding 5 per cent. of the value of the last-mentioned stock, to be paid by plaintiff to defendant as brokerage. At the time the land was conveyed by plaintiff (May 6, 1893), defendant paid the \$8,000, and also assigned and delivered to plaintiff 100 shares of the stock of the Bear Valley & Alessandro Development Company, which will hereinafter be called the "Development Company." Defendant's promise to exchange stock as aforesaid was a part of the consideration for the conveyance of the land by the plaintiff. Thereafter, within a reasonable time, on or about June 9, 1893, plaintiff demanded of defendant an exchange of stock according to the agreement; tendering to defendant said 100 shares of development company stock, and 5 per cent. on the value of 100 shares of the irrigation stock. But defendant refused to make the exchange, denying the alleged agreement to make such exchange. That at the time of said tender and demand 100 shares of the stock of the irrigation company were of the value of \$10,000, and the stock of the development company was of no value whatever. That since said demand and refusal both the irrigation company and the development company have become insolvent, and the stock of neither has any market value. Plaintiff alleged that he was damaged by defendant's breach of the agreement to exchange stocks in a sum equal to the difference of value of said stocks, to wit, the sum of \$7,910, at the time of said demand and refusal, and prays judgment for that sum. In his answer, defendant denies the alleged agreement to exchange stocks; denies the alleged tender and demand by plaintiff; also, denies that one hundred shares of the irrigation stock was of greater value than \$4,000 at the time of the alleged demand and tender by plaintiff; and further denies that 100 shares of the stock of the development company was then "of less value than \$4,000."



The cause was tried by a jury, whose verdict was in favor of plaintiff, assessing the damages at \$4,850, for which sum judgment was rendered against the defendant. Defendant moved for a new trial, which was granted by the following order: "The motion for new trial heretofore made in this case upon the part of defendant will be granted, upon the following grounds, to wit: The court erred in giving instructions Nos. 3, 4, and 6, at the request of the plaintiff, as each of said instructions ignored the 5 per cent. commission which defendant was entitled to under the testimony and plaintiff's own pleadings. (2) Upon the insufficiency of the evidence to justify the verdict, in this: that the weight of the evidence does not support the verdict as to the difference in value of the stock of the Bear Valley & Alessandro Development Company and the stock of the Bear Valley Irrigation Company."

1. The instructions "Nos. 3, 4, and 6," referred to in the order as being erroneous, related to the measure of damages, and were to the effect that, if the market value of the irrigation stock exceeded that of the development stock at the time of the demand of plaintiff for an exchange of stocks, the difference of such values would be the measure of the damages suffered by plaintiff, and that plaintiff was entitled to recover as damages a sum equal to such difference. It is admitted that a brokerage, not exceeding 5 per cent. of the value of the irrigation stock, should have been deducted from the excess of the value of that stock over that of the development stock, and therefore that the measure of damages, as stated in the instruction, is too large, by the amount of such brokerage. Appellant contends that this error can be corrected by a modification of the judgment, without any necessity for a new trial, and offers here, for the first time, to remit from the judgment a sum equal to 5 per cent. on the greatest possible value attributed to 100 shares of the irrigation stock by the complaint, or by any part of the evidence. In the complaint the value of 100 shares of the irrigation stock, at the time of plaintiff's demand for the exchange, is alleged to have been \$10,000, and the answer of the defendant denies that it was then of any greater value than \$4,000. The highest estimate of the value of that stock (100 shares) at any time, by defendant's witnesses, was \$10,500, and appellant offers to remit from the judgment a sum equal to 5 per cent. of this valuation, which would be \$525; and I think such remittance would fully compensate the respondent for all possible injury resulting from the alleged erroneous instructions, except his costs of this appeal. Considering all the circumstances, I think the offer of appellant to remit \$525 from the judgment, which is equal to 5 per cent. of the value of the irrigation stock, is quite liberal, and that respondent should be required to accept it on the condition that appellant pay all costs of the appeal. *Atherton v. Fowler*, 46

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Cal. 320; *Bank v. Chester*, 55 Cal. 49; *Woods v. Merrill*, 57 Cal. 435. See, also, *Davis v. Pacific Co.*, 98 Cal. 18, 32 Pac. 708. Perhaps the condition that appellant pay all costs of the appeal would not be just, if he had offered to remit the \$525 in the lower court before a new trial was ordered.

2. Nor do I think the second ground upon which the new trial was granted can be sustained, namely, insufficiency of the evidence to justify the verdict as to the difference in value of the stock of the development company, and that of the irrigation company. The court evidently overlooked the effect of the pleadings upon the value of the development stock. The complaint alleges that at the time the exchange of stocks was demanded 100 shares of the development stock was of no value. The answer denies that 100 shares of the development stock was then, or ever, of less value than \$4,000. Thus, the defendant failed to deny the allegation of the complaint as to the value of the development stock, except to the extent of \$4,000, and, by statutory implication, admits the truth of the allegation in the complaint, except to that extent. Besides, there is no evidence tending to prove that the market value of the development stock ever exceeded \$40 per share. The defendant who was a broker dealing in stocks, and who testified at greater length than any other witness on either side, said nothing as to the market value of the development stock, except that he had never represented to plaintiff that it had any market value. The only other witnesses on the part of the defendant—Mr. Waters and Mr. Sterling—each testified that he did not know that the development stock ever had any market value, though Mr. Waters said he had heard of one private sale at \$105 per share at some time between March and September, 1893, whereas plaintiff's demand for the exchange of stocks was on June 9, 1893. On the part of the plaintiff, Mr. Granger testified that he was a stockbroker, and knew the market value of the stocks in question in May and June, 1893, and that on and about the 9th day of June, 1893, the market value of the irrigation company stock ranged from \$105 to \$120 per share, and at the same time the development stock had no market value, "because there was no chance to sell any of it. \* \* \* It could be bought for almost any price"; that it had been offered to him at 40 cents per share. There was no evidence tending to prove that either its market value or its intrinsic value was as much as \$40 per share at any time. It follows that neither upon the pleadings nor by the evidence could it have been found or presumed that 100 shares of the development company stock was of greater real or market value than \$4,000 at any time during May and June, 1893. As to the market value of 100 shares of the stock of the irrigation company at the time of plaintiff's demand for the exchange of stock, only two witnesses—Mr. Granger, for plaintiff, and Mr. Waters, for de-

was \$10,000 to \$12,000, and Mr. Waters that it was \$9,500 to \$10,500. The difference between this lowest estimate (\$9,500) and the highest estimate that could have been made of the value of 100 shares of the development stock (\$4,000) is \$5,500, which is \$650 more than the verdict of the jury. So it is not improbable that the jury did deduct the brokerage commission from the difference in values of the stocks of the two corporations, notwithstanding the omission of the court to instruct them so to do; but, however this may have been, the proffered remission of \$525 from the judgment, and payment of costs of appeal, by plaintiff, will surely compensate defendant for all detriment suffered by him in consequence of the alleged error in the instructions for which the new trial was granted.

3. It is contended, however, that the order granting a new trial was justified on another ground than those stated by the court, to wit, that the court erred in giving the twelfth instruction at request of plaintiff, as follows: "(12) The fact that the stock of plaintiff was pledged as security in the hands of others has no bearing upon the case, and if the jury find that the plaintiff was able and willing to furnish his part of the exchange, and offered to do so, and the defendant refused to make such exchange, then plaintiff was excused from making an absolute proffer of the actual stock." It appeared from the evidence that the identical 100 shares of development stock delivered to plaintiff had been pledged by him to secure a debt, with the understanding that it was to be exchanged for irrigation stock, as per agreement. Mr. Granger, who demanded the exchange as agent for plaintiff, testified that the pledgee was willing and anxious to have the exchange made, and offered to permit it to be made, and that when he demanded the exchange he knew he could get the pledged stock and deliver it to defendant, but that when he demanded the exchange, and offered to deliver the development stock, the defendant denied any agreement or obligation on his part to make the exchange, and positively refused to exchange, so that there was no occasion or necessity for producing and exhibiting to the view of the plaintiff the certificate of the development stock, and that defendant made no objection to his offer to deliver the stock on the ground that it was not actually produced at the time it was offered and the exchange demanded. In connection with the instruction in question, the court also instructed the jury that, if they found the facts testified to by Mr. Granger to be true, the conduct of the defendant waived or excused the actual production of the stock, and that the offer to produce it, with the ability to do so, was a sufficient tender. Under these circumstances, I think the in-

which I have underscored, in the third line of the instruction, be omitted, as I think it should be in the reading, all obscurity would thereby be removed, and, so read, the instruction is clearly correct. *Hanson v. Slaven*, 98 Cal. 383, 33 Pac. 266. I think the order granting a new trial should be reversed, on the conditions that within 10 days after the filing of the remittitur in the court below the appellant remit from the judgment the sum of \$525, and pay all costs of this appeal; but, if these conditions are not performed by appellant, said order should stand affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from will be reversed, on the conditions that, within 10 days after the filing of the remittitur in the court below, the appellant remit from the judgment herein against the respondent the sum of \$525, and pay all costs of this appeal; but, if these conditions are not fully performed by the appellant within the period above named, then said order shall stand affirmed.

#### GETT v. SUPERVISORS OF SACRAMENTO COUNTY. (S. F. 381.)

(Supreme Court of California. Feb. 25, 1896.)

#### COUNTIES — CLASSIFICATION — PRIMARY ELECTION LAW.

The classification of counties referred to in the act of March 27, 1895 (St. 1895, p. 207), relating to primary elections, and which is made to apply only to counties of the first and second classes, is not that contained in section 4006 of the Political Code as originally enacted, but that made by the act of March 14, 1883 (St. 1883, p. 299), which revised the entire law on the subject of county government, and for the most part superseded the old law.

In bank. Proceeding by W. A. Gett for writ of mandate to the supervisors of Sacramento county. Denied.

D. E. Alexander and W. A. Gett, Jr., for petitioner. F. D. Ryan and J. Charles Jones, for respondent.

BEATTY, C. J. This is an original proceeding in which the petitioner asks a writ of mandate to the supervisors of Sacramento county, commanding them to perform the duties imposed upon election commissioners and boards of supervisors by the act of March 27, 1895 (St. 1895, p. 207), relating to primary elections. The act, by its express terms, is restricted to counties of the first and second classes (section 26, p. 218), and consequently has no application to Sacramento county or any other, except the city and county of San Francisco and the county of Los Angeles, unless the contention of petitioner can be sus-

tained that the classes referred to in said section 28 are those defined in section 4006 of the Political Code as originally enacted, which reads as follows: "Sec. 4006. For purposes other than roads and highways the counties of this state are classified as follows: (1) Those containing twenty thousand inhabitants or over constitute the first class; (2) those containing eight thousand and under twenty thousand inhabitants constitute the second class; and, (3) those containing less than eight thousand inhabitants constitute the third class." This section was a part of title 2 of part 4 of the Political Code, relating to the government of counties as the same was regulated prior to the adoption of the present constitution. By the act of March 14, 1883, entitled "An act to establish a uniform system of county and township government" (St. 1883, p. 299), the whole law upon this subject was revised, and the old law in most respects superseded. This being so, it is extremely doubtful whether the classification established by section 4006, supra, is continued in force for any purpose whatever; but, conceding that it may be in force with respect to some matters regulated by statutes passed prior to the new classification contained in the act of 1883, we have no doubt that the reference in the primary election law is to the classes defined in the latest county government act, and not to the classes established by section 4006 of the Political Code. It follows, therefore, that neither this petitioner nor the respondents have any interest in the determination of the question which they have attempted to submit, i. e. the constitutionality of the act of March 27, 1895, and that it ought not to be decided upon such attempted submission. Writ denied, and proceeding dismissed.

We concur: McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

**SOUTHERN CAL. RY. CO. v. SOUTHERN PAC. R. CO. et al. (No. 19,553.)**

(Supreme Court of California. Feb. 27, 1896.)

**DEED—MUNICIPAL CORPORATIONS—ORDINANCE—INJUNCTION—EMINENT DOMAIN.**

1. After a conveyance in fee of a strip of land known as a certain avenue, subject only to an easement in the public for road purposes, the grantor has no interest therein which he can convey to a subsequent grantee.

2. An ordinance granting a railroad company the right to enter upon and construct a track through a public street does not operate to justify wrongful acts of such company as trespassers prior to the passage of such ordinance.

3. Where defendant railroad corporation has been perpetually enjoined from entering upon and constructing its road over private lands, such injunction must be modified so far as it prohibits the exercise of rights subsequently acquired by defendant under right of eminent domain.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by the Southern California Railway Company, a corporation, against the Southern Pacific Railroad Company and the Pacific Improvement Company, corporations, and others, to restrain the construction or maintenance of a railroad track. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Harris & Gregg, for appellants. W. J. Hunsaker, for respondent.

SEARLS, C. This action is brought to restrain the defendants from constructing or maintaining a railroad track, and to compel them to remove all tracks and lines of track from a certain strip of land 100 feet in width, and commonly known as "Park Avenue," situate and being in the county of San Bernardino, and owned, possessed, and appropriated by the plaintiff for the purposes of a railroad; also, to recover from defendants \$1,000 damages for injuries to said strip of land. The plaintiff had a decree in its favor, whereby it was adjudged that it was the owner of the land described in the complaint; that neither of the defendants had any right, title, or interest therein or thereto, and perpetually restraining them and each of them from entering upon said land and premises, and from constructing, maintaining, or operating any line or lines of railroad, etc., thereon, and requiring them to remove therefrom, within 10 days, all roads, tracks, ties, rails, switches, etc., and awarding plaintiff damages in the sum of one dollar, and denying to defendants the relief sought in their answer and cross complaint. Defendants appeal from the decree, and from an order denying their motion for a new trial.

A very few facts will serve to illustrate the only important questions involved in this case. Plaintiff and defendant the Southern Pacific Railroad Company are both railroad corporations, and the defendant the Pacific Improvement Company is a corporation, and, as a contractor, was performing for the other corporation defendant the grading, track-laying, etc., spoken of hereafter. The city of Redlands is a municipal corporation in the county of San Bernardino, and the strip of land described in the complaint, and known as "Park Avenue," is a public street in said city. In 1886 one W. F. Summers was the owner in fee of the tract of land described as "Lugonia Park," including Park avenue aforesaid. In December, 1886, Summers contracted to sell all the land described in the complaint to George L. Cook and A. L. Park within eight months. Cook and Clark, on the 28th day of November, 1887, conveyed the strip of land, 100 feet wide, known as "Park Avenue," to the Central Railway Company, reserving from the

conveyance "the right to use all of the above land not used by the railroad track for a public road or drive." The Central Railway Company constructed a railroad longitudinally through the center of said Park avenue, and the present plaintiff, by consolidation, has succeeded to all the rights and property of the former owner. Summers consummated his agreement to convey to Cook and Park by a deed of conveyance. The railroad of plaintiff is an ordinary steam railroad, constructed and operated for the transportation of freight and carriage of passengers. Subsequent to the purchase of the fee in said avenue by the grantor of plaintiff, and subsequent to the construction of its railroad, the defendant railroad corporation projected and located a like railroad, for like purposes through and over said Park avenue.

The basis of defendants' claim to a right in Park avenue is: (1) A conveyance to the Southern Pacific Railroad Company by deed of September 18, 1891, by W. F. Summers, of a strip of land  $30\frac{1}{2}$  feet wide on the south side of said Park avenue, reserving all of the above-described land not occupied by the railroad track for a public road or drive. (2) An ordinance of the board of trustees of the city of Redlands passed March 2, 1892, authorizing the Southern Pacific Railroad Company to lay down, maintain, and use a railroad track upon and along the southerly  $30\frac{1}{2}$  feet of Park avenue. This action was commenced December 31, 1891, and on the 23d day of November, 1892, defendants, by a supplemental answer and supplemental cross complaint, set up the passage of the ordinance above mentioned. The allegations of the complaint and findings of the court are sufficient to warrant the judgment if defendants were not entitled to enter upon and interfere with the track, right of way, and property of plaintiff thereon. The deed to plaintiff's predecessor being prior in time to that to the railroad defendant, and conveying in fee the whole of Park avenue, subject only to an easement in the public for road purposes, the defendants acquired no right thereto by the subsequent conveyance; and hence, at the date of their intrusion upon the property and rights of plaintiff, defendants were trespassers.

Whatever rights were conferred upon defendants by the ordinance granting to the Southern Pacific Railroad Company the right to construct its road through Park avenue, it could not operate to justify or extenuate the wrongful acts of the defendants perpetrated many months prior to the passage of such ordinance. So, too, it is probable that defendants could not by and under such an ordinance so far justify their active interference with the plant of plaintiff, and thereby prevent the issuing of a perpetual injunction against them. We deem this question of

little importance here, for these reasons: Subsequent to the rendition of the decree and perpetual injunction in this case, the Southern Pacific Railroad Company commenced an action against the plaintiff herein, under the right of eminent domain, to condemn a right of way for its railroad over the southerly side of this same Park avenue, and such proceedings were had therein that a right of way was condemned to the plaintiff therein for its said railroad through said avenue; and upon an appeal to this court the judgment of condemnation was affirmed, on the 31st day of January, 1896. See case No. 19,500, 43 Pac. 602. By virtue of the title acquired by the Southern Pacific Railroad Company in said condemnation proceedings, it will become the duty of the superior court in and for the county of San Bernardino, upon application, to so modify its perpetual injunction herein that it shall not apply to or prohibit the exercise of the rights obtained under the judgment in condemnation.

It follows that except as to the matter of one dollar damages awarded to plaintiff, and as to costs, this cause is and has become mainly a moot case, not calling for extended discussion. We think the evidence justified the findings and the latter support the decree. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

SOUTHERN CAL. RY. CO. et al. v. SOUTHERN PAC. R. CO. et al. (No. 19,552)

(Supreme Court of California. Feb. 27, 1896.)

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by the Southern California Railway Company and another against the Southern Pacific Railroad Company and the Pacific Improvement Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Harris & Gregg, for appellants. W. J. Hunsaker, for respondents.

PER CURIAM. This action is precisely the same as No. 19,553, between the same parties, this day decided (43 Pac. 1123), except that in this action, which was commenced after No. 19,553, one F. H. Pattee, who is shown to have become an abutting landowner on Park avenue after the other suit was brought, is made a party plaintiff. Defendants, in addition to a like answer and cross complaint as in the other case, pleaded the pendency of that action in abatement of this. The finding was against the defendants on this plea, and in all other respects the findings and judgment are the same in this cause as in that. For the reasons given in said cause No. 19,553, between all of the same parties except said Pattee, the judgment and order appealed from herein are affirmed.

**BUCKMAN v. LANDERS et al. (S. F. 240.)**  
(Supreme Court of California. Feb. 25, 1896.)  
**MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—**  
**ASSESSMENTS—ACTIONS TO ENFORCE**  
**—EVIDENCE—DEFENSE.**

1. Under St. 1889, p. 168 (Street Law, § 12), making the warrant, assessment, certificate and diagram, with affidavit of demand and nonpayment of a street assessment, prima facie evidence of plaintiff's right to recover in an action on the assessment, a finding of demand publicly made on the lot is warranted by the affidavit alone.

2. Error in omitting from a street assessment one of the lots fronting on the street cannot be urged as a defense in an action on the assessment, since the remedy was by appeal from the assessment.

3. Prima facie evidence afforded by the assessment itself warrants a finding that the contractor performed the work to the satisfaction of the superintendent of streets, notwithstanding the certificate of the city engineer to the contrary.

4. An extension granted for performance of a contract for street work need not be indorsed on the contract before the expiration of the time originally fixed therein for completion of the work.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by one Buckman against Landers and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Smith & Murasky, for appellants. Wm. H. Chapman and E. G. Knapp, for respondent.

**HARRISON, J.** Action upon a street assessment in San Francisco. The finding of the court that Army street, upon which the work in question was done, is a public street, is not specified in the statement as unsupported by the evidence, and the finding must therefore be accepted as correct.

Section 12 of the street law (St. 1889, p. 168) declares: "The warrant, assessment, certificate and diagram, with the affidavit of demand and non-payment, shall be held prima facie evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment and diagram are based, and like evidence of the right of the plaintiff to recover in the action." In the absence of any other evidence, the prima facie character of this evidence was sufficient to sustain the finding of the court that the agent of the plaintiff went upon the lot assessed, and, while there, publicly demanded payment of the assessment. *Himmelman v. Hoadley*, 44 Cal. 213; *Dyer v. Brogan*, 57 Cal. 234. The testimony that no personal demand was made upon the defendants did not impair the statement in the affidavit that demand was made upon the lot.

An appeal from the assessment that had been originally made for the work by the superintendent of streets was sustained by the board of supervisors, and the assessment set

aside; and the assessment upon which the present action is brought was thereafter made by the superintendent, in accordance with the directions of the board of supervisors. It is now contended by the appellants that this assessment is invalid, for the reason that certain lots which should bear a portion of the expense of the work are not included therein. The appellants herein could, however, have appealed from this assessment, and could have had the error, if it was such, corrected upon such appeal by the board of supervisors. *People v. O'Neil*, 51 Cal. 91. Their failure to so appeal deprives them of the right to assign such error in an action to enforce the assessment. The mere omission from the assessment of one of the lots fronting upon the street does not of itself render the assessment void upon its face. *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71; *Dowling v. Conniff*, 103 Cal. 75, 36 Pac. 1034; *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781. The assessment was prima facie evidence that the contractor had fulfilled his contract to the satisfaction of the superintendent of streets, and, in the absence of any other evidence, the court was authorized to find in accordance therewith. The prima facie character of this evidence was not overcome by the certificate of the engineer. *Williams v. Society*, 97 Cal. 122, 31 Pac. 908.

The record shows that the work was completed within the time fixed for its completion by the superintendent of streets and the subsequent extensions thereof authorized by the board of supervisors. It does not appear at what time the superintendent indorsed these extensions upon the contract, and the prima facie character of the documentary evidence introduced includes the "regularity and correctness" of his acts. It was not requisite that he should indorse an extension upon the contract before the expiration of the time originally fixed therein. *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885; *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

**HARDY et al. v. FIRST NAT. BANK OF NEWTON.**

(Supreme Court of Kansas. March 7, 1896.)  
**NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER—**  
**INDORSEMENT WITHOUT RECOURSE.**

1. L. and G. were the president and the cashier, respectively, of plaintiff bank, and part owners of the negotiable note sued on, which was taken in the name of S. by the procurement of L. and G., who had full knowledge of the transaction in which it was given. *Held*, that the indorsement of the note by S. without recourse did not operate to transfer it to the bank free from defenses existing as between the original parties to it.

2. B., the bona fide payee and holder of a negotiable note, indorsed it without recourse to the plaintiff bank, the president and the cashier

of which had full knowledge of and some interest in the transaction in which the note was given. Held, that the indorsement of the note by B. operated to transfer it to the bank free from any defenses arising from the connection of the president and the cashier with the transaction.

(Syllabus by the Court.)

Error from district court, Harvey county; L. Houk, Judge.

Action by the First National Bank of Newton against George W. Hardy and others. From a judgment for plaintiff, defendants bring error. Modified and reversed.

The action in the court below was brought by the bank against George W. Hardy, James McKinstry, A. B. Gilbert, Hiram Constant, F. E. Carr, W. T. Atkinson, and J. L. Penny to recover judgment upon two promissory notes signed by the defendants, and also by S. Lehman and T. J. Templer, each dated May 13, 1887, and due six months after date, with interest at 8 per cent. per annum from date; one of them being for \$2,000, payable to the order of M. L. Stewart, and indorsed by him without recourse; and the other being for \$4,000, payable to the order of Frances L. Briggs, and indorsed by her without recourse. There was an indorsement of payment of \$200 on the former by W. K. F. Villa and \$400 on the latter by W. K. F. Villa. Several defenses were set up in the answer, and it appears that the transaction resulting in the giving of the notes was the same as that which was the subject of controversy in *Constant v. Lehman*, 52 Kan. 227, 34 Pac. 745. The defendants, having the burden of proof, introduced their evidence, but a demurrer thereto was sustained, and judgment was entered June 23, 1891, against the defendants, except A. B. Gilbert, for \$4,784; it being stated in the decree that the balance of said notes had been paid by other parties, said sum being presumably six-tenths of the principal of said notes and the interest accrued thereon. The \$2,000 note was part of the \$12,000 paid and to be paid for what was called the "Stewart Forty," which was east of Newton, and the \$4,000 note was part of the \$16,000 consideration paid and to be paid for what was called the "Briggs Forty," lying west of Newton. Frances L. Briggs owned the latter tract, but one W. C. Moore had obtained for \$250 an option for its purchase at \$15,000. But, although the Stewart 40 stood in the name of M. L. Stewart, yet in equity he owned a one-fourth interest only, and the remaining three-fourths belonged to Gilbert, Lehman, and Hildreth in equal shares. One of the defenses relied on was, in substance, that Gilbert and Lehman falsely pretended to the other makers of the notes and Villa that Stewart owned the 40-acre tract east of Newton, but that they would go in and form a syndicate of 10, each taking an equal interest in it, and also in the Briggs 40; and that they knew at the same time that Moore had an option for the purchase of the Briggs 40 for \$15,000, for which the syndicate was to

pay \$16,000; and that they concealed all knowledge of their interest in the Stewart 40 and of the option of Moore in the Briggs 40. It was further claimed that the other defendants resided at Hutchinson, and that they depended largely upon Lehman and Gilbert, who were president and cashier, respectively, of the plaintiff bank, and influential business men at Newton, to give correct information as to the prospects of the city, and the value of real estate in its vicinity; that said land was not in fact worth more than \$30 per acre; and that, said Lehman and Gilbert being such officers, the bank was not an indorsee and purchaser of the notes in good faith.

McKinstry & Fairchild and Bowman & Bucher, for plaintiffs in error. Willard Kline and Peters & Nicholson, for defendant in error.

MARTIN, C. J. (after stating the facts).  
1. We will first consider the case as to the \$2,000 note. It was alleged in the answer that M. L. Stewart was at the time the purchase was made a partner of Gilbert and Lehman in the tract called the "Stewart Forty"; that they had full power to dispose of it as they chose; that Stewart knew they were selling it to the defendants, and that they were pretending to become joint purchasers of said lands. It is contended on the part of the bank that Stewart was a bona fide owner and holder of the note, and that the bank, by the indorsement, obtained a good title to it, free from any defenses; but the evidence of Stewart shows that he had full knowledge of the fact that Gilbert was acting in a dual capacity as vendor and vendee of the property, which was a dishonest relation, unless all interested parties were fully apprised of it. In *Michoud v. Girod*, 4 How. 503, 555, Justice Wayne, delivering the opinion of the court, said that the law "prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells." And this is a well-recognized principle, both at law and in equity. And, as Lehman and Gilbert were the managing officers of the bank, and the owners of a one-half interest in the note, the bank was chargeable with notice of all equities between the original parties to it. *Mann v. Bank*, 30 Kan. 412, 420, 421, 1 Pac. 579, as modified in same case, 34 Kan. 746, 751, 752, 10 Pac. 150. We therefore hold that the evidence should have been submitted to the jury as to this note.

2. The complaint as to the \$4,000 note is that Lehman and Gilbert knew that Moore held an option for the purchase of the Briggs

40 at \$15,000, which was to be sold to the syndicate for \$16,000, and that this was not disclosed. Moore testified that he made no secret of it about Newton, and it is doubtful if a full knowledge of the fact would have made any difference in the action of the defendants. Certainly Lehman and Gilbert had nothing to gain by the profit which Moore might make out of the transaction, unless it was in obtaining his assistance in the selling of the Stewart 40 by putting both tracts in together; but, besides this, there is no suspicion of fraud attaching to Frances L. Briggs, the payee of this note. And, even if we should treat Lehman and Gilbert as guilty of any fraud with reference to it, yet the bank might obtain a good title to the note by her indorsement, for it is well settled that "the purchaser of a negotiable instrument from a bona fide holder for value acquires as good a title as the innocent holder had, and may recover thereon, although he may have had notice of infirmities in the note when he took it." *Bodley v. Bank*, 38 Kan. 59, 16 Pac. 88; *Porter v. Steel Co.*, 122 U. S. 267, 233, 7 Sup. Ct. 1206; *Scotland Co. v. Hill*, 132 U. S. 107, 117, 10 Sup. Ct. 26. In the absence of evidence to the contrary, it must be presumed that the indorsement was made before maturity, and that the bank is a bona fide holder for value. *Rahm v. Bridge Manufactory*, 16 Kan. 530.

The court below will be directed to modify its judgment by allowing \$3,189.33 as of date June 23, 1891, on the \$4,000 note, and the judgment will be reversed as to the amount allowed on the \$2,000 note, and the case remanded for a new trial thereon in accordance with the principles announced in this case and in that of *Constant v. Lehman*, 52 Kan. 227, 34 Pac. 745. All the justices concurring.

#### RICHARDSON v. JONES et al.

(Supreme Court of Kansas. March 7, 1896.)

#### CHATTEL MORTGAGE—RETENTION OF POSSESSION—POWER TO SELL—VALIDITY.

A chattel mortgage on three stallions, kept for breeding purposes, in which it is provided that the mortgagor may retain possession of the mortgaged property until default, or the purchaser deems himself insecure; and which also contains the following provision: "Party of the first part has the privilege to sell one or all of said stallions, the proceeds of said sale to be applied in payment of said notes,"—where possession of the mortgaged property is retained by the mortgagor, is inoperative and void as to other creditors.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action by J. J. Richardson against William C. Jones and others. From a judgment for defendants, plaintiff brings error. Affirmed.

This action was brought by J. J. Richardson, as plaintiff, on the bond of William C.

Jones, as marshal of the United States for the district of Kansas, to recover the value of three stallions, alleged to have been taken by him on or about the 14th day of January, 1889, and converted to his own use. It appears from the evidence that these stallions and another one were sold by Robert Holloway, who resided at Alexis, Ill., to Lee Stanford, who lived at Lyons, Kan. On the 16th day of February, 1887, a mortgage was given by Stanford to Holloway on the four stallions to secure the payment of \$4,500, which was filed in the office of the register of deeds of Rice county on February 28, 1887. An affidavit to renew this mortgage was filed more than 30 days before the expiration of a year from the date of filing it. It is claimed by the plaintiff that on or about the 28th day of July, 1888, the three horses, to recover the value of which this suit was brought, were sold by Stanford to his brother-in-law, J. B. Chalfant, who thereupon gave to Stanford four promissory notes for \$1,000 each, with 6 per cent. interest, due in one, two, three, and four years, respectively, and at the same time executed a chattel mortgage on the horses to secure the payment of the notes. The mortgage contains the following provision, inserted immediately after the description of the property: "Party of the first part has the privilege to sell one or all of said stallions, the proceeds of said sale to be applied in payment of said notes." It then contains the usual provisions to the effect that the mortgagor should retain possession of the property until default, or until the mortgagee deemed himself insecure. The plaintiff, who at that time resided at Leoti, in Wichita county, claims to have purchased the four promissory notes about August 8, 1888, and to have paid \$2,100 in cash for them. On the 13th of August, 1888, an action was brought by Holloway against Stanford in the circuit court of the United States for the district of Kansas to recover the amount due him for the horses. An order of attachment was issued, and under it the defendant Jones, as marshal, attached the four horses. On the 10th of January, 1889, judgment was rendered in favor of Holloway against Stanford for \$4,413, and ordering the marshal to sell the attached property to satisfy the same. Afterwards, on the 14th of January, 1889, the plaintiff demanded the three horses described in the chattel mortgage given by Stanford to Chalfant from the marshal, who refused to deliver them, but afterwards, on the 31st of January, sold them under a special execution. The case was tried to a jury, and the verdict and judgment rendered in favor of the defendants. The plaintiff brings the case to this court, and alleges numerous errors.

Jetmore & Jetmore, for plaintiff in error. Keeler, Welch & Hite and Eugene Hagan, for defendants in error.

ALLEN, J. (after stating the facts). It is only necessary to consider a single question presented by the record before us. The plaintiff's claim rests entirely on the chattel mortgage given by Chalfant to Stanford. It is not claimed that the plaintiff ever had possession of the property, either before or after its seizure by the marshal. There is no direct testimony in the record as to the transaction between Chalfant and Stanford. The only evidence with reference to it is the promissory notes and the chattel mortgage, which were offered in evidence, and the testimony as to surrounding circumstances, and their declarations with reference to the matter. There is no evidence showing that any consideration other than the notes and mortgage passed from Chalfant to Stanford in payment for the horses. The mortgage under which the plaintiff claims contains a provision by which the mortgagor reserves the unrestricted right to sell the mortgaged property, followed by the statement that the proceeds are to be applied to the payment of the notes. There is no provision as to the manner in which it shall be so applied, nor does the instrument in express terms nor by fair implication make the mortgagor the agent of the mortgagee to receive the purchase money. The right to sell would appear rather to be reserved to him as mortgagor, leaving the mortgagee no security after the mortgaged property is sold but the mere personal liability of the mortgagor. It is insisted that this court has sustained the validity of chattel mortgages containing similar provisions. In the case of Frankhouser v. Ellett, 22 Kan. 127, it was held that a chattel mortgage might contain a valid stipulation for the retention of possession of the mortgaged property by the mortgagor; and, further, that when it was so retained, and by an agreement outside the mortgage the mortgagor was permitted to dispose of the goods in the ordinary course of a retail business, and to use a portion of the proceeds in support of his family, paying the remainder in discharge of the mortgage debt, the transaction was not, as a matter of law, rendered fraudulent and void as against creditors, but would be upheld or condemned, according as it was carried out in good faith or not. In that particular case the mortgage was held valid, the chief justice dissenting. In the case of Leser v. Glaser, 32 Kan. 546, 4 Pac. 1026, a chattel mortgage was given, which, by its terms, permitted the mortgagor to retain possession of the property, which was also a stock of merchandise, and to sell the same in the regular course of trade at retail. It was claimed that there was actual fraud. The mortgage was held void; not, however, solely because of its provisions, but under all of the testimony with reference to it. The correctness of the doctrine announced in the case of Frankhouser v. Ellett has been often questioned, but the case has never been overruled. The cases in which it has been applied have been of mortgages on stocks of

merchandise purchased for sale at retail. In the case of such a mortgage, the retention of possession by the mortgagor would be of no benefit to him unless permitted to continue the sale of the property in the usual course of trade, and thus continue his business, and realize the best obtainable price in the retail market. Where an arrangement is made between the mortgagor and the mortgagee, by which the mortgagor acts in good faith strictly as the agent of the mortgagee, to sell the property at retail for his benefit, the transaction has been upheld by this court; and in some cases the court has gone so far as to uphold an arrangement by which the mortgagor was allowed to use a portion of the proceeds for his support. The view taken has been that the sale of the goods at a favorable price would necessarily entail expense, and that, where the mortgagor consented to and did act as the agent of the mortgagee in effecting the sale for a less compensation than it would have been necessary to pay to a stranger, the fact of making such an allowance could not be held conclusive proof of fraud. *Hughes v. Shull*, 33 Kan. 127, 5 Pac. 414; *Howard v. Rohlfing*, 36 Kan. 361, 13 Pac. 566; *Whitson v. Griffiths*, 39 Kan. 211, 17 Pac. 801; *Bliss v. Couch*, 46 Kan. 400, 26 Pac. 706; *Standard Implement Co. v. Parlin & Orendorff Co.*, 51 Kan. 632, 33 Pac. 342; *Lorie v. Adams*, 51 Kan. 692, 33 Pac. 599. In this case, as in that of *Leser v. Glaser*, supra, all of the facts disclosed by the record concerning the transaction between Stanford and Chalfant indicate that their purpose was to defraud. The plaintiff resided a long distance away from the parties to the transaction. The power to sell the mortgaged property is unrestricted as to price, as to the time of sale, as to the purchaser, and as to the mode of payment. The only provision that could possibly be construed into an agency is contained in the words, "the proceeds of sale to be applied in payment of said notes." This is nothing more than an agreement that after the sale of the mortgaged property the mortgagor will turn over to the mortgagee the proceeds. After the sale, the mortgagee's security is gone; the title to the property has passed by virtue of the authority reserved to the mortgagor in the very instrument itself. The claim, then, of the mortgagee is nothing more than a personal claim against his debtor. In this case the mortgaged property consisted of horses kept for breeding purposes. In order that the mortgagor might retain the beneficial use of them, it was not necessary, as in the case of a stock of merchandise kept for sale by a dealer, that he should be permitted to sell them. It was only necessary that he should be permitted to continue to use the horses for the purposes for which they were purchased. Instead, however, of reserving the right so to use them, he reserves the right to make an absolute sale of the whole mortgaged property in gross. The result of upholding such



a mortgage as this is to place the property beyond the reach of all other creditors of the mortgagor, and make it a valid security, so far as their claims are concerned, while leaving it altogether optional with the mortgagor as to how long it shall remain as a security for his debt to the mortgagee. Whenever he sees fit to exercise his power to sell, he can at once cancel the security. In order to uphold this as a valid mortgage we must extend the doctrine announced in *Frankhouser v. Ellett*. This we are unwilling to do. That case was an extreme one, and the doctrine announced in it is not to be extended to cases not clearly within the rules there declared. In this conclusion we are sustained by the great weight of authority. *Jones, Chat. Mortg. § 422*. The transaction between Stanford and Chalfant rests for its validity on the presumption of good faith which is applied to the dealings of men. The evidence in the case is sufficient to overcome this presumption, and to establish its fraudulent character, without reference to the provision contained in the chattel mortgage; and when this is added no doubt is left of the fraudulent purpose of these parties. The reservation of a right to sell the property by the mortgagor was sufficient to at least put the plaintiff in this case on inquiry as to the character of Chalfant's title, and therefore to leave him in no better position than the party under whom he claims. The plaintiff made no attempt to take the property into his possession from Chalfant, nor to recover it from the marshal until after judgment had been rendered in the United States court ordering the property to be sold. He seems to have placed unusual reliance on the strength of his security, notwithstanding it contained a provision by which he might be deprived of it on any day. While, in the books, such mortgages are usually spoken of as fraudulent, possibly it would be more accurate to speak of them as inoperative, because they are contradictory in their terms, the conveyance of title being effectually defeated by the power reserved by the mortgagor to defeat the title and pass it to another. The judgment of the trial court was right, and is affirmed. All the justices concurring.

ATCHISON, T. & S. F. R. CO. v. SHAW.  
(Supreme Court of Kansas. March 7, 1896.)  
RAILROAD COMPANIES—CROSSING ACCIDENT—CON-  
TRIBUTORY NEGLIGENCE—PLEADING AND  
PROOF—SPECIAL INTERROGATORIES.

1. In an action against a railroad company to recover damages for injuries received by the plaintiff at a street crossing in a populous city, where the only negligence charged is in the management of the engine and cars by the employees of the company, it is not proper to admit testimony showing that the company was required by a city ordinance to maintain automatic gates at the crossing, and that it failed to do so, nor for the court to instruct the jury that such failure would be negligence on the part of the company; but where it is clear from the un-

contradicted testimony in the case that the injury was caused by the gross negligence of the employees in the management of the engine and cars, and that the testimony with reference to the absence of gates did not influence the jury, the verdict and judgment will not be set aside because of the failure of the plaintiff to allege in her petition the failure to maintain gates as a ground of negligence.

2. Where a street in a city is crossed by numerous railroad tracks, it cannot be declared, as a matter of law, that the plaintiff was guilty of contributory negligence, in driving across the tracks on a slow trot, when the testimony shows that no engine was in sight, and that there was nothing else apparent indicating danger, and where it is shown that the plaintiff was vigilant in the use of her senses in endeavoring to detect danger. In such a case the question of contributory negligence should be left to the determination of the jury.

3. The trial court is not bound to compel direct answers to all questions that a party may propound to the jury. It is only fair and pertinent questions that can be truthfully answered under the testimony that a party may insist upon having answered as a matter of right.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by Alice Shaw against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

This action was brought by Alice Shaw to recover damages for injuries received while crossing a railroad track in the city of Wichita. The plaintiff and Mrs. Frazer, with her baby, were in a spring wagon passing along First street. Near the intersection of First street and Fifth Avenue, First street crosses a number of railroad tracks. The west one, where the plaintiff was injured, is called the "Hawn track"; about 53 feet east from this, is what is termed the "Wichita and Western track"; and about 15 feet from that is the "main track." There were many cars standing on the various tracks at the time, the Wichita and Western track being nearly filled with cars. On the Hawn track there were about 15 freight cars. There was an engine in the vicinity of Second street, which is the next street north from First street, and distant about 600 feet from it, engaged in switching cars onto the Hawn track. The train crew consisted of an engineer, fireman, foreman, and two others. The testimony all shows that the engineer and fireman were on the engine; that a man named Lee was stationed near the switch stand connecting the Hawn track with the Wichita and Western. As to the location of the other two men at the time the plaintiff was hurt, the evidence is somewhat conflicting, but it appears that McCambridge, the foreman, was down near First street, and that he went between the cars to which the engine was attached and other cars which were standing near First street, to make a coupling. The foreman testified that he himself stood within 30 feet of First street, and that the other man, whose name he did not remember, but

the man he calls "Flatty" was Ingram, and, according to his testimony, he was then just south of the place where the accident occurred, about to make a coupling between the car that struck the plaintiff and another car south of First street. From the testimony of the plaintiff and Mrs. Frazer, it appears that, as they approached the track, the speed of the horse was slackened; that they both looked up and down the tracks, to see if there were any engine or cars approaching; that they saw many cars on the various tracks, but did not see any engine. They passed along the street across all the tracks but the last one on a slow trot. As the horse was about to step on the Hawn track, they noticed that a car which had been standing partly in the street began to move. It appears that about this time a person standing on the sidewalk on the north side of the street called to them, and there is some testimony that Ingram, McCambridge, and Ruggles, a car sealer, also called to them, before they came to the track, but they did not hear any of the warnings. They urged the horse forward, deeming it the safer course to pursue. The hind wheels of the buggy were struck by the car, and the plaintiff was thrown forward to the ground, near the horse's feet, and hurt. The testimony of the engineer shows that he received no signal at the time the buggy was struck, nor until he stopped; that he stopped "for the reason that he felt the cars strike against something. I backed up until I felt the cars strike, and then stopped." Other testimony shows that a bolt on the corner of a car caught the felloe of the hind wheel of the buggy, holding it fast, and that it was shoved back by the moving car until it struck the platform of the Zephyr Mill, which was located west of the track, on the south side of First street. The cars moved on some distance past the north end of the mill platform. The jury rendered a general verdict in favor of the plaintiff for \$5,000, and, by their special verdict, they stated that \$1,000 of this amount was allowed as exemplary damages. Motions were made for judgment in favor of the defendant on the special findings of the jury, and for a new trial. The motion for judgment was overruled, and, on the hearing of the motion for a new trial, the plaintiff remitted the \$1,000 allowed as exemplary damages, and thereupon that motion also was overruled, and a judgment entered on the verdict for \$4,000. The defendant brings the case to this court.

A. A. Hurd and F. W. Bentley, for plaintiff in error. Holmes & Haymaker and Smythe & Douglas, for defendant in error.

ALLEN, J. (after stating the facts). The errors assigned are very numerous. We have

1. It is said that the negligence charged was that "the engineer and servants in charge of said train, suddenly, carelessly, and with gross negligence, backed said train across said highway, striking the wagon in which said plaintiff was riding." On the trial, the plaintiff offered in evidence an ordinance of the city of Wichita requiring the defendant to maintain and operate automatic gates at all street crossings, where there were two or more tracks. This was objected to by the defendant, but the objection was overruled. The plaintiff proved, without objection, that no gates were maintained, and that no flagman was stationed at the crossing, and the court instructed the jury that if they found that an ordinance required the defendant to maintain gates across First street, that the defendant failed to comply with the ordinance, and that such failure was the proximate cause of the injury, the defendant would be liable for the damages resulting from it. The jury, in answer to the forty-fifth question, find that it was negligence on the part of the company not to maintain automatic gates at this crossing. The failure to maintain gates at a crossing where the city ordinance required them might be, of itself, such negligence as would render the company liable for an injury received by a person crossing the track, and, where the failure to maintain the gates is relied on as the ground of recovery, it ought to be alleged in the petition. A careful examination of the whole case presented convinces us, however, that the jury were not influenced by this testimony. The failure to maintain the gates was not relied on for a recovery. There was an abundant showing of negligence without it. The forty-fourth special question submitted by the defendant was: "Q. Do you find that the defendant caused plaintiff's injury by willful and wanton negligence? A. Yes." We think the testimony of the witnesses for the defendant, and especially that of the engineer, shows that the switching crew were not only guilty of negligence, but of very gross negligence. The car which struck the wagon was standing as the jury find 15 to 18 feet south of the north line of First street. The engineer testifies that he could not see the rear cars because of cars on the Wichita and Western track. It is clear from all the evidence that no person was stationed upon or near the car which caused the injury, either to observe and warn persons passing along the street, to regulate the movement of cars, or to give signals to the engineer, nor were there train men so stationed along the train that signals could be readily transmitted to the engineer by any one on the ground near First street. The foreman was operating in utter disregard of the safety of persons passing along the street, and we think the find-

ing of the jury of wanton negligence in the management of the train is not only abundantly sustained by the evidence, but is uncontradicted by any witnesses except McCambridge himself, and even his testimony fails to show that he was taking that care which ought always to be taken under similar circumstances. Under this state of facts, the error with reference to the gates appears unimportant.

2. The claim that the plaintiff was guilty of contributory negligence as a matter of law, merely because the horse passed along the street on a slow trot, cannot be sustained. Her conduct was, of course, a proper subject of consideration by the jury, and the question whether she acted with ordinary prudence was fairly submitted to them, and their finding was in her favor. As the car which caused the injury was standing still until the horse was almost upon the track, and as the engine which propelled it was a long distance away, out of sight, and especially as no train man was in sight to give any warning that the car was likely to move suddenly, we are unable to perceive anything in the conduct of the plaintiff sufficient to bar her recovery, and certainly not in opposition to the finding of the jury.

3. At the request of the defendant, 52 special questions were submitted to the jury. They were not all answered when first returned into court, and the jury were again sent out. As the verdict was finally received, the eighth, fifteenth, thirtieth, thirty-first, thirty-second, and fiftieth questions were answered, "Don't know." Numerous cases are cited to the effect that these answers are improper, and that the court should have required the jury to return proper answers to them. It is only pertinent, properly framed questions which can be intelligently answered from the testimony that the court is required to compel an answer to. We do not deem it of any general interest to enter into a minute analysis of these questions, or of the testimony bearing on them, but shall content ourselves with the remark that the answers are fairer than the questions, and about as good as could be given under the testimony. The twenty-eighth question and answer were: "Was there anything to prevent plaintiff from seeing the engine when 110 feet from the main track, if she had looked in its direction? A. We cannot answer, as no direction is given." There is very little significance in this question, and we think the answer is only subject to criticism because of the concluding portion of it. What the jury doubtless meant is that, from the testimony, the exact direction of the engine from the point named, when the plaintiff passed it, could not be determined; and we think this is the truth.

4. It is claimed that the damages are excessive, given under the influence of passion and prejudice, and reference is made to the finding that the defendant was guilty

of wanton and willful negligence, and awarded \$1,000 exemplary damages as evidence thereof. There was a great deal of testimony by physicians with reference to the nature of the plaintiff's injuries. That she was severely hurt, and rendered delirious several days, is beyond dispute. Whether her injuries are of a permanent character, and such as the testimony in her behalf tended to show, was a proper matter for the consideration of the jury; and we find nothing in the award of damages to shock our sense of right, nor are we at all clear that this was not a proper case for exemplary damages.

5. Many questions were raised on the introduction of testimony, and are urged in the brief, but we find nothing we deem reversible error, nor worthy of special mention. Numerous criticisms of the instructions are made, but, on the whole, we think the case was fairly submitted, and that the verdict was right. The judgment is affirmed. All the justices concurring.

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BRIGGS v. CHICAGO, K. & W. R. CO.  
(Supreme Court of Kansas. March 7, 1886.)  
ADMINISTRATOR OF MORTGAGE—POWER TO BID IN  
PROPERTY—CONDEMNATION PROCEED-  
INGS—IMPROVEMENTS.

1. An administrator receiving as assets of the estate of his decedent a promissory note secured by mortgage, and having obtained a judgment on the note and a decree of foreclosure, may bid in the land at the foreclosure sale as administrator in satisfaction of the indebtedness, wholly or in part, and the sheriff's deed will pass the title to him as administrator.

2. After A. had mortgaged a tract of land, he executed a deed to a railroad company for a strip across the same, and the company constructed its railway, erected a depot, and made other improvements upon said strip. The assignee of the mortgage brought his action to foreclose it, making the railroad company a party; and it answered, setting up a right to occupy the strip by virtue of said deed from A.; but by the decree it was barred, enjoined, and cut off from claiming any estate or interest in the mortgaged premises, which were sold by the sheriff, and upon confirmation he executed to the purchaser a deed for the same. Afterwards, in a proceeding instituted by the railroad company, the strip occupied by it was condemned, but no award was made by the commissioners nor by the court upon appeal for the value of said improvements. *Held*, that the title to the improvements passed by the sheriff's deed as part of the real estate, and the purchaser was entitled to an award for their value.

(Syllabus by the Court.)

Error from district court, Woodson county; L. Stillwell, Judge.

Proceedings by the Chicago, Kansas & Western Railroad Company against James F. Briggs, administrator of Mrs. R. B. Fitch, deceased, for the condemnation of land. From the judgment rendered, the administrator brings error. Reversed.

On March 29, 1886. Loretta A. Ault and John A. Ault, husband and wife, being the owners of lot 3, plat of outlots to the city

the same by mortgage on said premises, and the mortgage was duly recorded on the same day. On April 7, 1886, the note and mortgage were assigned to Mrs. R. B. Fitch. On July 14, 1887, the Aults conveyed to the Chicago, Kansas & Western Railroad Company a right of way and strip of land 150 feet in width on each side of the center line of the track of the railroad of said company where the same was then located across, over, and through said lot. At said time the railroad company was constructing its line of railroad across said lot under a claim of right by virtue of certain condemnation proceedings which were invalid, and ever since said time the company has operated its railroad over and across said premises. Mrs. R. B. Fitch having died, James F. Briggs, was on November 5, 1888, duly appointed, and he qualified as administrator of her estate. An action was commenced to recover upon said note and to foreclose the mortgage. The railroad company was made a party, and on December 12, 1889, filed an answer setting up a right to occupy the strip 300 feet in width by virtue of said deed from the Aults. On March 12, 1890, judgment was rendered against the Aults for \$825, bearing interest at the rate of 12 per cent. per annum, and the whole tract was decreed to be sold after six months without appraisal, to pay the judgment, interest, and costs; but the cause was continued until June term as between the plaintiff and the railroad company, the latter expressly agreeing to waive the stay so that the land might be sold at the expiration of the six months from date of the decree of foreclosure against the Aults. On June 4, 1890, the cause came on for further hearing between the plaintiff and the railroad company, both parties appearing by their counsel, and thereupon it was decreed that the railroad company be, by the sale to be made under the decree of March 12, 1890, "forever barred, foreclosed, enjoined, and cut off from claiming any interest or estate in or to the real estate, or any part thereof, described in plaintiff's said amended petition, to wit, lot 3 in Yates plat of outlots in the city of Yates Centre." On September 16, 1890, an order of sale was issued, under which, in compliance with the decree of the court, the land outside of the strip was first sold for the sum of \$50 to James F. Briggs as administrator, and the strip was then bid off by him for \$100. An attorney of the railroad company was present at the sheriff's sale, but neither he nor any other representative of the company made any statement, or in any manner participated in the sale. Afterwards the sale was confirmed by the court, and on November 3, 1890, a sheriff's deed was executed to said James F. Briggs as administrator. On November 20, 1890, the

commissioners to condemn a right of way over and across said premises, and such commissioners were appointed, and they duly qualified, and on November 28, 1890, gave notice that they would proceed on December 30, 1890, to condemn such right of way. These proceedings were in the usual form, and made no mention of the fact that the railroad company was already in possession of the strip, and had made improvements thereon. On January 6, 1891, the commissioners duly filed their report, allowing \$124 for the land occupied and \$30 for damages to the remainder of the tract. No mention was made of any improvements. On January 15, 1891, James F. Briggs, as administrator and as owner of the land, filed an appeal bond, which was duly approved. On the trial of the appeal, June 1 and 2, 1891, it was agreed that since July 14, 1887, and prior to September, 8, 1888, the railroad company had constructed and erected upon said strip the improvements which at the time of the condemnation were respectively described and of value as follows: Dwelling house, fences around same, and outbuildings inclosed therewith, \$700; tool house, \$50; building adapted for use as depot and office, \$1,200; embankment, including poles and wires and the ties and steel rails of main and side tracks as constructed and graded, \$1,000. It was also agreed that the value of the right of way taken, exclusive of said improvements, was \$124, and the damages to the lands not taken \$30, and these items are all that the court below allowed. The question submitted for decision is as to whether Briggs, as administrator, was entitled to recover the value of the improvements, amounting to \$2,950, or not.

J. B. Larimer and Stephenson & Hogue-land, for plaintiff in error. A. A. Hurd, O. J. Wood, and W. Littlefield, for defendant in error.

MARTIN, C. J. (after stating the facts). 1. The railroad company takes the position that James F. Briggs, as administrator of the estate of Mrs. R. B. Fitch, deceased, could not acquire title to said lot, and therefore had no right to appeal. Authorities are cited upon the point that an executor or administrator cannot either directly or indirectly purchase the real estate of his decedent which he has been ordered by the probate court to sell. This is forbidden as well by public policy as the express terms of section 132 of the act respecting executors and administrators (chapter 37, Gen. St. 1889). But this was land of the Aults, subject to a mortgage lien upon which it was the duty of the administrator to realize for the benefit of the estate, and no consideration of public policy forbade him from taking in the land towards the payment of the indebtedness, especially if it could not be sold for cash. Of course, the administra-

tor is bound to account in the probate court to the heirs of Mrs. Fitch and the creditors of her estate for this land, to which he holds the title only in his representative capacity. The deed was valid, and passed the title to him. *Valentine v. Belden*, 20 Hun, 537, 541, 542; *Lockman v. Reilly*, 95 N. Y. 64, 71; *Stevenson v. Polk*, 71 Iowa, 279, 290, 291, 32 N. W. 340.

2. It seems a hard case when a railroad company is required to pay the value of improvements which it has placed upon a strip of ground occupied as a right of way, but it is a familiar principle that on a mortgage sale the title of the purchaser relates back to the execution of the mortgage, and cuts off intervening rights and equities acquired from the mortgagor by purchase; and this is applicable to all landowners alike. The decree of June 4, 1891, followed by the sheriff's deed executed in pursuance thereof, divested the railroad company of its title, and "forever barred, foreclosed, enjoined," and cut it off "from claiming any interest or estate in or to the real estate, or any part thereof." Unless, therefore, we may judicially declare that these buildings and structures were not and are not real estate, we must hold that they passed by the sheriff's deed to the purchaser at his sale. Attention has been called to the fact that for the purposes of taxation such improvements are treated as personal property, but this applies as well to the lands occupied for right of way, depot grounds, and otherwise for the convenient and daily operation of the road. Gen. St. 1889, c. 107, art. 7. Whether railway property be treated as real or personal, however, for purposes of taxation, is a mere matter of convenience, and does not have the effect of transforming the one into the other. If the right of possession of a crowbar or a lifting jack used by the railroad company should be in dispute, the proper form of action to settle it would be replevin; but if the right to occupy a strip of land for its road, or a lot for depot grounds, were in controversy, it would be necessary to resort to an action of ejectment for the determination of the question. These structures were real property. What right, if any, the company would have had prior to the foreclosure sale to remove them, or to obtain a condemnation without paying their value, is not involved in this case. For some authorities on this subject, see *Cohen v. Railroad Co.*, 34 Kan. 158, 8 Pac. 138. Before the company instituted its condemnation proceeding on November 20, 1890, it had been cut off and barred from claiming any interest in said lot 3, which included these structures; and the act of March 6, 1889, was in force, expressly prohibiting the removal of buildings from mortgaged premises without written permission. Gen. St. 1889, pars. 3900-3902. The judgment will therefore be reversed, and the cause remanded, with directions to allow the plaintiff the sum of \$3,104 as an award of damages upon condemnation, to be paid with-

in a short time, to be fixed by the court, together with costs. All the justices concurring.

#### HOWARD et al. v. EDDY et al.

(Supreme Court of Kansas. March 7, 1896.)

#### JUDGMENT—INJUNCTION AGAINST ENFORCEMENT—SUFFICIENCY OF EVIDENCE.

1. The extraordinary remedy of injunction cannot be employed to correct erroneous rulings made in another case, nor to enjoin the enforcement of a judgment, where the rights of the parties complaining might have been protected in the original action.

2. A statement in the nature of a conclusion, which does not show any of the facts or circumstances upon which it rests, does not rise to the rank of testimony, and is insufficient to sustain an application for injunction.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by George S. Howard and others against E. D. Eddy and another to enjoin the enforcement of a judgment. From a judgment dissolving a temporary injunction, plaintiffs bring error. Affirmed.

Pollock & Love, for plaintiffs in error. Joseph O'Hare, for defendants in error.

JOHNSTON, J. On December 20, 1890, in the district court of Cowley county, E. D. Eddy recovered a judgment against George S. Howard, Charles A. Howard, T. H. McLaughlin, and some other parties, for \$1,969.33. Subsequently an execution was issued for the enforcement of the judgment, and on December 9, 1891, on the application of the above-mentioned debtors, the probate judge of Cowley county, without notice to the opposing parties, granted a temporary injunction to prevent the enforcement of the judgment. Soon afterwards a motion was made in the district court to dissolve the injunction, upon the grounds that it was issued without notice, without sufficient evidence, that the petition on which the injunction was granted was not properly verified, and that the facts set forth in the petition did not entitle the parties to an injunction. The motion was allowed, and the injunction dissolved, but the ground upon which the ruling was based is not stated. The ruling of the court must be sustained. The temporary injunction was inconsiderately granted upon a verified petition. It is not necessary that the affidavit in support of the application for the injunction should be a separate, independent paper. If the petition sets forth the necessary facts, and is properly sworn to, an order may be allowed thereon. When used for that purpose, it must state facts with the detail and particularity that is required in an affidavit or deposition. "When a verified petition is used as an affidavit, its allegations must be construed as those of an affidavit, and must be such statements of fact as would be proper in the oral testimony of a witness. Allegations which are simply con-

clusions of law, whether sufficient, or not, as matter of pleading, are incompetent as testimony." *Olmstead v. Koester*, 14 Kan. 463. See, also, *Atchison v. Bartholow*, 4 Kan. 124; *Center Tp. v. Hunt*, 16 Kan. 430. Measured by this rule, the averments of the petition were insufficient to sustain the application. Many of the statements in the petition would have been inadmissible as testimony, and altogether they fail to establish equitable ground for relief.

That there was jurisdiction in the court rendering the judgment is clearly shown, and the matters complained of, in respect to the filing of amended pleadings and joining issues, are, at most, irregularities which may be revised on error. The extraordinary remedy of injunction cannot be employed to correct merely erroneous rulings, nor to prevent the enforcement of a judgment, where the rights of the party complaining might have been protected in the original action. No reason is alleged why they did not avail themselves of the ordinary remedies in the original action, and it does not appear that they were hindered in doing so by the wrong of the defendants. When this proceeding was brought the time had not yet expired within which the judgment might have been taken to an appellate court for review. Only one equitable consideration was attempted to be presented as a basis of an injunction, but it was only the naked conclusion that, for a valuable consideration, Eddy had agreed not to enforce the judgment against the plaintiffs. A statement of this kind, which does not show when the promise was made, what the consideration therefor was, nor any of the facts or circumstances upon which the conclusion rests, does not rise to the rank of testimony, and is wholly insufficient to sustain an application for an injunction. It is clear that the plaintiffs did not present a case authorizing the court to interpose by injunction to prevent the enforcement of a judgment that appears to be valid. The judgment of the district court will be affirmed. All the justices concurring.

#### VAN LEAR et al. v. KANSAS TRIP-HAMMER BRICK WORKS et al.

(Supreme Court of Kansas. March 7, 1896.)

CONSOLIDATION OF ACTIONS—MOTION FOR NEW TRIAL—TIME FOR FILING—APPEAL—PARTIES.

1. Two mechanics' liens were filed upon an entire tract, and other mechanics' liens were filed and mortgages were executed upon specific subdivisions of the same tract, and several actions were commenced in the district court to foreclose the mechanics' liens and the mortgages. Held, that it was proper to consolidate them for the purpose of trial.

2. In computing the time allowed for filing a motion for a new trial, an intervening Sunday must be included; and, where such motion is filed on the Wednesday next succeeding the Saturday on which the final decision was rendered, it is not within the three days prescribed by law.

3. There can be no review of a judgment in the absence of a party to it who may be prejudicially affected by its modification or reversal. (Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. Miller, Judge.

Separate actions between the Kansas Trip-Hammer Brick Works and others and H. E. Van Lear and others to foreclose mechanics' liens and mortgages. The actions were consolidated, and from the judgment rendered H. E. Van Lear and others bring error. Dismissed.

Palmer & Parker and Wheeler & Switzer, for plaintiffs in error. McGrew, Watson & Watson, W. C. Barry, Junius W. Jenkins, C. H. Nearing, N. F. Heitman, and Karnes, Holmes & Krauthoff, for defendants in error.

MARTIN, C. J. 1. Truitt, being the owner of nine lots lying together in Kansas City, Kan., in 1888, planned the improvement of the same by building six double houses thereon. He entered into contracts with several parties to perform work and furnish materials therefor. He also executed six several mortgages to Bowman, to cover each house, with the contiguous ground, and, at the same time, six second mortgages to Ball on the same properties. Truitt afterwards sold four of the properties to different parties, and he mortgaged the other two to Cary; this being the third mortgage, in order of time, upon said two properties. Mechanics' liens were filed afterwards upon these six several properties, and the Kansas Trip-Hammer Brick Works and the Wyandotte Coal Company filed single liens covering all the properties. Certain of the first and second mortgages were assigned, and seven separate suits were filed in the district court to foreclose said mortgages and mechanics' liens. For the purpose of trial, these several actions were consolidated; and, as two of the liens covered the undivided property, it was proper to try all the cases together. Civ. Code §§ 83, 636; *Town Co. v. Morris*, 39 Kan. 377, 18 Pac. 230; *Johnson v. Keeler*, 46 Kan. 304, 26 Pac. 728.

2. The record shows that final judgment was rendered on February 21, and the motions for a new trial were not filed until February 25, 1891. One of the four attorneys interested in obtaining a new trial filed an affidavit to the effect that two of his associates resided at Topeka, and that he did not ascertain their wishes as to motions for a new trial until Wednesday, February 25th, and that by reason of illness in his family, and being engrossed in business in the United States circuit court at Kansas City, Mo., on February 24th, he was unable to file the motions until the 25th; this being the third day, excluding Sunday, after the decision was rendered. The court found that the motions were filed in due time, but there is no finding of fact to the effect that their earlier filing was "unavoidably prevented" (Civ.

Code, § 308); and we think the showing insufficient for that purpose. The judgment was rendered on Saturday, however, and the plaintiffs in error contend that the Sunday following should be excluded from the computation, thus allowing three court days after the date of the judgment for filing the motions. This would be allowable in Missouri, Georgia, and perhaps some other states. *Bank v. Williams*, 46 Mo. 17; *Cattell v. Publishing Co.*, 88 Mo. 356; *Neal v. Crews*, 12 Ga. 93. Our statute governing the subject (Civ. Code, § 722) enacts that "the time within which an act is to be done shall be computed by excluding the first day and including the last; if the last day be Sunday it shall be excluded." Under identical statutes in New York and Indiana, it has been held that, while Sunday is excluded if the last day, yet it is included if an intervening day. *Taylor v. Corbiere*, 8 How. Prac. 385, and cases cited; *English v. Dickey*, 128 Ind. 174, 182, 27 N. E. 495. We hold the latter to be the true construction of our statute, and, although not expressly decided, it has been assumed by the courts, and accepted generally by the profession, as the correct interpretation. The legislature, having Sunday in mind, provided for its exclusion when the last day, and it is presumable that its inclusion was intended when an intervening day. In *Schultz v. Clock Co.*, 39 Kan. 334, 336, 337, 18 Pac. 221, where three days' notice was necessary to revive a dormant judgment rendered by a justice of the peace, and the notice was served December 11, for hearing December 14, 1885, it was held sufficient, and no attention was paid to the fact that December 13th was Sunday. In *Mercer v. Ringer*, 40 Kan. 189, 19 Pac. 670, a verdict was rendered April 23, 1887, and a motion for a new trial reached the post office of the clerk on the evening of April 26th, but he did not receive and file it until the next morning; and it was held that the motion was out of time. But as April 24, 1887, was Sunday, the motion was in time, if that day should be excluded from the computation. Indeed, that case was just like this, as to days of the week; for the judgment was rendered on Saturday, and the motion for a new trial was filed on Wednesday. Upon the theory of the plaintiff in error, the cases cited from 39 Kan., 18 Pac., and 40 Kan., 19 Pac., were erroneously decided. We think, however, that the decisions were correct, and that an intervening Sunday should be included, but if Sunday is the last day it must be excluded. The motions being out of time, errors for which a new trial might be granted are not reviewable.

3. Caryl set up his mortgage, and it was adjudged to be the last in order of the incumbrances on the two properties covered by it. Some persons who were parties in the court below are not brought into this court, —Caryl, among the number; and a motion to dismiss upon several grounds, including

the want of necessary parties, is urged upon our attention. Caryl, although litigating in the court below, took no exceptions to its rulings. It is said that he could not be injured, but would be benefited, by the setting aside of the mechanics' liens. He could not be benefited, however, as to the several liens affecting only the properties covered by his mortgage; for he made no complaint of the same, and they must be held valid, as against him, in any event, and it makes no difference to him whether the mechanics' liens are prior or subsequent to the first and second mortgage liens. But, as to the general or "blanket" liens of the Kansas Trip-Hammer Brick Works and the Wyandotte Coal Company, Caryl might suffer great loss by the four other properties being relieved from them; for, as they are entire, they cannot be apportioned, and must attach to whatever property they may cover. There can be no review of a judgment in the absence of a party to it who may be prejudicially affected by its modification or reversal. We therefore hold that no readjustment of the liens can be made in the absence of Caryl. *Central Kansas Loan & Investment Co. v. Chicago Lumber Co.*, 53 Kan. 677, 37 Pac. 132; *Norton v. Wood*, 55 Kan. 559, 40 Pac. 911; *Hyde Park Inv. Co. v. First Nat. Bank of Atchison*, 56 Kan. —, 42 Pac. 321. The case will be dismissed for want of necessary parties. All the justices concurring.

UNION PAC. RY. CO. v. GOCHENOUR et al.  
(Supreme Court of Kansas. March 7, 1896.)  
CORPORATIONS—CONSOLIDATION—RIGHTS OF NEW  
CONCERN—AFTER-ACQUIRED NOTES.

On the 26th of January, 1890, the Kansas Pacific and certain other railway companies were consolidated, forming the Union Pacific Railway Company. But it was provided in the articles of consolidation that the constituent companies should continue in existence for certain purposes. On the 11th of March, following, certain promissory notes were assigned by W. to the Kansas Pacific Railway Company. The Union Pacific Railway Company, in this action, seeks to recover on the notes, and to foreclose a mortgage securing the same, claiming title thereto solely by reason of said consolidation. Held, that it cannot recover, and that it has failed to establish its ownership of the notes.

(Syllabus by the Court.)

Error from district court, Trego county; S. J. Osborn, Judge.

Action by the Union Pacific Railway Company against David Gochenour and others. From a judgment for defendants, plaintiff brings error. Affirmed.

A. L. Williams, N. H. Loomis, and R. W. Blair, for plaintiff in error. Lilla Day Monroe and John E. Hessin, for defendants in error.

ALLEN, J. This action was brought by the Union Pacific Railway Company to recover on three promissory notes, for \$720

Kansas Pacific Railway Company, and to foreclose a mortgage on a section of land given to secure the payment of the same. The petition alleges the indorsement of the notes, and the assignment of the mortgage by Warren to the Kansas Pacific Railway Company; and the plaintiff claims title to the notes and mortgage by consolidation with, and as the legal successor of, said company. The evidence introduced by the plaintiff shows that on the 26th day of January, 1880, the Kansas Pacific Railway Company was consolidated with the Union Pacific Railway Company and the Denver Pacific Railway & Telegraph Company; forming the Union Pacific Railway Company, plaintiff in this action. The indorsements on the notes appear without date, but the assignment of the mortgage, which, by its terms, also transfers the notes sued on, was made on the 11th of March, 1880,—more than six weeks after the consolidation. The articles of consolidation were introduced in evidence, and show that the Kansas Pacific Railway Company did not at once become extinct by reason thereof, but was to continue in existence for the purpose of settling its liabilities. This provision of the articles of consolidation has been held valid by this court in the case of *Whipple v. Railway Co.*, 28 Kan. 474. The only parties to this action are the plaintiff and the different defendants who claim an interest in the lands. Neither Albert E. Warren nor the Kansas Pacific Railway Company is in court. There are no averments in the petition of mistake by which the assignment was made to the Kansas Pacific Company instead of the Union Pacific, nor is there any statement showing that the consideration paid for the notes moved from the Union Pacific Company. Under this state of the case, the plaintiff appears to have no title to the notes. This question was directly raised by the pleadings. The articles of consolidation contain no provision under which promissory notes afterwards acquired by the Kansas Pacific Railway Company would pass to the plaintiff. As this is necessarily decisive of the case, we have deemed it unnecessary to closely examine the questions raised on the motion to dismiss, as well as the other matters discussed in the briefs. The judgment is affirmed. All the justices concurring.

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BEAVER v. ATCHISON, T. & S. F. R. CO.  
(Supreme Court of Kansas. March 7, 1896.)

ACTION FOR INJURIES—CONTRIBUTORY NEGLIGENCE  
—PROVINCE OF JURY.

1. In an action to recover for personal injuries, where the defense is contributory negligence on the part of the plaintiff, the court cannot take the case from the jury, and determine as

be entertained, and where the facts shown and inferences to be drawn from them were such that reasonable minds might differ with respect to whether he had acted as a reasonably prudent man should have done under the circumstances.

2. The testimony examined, and held to be sufficient to take the case to the jury.

(Syllabus by the Court.)

Error from district court, Neosho county; L. Stillwell, Judge.

Action by John Beaver against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for personal injuries. From a judgment for defendant, plaintiff brings error. Reversed.

Kimball & Osgood, for plaintiff in error. A. A. Hurd, W. Littlefield, and O. J. Wood, for defendant in error.

JOHNSTON, J. John Beaver was employed by the Atchison, Topeka & Santa Fé Railroad Company at its yards in Chanute, Kan., as a car inspector and repairer. These yards consisted of two main tracks, as well as a number of side tracks, which were used for switching, making up, and inspecting trains. For some time prior to September 16, 1889, the railroad company had been unloading cinders in the yards for the purpose of raising and ballasting the tracks. The cinders were unloaded between the tracks, after which they were used for the purpose of raising and improving the roadbed and railroad yards. It is alleged that on the night of September 16, 1889, the company unloaded a large quantity of cinders between two of the tracks, and left them heaped up in an insecure condition in the passageway over which the plaintiff was required to go in the performance of his duty as an inspector; and that while passing over this pile of cinders in the performance of his duty, by reason of the unsafe and insecure footing caused thereby, he lost his balance, and fell towards an adjoining track, and was struck by a passing engine, breaking his leg, and otherwise bruising and injuring his body; and for the injury sustained he asks damages in the sum of \$10,000. The railroad company insisted that Beaver was guilty of negligence, and therefore responsible for the consequences. The case was tried with a jury, and, after the plaintiff had introduced his evidence a demurrer to the same was interposed by the railroad company, and sustained by the court.

It is insisted that it was not within the province of the court to determine the question of contributory negligence as one of law, and that its ruling upon the demurrer was erroneous. "In case of a demurrer to plaintiff's evidence, the court cannot weigh conflicting testimony, but must view that which is given in the light most favorable to the plaintiff, allowing all reasonable inferences in his favor; and, unless all that is offered fails to establish his case or some material



fact in issue, the demurrer should be overruled." *Rogers v. Hodgson*, 43 Kan. 276, 23 Pac. 732; *Railroad Co. v. Foster*, 39 Kan. 329, 18 Pac. 285; *Railroad Co. v. Cravens*, 43 Kan. 650, 23 Pac. 1044. If beyond dispute or cavil it appears that the accident was the result of Beaver's own negligence, then there was nothing for the jury to decide. On the other hand, if the standard of care required of him was a subject upon which different opinions might be entertained, and the facts shown and inferences to be drawn from them were such that reasonable minds might differ with respect to whether he had acted as a reasonably prudent man should have done under the circumstances, the case should have gone to the jury.

The action of the railroad company in leaving long, sloping piles of cinders between tracks, where the inspectors were required to pass over them in the performance of their duties, may be negligence. But it is insisted that, whether the railroad company was guilty of negligence or not, Beaver cannot recover, because he had knowledge of the location and condition of the cinders, and must necessarily have assumed the dangers incident thereto. On the evening before the injury, the company unloaded the cinders between two tracks, which were about 8 feet apart, ridding them up about 18 to 20 inches high, and so that they sloped off towards the rails. Shortly after dark on the same evening, it became the duty of Beaver to inspect a freight train which was placed on one of these tracks. After inspecting a part of the train, he came upon the cinders, and walked over them for about two car lengths, when an engine approached on the adjoining track. As it came up, he stopped work, straightened up, and endeavored to stand in the space between the engine and cars which he was inspecting; but the cinders, being loose and soft, gave way under his feet, and threw him towards the passing engine, by which he was struck and injured. In walking over the cinders for a distance of about two car lengths, he necessarily knew of their presence and something of the insecurity of the footing which they afforded; but how could the court fix the standard of care which he should have exercised? It was his duty to inspect the cars at the points where they were placed for inspection, and to do so with promptness and dispatch. The pile of cinders was deeper than those which he had previously seen in the yards; and it is stated that, where cinders were to be left in piles over night, they were leveled down by the company, so as to make it safer for yardmen to pass between the tracks. As a reasonably prudent man, then, what should he have done when the engine approached him? With ordinary footing, there was ample space for him to stand safely between the passing engine and the car he was inspecting. He testified that he knew that the cinders rendered the footing somewhat insecure, but he did not apprehend dan-

ger in assuming the position which he did while the engine was passing. He said that, if he had apprehended danger, he could have gone back to the end of the pile of cinders, or stepped between two of the cars he was inspecting, but that this was not customary, nor deemed by him to be necessary. He adopted the course usually taken by the inspectors when an engine was passing on an adjoining track, and, but for the unfortunate slipping of his feet as he straightened up, the position taken would have been secure. He was required to exercise ordinary prudence; and was it apparent to an ordinarily prudent man that he could not safely stand upon the cinders, in a space of about four feet, while the engine was passing? Some might say that he should have realized the danger, and gone to the end of the pile of cinders; others, that he should have stepped between the cars he was inspecting; while others might think that having seen the engine approaching in good time, and knowing the insecurity of the place, he should have made an earlier start for some place of safety. It appears that reasonable minds might draw different inferences and reach different conclusions with respect to the dangers of the situation and the proper course which Beaver should have taken; but, before the case could be taken from the jury on the ground of contributory negligence, it should be established beyond cavil or dispute, leaving no room for differences of opinion upon the question. Our view is that the case should have been submitted to the jury, and therefore the judgment will be reversed, and the cause remanded for another trial. All the justices concurring.

#### CHAFFEE v. FISHER.

#### HOWELL et al. v. SAME.

(Court of Appeals of Kansas, Northern Department, E. D. Feb. 14, 1896.)

#### RULINGS ON EVIDENCE—HARMLESS ERROR.

Errors in the rulings of the trial court upon the admission of evidence become immaterial when the evidence rejected is subsequently admitted.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Actions by C. L. Chaffee against John W. Fisher, and S. R. Howell and H. N. Jewett against the same. The actions were consolidated, judgment rendered for defendant, and plaintiffs bring error. Affirmed.

Solomon & Smith, for plaintiffs in error. W. W. & W. F. Guthrie, for defendant in error.

CLARK, J. The plaintiffs in error, as plaintiffs below, brought their several actions against John W. Fisher in the district court of Atchison county, and caused orders of attachment to issue to the sheriff

of Graham county, who levied upon certain real estate and promissory notes as the property of the defendant. The grounds for attachment, as alleged in the affidavits therefor, were that the defendant was about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; that he was about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; that he had property and rights in action which he was concealing, and had assigned, removed, and disposed of, and was about to dispose of, his property, or a part thereof, with the intent to defraud, hinder, and delay his creditors. The defendant in due time filed his affidavit in each case, in which he made specific denial of the several grounds alleged in plaintiffs' affidavits, and moved to dissolve the attachments and discharge the property from the liens thereof. By agreement of all parties, these motions were both heard at the same time, and upon the same evidence; and, upon a hearing duly had, the court sustained defendant's motions. The plaintiffs duly excepted to various rulings of the court on the admission of evidence, and assign these rulings for error in this court.

We have carefully examined the record, and find that the cases were heard and determined solely upon the evidence of the plaintiffs; and while, perhaps, the court may have erred in some of its rulings, the record shows that any errors which the court may have committed in this respect were subsequently cured when the witness was permitted to testify, in response to questions which were so framed as not to be deemed objectionable, to the same matters which plaintiffs had previously sought to introduce over defendant's objection. Other rulings, to which exceptions were saved, were in exclusion of testimony which plaintiffs sought to elicit on a very rigid examination of defendant, as their own witness, and upon matters which, if admitted, could not have aided the court in arriving at a correct determination of the question then being litigated. We think, from the whole record, it very clearly appears that no substantial rights of the plaintiffs in error were prejudiced by the rulings of the court complained of, and the decision in such case is accordingly affirmed.

#### HAGAN v. AMERICAN BUILDING & LOAN ASS'N OF MINNEAPOLIS.

(Court of Appeals of Kansas, Northern Department, E. D. Feb. 14, 1896.)

##### DAMURRER TO EVIDENCE.

A demurrer to the evidence should not be sustained when there is some proper evidence to establish every material allegation of the petition.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action by Eugene Hagan against the American Building & Loan Association of Minneapolis. Judgment for defendant. Plaintiff brings error. Reversed.

Quinton & Quinton, for plaintiff in error. A. Bergen, for defendant in error.

CLARK, J. This action was brought by the plaintiff in error, as plaintiff below, to recover damages from the defendant in error for the breach of a certain contract alleged to have been entered into between them. The court sustained a demurrer to plaintiff's evidence, and the only question necessary to consider in this case is as to whether the court erred in such ruling.

The defendant in error was a corporation duly organized under the laws of Minnesota, with its principal office or place of business in the city of Minneapolis, in said state, and was duly authorized to, and did, collect funds from its members, in stated installments, in proportion to the amount of stock held by them, respectively, which funds were, in turn, loaned by it, upon first mortgage real-estate security, to members of the association applying therefor. Under its rules, such loans were not usually made, except to applicants who had been members of the association for a period of at least two years. Its business was necessarily carried on through agents, and L. A. Starbird and F. E. Bryan were general agents for the state of Kansas, and had authority to appoint sub-agents to solicit applications for membership and subscriptions to its stock. The plaintiff in error introduced evidence tending to show that he was importuned by Starbird and one of his sub-agents to become a member of the association, and to subscribe for shares of stock therein, which he emphatically declined to do, stating that he had no desire to make an investment of that character; that at that time he was desirous of borrowing some money with which to improve certain real estate which he owned in the city of Topeka, and that Starbird represented to him that the defendant would make him such loan, upon application therefor, should the security offered be deemed adequate, and would waive the requirements of its rules with reference to the loaning of its funds only to such applicants as had been members for a period of at least two years, but that it would be necessary for him to make application for membership, subscribe for 200 shares of stock, and pay a membership fee of \$200, before the association could consider his application for a loan, this being necessary to be done "in order that they might have a basis of action, and also as evidence of good faith on his part"; that, if he would comply with these requirements, the association would promptly advise him that the agreement entered into between the plaintiff and the agent with reference to the

making of the loan would be carried out on the part of the association, or it would as promptly return the amount of the membership fee so paid by him, and no certificate of stock would be issued on his subscription; that acting upon such representations, and being induced solely thereby, the plaintiff signed a written application for membership, and subscribed for 200 shares of stock therein, and delivered the same, together with the membership fee of \$200, to such agent, who was duly authorized to receive them for the defendant, to be by him forwarded to the association; that, upon the receipt by the defendant of said application and subscription, the defendant proceeded to issue a certificate for 200 shares of stock in the association, which it forwarded to Mr. Hagan without advising him as to whether or not it was prepared to make him a loan, upon application therefor, upon adequate security; that this certificate was immediately returned by the plaintiff to the association, and a demand made for a return of the \$200 paid by him; and that the defendant had failed to comply with such demand. The evidence tended to show that it was mutually understood by Starbird and the plaintiff that no formal application for a loan would be necessary until after the defendant should notify Hagan that it would waive the requirements of its rules above mentioned in his case, such notice to be given immediately upon the receipt of the application for membership, or the membership fee should be promptly returned to him. No such notice was in fact given to the plaintiff, nor was the money returned in compliance with this agreement. Hagan parted with his money under certain conditions, which, if not complied with by the defendant, entitled him to recover it back. While plaintiff's cause of action, as disclosed by the evidence, is not very artistically stated in his pleading, still it must be remembered that the action was commenced before a justice of the peace, and, under the very liberal construction given by our supreme court to pleadings in justices' courts, we think the evidence in this case would warrant a verdict in favor of the plaintiff, under the allegations of his bill of particulars, and for this reason the court erred in sustaining the demurrer to the evidence. *Steelsmith v. Railway Co.*, 1 Kan. App. 10, 40 Pac. 992. The judgment will therefore be reversed, and the cause remanded, with directions to sustain the motion for a new trial.

# FOREMAN v. WARD et al.

(Court of Appeal of Kansas, Northern Department, E. D. Feb. 14, 1896.)

## APPEAL—NECESSARY PARTIES.

The parties at whose instance and in whose favor an order is made in the district court are necessary parties to any proceeding in this court to reverse such order; and, where

a case is brought to this court without making or joining as defendants the parties whose rights are sought to be determined, such petition in error must be dismissed.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by D. W. Foreman against E. J. Ward and D. M. Ward. Judgment for plaintiff. From an order modifying the judgment, plaintiff brings error. Dismissed.

John T. Little and J. W. Parker, for plaintiff in error. I. O. Pickering, for defendants in error.

GILKESON, P. J. In 1887 D. W. Foreman sold to Mrs. E. J. Ward a farm in Johnson county, Kan., for \$10,000. Mrs. Ward paid in cash the sum of \$2,500, and gave, with her husband, her notes for the balance, secured by a mortgage on the land. On June 15, 1890, Mrs. E. J. Ward commenced an action against Foreman, for damages, in the district court of Johnson county, for false representations concerning the sale of said land, and recovered a judgment against Foreman for the sum of \$2,000 as damages, and the further sum of \$360.75 as costs. During the same year, Foreman commenced an action in said court against Mrs. Ward and her husband, D. M. Ward, to recover the balance of the purchase price of the farm, and to foreclose the mortgage; and on September 30, 1889, he recovered a judgment against both defendants for the sum of \$7,512.57, and a judgment for \$1,455.77 against Mrs. Ward. In November, 1890, Foreman began this suit in the same court against the defendants, E. J. and D. M. Ward, for the purpose of having their judgment of \$2,000 and costs therein of \$360.75, against him, set off on his judgment of \$7,512.57; and upon the hearing of this case the court rendered judgment in favor of Foreman, and offset such judgment and costs, and ordered the same to be paid by crediting those amounts on the judgment of Foreman. This was on April 3, 1891, at an adjourned session of the January term of said court. On May 20, 1891, and at the May term of said court, M. F. Harp and other alleged witnesses in the case of E. J. Ward v. D. W. Foreman filed a motion in the case of Foreman against E. J. and D. M. Ward (being the case in which the set-off had been made), asking the court to modify the judgment rendered therein by deducting from the amount set off their fees in the case of Ward v. Foreman, claiming that they were a part of the \$360.75 which had been offset. The court sustained the motion, and ordered the judgment modified as asked. Foreman brings the case to this court for review.

The record in this case discloses the fact that the case presented to us for review is the case of D. W. Foreman, Plaintiff in Error, v. E. J. Ward and D. M. Ward, Defendants.

ants in error, and that the errors complained of were committed by the trial court upon a motion filed in that case by certain parties who were not original parties to the action in the court below. Nor do we think they have been made parties in this court. They are not made parties in the petition in error, either by name or otherwise, nor is there any appearance by any one for them in this court. The allegations of the petition in error are directed against the defendants in error, E. J. and D. M. Ward, complaining of a judgment against D. W. Foreman, plaintiff in error, and in favor of the defendants in error, or, rather, a modification thereof. It is true that the case made was accepted by I. O. Pickering as "attorney for the motion, and of the parties making the said motion, herein," and that notice was given to some 18 different parties that the case would be presented for settlement and signing to the judge of the district court at a certain date, and that such notice was accepted by "I. O. Pickering, Attorney for the Motion." The record also discloses that in the case of Foreman against Wards there was a motion filed by "M. F. Sharp, John Ewing, T. R. Morrill, Thomas Rochester, on their own behalf and on behalf of all the other witnesses of the plaintiff in the case of E. J. Ward v. Foreman," and these parties are named among the 18 upon whom the case made was served; but we do not think that the mere serving of a case made upon a party is, of itself, sufficient to make them parties to the record. The plaintiff in error claims that they were strangers to the record in the court below, and contends, for this reason, that they were not entitled to any consideration. If this be true, then how can it be said that they are parties in this court, without having been specially made so and brought in? The parties at whose instances and in whose favor an order is made in the district court are necessary parties to any proceeding in this court to reverse such order, and where a case is brought to this court without making or joining as defendants in error the parties whose rights are sought to be determined, such petition in error must be dismissed. *Ferguson v. Smith*, 10 Kan. 394. The petition in error, therefore, must be dismissed. All of the judges concurring.

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#### CHICAGO, R. I. & P. RY. CO. v. CLONCH.

(Court of Appeals of Kansas, Northern Department, E. D. Feb. 14, 1896.)

#### RAILWAY COMPANIES — KILLING STOCK — CATTLE GUARD — OPINION EVIDENCE.

1. When, in an action for damages against a railway company, a material fact to be determined is whether the railway company was guilty of negligence in failing to construct a cattle guard across its track where it intersects a

public highway, is it error for the court to permit witnesses to testify that in their opinion a cattle guard could not be constructed and maintained at such place without endangering the lives and limbs of the railway employes.

2. Where a railway company located its depot in such proximity to a public highway that it became necessary to cross the same by a side track, in the necessary use of which the lives and limbs of railway employes would be endangered should a cattle guard be constructed at the place where the track intersects the highway, the propriety of such location cannot be inquired into in an action brought by a private person against the railway company to recover damages for the killing of stock which strayed upon the line of the road because of the want of such cattle guard.

(Syllabus by the Court.)

Error from district court, Jackson county; Robert Crozier, Judge.

Action by C. C. Clonch against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Modified.

This action was brought to recover the value of 2 mules, 1 mare, and 2 colts, which were killed by the defendant in the operation of its road near Streight Creek, a small station on defendant's line of road in said county. The particular acts of negligence which plaintiff alleged in his petition, and upon which he based his right to recover damages, are that defendant had failed to inclose its right of way, at the place where it intersects a public highway, with a good and lawful fence, to prevent live stock from being on the track; and that those operating the train did not cause the whistle of the engine to be sounded 80 rods before reaching the highway, nor exercise any care to avoid the injury complained of; and that these animals, without the fault of plaintiff, entered the public highway, and from thence upon the right of way, on the southeast quarter of section 7, township 6, range 16, being within the inclosed and improved farm of L. T. Smith, where they were struck by a passing engine and killed. The plaintiff established the fact that the track was not inclosed with a good and lawful fence where it leaves the highway in question. In fact, there was no controversy upon this point. The accident was supposed to have occurred about 4 o'clock in the morning of November 14, 1890. The record does not show that any one saw the animals after the evening of November 13th until the following morning, when they were discovered by the defendant's station agent on the right of way north of the highway on the said southeast quarter of section 7; four of them being dead and the other one badly injured. The court sustained an objection to the introduction of any evidence upon the question as to whether or not the employes of the railway company observed the requirements of the statute with reference to sounding the steam whistle at least 80 rods from the crossing, to which ruling the plaintiff duly excepted. No attempt was made to show any other negligence in the management of the train.

The defendant's depot is located on the N. W.  $\frac{1}{4}$  of section 18, township 6, range 16, in Jackson county, and its right of way and railroad track traverses diagonally that quarter section, the northwest corner of the northeast quarter of the same section, and the southeast quarter of section 7, which joins section 18 on the north. Between these sections 18 and 7 there is a duly-established public highway 40 feet in width, which is also traversed by defendant's right of way and railroad track. The distance from the depot to a point where the railroad track crosses the highway is about 1,200 feet, and in addition to the main track the defendant had constructed a switch, or what is termed a "passing track," about 13 feet distant from the main track, and parallel thereto, extending from a point several hundred feet southwest of the depot across the highway to a point two or three hundred feet north of the south line of the said southeast quarter of section 7, where this passing track is joined to the main track; and 125 feet beyond that point was a cattle guard, to prevent live stock from getting upon the track and right of way. The railroad company introduced evidence tending to show that that part of the highway which is traversed by the right of way, the main track, and passing track was a part of the depot and switch grounds of the company as located by them; that the depot was located at a suitable place for the accommodation of the public and for the management of the business of the defendant; that five trains pass at that station daily; that much of the local switching of cars is done there; that as many as five trains had been there at a time; that it was necessary, in order to properly discharge its duties to the public, in the management of its business, that the depot grounds and switch yards, including its passing track, should extend over and across the public highway, and that it could not construct and maintain a fence or cattle guard on either side of the highway across its right of way without endangering the lives of its employes while engaged in doing the necessary switching of trains at that station. The jury returned a general verdict in favor of the defendant, and made the following special findings of fact: "Was there anything in the lay of the land or otherwise to interfere with or prevent the defendant from the erection of cattle guards or other barriers at the place where its road enters said land of Smith where the animals of the plaintiff went upon said right of way?" "Yes." "Could the defendant have constructed and maintained a cattle guard at the point where the railroad enters the south line of the land owned by Leonard T. Smith without thereby endangering the lives of its employes?" "No." The plaintiff in due time filed his motion for a new trial, in which he alleged that the verdict was not sustained by sufficient evidence, and was contrary to law, and that errors of law occurred at the trial

to which the plaintiff duly excepted. The hearing of this motion was continued until the next term of court, and pending the hearing the plaintiff asked leave to amend his petition, which application was also continued until the next term, at which time both motions were allowed. The plaintiff then filed his amended petition, in which, after referring to all the allegations of the original petition, and making them a part of the amended petition, he alleged in substance, "by way of conforming the said petition to the facts proved," that the highway across which the track ran diagonally existed long prior to the construction of the railway, and that the station limits, depot, and tracks in the vicinity of the highway were established and constructed in disregard of the needs, convenience, and the safety of the public and to property, and was not justified by the exigencies of the railway service; "and that by reason of the premises aforesaid the live stock of the plaintiff, going upon said right of way as aforesaid without plaintiff's fault, were killed," etc. The journal entry (omitting the caption) reads: "This day this cause came on for hearing upon the motion filed by plaintiff to amend his petition herein, and also upon the motion of the plaintiff for a new trial; and the court, after hearing arguments of counsel, and being fully advised in the premises, grants leave to the plaintiff to file an amendment to his petition herein instant, which is done, to which ruling and decision of the court the plaintiff at the time duly excepted, and thereupon the court sustained the application of the said plaintiff for a new trial herein and set aside the verdict and findings of the jury originally rendered in this action, to which ruling and decision of the court the said defendant at the time duly excepted, and thereupon, for good cause shown, the said defendant is granted forty days herefrom in which to make and serve upon the plaintiff herein a case made for the supreme court, and this cause is continued until the next term of this court." The defendant has brought the case here, complaining of the ruling of the court in allowing the plaintiff, after trial, and after a verdict had been rendered, to file an amendment to his petition, and then granting a new trial.

M. A. Low, W. F. Evans, and Hayden & Hayden, for plaintiff in error. James H. Lowell, for defendant in error.

CLARK, J. (after stating the facts). The record shows that the amendment to the petition was allowed "in order to conform the petition to the facts proved," but, even if the original petition had contained all of the allegations of the amended petition, the jury could not, under the evidence, have found otherwise than in favor of the defendant. How, then, can it be said that the amendment conformed the petition to the facts proved? It might with much more propriety

be said that the allegations of the amended petition were clearly controverted by the evidence. If the question presented by the amendment could be properly litigated in a case of this kind, the plaintiff in error ought not to complain that this amendment was allowed, as the railway company, over the objection of the defendant, introduced evidence tending to rebut the allegations of the amended petition. But we do not think the question presented by this amendment could be properly litigated in this action. The right of locating the railroad, the depot, the depot grounds, the switch and passing tracks was vested by law in the railroad company in the first instance. The act of location was not void, and, if it was voidable, the state only could call the company to account for it. Wood, Ry. Law, § 227; Railroad Co. v. Young, 33 Pa. St. 175; Railroad Co. v. Speer, 56 Pa. St. 325; Chicago, R. I. & P. R. Co. v. City of Joliet, 79 Ill. 25; Railroad Co. v. Dunbar, 100 Ill. 110; McGrath v. Railroad Co. (Mich.) 24 N. W. 854. While we think the court erred in allowing this particular amendment to the petition, and while we would not hesitate to reverse the decision of the trial court in granting a new trial if it clearly appeared from the record that a new trial was granted solely to enable the plaintiff below to introduce evidence in support of the allegations of negligence which were not included in the original petition, still it must be remembered that the grounds set up in the motion for a new trial are that the verdict was not sustained by sufficient evidence, and was contrary to law; and that errors of law occurred at the trial, to which the plaintiff duly excepted; and, for aught that appears in the record, the court may have granted the new trial partly on these grounds. The defendant in error insists that the court erred both in the admission and rejection of evidence offered at the trial, and that, although it may be said the verdict as returned is sustained by the evidence, the findings were influenced by the errors of the court in the admission of evidence. We think, under the circumstances of this case, the court properly ruled that it was immaterial whether the defendant did or did not sound the steam whistle at least three times 80 rods from the crossing. There was no proof that any one was in charge of the stock, nor as to whether they were on or off the railroad track or on the highway at the time the train was 80 rods from the crossing. The failure to comply with the statute would not render the company liable to the owner of the stock injured unless it was shown that the injury resulted from a failure to comply with the statute in this respect. The supreme court of Indiana, in *Railway Co. v. Green*, 22 N. E. 327, in construing a statute similar to our own, said: "It is manifestly not the object or purpose of the statute to require this signal for the purpose of frightening animals which may stray upon the crossing, as the law does not permit cattle to run at large in

the highways of the state; and the presumption is that none will be upon the highway, and, if they were, they would, no doubt, be as liable to become frightened at the approaching train as by the signal required. \* \* \* We cannot presume, or the inference cannot be drawn, that the cow remained on the track notwithstanding the noise of the approaching train, the ringing of the bell, the shining headlight of the engine coming at a rapid rate of speed towards her; but, if the whistle had been sounded, she would have left the track, and avoided instant death." The plaintiff having established his ownership of the stock, the injury resulting from their contact with a passing engine on the right of way at a place other than a public highway which the defendant had not inclosed with a good and lawful fence to prevent animals from being thereon, in order to defeat a recovery it devolved upon the railroad company to show either contributory negligence on the part of the plaintiff, or that it was not required to inclose its track at the particular place where the animals entered its right of way from the highway. The jury found that the plaintiff was not guilty of negligence contributing to the injury.

The defendant propounded to several of its witnesses the following question: "State whether or not a cattle guard could be constructed or maintained at the point where the railroad intersects the south line of the L. T. Smith land, on the north side of the highway, without endangering the lives or limbs of railroad employes. The court, over the objection of the plaintiff, permitted the witnesses to answer the question, and an exception was saved to the ruling of the court. The jury were instructed that if the defendant located its depot at a suitable place, and it was necessary that it should construct its main track and passing track across the highway in order to properly manage its business in the public interest, it would have a right to do so; and that, if a fence or cattle guard along the margin of the highway could not be constructed without interfering with the safe management of the trains with reference to the employes of the railroad company, the law would dispense with such fence or cattle guard at that place; and that it was for the jury to determine whether or not the passing track was properly constructed,—was of proper length for the convenient operation of the railroad with reference to the public interest,—and, if it was, that then they should determine from the evidence whether it would have been proper for the defendant, in view of all the circumstances of the case, to have constructed a fence or cattle guard on the north side of the highways; and that would depend on the determination of the question as to whether a fence or cattle guard at that place would have interfered with the safe management of the trains with reference to the employes of the railway company. It will thus be seen that under the instructions

the main question to be decided by the jury was one upon which the witnesses were allowed to express an opinion. The witnesses had not shown any peculiar qualifications to testify upon this question, except that they were railroad employes, including a civil engineer, brakemen, locomotive engineers, and a station agent. In fact, it required no special skill or training to ascertain whether a cattle guard at the place in question would have been dangerous to defendant's employes. It is not apparent why these witnesses could not have testified as to the manner of the construction of cattle guards, the location of the tracks, the uses made of them, and stated any other facts which would tend to show that a cattle guard across or under the tracks in the station grounds or switch yards, or at the particular place in question, would be dangerous to employes of the railway company; and the jury, upon such testimony, would have been able to draw reasonably correct conclusions with reference thereto, without the aid of the opinions of the witnesses. "If the relation of facts and their probable result can be determined without special skill or study, the facts themselves must be given, and the jury left to draw conclusions or inferences." *Railway Co. v. Ritz*, 33 Kan. 404, 6 Pac. 583. In *Railroad Co. v. Modesitt*, 24 N. E. 986, the supreme court of Indiana held that in a suit for horses killed by getting upon the railroad track at a crossing where no cattle guard was maintained the evidence of a witness that a cattle guard could not be maintained there without injuring defendant's employes was properly excluded; the court saying: "The railway company was entitled to prove the condition of the tracks, their location, the use made of them, and the like facts; but it was not entitled to the opinion of a witness that the construction of a cattle guard would make the use of the tracks dangerous. In *Railway Co. v. Hale*, 93 Ind. 79, which was an action to recover damages for killing a horse, the evidence tended to show that the animal was killed by a freight train on the railroad. The principal contention was whether the railroad could have properly been fenced at the place where the horse entered upon the track and was killed. The court held that it was not competent to take the opinion of witnesses, but that the jury must be left to decide that question upon the facts proved." See, also, *Bliss v. Wilbraham*, 8 Allen, 564; *Muldowney v. Railroad Co.*, 36 Iowa, 462; *Railroad Co. v. Zumbaugh* (Ind. App.) 39 N. E. 1058; *Montgomery v. Scott*, 34 Wis. 345; *Turnpike Co. v. Coover*, 26 Ohio St. 520; *Couch v. Railroad Co.*, 22 S. C. 557; *Railroad Co. v. Greeley*, 23 Fost. (N. H.) 237; *City of Topeka v. Sherwood*, 39 Kan. 698, 18 Pac. 933; *City of Junction City v. Blades*, 1 Kan. App. 85, 41 Pac. 677. For the reasons assigned, the order allowing the amendment to the petition will be reversed, while the order granting a new trial will be affirmed.

## WALKER et al. v. DOUGLAS et al.

(Court of Appeals of Kansas, Northern Department, E. D. Feb. 14, 1896.)

## TAX DEED—VALIDITY.

A tax deed is not invalid from the mere fact that a part of the taxes for which the land was sold was a tax levied for the preceding year, but not extended upon the tax rolls for that year, if such tax was otherwise a legal charge upon the land.

(Syllabus by the Court.)

Error from district court, Jackson county; Robert Crozier, Judge.

Action by A. D. Walker and others against John C. Douglas and others. Judgment for defendants. Plaintiffs bring error. Reversed.

The plaintiffs in error (plaintiffs below) brought this action, claiming title to the real estate in controversy under and by virtue of two tax deeds. The first is based upon the sale of said land for delinquent taxes of the year 1885, which is in statutory form, and recorded on September 10, 1889; and the second upon the sale of the same land for delinquent taxes for the year 1886, which is in statutory form, and includes the taxes of 1887 and 1888, and recorded on March 4, 1891. Plaintiffs in their petition, in addition to their claim of ownership, aver that defendants have been wrongfully receiving all the rents, issues, and profits of the land since September 9, 1889, which the plaintiffs, as the absolute owners, were entitled to, and that they were of the value of \$300. Defendants answered by general denial. Trial had before the court upon the issues thus joined. Special findings of fact and conclusions of law returned by court. Judgment rendered thereon, declaring the deeds void, and assessing costs against the plaintiffs.

James H. Lowell, for plaintiffs in error. John C. Douglas, for defendants in error.

GILKESON, P. J. (after stating the facts). This cause comes here upon error in the findings of fact, conclusions of law, and judgment. The court found that each of the tax deeds was invalid. "(1) That the tax deed issued upon the sale for the taxes of 1885 is invalid because there was included in such taxes a township road tax levied in 1884, under the eighth subdivision of section 22, c. 110, Comp. Laws 1879, and carried over to and added to the taxes of 1885; such road tax being illegal because the said subdivision of section 22 was unconstitutional. That the tax deed issued upon the sale for the taxes of 1885 is invalid because a township road tax, levied in 1885, was not collected as other taxes levied for that year, but was carried over to 1886, and constituted a part of the taxes for which the land was sold in the latter year." No other reasons are assigned. As to the first tax deed, we think the decision of the court is correct. It is conceded by defendants in error that section 22, c. 110,

Comp. Laws 1879, was declared unconstitutional by the supreme court of this state in *Railway Co. v. Champlin*, 37 Kan. 682, 16 Pac. 222; but they contend that the assumption of the court in its findings of fact that these taxes were levied under that law was erroneous, and is not warranted by the findings of fact. The testimony is not preserved in the record, and the findings of the court upon this proposition are conclusive upon us. We shall treat it, then, as a fact that these taxes were so levied.

An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. As to the second tax deed, the court held it was invalid for the reason that a township road tax, levied in 1885, was not collected as other taxes levied for that year, but was carried over to 1886, and constituted a part of the taxes for which the land was sold in the latter year. At the time this tax was levied there were in force the Laws of 1885 and 1874. Conceding this to be true, we think that the carrying over of the taxes to the following year would be but a mere irregularity without prejudice to the taxpayer.

There is no contention, nor does the court find in this case, that the land in controversy was not subject to taxation, or that the taxes were illegally levied for the year 1885. The law in force at the time this tax was levied (section 85, c. 34, Laws 1876) is as follows: "All taxes shall be due on the first day of November of each year. A lien for all taxes shall attach to the real property subject to the same, on the first day of November in the year in which said taxes are levied, and such lien shall continue until such taxes, penalties, charges and interest, which may have accrued thereon shall be paid by the owner of the property, or other person liable to pay the same." We think that the language of this section is perfectly plain. "A lien for all taxes shall attach to the real property, subject to the same, on the first day of November;" that is, when a tax is levied, and the 1st day of November has arrived, it then becomes a lien, and continues so to be until paid. The defendants in error do not attempt to show that for 1885 they had paid all of the taxes except this, but, on the contrary, the record shows that none of the taxes upon the real estate in controversy were paid for that year, or for two years subsequent thereto. And section 54 of the act of 1876 makes it the duty of all county clerks to cause all lands in their respective counties that for any reason have escaped taxation for any former year or years, when the same were liable for taxation, to place the same upon the tax roll, and charge up or carry out assessments against said lands. And section 55 provides "that the taxes charged up under the provisions of section 54 shall be collected in the same manner as other taxes levied

upon said real estate." This case might stand quite different if the owners, or if the defendants in error, they claiming to be the owners, had paid or offered to pay the taxes for 1885, or if they had paid all of the taxes for 1885, and this had been omitted from the roll of that year, or if they had changed ownership other than by will, inheritance, or gift. But these conditions do not exist. The law is very careful to prevent the escape from taxation of any person. All must bear their fair share of the public burden, and no one should be permitted to escape taxation merely because of some irregularity in the assessment or elsewhere. And we do not think that the party who has contributed to the public revenue should be deprived of the benefits that he has derived by a mere irregularity, and particularly where the purchase price paid is for a removal by a lien created by express terms of the statute. The most that can be said of this transaction would be that it is a mere irregularity, and that no one has been prejudiced thereby. The man who fails to pay his taxes is not complying with the duties imposed upon him by law, and cannot be said to be without blame. We think, therefore, that the court erred in its second conclusion of law as to the tax deed issued upon the sale for delinquent taxes of 1886. The judgment in this case will therefore be reversed, and cause remanded for further proceedings in accordance with the views herein expressed. All the judges concurring.

#### BOOGE v. RITCHIE.

(Court of Appeals of Kansas, Northern Department, E. D. Feb. 14, 1896.)

#### EJECTMENT—RIGHTS OF HOLDER OF INVALID TAX DEED.

1. In an action for the recovery of possession between the holder of a tax deed and the owner of the land, if the tax deed be adjudged invalid, the holder of the deed is entitled to recover, and the successful party should be adjudged to pay, the full amount of all taxes paid on such land, with interest and costs as allowed by law up to the date of said tax deed, including the cost of such deed and the recording of the same, with interest on such amount at the rate of 20 per cent. per annum.

2. In such action it is not proper for the court to inquire into the correctness of the assessed valuation of the land, for the purpose of showing the amount of taxes justly chargeable thereon, and to reduce the amount of taxes recoverable by the holder of the invalid tax deed.

(Syllabus by the Court.)

Error from circuit court, Shawnee county; J. B. Johnson, Judge.

Action by H. D. Booge against Hale Ritchie. Judgment for plaintiff, who moved for a new trial. Motion overruled, and plaintiff brings error. Reversed.

On the 26th of October, 1888, the plaintiff in error commenced his action in the district court of Shawnee county, Kan. (which was afterwards duly transferred to



the circuit court of said county), in ejectment, against the defendant, for the recovery of certain real estate in said county under and by virtue of a tax deed. In 1884 the real estate in controversy was owned by defendant, and was subject to taxation. The taxes for that year not being paid, the land was, in 1885, at a regular tax sale, sold by the treasurer of Shawnee county to one C. D. Long, for the sum of \$59.14. He shortly after, for the same amount, sold and assigned the tax-sale certificate to the plaintiff, to whom, on the 31st of September, 1888, was issued a tax deed. Upon the trial of this cause by the said circuit court on the 17th of June, 1891, the court found that plaintiff's tax deed was invalid and conveyed no title, and rendered judgment against him in favor of the defendant for costs of suit. The plaintiff moved the court at said trial for an allowance of the taxes paid by him, and that the defendant be adjudged to pay the same, together with the interest and costs allowed by law, amounting in all, at that time, to the sum of \$160. On the hearing of this motion, the court, over the objection of the plaintiff, permitted the defendant to introduce testimony to show that the real estate had been assessed too high by the township trustee in 1884, and, as a result of such testimony, the court found that in that year the property did not exceed in value \$260, and decided the plaintiff should recover of and from the defendant, on account of the taxes so paid by him, the sum of \$9.40, instead of \$160, which would be the amount due, computed on the basis of the amount of taxes actually paid. There is no dispute about the full amount of taxes paid on such lands by plaintiff, and the court found that the amount paid was \$59.14. There is no dispute about the amount of interest and the costs allowed by law. The plaintiff excepted to the decision of the court, and filed a motion for a new trial, which was overruled, and excepted to, and now brings the case here for review.

Vance & Campbell, for plaintiff in error.  
E. E. Chesney & E. G. Wilson, for defendant in error.

GILKESON, P. J. (after stating the facts). The errors assigned are: (1) The court erred in overruling the plaintiff's motion to be allowed the full amount of taxes so paid by him, with interest and costs allowed by law; (2) the court erred in admitting testimony, over plaintiff's objection, to show the excessive assessment in 1884 by the township trustee; and (3) the court erred in overruling plaintiff's motion for a new trial, and in rendering judgment for only \$9.40, when, according to the law of the land, the judgment should have been for \$160.

Paragraph 6996 of the General Statutes of 1889 reads as follows: "If the holder of

a tax deed \* \* \* be defeated in an action by or against him for the recovery of lands sold, the successful claimant shall be adjudged to pay to the holder of the tax deed the full amount of all taxes paid on such lands, with interest and costs as allowed by law up to the date of said tax deed, including the cost of such deed and the recording of the same, with interest on such amount at the rate of 20 per cent. per annum." While the language of the statute is very broad, or, as was said in *Jackson v. Challiss*, 41 Kan. 258, 21 Pac. 87, the terms thereof are sweeping and vigorous, yet they mean precisely what they say, viz. "that the party paying the taxes, or holder of a tax deed, when defeated in an action, shall be entitled to recover the full amount of taxes paid, with interest and costs as allowed by law." Not such portion of them as a court may, years after, reassess; not a part of them, but the full amount paid. And the court had no authority to go back and hear evidence on the value of the real estate, and virtually usurp the office of township trustee for the time, and reassess the property, to the prejudice of the purchaser, who is in no way to blame for the excessive assessment in the first place, even if it was fraudulent. What difference can it make to him what the reason is that renders his deed invalid? He innocently and in good faith invested his money on the assurance of the law that, should he be defeated in his title to the land for any reason, he should recover the amount he had invested, with interest and costs; and our supreme court has repeatedly and uniformly so held the law to be.

It is admitted that this land was subject to taxation for the year 1884. There was no dispute as to the amount of taxes paid, nor the amount of interest and costs as allowed by law. It was the duty of the defendant to pay his taxes, and, if they were erroneously assessed, it was his duty to have the mistake corrected in the way provided by law, or suffer the consequences of his neglect in the matter. As between him and a purchaser at a tax sale, he is the least innocent of the two, and should be the one to suffer, if either. He cannot say to a court of equity "that he is free from blame." He has permitted his lands to be sold for nonpayment of taxes, and to permit a court to play assessor at this late date, and leave the plaintiff, who has expended his money on the strength of the public record, without any remedy for the wrong done him, is certainly beyond equity and good conscience; and, if the decision in this case were permitted to stand as correct, it would practically abrogate said paragraph 6996. In *Coonradt v. Myers*, 31 Kan. 31, 2 Pac. 858, the court says: "In an action for the recovery of possession between the holder of a tax deed and the original owner of the land, if the tax title is adjudged in-

valid, can the holder of such title recover all the taxes theretofore paid by him, with interest, or can he only recover those paid within three years prior to the commencement of the action? This question must be answered in favor of the recovery of all taxes; and, if this were not the true rule of construction, the inducement to invest in tax sales would be wonderfully abridged. The theory upon which this court has acted, which is the general rule of construction in other states, and which is the obvious policy of our statutes, is to secure to the taxpayer either the land, or his tax investment with its large statutory interest. In that way it compels the prompt payment of taxes, by holding out large inducements to tax purchasers to invest upon the delinquencies of original holders." Under the ruling of the court below, the plaintiff not only lost the land, but lost nearly all of his investment; this through no fault of his, and in the face of a statute that expressly says he shall recover the full amount of taxes paid on such lands, with all the interest and costs, without the restriction of limitation of any kind or character. The position taken by the defendant in error is not only novel, but unauthorized by law. "Equity has no jurisdiction under its general power to correct merely unequal or unjust assessments, where there is a statutory board that may do so." *Cooley, Tax'n*, §§ 328, 329; *Rhoads v. Cushman*, 45 Ind. 85. He has not attempted to take advantage of any of the remedies afforded him by statute. The county board of equalization is authorized at its meetings to correct and equalize the assessment made, and at such times the owner of such property has an opportunity for a hearing at which to contest the legality of the assessment; and the statute further provides a remedy by injunction to enjoin the illegal levy of any tax, charge, or assessment, or, if the levy has been made, to enjoin the collection, or any proceeding to enforce the same, if commenced within the time limited by law. None of these remedies had the defendant thought fit to evoke, but has lain quietly by for more than six years without complaint. We think the plaintiff is entitled to all the taxes which he paid, and all interest and costs, as allowed by law. The judgment in this case will therefore be reversed, and cause remanded, with instructions to render the judgment herein in accordance with the views herein expressed. All the judges concurring.

**MORTGAGE TRUST CO. OF PENNSYLVANIA v. FLEMING et al.**

(Court of Appeals of Kansas, Northern Department, E. D. Feb. 14, 1896.)

**GRANT OF NEW TRIAL—REVIEW ON APPEAL.**

Where the trial court sustains a motion for a new trial on the ground that the ver-

dict of the jury is not supported by the evidence, and the record discloses conflicting testimony from which different conclusions might reasonably be drawn, such ruling will not be disturbed by this court.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; William Thomson, Judge.

Action by the Mortgage Trust Company of Pennsylvania against W. J. Fleming and others. Verdict for plaintiff. From an order granting a new trial, plaintiff brings error. Affirmed.

H. A. Coates and Coddling & Skene, for plaintiff in error. H. C. Hutton, for defendants in error.

CLARK, J. This action was brought by the Mortgage Trust Company of Pennsylvania against W. J. Fleming et al. to recover a personal judgment against Fleming on a coupon mortgage note for \$500, alleged to have been executed by him, and to foreclose a mortgage on certain real estate in Pottawatomie county, securing the payment thereof. The defendant Fleming answered under oath, denying the execution of the note and mortgage, and this issue was submitted to a jury, which in due time returned its verdict in favor of the plaintiff. The defendant filed his motion for a new trial, setting forth, among other of the statutory grounds, as reasons therefor, that "the verdict, report, and decision is not sustained by sufficient evidence, and is contrary to law." This motion was sustained by the court, the record showing that a new trial was granted for the reason that "the verdict is contrary to, and not supported by, the evidence." The plaintiff duly excepted to this ruling, and has brought the case here for review, assigning for error the action of the court in vacating the verdict of the jury and granting a new trial.

The plaintiff in error contends that the prevailing rule of law is that "unless the verdict is clearly, palpably, decidedly, strongly, and shockingly against the competent evidence, a court has no legal right to set it aside as unsupported thereby; and that, when the evidence is conflicting, a difference of opinion thereon by a court is nothing but its personal opinion, and that the jury are then the exclusive judges of the weight of the evidence and the credibility of the witnesses. There is no prerogative in the court, in such event, authorizing it to override the finding of the jury, and set aside their verdict on the ground that it is against the weight of the evidence." This court, in *Railway Co. v. Reardon*, 1 Kan. App. 114, 40 Pac. 931, passed upon the question at issue, and there held that "it is the duty of the trial judge, passing on a motion for a new trial, one of the grounds of which is that the verdict of the jury is not sustained by sufficient evidence, to review the evidence in the case, and to approve or dis-

prove the verdict; and if, after such review of the evidence, he is clearly of the opinion that the verdict is wrong, he should express his disapproval by setting it aside and granting a new trial." In the opinion, Garver, J., reviews the decisions of our supreme court at some length, and says: "The functions of judge and jury are dissimilar until the verdict is rendered, but at that point the duties of the trial judge are enlarged, and he is called upon to consider, weigh, and pass upon all questions of fact as well as of law in the case. The decision of the jury cannot be ignored or laid aside simply because, in the exercise of his judgment upon the evidence, the judge would have arrived at a different conclusion; but when the difference between the judge and jury is so marked that the former cannot bring his judgment to acquiesce in the conclusions of the latter as being such conclusions as reasonable men might, under the circumstances, naturally arrive at, it is his duty without evasion or hesitation to withhold any approving act from a verdict so rendered, and set it aside." There is no question but that in July, 1887, the defendant executed and delivered to a firm of loan agents in Pottawatomie county, who also represented plaintiff's assignors, a note for \$500, and a mortgage on real estate to secure its payment. A member of that firm testified that this mortgage was subsequently released of record, and, together with the note, returned to the defendant; that on August 1, 1887, Fleming signed a written application, prepared by the witness, for a loan of \$500, and that on August 18th the defendant executed the note and mortgage sued on in this action. The record shows that Fleming was indebted to certain parties on other notes, which were held by this firm of loan agents for collection, amounting to nearly \$500, which were paid out of the proceeds of the loan; but they were not delivered to the defendant, nor was any money paid to him, until some time in August. The defendant testified that the note and mortgage which he signed in July had never been returned to him, and that he had supposed his payments of interest were being applied on that loan. He also testified that he had no knowledge or information concerning the note and mortgage in controversy until after this suit was brought, and that he did not execute them. Several witnesses, including bankers of many years of experience, accustomed to examine and compare signatures, testified that in their judgment the note and mortgage sued on in this action were not executed by the defendant. True, two witnesses testified that they saw the defendant sign them, yet they both admitted on cross-examination that they had but recently been brought back from New Mexico on extradition papers; but upon what charge they were being prosecuted does not appear from the record. They were both members of the

firm of loan agents to whom the July note and mortgage had been executed, and both testified regarding that transaction, and it is almost wholly upon their testimony that the plaintiff relied to establish its case. Another witness testified that he was with the defendant constantly from the 1st day of August at 9 o'clock a. m., until the 20th or 21st of that month, in Marshall county, and this statement is corroborated by the defendant; and, if their testimony is true, the witnesses of the plaintiff must have been in error when they stated that the written application was signed in their office in Pottawatomie county on the 1st day of August, that about a week thereafter the defendant called in person, and got the note and mortgage which he had executed in July, and that he also executed the new note and mortgage in their office on the 18th day of August. The evidence is conflicting, and, while the jury found the issues in favor of the plaintiff, and while from an examination of the record it might seem that the verdict was supported by the evidence, yet the trial judge, having the same opportunity to hear and see the witnesses as the jury had, is better able to determine that question than a reviewing court can be with nothing before it save the printed record of the proceedings of the trial court. As we cannot say that the court erred in granting a new trial on the ground that the verdict was contrary to and not supported by the evidence, the order vacating the verdict and granting a new trial must be affirmed.

KANSAS CITY, FT. S. & M. R. CO. v.  
BOARD OF COM'RS OF JOHN-  
SON COUNTY et al.

(Court of Appeals of Kansas, Northern Department, E. D. Feb. 14, 1896.)

COURT OF APPEALS—JURISDICTIONAL AMOUNT.

The court of appeals has no jurisdiction to review a judgment of the district court where the amount or value exceeds the sum of \$2,000, exclusive of interest and costs.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by the Kansas City, Ft. Scott & Memphis Railroad Company against the board of county commissioners of Johnson county and others. Judgment for defendants. Plaintiff brings error. Certified to the supreme court.

Wallace Pratt and C. W. Blair, for plaintiff in error. S. D. Scotta, for defendants in error.

GILKESON, P. J. In December, 1888, the plaintiff in error filed its petition for an injunction against the defendants in error, to restrain the collection of certain alleged illegal taxes, and a temporary order of injunction was granted by the judge of

the district court at chambers. On the 22d of April, 1890, the plaintiff filed an amended petition, upon which the case was finally tried, to which the defendants filed their answer. The petition alleges and the answer admits that the taxes sought to be enjoined were levied under and pursuant to the act of the legislature of March 11, 1887, entitled "An act for the improvement of county roads," being chapter 214 of the Laws of 1887; that the total amount of taxes apportioned against the property of the plaintiff was \$6,122.65, divided into five equal installments. The case was submitted and tried upon an agreed statement of facts. Paragraph 7 of this agreed statement of facts reads as follows: "That a tax has been levied upon the plaintiff's property, of \$1,224.53, for the year 1889, to pay for these improvements, and a like tax for the same amount for the same purpose was levied against the plaintiff for the year 1890, and a tax for the same amount each year will be levied for the years 1891, 1892, and 1893, unless restrained by the injunctive order of this court." The court below dissolved the temporary order, and refused an injunction. To this ruling, decision, and judgment the plaintiff duly excepted, and prosecuted its appeal to the supreme court. All of these proceedings were had prior to the enactment of chapter 96 of the Laws of 1896, entitled "An act creating appellate courts, defining their jurisdiction and proceedings therein." Subsequently said case was certified to this court for review. The jurisdiction of the courts of appeal is defined in section 9 of said act, which, among other things, provides, "And from all final orders and judgments of such courts, within their respective divisions, where the amount or value does not exceed \$2000.00 exclusive of interest and costs." Before this court will review a judgment of an inferior court, it must appear that it has jurisdiction over the subject-matter thereof; otherwise its judgment would be of no validity or binding force. The record in this case shows, we think, that the amount in controversy exceeds the jurisdiction and limit of this court; it being the amount due at the time of the trial, viz. the taxes for the years 1889 and 1890, amounting in the aggregate to the sum of \$2,449.06. The case seems to have been tried in the district court upon the theory that the whole assessment of \$6,122.65 was involved. If that were true, it would unquestionably be beyond the limit of this court; but for the purpose of retaining jurisdiction, if possible, we have selected the smallest possible amount claimed by the plaintiff in error, but even this would place it beyond the jurisdiction of this court. The case, therefore, is not properly here, and the record will be by the clerk returned to the supreme court, with a copy of this opinion. All of the judges concurring.

# WILLIAMS v. KEMPER, HUNDLEY & McDONALD DRY GOODS CO.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

## VOLUNTARY ASSIGNMENTS—VALIDITY—STATUTES—EXTRATERRITORIAL FORCE—COMITY.

1. The voluntary assignment laws of Oklahoma have no extraterritorial force or operation, and must be so construed as to embrace and operate upon deeds of assignment executed in Oklahoma, and not elsewhere.

2. Involuntary assignments, which are made under foreign insolvent laws, have no operation outside of the state under whose laws they are made, while a voluntary assignment is a personal common-law right, possessed by every owner of property, unless prohibited by statute, and may operate in other states as well as in the state where it is executed.

3. Voluntary assignments, valid in the state or territory where made, will, on the principle of comity, be upheld by the courts of other states against nonresident attaching creditors, even though the effect of the assignment is contrary to the policy and laws of the state where it is sought to be enforced. But this rule cannot be invoked as against resident creditors.

4. A voluntary assignment, made by a partnership residing and doing business in the Indian Territory to a trustee residing in said territory, which is valid under the laws relating to voluntary assignments in Indian Territory, and which conveys property situated in Oklahoma, although said assignment contains preferences which would render it void if made in Oklahoma, will, on the principle of comity, be upheld, and enforced against an attaching creditor of such partnership who resides in the state of Missouri.

5. A deed of assignment made and executed in the Indian Territory according to the laws of that territory, and conveying real estate in Oklahoma, is sufficient as a deed of conveyance in this territory if it conforms to all the statutory requirements of Oklahoma as to its recitals, execution, and acknowledgment, and has been duly filed for record in the office of register of deeds in the county where said land is situated.

6. The assignment laws of Oklahoma, only having been intended to embrace assignments made within the territory, have no application to voluntary assignments made in the Indian Territory, and an assignee or trustee under an assignment made there is not required to comply with Oklahoma statutes as to filing, schedule, giving bond, etc., in Oklahoma.

7. A voluntary assignment for benefit of creditors, executed in conformity with the laws of Indian Territory, and valid there, which purports to convey real estate situated in Oklahoma, and which contains all the common-law and statutory requirements: to constitute a deed of conveyance in Oklahoma, will be sufficient to convey real estate in Oklahoma, although it contains provisions which would render it void as a deed of assignment in Oklahoma. And on the principle of comity, such conveyance will be upheld by the courts of Oklahoma as against a nonresident attaching creditor of the assignor; but said assignment would be held void as against a creditor of such assignor residing in Oklahoma.

(Syllabus by the Court.)

Appeal from district court, Cleveland county; before Justice H. W. Scott.

Action by the Kemper, Hundley & McDonald Dry Goods Company against O. P. Houghton and C. H. Jackson, as surviving partners of the Houghton Mercantile Company. S. L. Williams impleaded as assignee of the Mercantile Company, and from a judgment for plaintiff he appeals. Reversed.

G. M. Miller, for appellant. J. R. Sharp, for appellee.

BURFORD, J. On August 1, 1893, the Houghton Mercantile Company, a partnership at Purcell, Ind. T., assigned all their property to S. L. Williams of Purcell in trust for the benefit of their creditors. The deed of trust included and sought to convey two lots in Lexington, Oklahoma, together with the business house of said firm situated thereon. This deed was recorded in the register of deed's office in Cleveland county, Okl. T., the county wherein the real estate in question is situated. On August 3, 1894, the defendant in error, the Kemper, Hundley & McDonald Dry Goods Company, which was a nonresident of Oklahoma and creditor of the Houghton Mercantile Company, began its action in the district court of Cleveland county against O. P. Houghton and C. H. Jackson, as surviving partners of the Houghton Mercantile Company, on a judgment for \$604.60, rendered in the United States court at Ardmore, Ind. T., in October, 1893. It procured an order of attachment to issue out of the district court, and the same was levied upon lots 1 and 2, in block 55, of Lexington, Okl. T., the real estate in controversy. The plaintiff in error, Williams, as assignee, by leave of court, filed his interplea in said cause, and set up the transfer to him by the deed of assignment executed by the Houghton Mercantile Company. Issues were formed, and the cause tried before a referee, who reported the facts and conclusions of law, which were, over the exceptions and objections of plaintiff in error, duly confirmed by the court, and judgment rendered against the plaintiff in error. Motion for new trial was made and overruled, and plaintiff in error appeals.

Two propositions are presented which are decisive of the questions involved: First. Was the deed of assignment sufficient, under our statute, to constitute a deed of conveyance, and to entitle it to be recorded? Second. Can an assignment with preferences, good in the jurisdiction where made, be sustained in Oklahoma, where preferences are prohibited as between nonresident creditors and debtors? A number of other questions are argued by counsel, but we think a proper determination of these propositions will dispose of the case.

It is conceded that the assignment was valid in the Indian Territory; that the assignee duly qualified, gave bond, and was engaged in the execution of said trust; that all the parties were nonresidents of Oklahoma, and that the deed of assignment was made out of this territory. The general rule as to the effect of findings of a referee is that they will be treated as special findings, and are taken as conclusive on appeal. This case was submitted on a stipulation between the parties as to certain facts, which agreement appears in the record. This agreement

is also conclusive on the parties. Our attention is called to the fact that one finding of the referee is in conflict with the agreed facts. It was agreed in the stipulation "that the said O. P. Houghton and R. A. Houghton, who signed the deed of assignment, constituted the firm of the Houghton Mercantile Company, who owned and controlled the said property in Lexington, Okl. T." The referee finds that on and prior to August 2, 1893, R. A. Houghton, O. P. Houghton, and C. H. Jackson were partners, doing business in Purcell, and owned the lots in question. He further found that R. A. Houghton died after the execution of the deed of assignment, and that O. P. Houghton and C. H. Jackson were surviving partners of the firm, Houghton Mercantile Company. This irregularity should have been corrected in the court below, and, while the plaintiff in error excepted generally to the referee's report, it does not appear that the attention of the court below was ever called to the defect in question. We do not consider the question as essential to a decision of the case. The partners who joined in the deed had power to convey the interest of the firm in the real estate in question, as it appears from the finding that the real estate belonged to the firm. Section 3478, Okl. St. provides: "The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership, and all that is subsequently acquired thereby." Section 3479: "The interest of each member of a partnership extends to every portion of its property." Section 3483: "Property whether real or personal acquired with partnership funds is presumed to be partnership property." Section 3516: "Unless otherwise expressly stipulated, the decision of the majority of the members of a general partnership binds it in the conduct of its business." Under these provisions of statute, even if Jackson was a member of the firm at the time of the assignment, the action of the other two partners in executing the trust deed would bind the firm as to partnership property.

We will now consider the sufficiency of the deed of assignment. The universal rule is that the *lex rei sitæ* governs in the conveyance of lands, both as to the requisites and forms of conveyances; and we must measure this deed by the rules prescribed by our statutes. It is contended by defendant in error that the deed of assignment is not executed and acknowledged as required by Oklahoma statute, and hence it conveys no title to real estate in Oklahoma. The deed is in writing; contains the names of the grantors and grantee. It sufficiently identifies the real estate, and is properly signed. It contains the conveying clause, "has this day bargained, sold, and conveyed, and does by these presents grant, bargain, sell, and convey, unto the said Samuel L. Williams." It contains a consideration, and recites that the

real estate in question is owned by the Houghton Mercantile Company. It is dated August 1, 1898, and signed "Houghton Mercantile Co. Reuben A. Houghton, Orrin P. Houghton." The certificate of acknowledgment is in due form before a notary public of the Third judicial division of Indian Territory, which certificate bears the signature and seal of the notary. It conforms in all respects substantially to the requirements of our statute, and is sufficient to convey real estate in Oklahoma, and did convey to the assignee all of the interest of said firm in and to the real estate in question, unless it is void for conflict with our statute on assignment. Upon the second proposition upon which this case must turn it would seem from a casual examination of authorities that there is an irreconcilable conflict, but this apparent conflict grows largely out of the failure to separate the adjudicated cases into distinct classes, and to apply a particular rule to each class. When this is done, the apparent conflict to a considerable degree vanishes, and approximate harmony is brought out of confusion. In the very ably edited notes to the case of *Long v. Forrest*, decided by the supreme court of Pennsylvania, and reported in 23 *Lawy. Rep. Ann.* 33 [*Long v. Girdwood*, 24 *Atl.* 711], all the cases are cited, grouped, and classified. It is the general doctrine that personal property will pass by a purely voluntary assignment for creditors made in another jurisdiction from that in which the property is situated, subject to some exceptions. A discrimination is made by some courts in favor of their own citizens, claiming as creditors against assignees in another state. Most of the cases hold that citizens of the state in which the assignment was made are bound by the assignment, where the assignment is purely voluntary. A clear distinction is made between assignments which are purely voluntary and such as are involuntary, or result from operation of law. The best-considered cases support the doctrine that, where a voluntary assignment is valid in the state where made, it will on the principle of comity be upheld in other states and jurisdictions; but it was said in the case of *Green v. Van Buskirk*, 7 *Wall.* 139, "that this principle of comity will yield when the laws and policy of the state where the property is located have prescribed a different rule to transfer from that of the state where the owner lives." A number of the states hold that, if the assignment is valid in the state where made, the courts of another state will not hold it void in favor of a nonresident creditor, even though it is not in harmony with the law and policy of such state; while still another class of cases hold to the rule that if the assignment, though valid where made, is in conflict with the settled policy or law of the state where the property is situated, any creditor, foreign or domestic, may attach the

property, or levy on same, and the courts in such cases will not recognize the foreign assignment. But we regard this rule as settled by the supreme court of the United States in the case of *Barnett v. Kinney*, 147 *U. S.* 476, 13 *Sup. Ct.* 403. In that case a citizen of Utah had made a voluntary assignment under the laws of Utah of all his property to another citizen of Utah, for the benefit of creditors, with preferences. Part of the property assigned was in Idaho. The law of Idaho relating to voluntary assignments prohibited preferences, and made all such assignments void. A nonresident of Idaho attached the property situated in that territory, and the question as to whether the attaching creditor of the assignee was entitled to the property went to the United States supreme court for decision. It was contended in that case that the assignment, being in direct conflict with the statutes of Idaho prohibiting preferences, was inoperative to pass title to property in that jurisdiction, and that there could be no distinction made in administering the laws, and no right denied to citizens of one state over the citizens of another state. Mr. Chief Justice Fuller delivered the opinion for the court, and entered into a lengthy review of the cases on the questions involved, and held that the assignment laws of Idaho were intended to regulate domestic assignments, and had no reference to assignments made without that territory; and further said: "While the statute of Idaho prescribed pro rata distribution without preference in assignments under the statute, it did not otherwise deal with the disposition of property by a debtor, or prohibit preferences between nonresident debtors and creditors through an assignment valid by the laws of the debtor's domicile. No just rule required the courts of Idaho, at the instance of a citizen of another state, to adjudge a transfer, valid at common law and by the law of the place where it was made, to be invalid because preferring creditors elsewhere, and therefore in contravention of the statutes of Idaho, and the public policy therein indicated in respect of its own citizens proceeding thereunder." While it was a fact in this case that possession was in the assignee when the attachment was levied, and the property in question was personal property, which fact entered into the consideration of the questions, the case is valuable for settling the principle that state assignment laws are domestic laws, intended to operate upon the citizens and property in such state; and, while they have no extraterritorial force, will be enforced by the courts of other states upon the principle of comity, as against nonresidents, and, when valid in the state where made, will operate to transfer property in another state, though in conflict with the policy of the assignment laws of such state. The rule enunciated in the case last referred to is supported by the following authorities: *May v. Bank*, 122 *Ill.*

625, 13 S. W. 106; *Frank v. Bobbitt*, 155 Mass. 112, 29 N. E. 209; *Butler v. Wendell*, 57 Mich. 62, 23 N. W. 460; *Thurston v. Rosenfield*, 42 Mo. 474; *Bank v. Hughes*, 10 Mo. App. 7; *Green v. Iron Works*, 49 N. J. Eq. 48, 23 Atl. 498; *Schuler v. Israel*, 27 Fed. 851. In the case at bar it is contended by counsel for defendant in error that, inasmuch as the assignment made in the Indian Territory was in conflict with the policy of our assignment laws, the courts of this territory should declare it void. Evidently this contention would be correct if invoked in favor of a creditor residing in Oklahoma, but under the rule announced by Chief Justice Fuller, *supra*, our assignment laws were intended to regulate assignments made by residents of Oklahoma, and have no effect upon assignments made in the Indian Territory. The assignment in this case was good at common law, as the common law allowed preferences. It is good by the law of the domicile of the assignor, and on the principle of comity it is the duty of the courts of Oklahoma to uphold it as against nonresident creditors.

The referee and the trial court held that the deed of assignment was not operative here, because the assignee had failed to comply with the laws of Oklahoma in giving bond, filing schedule, etc. He was under no obligation to comply with our assignment laws. If the deed of assignment was sufficient, under our laws, to convey property, and was recorded as deeds are required to be recorded, the assignee took the title of the assignors, and this is as far as we have to deal with the question.

The final question is, do the foregoing rules apply to real estate? It is contended by defendant in error that the law of the situs governs in relation to real estate, and that, the deed of assignment being void under our statutes, it conveys no title, and that the rules applicable to personal property do not apply. Upon this question there is again an irreconcilable conflict of authority, which is more apparent than real. A critical examination of the adjudicated cases reveals the fact that they are practically harmonious. It is unquestionably the law that in the disposition of real estate the law of the place where the real estate is situated governs, but in harmony with this rule is the rule that a conveyance made out of the state or territory where the land is situated will convey title if it conforms to the requirements of the law where the land is situated. It has been held in a number of cases that an assignment for benefit of creditors will not convey real estate situated outside the country where the assignment is made, and this is a general rule, applicable to assignments generally; but herein again is a distinction made between voluntary assignments and assignments by operation of law. The former are voluntary

to his own property, and over which he has control, and, if the deed of assignment meets all the requirements of a deed of conveyance in the country where the land is situated, it will convey whatever of interest the assignor has. This rule is subject to the same exceptions that apply to personal property. If the deed of assignment is in its general effect repugnant to the law of the jurisdiction where the land is situated, it will be void as against creditors residing in the state or territory where the land is situated, but as against non-resident creditors the assignment will be upheld in the principle of comity. The majority of cases which seem to be in conflict with this rule relate to involuntary insolvency, or such assignments as are the result of operation of law, or to cases where the deed of assignment did not of itself constitute a good conveyance of real estate in the country where the land was situated. The editor of the notes in *Long v. Forrest*, *supra*, says: "The general doctrine seems to be fairly established that a voluntary assignment for creditors, if it is so executed as to constitute a sufficient conveyance, or accompanied by such conveyance, although it is made in trust for creditors, will be upheld in other states as to land there situated, unless the provisions of the assignment are against the policy of the local laws. In other words, that the same general rule which applies to all voluntary transfers of real property applies to such assignments." The following authorities support the rule we have announced as to conveyances of real estate in trust for benefit of creditors: *Rogers v. Allen*, 3 Ohio, 489; *Sortwell v. Jewett*, 9 Ohio, 181; *Lamb v. Fries*, 2 Pa. 83; *Palmer v. Mason*, 42 Mich. 152; *Pemberton v. Klein*, 43 N. J. Eq. 98, 10 Atl. 837; *Bentley v. Whittemore*, 19 N. J. Eq. 462, overruling same case in 18 N. J. Eq. 366; *Merchants' Bank of Baltimore v. Bank of U. S.*, 2 La. Ann. 660; *Eddy v. Winchester*, 60 N. H. 63; *Green v. Cross*, 12 Neb. 117, 10 N. W. 459; *Chafee v. Bank*, 71 Me. 514; *Gardner v. Bank*, 95 Ill. 298; *Heyer v. Alexander*, 108 Ill. 385. The following states have held against this rule: Alabama, Massachusetts, Iowa, and possibly others. We have been cited the case of *Thompkins v. Adams*, 41 Kan. 38, 20 Pac. 530, as holding that a deed of assignment for benefit of creditors made in Illinois was ineffectual to pass title to real estate in Kansas. We fail to find any such principle announced in that case. Upon the contrary, the Kansas court expressly held that the deed from the assignor to the assignee, made in Illinois, was not only in conformity to the laws of Kansas, but was sufficient to pass title. But the assignee in Illinois had sold to a third party without complying with the laws of Kansas as to the sale of such property, and as between the assignor's vendee and an attaching creditor the court held that the vendee had no title. And this is as

far as the decision in that case goes, and it is not in conflict with the rules we have announced herein.

In view of the foregoing propositions, which we regard as well supported by reason and authority, we are of the opinion that the deed of assignment executed by the Houghton Mercantile Company to Williams as trustee is sufficient to entitle it to record, and to convey real estate in Oklahoma; that on the principle of comity, the assignment being valid in the Indian Territory, the courts of Oklahoma should uphold the trust as against a nonresident attaching creditor. As further support-

ing our position, we cite *Schroder v. Tompkins*, 58 Fed. 672. A very instructive case, involving the principles herein discussed, is *Paxson v. Brown*, decided by the United States circuit court of appeals, and reported in 10 C. C. A. 135, 61 Fed. 874. Our conclusion is that the district court erred in holding the attachment valid as against the title of the assignee, and the judgment of the district court is reversed, and cause remanded, with directions to render judgment for the plaintiff in error, Williams, upon the finding of fact of the referee. All the justices concurring, except SCOTT, J., not sitting.

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Error in the admission of parol evidence will not be considered where the facts proven are not shown by the record.—*Hughes v. Lazard* (Ariz.) 422.

No errors of law need be specified in a bill of exceptions to enable the appellate court to consider the same.—*Barfield v. South Side Irrigation Co.* (Cal.) 406.

The statement in the record, with the certificate of the judge that it contains all the evidence and all the proceedings, is conclusive.—*Libbey v. Ralston* (Kan. App.) 294.

Where the record does not show such amount in controversy as gives jurisdiction, and there is no certificate that it is an excepted case, the appeal will be dismissed.—*Gray v. Haish* (Kan. App.) 293.

Where the record fails to show that the amount involved is within the jurisdiction of the court, and there is no certificate showing the cause is within the exceptions of the statute, the appeal will be dismissed.—*Webber v. Carey* (Kan. App.) 284.

Where the exhibits as to the location of a ditch were omitted from the abstract, and the map and survey introduced were omitted from

the bill of exceptions, the evidence cannot be considered.—*Old v. Keener* (Colo. Sup.) 127.

The refusal to dissolve an attachment cannot be reviewed in the absence of a bill of exceptions containing the evidence introduced.—*Syndicate Imp. Co. v. Bradley* (Wyo.) 79.

A special appearance in writing, to be considered, must be incorporated in a bill of exceptions.—*Syndicate Imp. Co. v. Bradley* (Wyo.) 79.

Where the transcript fails to show a compliance with the statute or rules of court, the appeal will be dismissed.—*Pence v. Lemp* (Idaho) 75.

To support an assignment of error in refusing a jury, the record must show a request when the docket was called, a refusal, and an exception.—*Syndicate Imp. Co. v. Bradley* (Wyo.) 79.

#### — Case made or statement of facts.

The certificate of a judge in a case made should affirmatively show that he has settled it.—*Mutual Ben. Life Ins. Co. v. Sackett* (Kan. App.) 816.

Party cannot be compelled to include transcript of stenographer's notes of the trial in a statement of facts in the superior court.—*State v. Superior Court of Spokane County* (Wash.) 636.

That the trial court erred in amending the proposed statement of facts before settlement will not enable the appellate court to consider it as though it had been settled without amendment.—*Scott v. Bourn* (Wash.) 372.

A statement of facts appearing to have been filed after the copy was served cannot be considered.—*Boyle v. Great Northern Ry. Co.* (Wash.) 344.

Matters not relating to the merits of the case, when not incorporated in the case made, may be shown by extrinsic evidence.—*Bank of Clafin v. Rowlinson* (Kan. App.) 304.

A certificate to a case made, stating that it was presented to the judge for settlement, but failing to show that he had settled it, is insufficient.—*Mudge v. Kansas Nat. Bank* (Kan. Sup.) 255.

Evidence was admissible on appeal to show consent to an irregular settling of a case made.—*Haseltine v. Gilleland* (Kan. App.) 88.

#### Review.

The granting of a new trial on conflicting evidence will not be disturbed.—*Mortgage Trust Co. v. Fleming* (Kan. App.) 1146.

Vacation of a default judgment held not an abuse of discretion.—*Mantle v. Largey* (Mont.) 633.

The grant of a continuance is in the discretion of the trial court.—*Cannon v. Griffith* (Kan. App.) 829.

Where a public officer is authorized to do a certain act on the existence of a certain fact, his finding as to the fact is not reviewable.—*State v. Forrest* (Wash.) 51.

Where an appeal from an order denying a new trial is dismissed for want of an undertaking, only such questions can be considered as arise upon the judgment roll.—*Broker v. Taylor* (Cal.) 387.

On appeal, under Comp. Laws 1887, div. 5, § 764, by a taxpayer from an allowance of a claim against the county, the clerk, by transmitting the proceedings to the district court, held to have waived any informality in the service of notice of appeal.—*Twohy v. Board of Com'rs of Granite County* (Mont.) 494.

#### — Objections not raised below.

Questions not raised below will not be considered.—*Truesdell v. Peck* (Kan. App.) 900.

Issue not presented to the trial court cannot be determined on appeal for the purpose of reversing the judgment appealed from.—*California Loan & Trust Co. v. Hammell* (Cal.) 955.

Objection to form of judgment must be raised in the trial court.—*Rawson v. Ellsworth* (Wash.) 934.

An objection that there was no proof of execution of a bond sued on cannot be first raised on appeal.—*Price v. Scott* (Wash.) 634.

Errors in instructions cannot be first raised on appeal.—*Denver & R. G. R. Co. v. Rosuck* (Colo. App.) 456.

Objection that false issues were litigated cannot first be raised on appeal.—*Gilson v. Hays* (Kan. App.) 93.

The constitutionality of an act will not be passed on when collateral to the issues.—*Bellevue Water Co. v. Stockslager* (Idaho) 568.

Defendant in mandamus cannot urge any defense on appeal not alleged in his answer below.—*Stevens v. Miller* (Kan. App.) 439.

#### — Presumption.

It will be presumed that a cause triable at the term when heard was duly entered on the trial docket.—*Syndicate Imp. Co. v. Bradley* (Wyo.) 79.

It will be presumed on appeal that a judgment increasing an assessment was rendered on sufficient evidence, though it is not shown on what evidence it was rendered, or that there was any evidence.—*Godfrey v. Douglas County* (Or.) 171.

Where the record does not show a motion for new trial filed in time, it will be presumed that it was filed too late.—*Wanamaker v. Manufacturers' Nat. Bank* (Kan. App.) 796.

Where there is no statement on appeal or motion for new trial, the presumption is that the evidence supported the finding.—*Sadler v. State* (Nev.) 915.

The presumption is that the court admonished the jury before each separation.—*State v. Rogers* (Kan. Sup.) 256.

#### — Weight and sufficiency of evidence.

Findings of fact will not be set aside, except for manifest insufficiency of evidence, or for passion or prejudice.—*Campbell v. First Nat. Bank* (Colo. Sup.) 1007.

Findings of court are as conclusive as a verdict.—*Truesdell v. Peck* (Kan. App.) 990.

On trial by the court, a general finding, where there is evidence to support it, will not be disturbed.—*Kirwin v. United States Nat. Bank* (Kan. App.) 796.

Where the special findings and general verdict are contrary to the evidence, they will be set aside.—*Challis v. Woodburn* (Kan. App.) 792.

Verdict will not be disturbed on appeal where warranted by any evidence.—*Miller v. Bean* (Wash.) 636.

A finding in a suit to cancel a note that the note was based on a sufficient consideration held sustained by the evidence.—*Scott v. Bourn* (Wash.) 372.

Evidence of the recorder that a certificate was not on file held to justify a finding that the certificate was not filed.—*Jenet v. Nims* (Colo. App.) 147.

Finding of the trial court held against the evidence.—*Morford v. Frye* (Wash.) 46.

A finding on conflicting evidence will not be disturbed.—*Smith v. Sabin* (Cal.) 588; *Johnson v. Kountze* (Colo. Sup.) 445; *Jones v. Sullivan* (Colo. Sup.) 1001; *Justice v. Elwert* (Or.) 649.

A verdict on conflicting evidence will not be disturbed.—*Anderson v. Hinshaw* (Cal.) 389; *McGee v. San Francisco & N. P. Ry. Co.* (Cal.)

1106; *Hagler v. Taylor* (Kan. App.) 87; *Tarpey v. Sharp* (Utah) 104.

#### — Harmless error.

An objection, on appeal, that an action has been brought by a lessee instead of by the lessor for his benefit, is not ground for reversal where no prejudice is shown.—*Jenkins v. Columbia Land & Improvement Co.* (Wash.) 328.

Unless it appears that the error committed worked manifest injustice, it will not be regarded as sufficient to require a reversal.—*Cunningham v. Bostwick* (Colo. App.) 151.

Error in overruling a demurrer for misjoinder of parties is not ground for reversal, where the cause was subsequently dismissed as to the defendant alleged to have been improperly joined.—*Jackson v. McAuley* (Wash.) 41.

Error in sustaining a demurrer to an answer was harmless where an amendment was allowed.—*Scully v. Porter* (Kan. App.) 824.

The overruling of an objection to an irrelevant question *held* harmless.—*Redfield v. Oakland Consol. St. Ry. Co.* (Cal.) 1117.

Error in denying a motion to strike out part of the pleading *held* harmless.—*Charles v. E. F. Hallack Lumber & Manufacturing Co.* (Colo. Sup.) 548.

The exclusion of evidence under defective allegations renders them harmless.—*Johnson v. Bellingham Bay Imp. Co.* (Wash.) 370.

Where defendant is estopped to deny plaintiff's corporate existence, the admission of insufficient articles of incorporation is harmless error.—*Stuyvesant v. Western Mortgage & Investment Co.* (Colo. Sup.) 144.

Error in excluding evidence is immaterial when it is subsequently admitted.—*Chaffee v. Fisher* (Kan. App.) 1137; *Howell v. Same*, *Id.*

The admission of immaterial evidence is harmless error where the same facts are proven by competent evidence.—*Rock Springs Nat. Bank v. Luman* (Wyo.) 514.

Admission of evidence on issue finally not determined is without prejudice.—*Carl v. West Aberdeen Land & Improvement Co.* (Wash.) 890.

Error in permitting proof of negligence in not maintaining gates at a crossing, under a petition alleging negligence in operating the engine, *held* harmless.—*Atchison, T. & S. F. R. Co. v. Shaw* (Kan. Sup.) 1129.

#### Decision.

The trial court has no jurisdiction of a suit to enjoin the enforcement of a judgment which has been affirmed on appeal.—*Cochrane v. Van De Vanter* (Wash.) 42.

Where, on appeal, on the ground that the findings are not supported by evidence, the respondent fails to point out where the evidence may be found in support of the findings, a new trial will be ordered.—*Mountain Tunnel Gravel Min. Co. v. Bryan* (Cal.) 410.

Where remittitur is offered on appeal which would cure an error in an instruction, a new trial should not be granted.—*Eames v. Haver* (Cal.) 1120.

In an action on a judgment, an admission by defendant of the judgment *held* insufficient to authorize a judgment for plaintiff on reversal of a judgment for defendant on a plea of payment.—*Edmunds v. Black* (Wash.) 330.

Decision of appellate court on facts of a case is binding on trial court on a retrial, where the evidence is substantially the same.—*Furth v. Snell* (Wash.) 935.

#### — Dismissal.

An appeal from a judgment entered by the lower court in accordance with the mandate of the supreme court on a previous appeal will be dismissed.—*Krantz v. Rio Grande Western Ry. Co.* (Utah) 623.

Where the resignation of a guardian, pending an appeal from an order revoking his appointment, is accepted, the appeal will be dismissed.—*In re Treadwell* (Cal.) 584.

Where appellant has acquired no rights under an appeal appellee may, before the record is returnable, file a transcript thereof, and move for a dismissal of the appeal.—*Hamill v. Bank of Clear Creek County* (Colo. App.) 903.

#### — Reversal.

Where the record shows the judgment to be erroneous, it will be reversed.—*Hampton v. Board of Com'rs of Logan County* (Idaho) 324.

Where respondent confesses error, a reversal will be granted.—*O'Donnell v. Gainan* (Mont.) 713.

Where the only error is the excessive amount of damages, the court may reverse the case, unless plaintiff remits the excessive amount.—*Hamilton v. Great Falls St. Ry. Co.* (Mont.) 713.

Appellee cannot, by offering to permit a judgment to be modified after an appeal has been perfected, deprive appellant of his right to demand a reversal.—*Leake v. Hayes* (Wash.) 48.

## APPEARANCE.

An objection for the first time on appeal that defendant was not notified of the trial will not avail where a general appearance is shown in the record.—*Syndicate Imp. Co. v. Bradley* (Wyo.) 79.

An appearance by a taxpayer before the county court on the equalization of assessments will be presumed to be general.—*Godfrey v. Douglas County* (Or.) 171.

Where plaintiff fails to appear, defendant cannot have a trial, having filed no plea.—*Elsberg v. Fietze* (N. M.) 690.

## Appellate Court.

See "Courts."

### Application.

For insurance, see "Insurance."  
For patent, see "Public Lands."

### Appropriation.

See "States and State Officers."

## ARBITRATION AND AWARD.

See, also, "Reference."

The decision of arbitrators will not be interfered with on account of error in law on a doubtful point.—*School Dist. No. 5 of Snohomish County v. Sage* (Wash.) 341.

Though arbitrators found that a building varied from the original plan, but made their award in plaintiff's favor after crediting defendant with a certain amount for such variation, their award will not be disturbed.—*School Dist. No. 5 of Snohomish County v. Sage* (Wash.) 341.

Under Code Proc. § 429, the evidence submitted to arbitrators is not subject to examination in support of exceptions that the arbitrators committed error in fact or in law.—*School Dist. No. 5 of Snohomish County v. Sage* (Wash.) 341.

### Argument of Counsel.

See "Criminal Law."

### Arraignment.

See "Criminal Law."

### Assessment.

Of benefits from public improvements, see "Municipal Corporations."  
Of corporate stock, see "Corporations."  
Of taxes, see "Taxation."  
On mutual policy, see "Insurance."

### ASSIGNMENT.

See, also, "Assignment for Benefit of Creditors."  
Of lease, see "Landlord and Tenant."

A draft is not an equitable assignment until accepted.—Meldrum v. Henderson (Colo. App.) 148.

An order on a bank to pay a specified sum out of a special fund is an assignment to the person named in the order.—Central Nat. Bank v. Spratlen (Colo. App.) 1048.

A drawee would not be justified in accepting a draft showing that the drawer had assigned in insolvency.—Meldrum v. Henderson (Colo. App.) 148.

A contract of a water company to furnish an electric light plant belonging to the city with water *held* assignable.—Jenkins v. Columbia Land & Improvement Co. (Wash.) 328.

A material man's right of action on the bond required by Gen. St. § 2415, to be executed to a county, conditioned the contractor will pay all laborers and material men, is assignable.—Gilmore v. Westerman (Wash.) 345.

When receipt in full of accounts will not discharge one previously assigned.—McCarthy v. Mt. Tecarte Land & Water Co. (Cal.) 391.

The assignment of an account must be pleaded in an action before a justice.—Balden v. Thomasen (Mont.) 627.

A claim for money found due by a verdict may be assigned, so that the assignee can recover the same.—Noble v. Hunter (Kan. App.) 994.

Under Sess. Laws 1893, 17th Leg. Assem. p. 26, par. 680, one to whom a claim is assigned for collection may sue thereon in his own name.—Sroufe v. Soto (Ariz.) 221.

### ASSIGNMENT FOR BENEFIT OF CREDITORS.

A creditor attaching land is an incumbrancer, within Sess. Laws 1885, c. 43, § 6, requiring notice of the assignment to be recorded.—Thatcher v. Valentine (Colo. Sup.) 1031.

A creditor is not prevented, by Sess. Laws 1885, c. 43, § 4, from attaching before notice of the assignment is recorded in the county in which the land is situated, and acquiring a superior lien.—Thatcher v. Valentine (Colo. Sup.) 1031.

The court of a county in which an assignment is filed has no authority over land in another county, in which notice of assignment was not filed until after an attachment lien had been acquired.—Thatcher v. Valentine (Colo. Sup.) 1031.

A voluntary assignment executed in another state, and valid there, which conveys real estate in Oklahoma, will be upheld in the latter state, though it would be void if executed there.—Williams v. Kemper, Hundley & McDonald Dry Goods Co. (Okla.) 1148.

When an assignment executed in another state conveys property in Oklahoma, the assignee is not required to proceed under the Oklahoma statutes.—Williams v. Kemper, Hundley & McDonald Dry Goods Co. (Okla.) 1148.

Chattel mortgages made substantially at the time of the execution of a general assignment confer no preferences.—Goodman v. Kendall (Kan. Sup.) 687.

A creditor of an insolvent debtor *held* not to have waived his right to share in the assigned estate.—Anderson v. Risdon-Cahn Co. (Wash.) 337.

An assignee has no standing to maintain an action to set aside a voluntary deed made by the assignor.—Balcceck v. Chase (Cal.) 1105.

A petition for the appointment of an assignee on the ground that the assignee named failed to qualify should not be dismissed on the insolvent's affidavit that the petitioners were not creditors.—In re Hense (Wash.) 888; Snell, Heitschu & Woodard Co. v. Murdoch, Id.

Injunction restraining an assignee for the benefit of creditors from enforcing a judgment against a creditor of the assignor *held* error.—Anderson v. Risdon-Cahn Co. (Wash.) 337.

An assignee under a void assignment acquires no title to the property.—Mosconi v. Burchinell (Colo. App.) 912.

### Associations.

See "Building and Loan Associations"; "Corporations."

### ASSUMPSIT.

That work was performed under a special contract will not defeat a recovery on a quantum meruit count.—Hecht v. Stanton (Wyo.) 508.

One accepting a note as evidence of a loan may disregard it and sue for the loan.—Schreyer v. Turner Flouring Mills Co. (Or.) 719.

A recovery on a quantum meruit cannot be had for services rendered under a void contract.—Hampton v. Board of Com'rs of Logan County (Idaho) 324.

When profits arising from an illegal business may be recovered as for money had and received.—McDonald v. Lund (Wash.) 348.

### Assumption of Risks.

See "Master and Servant."

### ATTACHMENT.

See, also, "Execution"; "Exemptions"; "Garnishment."

A return of an attachment of growing crops is insufficient, under Code Civ. Proc. § 542, subd. 5, which merely states that it was attached by "taking it into custody."—Rudolph v. Saunders (Cal.) 619.

Sheriff's return examined, and *held* insufficient, as not containing a proper description of the property attached.—Harding v. Guaranty Loan & Trust Co. (Kan. App.) 835.

Whether one who at different times had been told of a person's ownership in property retained such knowledge at a time when such property was attached by a bank of which he was the president is for the jury.—Campbell v. First Nat. Bank (Colo. Sup.) 1007.

A complaint *held* to state a cause of action for excessive levy.—Palmer v. Breed (Ariz.) 219.

A bond for a deed, reciting as a consideration a cash payment and the payment of two certain mortgages of specific amount, provides for the payment of a sum certain, so that attachment may issue.—Stuyvesant v. Western Mortgage & Investment Co. (Colo. Sup.) 144.

An action to enjoin sale of property under a void attachment may be maintained by another creditor claiming a lien.—Mentzer v. Ellison (Colo. App.) 464.

### Affidavit.

An affidavit which omits either a statement of indebtedness to plaintiff or an averment of some ground for attachment is jurisdictionally

deficient, and cannot be amended.—*Mentzer v. Ellison* (Colo. App.) 464.

All proceedings based on an affidavit insufficient to give the court jurisdiction of the property are void, and may be collaterally attacked.—*Mentzer v. Ellison* (Colo. App.) 464.

#### **Levy and lien.**

A lien does not affect rights in third persons outstanding when acquired.—*Gates Iron Works v. Cohen* (Colo. App.) 667.

Where, in attachment, a person is garnished, it constitutes an attachment lien on the property in his possession.—*Kimball v. Richardson-Kimball Co.* (Cal.) 1111.

Priority of attachment determined.—*Kimball v. Richardson-Kimball Co.* (Cal.) 1111.

An attachment creditor having no notice of an unrecorded deed acquires a lien superior thereto under *Mills' Ann. St. § 446*.—*Jerome v. Carbonate Nat. Bank* (Colo. Sup.) 215.

Rights of grantee under an unrecorded deed are superior to those of attaching creditor of grantor with notice.—*Campbell v. First Nat. Bank* (Colo. Sup.) 1007.

The levy of an attachment on personalty, where the officer holds it, creates a lien prior to a chattel mortgage executed subsequent to the levy, but prior to taking actual possession under the levy.—*Falk-Bloch Mercantile Co. v. Branstetter* (Idaho) 571.

#### **Intervention.**

A subsequent attaching creditor can intervene in the prior attachment.—*Kimball v. Richardson-Kimball Co.* (Cal.) 1111.

In attachment in a justice's court, an intervenor, on appeal to the county court by defendant alone, cannot question the decision of the justice on his claim.—*Winship v. May* (Colo. App.) 904.

Where an assignee for creditors fails to file notice of his appointment in the county where a partner of the insolvent firm owns land, an attachment of the land by an individual creditor without notice creates a superior lien.—*Spangler v. West* (Colo. App.) 905.

Any person claiming lands levied on, though not a party, may move to discharge the attachment as to such property.—*Harding v. Guaranty Loan & Trust Co.* (Kan. App.) 835.

One claiming property as against attaching creditors, there being no change of possession, must prove an actual bona fide sale.—*Tullis v. McCall* (Kan. App.) 980.

An action by a third person to enjoin the sale of property under an attachment does not operate under the provisions of Code, § 146, as a waiver of errors in the attachment proceedings.—*Mentzer v. Ellison* (Colo. App.) 464.

### **ATTORNEY AND CLIENT.**

Argument of counsel, see "Criminal Law."

Substitution of attorney, see "Practice in Civil Cases."

Verification of pleading by attorney, see "Pleading."

When attorney may act as judge, see "Judge."

#### **Admission to practice.**

A petition for a rule against members of the examining committee to show cause why they should not examine petitioner, must show that petitioner obtained a certificate that he had previously studied law for two years.—*People v. Carr* (Colo. Sup.) 128.

The committee for examination for admission to the bar cannot delegate their power to examine to the faculty of the state university.—*People v. Carr* (Colo. Sup.) 128.

The committee on admission to the bar may require applicants to produce the certificate re-

quired by statute, of the time during which they have studied law.—*People v. Carr* (Colo. Sup.) 128.

#### **Suspension and disbarment.**

Attorney suspended for six months, under Code, § 1047, on conviction of libel.—*State v. Mason* (Or.) 651.

Conviction of libel authorizes the removal or suspension of an attorney, under Code, § 1047.—*State v. Mason* (Or.) 651.

The record of a conviction of a misdemeanor is conclusive of moral turpitude, but the court may go behind the record in considering the punishment.—*State v. Mason* (Or.) 651.

Evidence held insufficient in a disbarment proceeding to sustain charges of improperly influencing the testimony of witnesses.—*In re Catron* (N. M.) 724.

Evidence examined, and held insufficient to warrant disbarment because of a change of entry of an order prepared by the court.—*Whalley v. Tongue* (Or.) 717.

A disbarred attorney may prosecute a claim assigned to him in good faith in the course of litigation.—*Philbrook v. Superior Court of City and County of San Francisco* (Cal.) 402.

#### **Compensation.**

Where an attorney proposes to try a case for a stated fee, and does so with the consent of client, he cannot claim a larger fee after the services are completed.—*Walsh v. Board of Trustees of Helena School Dist. No. 1* (Mont.) 180.

Where, in a divorce suit, the defendant's husband is ordered to pay plaintiff's attorney's fees, and the bill is dismissed at his cost, an action will lie to recover such fees.—*Bowers v. Kauts* (Kan. App.) 806.

Construction of a contract between attorney and client for compensation.—*Niagara Fire Ins. Co. v. Hart* (Wash.) 937.

That an attorney knew of the assignment by his client, pending the action, of his claims in suit, and that the client had agreed to prosecute the actions without cost to the assignee, does not preclude the attorney, on recovery of judgment, from claiming a lien thereon for his fees.—*Niagara Fire Ins. Co. v. Hart* (Wash.) 937.

An attorney held to have abandoned his lien on a judgment by an assignment of the same to himself.—*Whitehead v. Jessup* (Colo. App.) 1042.

### **Autrefois Acquit and Convict.**

See "Criminal Law."

### **Award.**

See "Arbitration and Award."

### **BAIL.**

In statute providing that, in case where "corporal punishment" is inflicted, a prisoner shall not be bailed, such words do not apply to imprisonment.—*Ritchey v. People* (Colo. Sup.) 1026.

Recovery on a recognizance of one bound over by a justice is not precluded by the justice's failure to indorse the amount of bail on the commitment, or by his leaving vacant a blank in the commitment left for the insertion of the name of the county.—*George v. State* (Kan. App.) 850.

### **Bailment.**

See "Banks and Banking"; "Pledge."

### **Ballots.**

See "Elections and Voters."

**BANKS AND BANKING.**

Deposit as trust fund, see "Trusts."

Removal of bank commissioners, see "Office and Officer."

A bank is charged with notice of facts within the knowledge of its president, though he gained the information in the transaction of his private business.—*Campbell v. First Nat. Bank* (Colo. Sup.) 1007.

The fact that a check deposited by one payee individually was intrusted to the two payees in an official capacity did not permit them to charge the proceeds as a trust fund.—*Meldrum v. Henderson* (Colo. App.) 148.

**Bequest.**

See "Wills."

**Best and Secondary Evidence.**

See "Evidence."

**Bills and Notes.**

See "Negotiable Instruments."

**Bona Fide Purchasers.**

See "Vendor and Purchaser."

Of bills and notes, see "Negotiable Instruments."

**BONDS.**

See, also, "Principal and Surety."

Bail bonds, see "Bail."

Municipal bonds, see "Municipal Corporations."

Of county, see "Counties."

Of town, see "Towns."

On appeal, see "Appeal."

Sheriff's bonds, see "Sheriffs and Constables."

A bond given by a contractor to a school district, under Laws 1887-88, p. 15, to protect persons furnishing materials for the erection of the schoolhouse, is an official bond.—*Ihrig v. Scott* (Wash.) 633.

Under Hill's Ann. Laws, §§ 340, 341, the county in which taxes for county and state purposes are levied can sue on the official bond of the tax collector.—*Hume v. Kelly* (Or.) 380.

**BOUNDARIES.**

Where the evidence showed the original location of a quarter post within a space covered by a circle the radius of which was 50 feet or more, the monument was lost within the rule relating to relocation.—*Wilkeson Coal & Coke Co. v. Driver* (Wash.) 889.

**Briefs.**

See "Appeal."

**Brokers.**

See "Factors and Brokers."

**BUILDING AND LOAN ASSOCIATIONS.**

On foreclosure, the amount of recovery should be determined by the statutory rule provided by Gen. St. 1889, c. 23, art. 17, § 272.—*Murphy v. Goodland Building & Loan Ass'n* (Kan. App.) 863.

**Building Contracts.**

See "Contracts."

**Burden of Proof.**

See "Evidence."

**BURGLARY.**

Evidence examined, and held to sustain a conviction.—*State v. Cowen* (Kan. Sup.) 687.

**Cancellation.**

Of contract, see "Equity."

**CARRIERS.**

See, also, "Horse and Street Railroads"; "Railroad Companies."

Cattle in course of shipment are in the possession of the carrier.—*Atchison, T. & S. F. R. Co. v. Ditmars* (Kan. App.) 833.

Evidence of negligence of a carrier of live stock held to sustain the judgment.—*Atchison, T. & S. F. R. Co. v. Ditmars* (Kan. App.) 833.

The complaint in an action for injury to stock under Gen. St. 1889, par. 1250, must show negligence of the company and damage resulting therefrom.—*Atchison, T. & S. F. R. Co. v. Ditmars* (Kan. App.) 833.

A complaint against a railroad company for personal injuries by one who was employed by independent contractors held to show that there was a contract whereby the railroad company was to transport said contractors' employes.—*Boyle v. Great Northern Ry. Co.* (Wash.) 344.

**Case Made.**

See "Appeal."

**CERTIORARI.**

See, also, "Review, Writ of."

On certiorari to review proceedings for contempt for violating an injunction, evidence not in the record proper may be considered.—*Schwarz v. Superior Court of City and County of San Francisco* (Cal.) 580.

The appointment of a city marshal by the board of trustees of a city cannot be reviewed by certiorari.—*Lorbeer v. Hutchinson* (Cal.) 896.

On a judgment of the district court quashing a writ of review to a justice's judgment, certiorari will not lie to review the justice's judgment.—*State v. Lenahan* (Mont.) 712.

**Challenge.**

See "Jury."

**Chancery.**

See "Equity."

**CHATTEL MORTGAGES.**

See, also, "Fraudulent Conveyances."

Power of firm to execute, see "Partnership."

A bill of sale of personality with an agreement for reconveyance on payment of consideration is a mortgage.—*Pritchard v. Butler* (Idaho) 73.

One taking the proceeds of a sale of mortgaged chattels from the mortgagor is liable to the mortgagee therefor if the mortgage was recorded.—*Rock Springs Nat. Bank v. Luman* (Wyo.) 514.

A chattel mortgage held to sufficiently describe the stock of merchandise covered therein.—*Dillon v. Dillon* (Wash.) 894.

A chattel mortgagee not accepting the mortgage until after liens of creditors of the mortgagor



have attached takes subject thereto.—*Griswold v. Case* (Wash.) 876.

The right to the penalty provided by Gen. St. 1889, par. 3892, is a right belonging only to the owner of the property.—*Curd v. Bown* (Kan. App.) 848.

In replevin by a chattel mortgagee of property remaining in possession of the mortgagor from an attaching creditor plaintiff must prove the record of the mortgage.—*Griffin v. Whitson* (Kan. App.) 813.

### **Cheat.**

See "False Pretences."

### **Child.**

See "Infancy"; "Parent and Child."  
Custody and support of children, see "Divorce."

### **City.**

See "Municipal Corporations."

### **Claim and Delivery.**

See "Replevin."

### **Classification.**

Of counties, see "Counties."

### **Cloud on Title.**

See "Quieting Title—Removal of Cloud."

### **Collateral Attack.**

On judgment, see "Judgment."  
On official survey, see "Public Lands."

### **Collateral Security.**

See "Pledge."

### **Commercial Paper.**

See "Negotiable Instruments."

### **Commission.**

Of factor or broker, see "Factors and Brokers."

### **Commitment.**

Of insane person, see "Insanity."

### **Common Carrier.**

See "Carriers."

### **Community Property.**

See "Husband and Wife."

### **Compensation.**

For land taken for public use, see "Eminent Domain."  
Of attorney, see "Attorney and Client."  
Of city officer, see "Municipal Corporations."  
Of factor or broker, see "Factors and Brokers."  
Of sheriff, see "Sheriffs and Constables."  
Of state officer, see "States and State Officers."

### **Competency.**

Of evidence, see "Evidence."  
Of juror, see "Jury."  
Of witness, see "Witness."

### **Complaint.**

See "Pleading."

### **Composition with Creditors.**

See "Assignment for Benefit of Creditors."

### **Condemnation Proceedings.**

See "Eminent Domain."

### **Condition.**

In policies, see "Insurance."

### **Confession.**

As evidence, see "Criminal Law."

### **Consideration.**

Of note, see "Negotiable Instruments."  
Of suretyship, see "Principal and Surety."

### **Consolidation.**

Of actions, see "Action."

### **Constable.**

See "Sheriffs and Constables."

## **CONSTITUTIONAL LAW.**

Regulation of school districts, see "Schools and School Districts."

It was competent for the people of the state to continue, or not, the probate courts of the territory, or to extend the power of the officers thereof.—*State v. McNally* (Utah) 920.

Amendment of corporate franchises held not an impairment of the obligation of contracts.—*McGowan v. McDonald* (Cal.) 418.

The provision of the revenue act that judgment for delinquent taxes may be entered without any other notice than publication is not unconstitutional, as being a local act regulating practice.—*Hughes v. Lazard* (Ariz.) 422.

St. 1895, p. 207, regulating primary elections, is unconstitutional, as special legislation.—*Marsh v. Hanley* (Cal.) 975.

Act March 28, 1895, providing for the appointment of a board of election commissioners in municipalities having a population of over 150,000, is unconstitutional as special legislation.—*Denman v. Broderick* (Cal.) 516.

Act Feb. 23, 1895, extending the time for redemption in foreclosure executed prior to its passage, is not unconstitutional.—*State v. Sears* (Or.) 482.

Laws 1885, p. 304, as amended by Laws 1891, p. 281, imposing liability on railroad companies for killing stock, is unconstitutional.—*Sweetland v. Atchison, T. & S. F. R. Co.* (Colo. Sup.) 1006.

A sentence to 50 years' imprisonment for manslaughter is not, as a matter of law, cruel and unusual.—*Jones v. Territory* (Okla.) 1072.

Sess. Laws 1891, p. 240, § 2, as amended in 1893, providing that in certain cases an information need not be verified, is not unconstitutional.—*Ratcliff v. People* (Colo. Sup.) 553.

Act March 9, 1893, providing for a reassessment for a local improvement when the first assessment has been declared void, is constitutional.—*Frederick v. City of Seattle* (Wash.) 364.

Laws 1879, c. 166, § 98, requiring concurrence of a majority of members in the election of a state printer, conflicts with Const. art. 15, § 4.—*Snow v. Hudson* (Kan. Sup.) 260; Same v. *Edwards*, Id.

Pol. Code, § 4636, relating to the number of witnesses to be summoned in a criminal cause, is constitutional.—*State v. O'Brien* (Mont.) 1091.

Act March 11, 1889, establishing a school of industry, is constitutional. — *Ex parte Nichols* (Cal.) 9.

Laws 1887, p. 289, § 10, providing that the benefit from a life and casualty insurance on the assessment plan shall not be liable to process for payment of beneficiary's debts, is constitutional. — *Burton v. Snyder* (Colo. Sup.) 1004.

### Construction.

Of city charter, see "Municipal Corporations."  
Of contract, see "Contracts."  
— to convey, see "Vendor and Purchaser."  
Of deed, see "Deed."  
Of mortgage, see "Mortgages."  
Of note, see "Negotiable Instruments."  
Of partnership contract, see "Partnership."

### CONTEMPT.

For violation of injunction, see "Injunction."

Rev St. § 5164, prescribing punishment for contempt, is a limitation of the power of the court in such matters. — *Levan v. Third District Court* (Idaho) 574.

An editor publishing an article attributing improper motives to the supreme court held punishable by imprisonment. — *In re Hughes* (N. M.) 692.

Liability of editor of a newspaper for an article imputing improper motives to the supreme court determined. — *In re Hughes* (N. M.) 692.

An appeal lies from an order finding defendant guilty of contempt in failing to pay alimony. — *Snow v. Snow* (Utah) 620.

### CONTINUANCE.

See, also, "Criminal Law."

Discretion of court, see "Appeal."

A continuance on the ground of absence of material evidence, on the application of one not a party, held properly denied. — *Burgwald v. Donelson* (Kan. App.) 100.

### CONTRACTS.

See, also, "Agistment"; "Arbitration and Award"; "Assignment"; "Assignment for Benefit of Creditors"; "Assumpsit"; "Bonds"; "Carriers"; "Chattel Mortgages"; "Covenants"; "Deed"; "Factors and Brokers"; "Frauds, Statute of"; "Fraudulent Conveyances"; "Insurance"; "Interest"; "Landlord and Tenant"; "Master and Servant"; "Mortgages"; "Negotiable Instruments"; "Partnership"; "Payment"; "Pledge"; "Principal and Agent"; "Principal and Surety"; "Sale"; "Specific Performance"; "Subrogation"; "Usury"; "Vendor and Purchaser."

Between mining partners, see "Mines and Mining."

Cancellation and rescission, see "Equity."

Laws impairing obligation, see "Constitutional Law."

Measure of damages for breach, see "Damages."

Of city, see "Municipal Corporations."

Of county, see "Counties."

Of married woman, see "Husband and Wife."

Reformation, see "Equity."

A contract granting to a telegraph company the exclusive right to establish lines along the right of way of a railroad is void. — *Union Trust Co. of New York v. Atchison, T. & S. F. R. Co.* (N. M.) 701.

An agreement to extend the time of payment so long as interest on the debt is promptly paid is not valid. — *Jenks v. Lehman* (Colo. App.) 1045.

A bond not required to be under seal may be ratified by parol. — *Smyth v. Lynch* (Colo. App.) 670.

### Interpretation.

Contract for purchase of hay in stacks construed, and rule of measurement determined. — *Morford v. Frye* (Wash.) 46.

An agreement to pay a mortgage securing a note is an agreement to pay the note. — *Stuyvesant v. Western Mortgage & Investment Co.* (Colo. Sup.) 144.

A contract for hauling for a city construed, and amount of compensation determined. — *Coggins v. City of Seattle* (Wash.) 943.

Contract with county commissioners for compensation for furnishing plats and lists of taxable real estate construed. — *Arment v. Yamhill County* (Or.) 653.

Contracts between private parties for work in street imply a compliance with city ordinances relative to permits, and the consent of the requisite number of property holders. — *Smith v. Luning Co.* (Cal.) 967.

### Performance.

Tender of performance of contract to exchange stocks is sufficient without actual production of the stocks, where the other party refuses the exchange and denies the contract. — *James v. Haver* (Cal.) 1120.

Severity of weather held no excuse for failure to perform a building contract by the stipulated time. — *Reichenbach v. Sage* (Wash.) 354.

In action for the contract price for the construction of a building, held, that the owner waived his right to demand a strict performance of the contract. — *Charles v. E. F. Hallack Lumber & Manufacturing Co.* (Colo. Sup.) 548.

Right of architect to recover compensation where, before the completion of the building, his employment is terminated. — *Havens v. Donahue* (Cal.) 962.

Where the owner of a building prevents contractors from completing the work, he waives the right to a certificate that the work had been completed according to contract. — *Justice v. Elwert* (Or.) 649.

### Actions on.

Complaint in an action to recover damages for an alleged breach of contract of warehouse receipts under Act Jan. 15, 1891, held to state a cause of action. — *Lawson v. Genesee Farmers' Alliance Joint-Stock Co.* (Idaho) 191.

Where issues are joined as to a contract price, it is error to admit evidence on a quantum meruit. — *Fladung v. Dawson* (Cal.) 1107.

The failure of a subcontractor to fulfill his contract is no defense to the recovery from the contractor of the damages stipulated for in case of noncompletion by a certain date. — *Reichenbach v. Sage* (Wash.) 354.

Where an action on a contract sets up one subsequent to the one sued on as a defense, defendant should be permitted to introduce all evidence tending to prove such issue. — *Haskins v. Curran* (Idaho) 559.

One need not be originally liable for a debt which he agrees to pay when the assumption of liability is not a naked promise. — *Wright v. McKittrick* (Kan. App.) 977.

One to whom a contract for street improvements was assigned held not liable on the contract or the bond of the contractor for materials furnished to the subcontractor. — *Brower & Thompson Lumber Co. v. Miller* (Or.) 659.

### Contribution.

Between partners, see "Partnership."

### Contributory Negligence.

See "Negligence."

**Conversion.**

See "Trove and Conversion."

**Conveyances.**

See "Chattel Mortgages"; "Covenants"; "Deed"; "Fraudulent Conveyances"; "Mortgages"; "Sale"; "Vendor and Purchaser."

**CORPORATIONS.**

See, also, "Banks and Banking"; "Building and Loan Associations"; "Carriers"; "Horse and Street Railroads"; "Insurance"; "Municipal Corporations"; "Railroad Companies"; "Water Companies."

Service of summons on, see "Writs."

A corporation cannot defend an action on a note executed in consideration of a loan made the corporation as executed *ultra vires*.—Allen v. Olympia Light & Power Co. (Wash.) 55.

**Officers and agents.**

A person owning no stock in a corporation and elected a director without his knowledge held neither a director *de jure* nor *de facto*.—Rozecrans Min. Co. v. Morey (Cal.) 585.

A corporation ratifying contracts of its promoters is bound thereby.—Schreyer v. Turner Flouring Mills Co. (Or.) 719.

Evidence examined, and held sufficient to go to the jury on the question as to whether the corporation ratified the acts of its promoters.—Schreyer v. Turner Flouring Mills Co. (Or.) 719.

In an action for compensation by a director, defendant corporation may show usage as to compensation and payment of salaries.—McCarthy v. Mt. Tecarte Land & Water Co. (Cal.) 956.

A resolution authorizing the president to "make arrangements for paying off a debt by giving a mortgage, or any other means," is sufficient to authorize the execution of such a mortgage.—Boggs v. Lakeport Agricultural Park Ass'n (Cal.) 1105.

The fact that by statute directors of a corporation could hold office for one year only did not exempt them from liability as such if they continued in office after that year.—Jenet v. Nims (Colo. App.) 147.

One who acted as agent of a corporation could not deny his official character.—Jenet v. Nims (Colo. App.) 147.

Persons acting as directors, and contracting debts, are estopped to deny their official position.—Jenet v. Albers (Colo. App.) 452.

A corporation, by entering under a lease executed by an officer without authority, and paying rent, ratifies it.—Jenet v. Albers (Colo. App.) 452.

**Actions.**

In an action against trustees of a corporation, under Comp. St. div. 5, § 460, the complaint must state in what county the business was carried on.—Wethey v. Kemper (Mont.) 716.

Where corporations were consolidated, the constituent companies to continue for certain purposes, the new concern was not entitled *prima facie* to sue on a note subsequently given one of said companies.—Union Pac. Ry. Co. v. Gochenour (Kan. Sup.) 1135.

Appointment of a receiver for a corporation held not to prevent its being sued.—Allen v. Olympia Light & Power Co. (Wash.) 55.

Failure of corporation to file copy of its articles of incorporation, in county where it brings action when required by Civ. Code, § 299, does not affect its cause of action, and must be taken advantage of by plea in abatement.—California Savings & Loan Soc. v. Harris (Cal.) 525.

The provision of Civ. Code, § 299, that a corporation "shall not maintain" an action until it complies with the requirements of such section, does not prohibit the commencement of an action, and a compliance before plea in abatement is filed cures the omission.—California Savings & Loan Soc. v. Harris (Cal.) 525.

Under Civ. Code, § 299, corporation is required only to file a certified copy of the copy of its articles of incorporation on file with secretary of state in each county where it holds property.—California Savings & Loan Soc. v. Harris (Cal.) 525.

**Stock.**

After the transfer of stock has been duly made on the books of the company, the transferee is liable on assessments.—Visalia & T. R. Co. v. Hyde (Cal.) 10.

An assignment of stock after an assessment thereon, will not relieve the assignor from liability in the absence of a formal transfer on the books.—Visalia & T. R. Co. v. Hyde (Cal.) 10.

It is no defense to an assessment to meet debts that the company had sufficient property with which to meet such debts.—Visalia & T. R. Co. v. Hyde (Cal.) 10.

It is no defense to an assessment that defendant was not a stockholder when the obligation to meet which the assessment was levied, was created.—Visalia & T. R. Co. v. Hyde (Cal.) 10.

**Members and stockholders.**

A complaint held to state a cause of action to enforce a stockholder's liability.—Aulbach v. Dahler (Idaho) 322.

Laws 1862, § 27, is unconstitutional so far as it was intended to declare that stockholders should not be individually liable for corporate debts.—McGowan v. McDonald (Cal.) 418.

Legislature cannot exempt stockholders of certain corporations from the provisions of the constitutions of 1849 and 1879.—McGowan v. McDonald (Cal.) 418.

What evidence is competent to charge stockholder for corporate debts.—McGowan v. McDonald (Cal.) 418.

What provisions of the Code did not affect corporations existing at the time of its passage without the election of the corporations.—McGowan v. McDonald (Cal.) 418.

Where an allegation that defendant owns shares of stock is undenied it is admitted that he is a stockholder.—McGowan v. McDonald (Cal.) 418.

On insolvency, and appointment of a receiver therefor, the liability of stockholders is to be enforced at the suit of the receiver.—Wilson v. Book (Wash.) 939.

Under Const. art. 12, § 11, the liability of a stockholder in a banking corporation in addition to the amount of his stock is secondary, and cannot be enforced by the corporate creditors independent of any action against the corporation.—Wilson v. Book (Wash.) 939.

**Foreign corporations.**

A foreign corporation purchasing a note in the state is not "transacting business" in the state.—Commercial Bank v. Sherman (Or.) 658.

A single sale of machinery held not "doing business" in the state.—Gates Iron Works v. Cohen (Colo. App.) 667.

The filing of a petition in intervention held not "doing business" in the state.—Gates Iron Works v. Cohen (Colo. App.) 667.

An objection that a foreign corporation has failed to comply with the statute before beginning business can be raised only in a direct proceeding.—Union Trust Co. of New York v. Atchison, T. & S. F. R. Co. (N. M.) 701.

## COSTS.

Fees of witnesses, see "Witnesses."

A statement of costs alleging that a certain person attended as a witness, and that he was sworn and examined, need not further show the necessity of his testimony.—*Wills v. Lance* (Or.) 384.

The time to file an amended statement of costs may be extended where application therefor is made within the time allowed by Hill's Ann. Laws, § 557, to file said amended statement.—*Wills v. Lance* (Or.) 384.

A party having objected to each item of a cost bill, the court, upon motion to retax, should make separate findings as to each item.—*Wills v. Lance* (Or.) 384.

Where separate actions for the same tort, which cannot be joined, are brought, plaintiff is entitled to costs in both suits, though to the satisfaction of but one judgment.—*Butler v. Ashworth* (Cal.) 386.

In a suit to cancel a tax deed, the matter of costs rests largely within the discretion of the trial court.—*Charlton v. Kelly* (Colo. App.) 455.

The failure to allow costs in equity case will not be reviewed, except for abuse of discretion.—*Leick v. Beers* (Or.) 653.

An oral assurance in argument that an appeal was taken in good faith will not avoïd damages if from the record it appears frivolous.—*Younglove v. Cunningham* (Cal.) 755.

An appeal from an order refusing to tax a docket fee held frivolous, the record failing to show the items of costs, and no argument being made.—*McGuire v. Sweeney* (Mont.) 924.

## Cotenancy.

See "Tenancy in Common."

## Counsel.

See "Attorney and Client."

## Counterclaim.

See "Set-Off and Counterclaim."

## COUNTIES.

See, also, "Highways"; "Municipal Corporations." Mandamus to county officer, see "Mandamus." Right to reduce school tax, see "Schools and School Districts."

The classification of counties on which the primary election law is based is that contained in Act March 14, 1883 (St. 1883, p. 299).—*Gett v. Supervisors of Sacramento County* (Cal.) 1122.

In the absence of statutory provisions, a county is not liable for the tortious acts of its officers in unlawfully taxing property.—*Board of Com'rs of Pitkin County v. Ball* (Colo. Sup.) 1000.

Resolution under Act 1891 (Sess. Laws 1891, p. 111, § 1), requiring county commissioners to make appropriations for county expenses, held sufficiently definite.—*Beshoar v. Board of Com'rs of Las Animas County* (Colo. App.) 912.

## Contracts.

Where a notice for bids correctly stated the series and the amount thereof, and the time that each series was to run, the fact that there was a mistake in the notice as to the total amount of the bonds was harmless.—*Richards v. Klickitat County* (Wash.) 647.

Under Laws 1895, c. 170, § 1, a county may fund warrants issued on the day of the adoption of the constitution, for indebtedness incurred prior thereto.—*Richards v. Klickitat County* (Wash.) 647.

Under Laws 1895, c. 170, § 1, a county has authority to fund outstanding warrants issued before the adoption of the present constitution.—*Richards v. Klickitat County* (Wash.) 647.

Outstanding warrants issued as rebate on taxes need not be validated.—*Richards v. Klickitat County* (Wash.) 647.

Where notice was actually given of an election to validate county indebtedness, the failure of the board to provide for said notice did not invalidate the election.—*Richards v. Klickitat County* (Wash.) 647.

Where warrants for outstanding indebtedness were submitted in separate classes, and the voter was notified of the warrants which he was called upon to validate, the fact that the indebtedness as set forth in the resolution and notice did not in all respects agree with the amounts actually outstanding did not render the election invalid.—*Richards v. Klickitat County* (Wash.) 647.

A subcontractor's right to recovery on the contractor's bond to a county, required by Gen. St. § 2415, is not defeated by the original contractor's acceptance of an order drawn on him for the amount of the subcontractor's claim.—*Gilmore v. Westerman* (Wash.) 345.

Those who furnish materials for public bridges are entitled, under Gen. St. § 2415, to sue on the bond given by contractors to the county.—*Gilmore v. Westerman* (Wash.) 345.

Under Gen. St. § 2415, all material men have a right to sue on the bond given by contractors to a county conditioned to pay all laborers and material men.—*Gilmore v. Westerman* (Wash.) 345.

## Officers.

Money paid a county officer by county commissioners in violation of law may be recovered in an action at law.—*Ada County v. Gess* (Idaho) 71.

A county treasurer cannot receive any compensation for services other than the salary allowed by law.—*Spratley v. Board of Com'rs of Leavenworth County* (Kan. Sup.) 232.

Money deposited with a county treasurer in condemnation proceedings is public money within Gen. St. 1889, par. 1716, and interest thereon belongs to the county.—*Spratley v. Board of Com'rs of Leavenworth County* (Kan. Sup.) 232.

## Allowance of claims.

A county auditor must draw his warrant for a claim on the supervisors' certificate giving the name of the claimant and the amount of the claim, though it does not state when it accrued.—*Sehorn v. Williams* (Cal.) 8.

County Government Act, § 41, requiring a claim against the county to be itemized before allowed by the supervisors, does not control the county auditor in drawing warrants for claims allowed.—*Sehorn v. Williams* (Cal.) 8.

On rejection or allowance of claims against a county, suit may be brought either by or against the county.—*Ada County v. Gess* (Idaho) 71.

An appeal may be taken by a taxpayer from the separate items of the allowance of a claim against the county, without taking an appeal from the whole allowance.—*Twohy v. Board of Com'rs of Granite County* (Mont.) 494.

## County Board.

See "Counties."

## COURTS.

See, also, "Judge"; "Justices of the Peace." Discretion of trial court, see "Appeal." Jurisdiction over infants, see "Infancy."

Mandamus to, see "Mandamus."  
 Prohibition to, see "Prohibition, Writ of."  
 Sales under order of court, see "Executors and Administrators."  
 Trial by court, see "Trial."

The court first acquiring jurisdiction will retain it throughout, as against other courts having concurrent jurisdiction.—*Louden Irrigating Canal Co. v. Handy Ditch Co.* (Colo. Sup.) 535.

Jurisdiction cannot be conferred by stipulation.—*American Fire Ins. Co. v. Pappe* (Okla.) 1085.

The judgment of a court not legally in session is void.—*American Fire Ins. Co. v. Pappe* (Okla.) 1085.

A proceeding under Pen. Code, § 772, providing for the removal of a public officer for misconduct, is not appealable to the supreme court.—*Wheeler v. Donnell* (Cal.) 1.

When the court record fails to show that the court was opened prior to February 1st, it is presumed that the court did not convene on the first Monday in January, as provided by law.—*American Fire Ins. Co. v. Pappe* (Okla.) 1085.

Under Act 1891, creating the appellate court, it has jurisdiction of appeals from all final judgments in civil cases, irrespective of the amounts involved.—*Livermore v. Truesdell* (Colo. App.) 663.

The court of appeals has no jurisdiction to review a judgment where the amount exceeds \$2,000.—*Kansas City, Ft. S. & M. R. Co. v. Board of Com'rs of Johnson County* (Kan. App.) 1147.

Where an action by a colored man for wrongful expulsion from a theater was dismissed on the ground that defendant was not liable therefor, plaintiff had no right of appeal on the ground that a constitutional question was involved.—*Mackey v. Tabor* (Colo. Sup.) 143.

The court of appeals has original jurisdiction in quo warranto proceedings.—*State v. Kelly* (Kan. App.) 299.

Const. art. 6, relative to the jurisdiction of district courts, does not give every district court in the state jurisdiction in every case.—*Louden Irrigating Canal Co. v. Handy Ditch Co.* (Colo. Sup.) 535.

The exclusive jurisdiction vested by Act 1879, p. 99, § 19, in a particular district court of an irrigation district extending into several counties, was not affected by Act 1881, p. 159, § 34.—*Louden Irrigating Canal Co. v. Handy Ditch Co.* (Colo. Sup.) 535.

The court of appeals has jurisdiction in proceedings in error from decisions of the district court.—*Shaffer v. Hoenschild* (Kan. App.) 979.

Jurisdiction in unlawful detainer is unaffected by the value of the property.—*Kelly v. E. F. Hallack Lumber & Manuf'g Co.* (Colo. Sup.) 1003.

Under Const. art. 24, § 9, and article 8, §§ 1, 7, the probate courts were abolished.—*State v. McNally* (Utah) 920.

The pleadings and practice in the probate court must conform to those in the district court.—*American Fire Ins. Co. v. Pappe* (Okla.) 1085.

## COVENANTS.

See, also, "Deed"; "Vendor and Purchaser."

A grantee in a warranty deed can rely on the covenant of warranty, though he knew the title was defective.—*Batterton v. Smith* (Kan. App.) 275.

A cause of action against a grantor for conveying, through mutual mistake, the wrong land, is not a covenant running with the land.—*Norris v. Colorado Turkey Honestone Co.* (Colo. Sup.) 1024.

Covenant for quiet enjoyment *held* broken by the eviction of the grantee by reason of the foreclosure of a mortgage executed by the grantor.—*Jackson v. McAuley* (Wash.) 41.

## Coverture.

See "Husband and Wife."

## Credibility.

Of witness, see "Witness."

## Creditors.

See "Assignment for Benefit of Creditors"; "Creditors' Bill."

## CREDITORS' BILL.

A petition to subject property to the payment of judgments *held* to state a cause of action.—*York Draper Mercantile Co. v. Hutchinson* (Kan. App.) 315.

## CRIMINAL LAW.

See, also, "Bail"; "Indictment and Information"; "Jury"; "Witness."

Conviction of less offense than that charged, see "Indictment and Information."

Effect of repeal of statute, see "Statutes."

Jurisdiction over crimes by Indians, see "Indians."

Offenses against election laws, see "Elections and Voters."

Particular crimes, see "Burglary"; "Embezzlement"; "Extortion"; "False Pretenses"; "Forgery"; "Homicide"; "Intoxicating Liquors"; "Larceny"; "Prize Fighting"; "Rape"; "Robbery."

Repeal of statute as to competency of witness, see "Statutes."

Under Hill's Ann. Laws, § 2011, one who procured the commission of a homicide, but was not present, can be convicted on an indictment charging him with the commission of the act.—*State v. Steeves* (Or.) 947.

A principal may be convicted of murder in the second degree, and an accessory before the fact of manslaughter.—*State v. Steeves* (Or.) 947.

## Arraignment and pleas.

A former acquittal must be pleaded specially.—*Guenther v. People* (Colo. Sup.) 999.

A plea of former acquittal is not bad because not verified, where defendant is willing to verify it.—*Guenther v. People* (Colo. Sup.) 999.

The overruling of a plea of former acquittal may be reviewed, though no exception was taken.—*Guenther v. People* (Colo. Sup.) 999.

A conviction of murder in the second degree on an indictment for murder in the first degree is an acquittal of the latter charge.—*State v. Murphy* (Wash.) 44.

One convicted as accessory before the fact cannot be convicted of a conspiracy to commit the crime.—*Davis v. People* (Colo. Sup.) 122.

Under Sess. Laws 1891, p. 125, § 2, one who was convicted of a felony may be also convicted for conspiring to commit said felony.—*Davis v. People* (Colo. Sup.) 122.

Where, on an indictment for murder, defendant is convicted of manslaughter, on new trial he cannot be tried for murder.—*State v. Steeves* (Or.) 947.

## Venue.

One charged with selling liquors in violation of an ordinance in a city of the third class is entitled to a change of venue from the police justice to a justice of the peace.—*City of Puyallup v. Snyder* (Wash.) 635.

The court may require defendant, on motion for a change of venue for prejudice, to produce the persons making the supporting affidavit.—*Territory v. Leary* (N. M.) 688.

#### **Continuance.**

Refusal of a continuance *held* error.—*State v. Metcalf* (Mont.) 182.

A continuance is properly refused where defendant has made no effort to procure the attendance of the witness whose evidence is desired.—*State v. Lewis* (Kan. Sup.) 265.

The overruling of an application for continuance for sickness of defendant *held* not an abuse of discretion.—*State v. Rogers* (Kan. Sup.) 256.

The court could be adjourned to a time beyond the commencement of the regular term in another county of the same district.—*State v. Rogers* (Kan. Sup.) 256.

#### **Conduct of trial.**

Certain defendants, having made statements, which were admissible only against themselves, must be separately tried, under Sess. Laws 1891, p. 132, § 1.—*Davis v. People* (Colo. Sup.) 122.

Sess. Laws 1891, p. 132, § 1, providing for separate trials of defendants against whom certain evidence is admissible, which is not admissible against other defendants, applies to conspiracy cases.—*Davis v. People* (Colo. Sup.) 122.

Defendant's voluntary absence from the court room during the examination of a juror who was challenged by defendant's counsel, and who did not sit in the case, is not ground for reversal.—*Van Houten v. People* (Colo. Sup.) 137.

Failure of the state to call a witness, who, though not an eyewitness of the killing, was near enough to hear the conversation between defendant and deceased preceding the killing, *held* error.—*State v. Metcalf* (Mont.) 182.

After a jury has been sworn, and evidence admitted, the court may excuse a juror against defendant's objection on proof that he is opposed to capital punishment.—*State v. Vaughan* (Nev.) 193.

A judge may declare to the jury that certain persons were not accomplices, when there was no evidence that they were.—*People v. Sternberg* (Cal.) 198.

Remarks of the court to the jury on the subject of disagreement *held* not to warrant a reversal.—*State v. Rogers* (Kan. Sup.) 256.

A defendant will not be discharged because of improper separation of the jury with his consent.—*People v. Hawley* (Cal.) 404.

A separation of the jury after retiring is ground for reversal, under Pen. Code, § 1128.—*People v. Hawley* (Cal.) 404.

Error in reading Pen. Code, § 332, on a trial for larceny, *held* cured by an instruction that the person obtaining money from another by artifice, with the intention of stealing it, was guilty of larceny.—*People v. Shaughnessy* (Cal.) 2.

It is within the discretion of the court to allow the jury to view the premises with consent of defendant.—*People v. Hawley* (Cal.) 404.

A conviction will not be disturbed because the court permitted the state to introduce in rebuttal evidence which should have been put in chief.—*State v. Nelson* (Wash.) 637.

#### **— Argument of prosecuting attorney.**

The prosecuting attorney should not state that if any wrong is done to defendant he has his redress by appeal to the supreme court.—*State v. Biggerstaff* (Mont.) 709.

To enable the appellate court to review improper remarks of the prosecuting attorney it is necessary to secure a ruling of the trial court thereon.—*State v. Biggerstaff* (Mont.) 709.

Improper argument of prosecuting attorney is not ground for reversal, where defendant fails to request an instruction to disregard it.—*State v. O'Keefe* (Nev.) 918.

#### **Evidence.**

Where an indictment sets out the substance of a fraudulent telegram in the possession of defendant, secondary evidence of its contents is admissible without notice to defendant to produce it.—*State v. Hanscom* (Or.) 167.

On a prosecution for procuring a person to register falsely others may testify that defendant procured them so to do.—*People v. Sternberg* (Cal.) 198.

Testimony given by defendant on a former trial *held* sufficiently identified to be admissible.—*State v. Rogers* (Kan. Sup.) 256.

On indictment for embezzlement by an agent by collecting from a debtor of his principal after discharge, evidence of embezzlement from the principal is admissible.—*People v. Van Eman* (Cal.) 520.

Proofs of conversation with the accused in reference to his actions on the night of the alleged crime *held* admissible.—*State v. Cowen* (Kan. Sup.) 687.

Persons falsely registering at defendant's procurement are not accomplices in the procurement by him of another so to register.—*People v. Sternberg* (Cal.) 198.

Testimony that defendant procured the witnesses to register falsely at an election *held* corroborative.—*People v. Sternberg* (Cal.) 198.

A defendant is entitled to a definition of corroborative evidence.—*People v. Sternberg* (Cal.) 201.

#### **— Confessions and admissions.**

A confession extorted by threats, and not connecting defendant with the crime, is inadmissible.—*State v. Mason* (Idaho) 63.

Voluntary statements by defendant at the time of and while under arrest *held* admissible.—*State v. Ellington* (Idaho) 60.

Testimony of an accused at the coroner's inquest is inadmissible where he testified under the belief that he was required so to do.—*State v. O'Brien* (Mont.) 1091.

#### **Instructions.**

Under Mills' Ann. St. § 1468, instructions may be oral, unless written instructions are demanded by the state or by defendant.—*Bradford v. People* (Colo. Sup.) 1013.

Instructions will not be reviewed where no exceptions were taken thereto.—*State v. Williams* (Wash.) 15.

It is not the duty of the court to address its instructions to each one of the jury as individuals.—*State v. Williams* (Wash.) 15.

Where the instructions given sufficiently state the law, a refusal of an instruction is not ground for reversal.—*State v. Murphy* (Wash.) 44.

It is proper to refuse a requested charge fully covered by the instructions given by the court.—*Van Houten v. People* (Colo. Sup.) 137.

An instruction as to corroborative evidence following the definition of the Code is not abstract.—*People v. Sternberg* (Cal.) 201.

An instruction that defendant could not be convicted if any juror entertained a reasonable doubt of his guilt, and that he could not be acquitted unless all the jurors entertained a reasonable doubt, was proper.—*State v. Rogers* (Kan. Sup.) 256.

An instruction as to the burden of proving an alibi *held* reversible error.—*Shoemaker v. Territory* (Okla.) 1059.

**— Province of court and jury.**

Instructions declaring a certain witness an accomplice *held* not error as charging on the facts.—*People v. Sternberg* (Cal.) 198.

An instruction that the evidence of an accomplice is to be viewed with "caution and distrust" is not bad under Code Civ. Proc. § 2061, subd. 4.—*People v. Sternberg* (Cal.) 201.

It is not error, under Code Civ. Proc. § 2061, subd. 4, to refuse an instruction that oral admissions of party are to be viewed with "distrust."—*People v. Sternberg* (Cal.) 201.

*Held* error to refuse to instruct that the fact that the accused "is the defendant is not of itself sufficient to impeach or discredit his testimony."—*State v. Metcalf* (Mont.) 182.

Instruction in regard to a witness testifying that he aided defendant in the theft *held* erroneous, for assuming that such witness was in fact an accomplice.—*Heivner v. People* (Colo. App.) 1047.

It is error to assume in an instruction the existence of an important fact not established by uncontradicted evidence.—*State v. Lewis* (Kan. Sup.) 265.

An instruction on the weight of defendant's testimony, *held* erroneous as a charge on the evidence.—*People v. Van Eman* (Cal.) 520.

**Judgment and sentence.**

That the judgment was "commanded" by the court sufficiently showed it to have been rendered.—*Jones v. Territory* (Okla.) 1072.

If a second judgment, which in terms sets aside a valid judgment, is void, the first remained in full force and effect.—*Bradford v. People* (Colo. Sup.) 1013.

Temporary confinement in county jail is not a part of a prisoner's term, under *Mills' Ann. St.* § 3459.—*Bradford v. People* (Colo. Sup.) 1013.

The court need not name the day on which the sentence shall commence.—*Jones v. Territory* (Okla.) 1072.

The prisoner may waive the statutory time allowed between the time of trial and judgment.—*Jones v. Territory* (Okla.) 1072.

Where petty larceny is committed in connection with burglary, a sentence to confinement at hard labor for the larceny, in addition to the punishment for the burglary, is proper.—*State v. Cowen* (Kan. Sup.) 687.

The death penalty cannot be lawfully inflicted until the governor shall fix the time therefor, and issue his warrant in accordance with the act of 1872.—*In re Dyer* (Kan. Sup.) 783.

**New trial.**

A new trial cannot be granted on an affidavit, on information and belief, of misconduct of the jury.—*State v. Murphy* (Wash.) 44.

Where the circumstances are perfectly consistent with defendant's innocence, a new trial should be granted.—*State v. Nesbit* (Idaho) 66.

Certain affidavits *held* to show such misconduct on the part of the jury, prejudicial to defendant, as to require a new trial.—*Heller v. People* (Colo. Sup.) 124.

Misconduct of the jury cannot be shown by jurors' affidavits, though they may be received to show misconduct of third persons.—*Heller v. People* (Colo. Sup.) 124.

Persistent misconduct of the district attorney in making remarks calculated to prejudice defendant, after objections to such remarks were sustained, is ground for a new trial.—*Heller v. People* (Colo. Sup.) 124.

Verdict rendered after improper remarks of judge set aside.—*People v. Hawley* (Cal.) 404.

**Appeal and error.**

An appeal by a city will not lie from a ruling of the district court quashing a complaint for

the violation of a city ordinance.—*City of Salina v. Wait* (Kan. Sup.) 255.

No appeal lies from an order adjudging the costs of a proceeding against defendant to give bonds to keep the peace adjudging the costs against him.—*State v. Arnold* (Kan. Sup.) 267.

Where, on a prosecution for violating a city ordinance, defendant is discharged in the district court, an appeal does not lie in behalf of the city.—*City of Lyons v. Wellman* (Kan. Sup.) 267.

Under Pen. Code 1895, § 2321, on appeal from a judgment errors in rulings on evidence may be reviewed without motion for new trial.—*State v. O'Brien* (Mont.) 1091.

A motion for change of venue under a former indictment cannot be considered on appeal from a conviction under a subsequent indictment.—*Van Houten v. People* (Colo. Sup.) 137.

Effect of supersedeas granted by supreme court is not dependent on the giving by a defendant of the bail fixed in the same order.—*Ritchey v. People* (Colo. Sup.) 1026.

**— Record.**

To sustain a conviction for a felony, the record must affirmatively show the arraignment and plea.—*Wright v. People* (Colo. Sup.) 1021.

The denial of a motion for change of venue cannot be considered, in the absence of the motion and affidavit from the bill of exceptions.—*Van Houten v. People* (Colo. Sup.) 137.

The record showing defendant's presence during the trial cannot be impeached by affidavit showing his absence.—*Van Houten v. People* (Colo. Sup.) 137.

Evidence does not become a part of the record unless embodied in a bill of exceptions.—*State v. Kness* (Kan. Sup.) 782.

Petition for change of venue and affidavits must be preserved in bill of exceptions.—*Bradford v. People* (Colo. Sup.) 1013.

Where there is no bill of exceptions and no motion for new trial in the record, there is nothing for review.—*Silva v. Territory* (N. M.) 690.

The fact that the prosecuting attorney explained why he did not testify in the case cannot be reviewed, in the absence of his explanation in the record.—*State v. Young* (Wash.) 881.

**— Review.**

An objection that defendant was not present at certain times during the trial cannot be first raised on appeal.—*State v. Young* (Wash.) 881.

An objection to the competency of a witness cannot be raised for the first time on appeal.—*State v. Steeves* (Or.) 947.

The exclusion of evidence is not ground for reversal if the evidence is subsequently admitted.—*State v. Biggerstaff* (Mont.) 709.

Weight of evidence passed on by trial court and jury not considered on appeal.—*State v. Kroenert* (Wash.) 876.

Where there is no evidence to sustain the verdict, it will be set aside.—*State v. Nesbit* (Idaho) 66.

**Cross-Examination.**

See "Witness."

**CUSTOM AND USAGE.**

When evidence is admissible to explain the meaning of technical or peculiar terms under Code Civ. Proc. § 633.—*Newell v. Nicholson* (Mont.) 180.

Custom of doing business by a defendant is not relevant in an action to recover on a contract.—*Miller v. Bean* (Wash.) 636.

## DAMAGES.

For conversion, see "Trover and Conversion."  
For injuries by surface water, see "Surface Waters."  
For land taken for public use, see "Eminent Domain."  
For libel and slander, see "Libel and Slander."

A sum which a sale of business provides the sellers shall pay as liquidated damages if they re-engage in the business is not a penalty.—*Potter v. Ahrens* (Cal.) 388.

A provision in a contract for the construction of a residence providing for the payment of \$10 for each day's delay in the completion thereof after a given date held a stipulation for liquidated damages.—*Reichenbach v. Sage* (Wash.) 354.

Unless it appears that permanent injuries are reasonably certain to result that element should not be submitted to the jury.—*Chicago, R. I. & P. Ry. Co. v. Kennedy* (Kan. App.) 802.

Where a petition shows plaintiff injured so as to cause great pain, she need not specially plead damages through impairment of capacity to earn money.—*Hamilton v. Great Falls St. Ry. Co.* (Mont.) 713.

In an action by a wife for personal injuries, she may show any impairment of her capacity to earn money.—*Hamilton v. Great Falls St. Ry. Co.* (Mont.) 713.

Evidence held to be improper on an issue as to the damages sustained by the negligent maintenance of a ditch over land conveyed by plaintiffs to defendants.—*Old v. Keener* (Colo. Sup.) 127.

Judgment for \$30,000 for injury to little girl eight years old, is excessive.—*Mitchell v. Tacoma Railway & Motor Co.* (Wash.) 528.

### Measure for torts.

In action against a factor for fraudulent representations as to the area of the land conveyed, the measure of damages is such proportion of the price as the deficiency bears to the represented area.—*Cawston v. Sturgis* (Or.) 656.

The measure of damages to land from fire set by a locomotive is the difference in market value just before and just after the fire.—*Atchison, T. & S. F. R. Co. v. Briggs* (Kan. App.) 289.

The measure of damages for destruction of personal property by fire set by a locomotive is its reasonable value at the time and place of destruction.—*Atchison, T. & S. F. R. Co. v. Briggs* (Kan. App.) 289.

Plaintiff may recover for suffering sustained, or which in reasonable probability she will hereafter sustain.—*Hamilton v. Great Falls St. Ry. Co.* (Mont.) 713.

Where plaintiff in a personal injury suit died and his administratrix was substituted, she was entitled to recover for pain and suffering endured by him.—*Atchison, T. & S. F. R. Co. v. Rowe* (Kan. Sup.) 683.

Damages should not be allowed in a personal injury suit for loss of wages resulting from a disability not caused by the injury.—*Atchison, T. & S. F. R. Co. v. Rowe* (Kan. Sup.) 683.

### Excessive damages.

A verdict for \$37,500, awarded for loss of eyesight, held to be excessive.—*Deep Mining & Drainage Co. v. Fitzgerald* (Colo. Sup.) 210.

\$15,000 for the loss of a leg of a child nine years old held not excessive.—*Roth v. Union Depot Co.* (Wash.) 641.

Evidence held insufficient as a basis for recovery of damages to crops by reason of defendant's failure to furnish water for irrigation.—*Knowles v. Leggett* (Colo. App.) 154.

A verdict of \$8,000 held not excessive, where the injury resulted in a shortening of a leg, and plaintiff was confined to her bed for 18 months, and the suffering was likely to continue.—*Lorance v. City of Ellensburg* (Wash.) 20.

## DEATH.

Evidence examined and held insufficient to create a presumption of death.—*Martin v. Union Mut. Life Ins. Co.* (Wash.) 53.

## DEATH BY WRONGFUL ACT.

An unverified general denial in an action by an administrator to recover for the death of his intestate admits plaintiff's capacity to sue.—*Atchison, T. & S. F. R. Co. v. McFarland* (Kan. App.) 788.

In an action for loss of a wife's services, it was proper not to instruct that the jury could not consider the loss suffered by plaintiff's children.—*Redfield v. Oakland Consol. St. Ry. Co.* (Cal.) 1117.

## Decedents.

See "Executors and Administrators"; "Wills"  
Allowance of claims against estate, see "Executors and Administrators."

## Declarations.

As evidence, see "Evidence."

## DEDICATION.

The fact that a private way is allowed to be used by others does not establish dedication to the public as a highway.—*Silva v. Spangler* (Cal.) 617.

## DEED.

See, also, "Boundaries"; "Fraudulent Conveyances"; "Vendor and Purchaser."

Acknowledgment, see "Acknowledgment."

As mortgage, see "Mortgages."

Covenants in, see "Covenants."

Estoppel by, see "Estoppel."

Reformation in equity, see "Equity."

Tax deed, see "Taxation."

The testimony of a grantor that he did not execute the deed, held, in view of the circumstances, not to overcome the presumption of execution arising from the possession of the deed by the grantee.—*Nixon v. Post* (Wash.) 23.

Possession by the grantee of a deed, sufficient in form, is prima facie evidence of its execution.—*Nixon v. Post* (Wash.) 23.

Description in a deed held not void for uncertainty.—*Hutchcraft v. Ludwig* (Wash.) 29.

After conveyance in fee subject only to an easement in the public for road purposes, grantor has no interest in the premises which he can convey to subsequent grantee.—*Southern Cal. Ry. Co. v. Southern Pac. R. Co.* (Cal.) 1123.

Where a deed has been executed under a bond for a deed, the intention of the parties is to be determined from both instruments.—*Stuyvesant v. Western Mortgage & Investment Co.* (Colo. Sup.) 144.

## Defective Sidewalks.

See "Municipal Corporations."

## Demurrer.

See "Pleading."

To evidence, see "Trial."



**DEPOSITARIES.**

In an action against a depositary the complaint should show that the condition under which plaintiff was entitled to the money deposited had been complied with.—*Kiefer v. Laventhal* (Cal.) 205.

**DEPOSIT IN COURT.**

Pending an appeal from an order as to the disposition of a fund deposited in court, the court has no power to deplete it.—*State v. Superior Court of King County* (Wash.) 877.

**Deposit.**

See "Banks and Banking."

**Descent and Distribution.**

See "Executors and Administrators"; "Wills."

**Description.**

In deed, see "Deed."

In lien claim, see "Mechanics' Liens."

**Desertion.**

As ground for divorce, see "Divorce."

**Devise.**

See "Wills."

**Directing Verdict.**

See "Trial."

**Disbarment.**

Of attorney, see "Attorney and Client."

**DISCOVERY.**

Answers to interrogatories in a bill of discovery under Misc. Laws, c. 25, cannot be compelled where such bill does not disclose a cause of action.—*State v. Security Savings & Trust Co.* (Or.) 162.

**Dismissal.**

Of appeal, see "Appeal."

**District.**

See "Schools and School Districts."

**District Court.**

See "Courts."

**Ditches.**

See "Irrigation."

**DIVORCE.**

Nonpayment of alimony, see "Contempt."

Decree in *ex parte* divorce proceeding in which defendant is served by publication determines only the status of plaintiff.—*Hunter v. Hunter* (Cal.) 756.

Under Code 1877, § 75, one not personally served may answer to the merits within six months.—*Medina v. Medina* (Colo. Sup.) 1001.

A decree granting a divorce may be opened, though the person obtaining it is married.—*Medina v. Medina* (Colo. Sup.) 1001.

Evidence of matters occurring after the separation, is admissible to show that defendant

left with intent to desert.—*Johnson v. Johnson* (Colo. Sup.) 130.

Where a divorce is sought for desertion and nonsupport, and a decree for desertion was warranted, errors assigned on rulings as to nonsupport will not be considered.—*Johnson v. Johnson* (Colo. Sup.) 130.

**Alimony.**

The court may allow the filing of a supplementary petition, relating exclusively to property rights and permanent alimony.—*Johnson v. Johnson* (Colo. Sup.) 130.

Allowance of alimony in an action for divorce is not the trial of an issue in the case.—*Hunter v. Hunter* (Cal.) 756.

Evidence examined, and held that defendant was guilty of contempt for failing to pay alimony.—*Snow v. Snow* (Utah) 620.

In the absence of statute, the court has no power to make a decree for permanent alimony a lien on defendant's personality.—*Johnson v. Johnson* (Colo. Sup.) 130.

1 Mills' Ann. St. § 1567, does not authorize the court to make a decree for permanent alimony a lien on defendant's personality.—*Johnson v. Johnson* (Colo. Sup.) 130.

**Custody and support of children.**

A divorced wife who supported the children could not recover therefor from the father.—*Hampton v. Allee* (Kan. Sup.) 779.

It is error in an action for divorce to set apart to the children a portion of the father's real estate.—*Rodgers v. Rodgers* (Kan. Sup.) 779.

The courts of a sister state may divorce a party residing in Kansas, but cannot settle the title to lands nor control the custody of children therein.—*Rodgers v. Rodgers* (Kan. Sup.) 779.

**Druggists.**

Illegal liquor sales, see "Intoxicating Liquors."

**EASEMENTS.**

Deed construed, and held to convey only a right of way, and not a fee-simple title.—*Peterson v. Machado* (Cal.) 611.

Deed construed, and held to convey an easement in a private alley to the grantee.—*Shannon v. Timm* (Colo. Sup.) 1021.

**EJECTMENT.**

See, also, "Adverse Possession"; "Quieting Title—Removal of Cloud."

One who has disposed of his interest in land cannot maintain ejectment therefor.—*Salcido v. Genung* (Ariz.) 527.

Evidence of possession prior to defendants' is sufficient proof of title as against a motion for nonsuit.—*Zillmer v. Gerichten* (Cal.) 408.

A complaint which fails to describe the land with sufficient certainty to enable the officer to locate the land from the description itself, is fatally defective.—*Tracy v. Harmon* (Mont.) 500.

**ELECTIONS AND VOTERS.**

Election for issuance of town bonds, see "Towns."

—to increase school indebtedness, see "Schools and School Districts."

Payment of election expenses by city, see "Municipal Corporations."

Under Const. art. 6, § 2, and Common School Act March 27, 1890, § 58, women can vote on the question of increasing the debt limit of a

school district.—Holmes & Bull Furniture Co. v. Hedges (Wash.) 944.

A candidate who neglects to have a defect in the official ballot corrected as provided by the election laws cannot, after election, object that the name of the successful candidate was improperly placed thereon.—Baker v. Scott (Idaho) 76.

The return day within 40 days after which a contestant must file a statement is the day on which the canvass begins.—Carlson v. Burt (Cal.) 583.

The "purity of election law" applies as well to a private citizen as to an officer.—People v. Sternberg (Cal.) 198.

One who, testifying in a civil case against a clerk for cancellation of votes, illegally registered, *held* not protected from prosecution for procuring as "deputy register" false registration.—People v. Sternberg (Cal.) 198.

### EMBEZZLEMENT.

See, also, "Larceny."

On embezzlement by an agent, receipts to debtors of his principal over his own name are admissible.—People v. Van Eman (Cal.) 520.

Where an agent, after discharge, collects money from his principal's debtor, a demand by the debtor for the return is not necessary.—People v. Van Eman (Cal.) 520.

On embezzlement of money by defendant after discharge as agent, on collecting from a debtor of his principal, the debtor may be alleged as owner.—People v. Van Eman (Cal.) 520.

### EMINENT DOMAIN.

Right of a railroad company, for the purpose of constructing necessary tracks, to appropriate part of a strip purchased by another railroad company upon which it had laid its tracks, determined.—Southern Pac. R. Co. v. Southern Cal. Ry. Co. (Cal.) 602.

Condemnation proceedings cannot be instituted to quiet title to land owned by complainant, nor to compel specific performance.—Florence, E. D. & W. V. R. Co. v. Lilley (Kan. App.) 857.

Form of judgment to be rendered on appeal from the award of commissioners determined.—Florence, E. D. & W. V. R. Co. v. Lilley (Kan. App.) 857.

Condemnation proceedings cannot be instituted to condemn a mortgage lien on land, the title to which is vested in petitioner.—Chicago, K. & W. Ry. Co. v. Need (Kan. App.) 997.

The measure of damages to land by the location of a railroad through it is the depreciation in market value.—Omaha, H. & G. Ry. Co. v. Doney (Kan. App.) 831.

The proximity of a railroad to the house of the owner of the land through which it is located, and the noise and smoke made by trains, may be considered in determining the depreciation in market value of the land, but not as a basis for awarding damages.—Omaha, H. & G. Ry. Co. v. Doney (Kan. App.) 831.

Title to improvements erected by a railroad company which entered the land under void condemnation proceedings, *held* to pass to a purchaser at foreclosure sale of a mortgage given by the owner.—Briggs v. Chicago, K. & W. R. Co. (Kan. Sup.) 1131.

### Endowment Policy.

See "Insurance."

### Equalization.

Of taxes, see "Taxation."

### Equitable Assignment.

See "Assignment."

### EQUITY.

See, also, "Creditors' Bill"; "Discovery"; "Divorce"; "Fraud"; "Fraudulent Conveyances"; "Injunction"; "Mortgages"; "Partition"; "Partnership"; "Quiet Title—Removal of Cloud"; "Reference"; "Specific Performance"; "Subrogation"; "Trusts."

Relief against illegal assessment, see "Municipal Corporations."

—against obstruction of navigable river, see "Navigable Waters."

Equity has jurisdiction to set off judgments against each other, though courts of law have jurisdiction under the statute.—Whitehead v. Jessup (Colo. App.) 1042.

In an action by a purchaser at a sheriff's sale to reform a deed to the land to the judgment debtor, the latter's wife is not a necessary party.—Power v. Burd (Mont.) 1094.

Evidence *held* insufficient to show mutual mistake authorizing reformation of a deed.—Norris v. Colorado Turkey Honestone Co. (Colo. Sup.) 1024.

### Rescission and cancellation of contracts.

A contract for the sale of land will not be rescinded for fraud so as to affect the rights of third persons furnishing materials and labor for building on the land conveyed.—West v. Badger Lumber Co. (Kan. Sup.) 239.

Evidence in an action for rescission on the ground of fraud *held* to show that plaintiff did not rely on the false representations.—Wood v. Standenmayer (Kan. Sup.) 760.

Facts considered which, it was *held*, did not authorize a rescission of a contract under which a conveyance of land had been made.—Green Mountain Falls Town & Improvement Co. v. Boyes (Colo. Sup.) 1036.

Where one obtaining a conveyance through fraud conveyed to one knowing the facts, who the same day conveyed to his brother without knowledge of conveyance, all the deeds were properly canceled.—Reddin v. Dunn (Colo. Sup.) 1006.

In a suit where plaintiff seeks to rescind a contract for the purchase of land, and to cancel a mortgage given thereon, defendant may file a cross complaint to foreclose.—Duggar v. Dempsey (Wash.) 357.

Grantee *held* entitled to rescind the conveyance because of fraud of the grantor in concealing the fact that an alley in the rear of the land conveyed as platted had been vacated.—Friday v. Parkhurst (Wash.) 362.

Evidence *held* insufficient to establish breach of a representation that an irrigation ditch would be so located on plaintiff's land as to enable her to irrigate her land.—Barfield v. South Side Irrigation Co. (Cal.) 406.

### Error, Writ of.

See "Appeal"; "Certiorari"; "New Trial"; "Review, Writ of."

### Estates.

See "Deed"; "Easements"; "Homestead"; "Tenancy in Common"; "Wills."

### ESTOPPEL.

To deny liability for city taxes, see "Municipal Corporations."

To deny validity of bond, see "Principal and Surety."  
To question proceeding for public improvement, see "Municipal Corporations."

The recital of a material fact in a deed estopped the parties from denying the truth thereof.—*Libbey v. Ralston* (Kan. App.) 294.

A surety giving a mortgage to secure certain payments held not estopped to show an alteration discharging him therefrom.—*Parke & Lacy Co. v. White River Lumber Co.* (Cal.) 202.

When plaintiff in divorce proceedings not estopped to deny facts stated in affidavit.—*Hunter Hunter* (Cal.) 756.

The grantee of an easement in a private alley held not estopped to assert it as against a subsequent trust deed of the grantor not reserving such easement.—*Shannon v. Timm* (Colo. Sup.) 1021.

Plaintiff held not estopped to deny liability on a note indorsed by her, and transferred to one of the defendants by the other defendants, to indemnify him from liability as accommodation maker of a note payable to plaintiff.—*Beer v. Clifton* (Cal.) 411.

Persons receiving benefits held estopped thereby.—*Smithson Land Co. v. Brautigam* (Wash.) 1096.

A fact admitted on the hearing cannot thereafter be denied.—*Hearne v. De Young* (Cal.) 1108.

Award in condemnation proceedings is binding on landowner who accepts and retains the amount awarded, though the proceeding was invalid.—*Allen v. Colorado Cent. R. Co.* (Colo. Sup.) 1015.

A judgment appropriating water, held a bar after four years to all parties thereto acquiescing therein.—*Boulder & Weld County Ditch Co. v. Lower Boulder Ditch Co.* (Colo. Sup.) 540.

One recognizing a decree by participation in its benefits is estopped to deny its validity.—*Boulder & Weld County Ditch Co. v. Lower Boulder Ditch Co.* (Colo. Sup.) 540.

## EVIDENCE.

See, also, "Witness."

Demurrer to, see "Trial."

In action to quiet title, see "Quieting Title—Removal of Cloud."

In criminal cases, see "Burglary"; "Criminal Law"; "False Pretenses"; "Homicide"; "Rape"; "Robbery."

In replevin, see "Replevin."

Objections to, see "Trial."

Of boundary, see "Boundaries."

Of breach of warranty, see "Sale."

Of custom, see "Custom and Usage."

Of dedication, see "Dedication."

Of fraud, see "Fraud."

Of negligence, see "Negligence."

Of passage of ordinance, see "Municipal Corporations."

Of payment, see "Payment."

Of ratification by principal, see "Principal and Agent."

Of sale, see "Sale."

Presumption of death from absence, see "Death."

Reception of, see "Trial."

To establish trust, see "Trusts."

Weight and sufficiency, see, also, "Appeal."

Courts take judicial notice that railway companies are common carriers.—*Boyle v. Great Northern Ry. Co.* (Wash.) 344.

The admission of irrelevant facts is erroneous.—*Atchison, T. & S. F. R. Co. v. Briggs* (Kan. App.) 289.

When burden of proof on one denying the death of another.—*Hunter v. Hunter* (Cal.) 756.

In an action by a principal on a contract executed in the name of his agent, plaintiff need

only prove that he is the real party by a preponderance of the evidence.—*Barbre v. Goodale* (Or.) 378.

Evidence held to show knowledge of handwriting sufficient to render witness competent as an expert witness.—*Bradford v. People* (Colo. Sup.) 1013.

Where accused becomes witness in his own behalf, and denies writing a document alleged to be forgery, he may be required to write in presence of the jury.—*Bradford v. People* (Colo. Sup.) 1013.

### Best and secondary.

A demand on a railroad company for the value of stock killed is required to be proved by the written demand itself.—*Atchison, T. & S. F. R. Co. v. Bartlett* (Kan. App.) 284.

A certified copy of a resolution by directors of a corporation, duly attested, ratifying a mortgage, is admissible, without proof of the loss of the record of such resolution.—*Purser v. Eagle Lake Land & Irrigation Co.* (Cal.) 523.

Where a party refuses to produce written instruments, secondary evidence of their contents will be strongly construed against such party.—*Schreyer v. Turner Flouring Mills Co.* (Or.) 719.

A deposition taken in another action of a witness present at the trial held not admissible.—*First Nat. Bank v. Marshall* (Kan. Sup.) 774.

### Declarations and admissions.

Declarations of the husband in the absence of the wife cannot bind the latter.—*Van Zandt v. Shuyler* (Kan. App.) 295.

Subsequent conduct of the mortgagees held admissible on an issue of the validity of the mortgage as against creditors.—*First Nat. Bank v. Marshall* (Kan. Sup.) 774.

Statements by defendant in the absence of plaintiff are admissible in his own behalf.—*Rogers v. Schulenburg* (Cal.) 899.

### Opinion evidence.

Opinion evidence that a cattle guard could be constructed at an intersection with a highway is inadmissible.—*Chicago, R. I. & P. R. Co. v. Clonch* (Kan. App.) 1140.

A dealer in horses may testify to the value of colts killed.—*Atchison, T. & S. F. R. Co. v. Bartlett* (Kan. App.) 284.

Opinion of physician, based on testimony, is competent to show probable result in the future of an injury to a child, in an action to recover therefor.—*Mitchell v. Tacoma Railway & Motor Co.* (Wash.) 528.

Evidence held to be improper as calling for an opinion on the ultimate fact to be tried by the jury.—*Old v. Keener* (Colo. Sup.) 127.

Testimony of railroad employes that a flat car in front of a road engine used for switching were so placed to allow the switchman to mount on the brake beam by use of the brake staff is a statement of fact.—*Prosser v. Montana Cent. Ry. Co.* (Mont.) 81.

A question as to the custom as to the number of men employed to manage a car held not to call for an opinion.—*Redfield v. Oakland Consol. St. Ry. Co.* (Cal.) 1117.

Whether an electric railway company was negligent in employing but one man to operate a car held not a subject of expert evidence.—*Redfield v. Oakland Consol. St. Ry. Co.* (Cal.) 1117.

Where the answer of an expert witness to a hypothetical question is not responsive, it should be stricken out.—*City of Wichita v. Cogshall* (Kan. App.) 842.

### Documents.

Under Rev. St. U. S. § 886, a transcript from books of the war department was admissible

in an action against a defaulting bidder to show the bid, acceptance thereof, his refusal to make the contract, and an account of the purchases by the government because of his default.—*United States v. Drachman* (Ariz.) 222.

A bill of sale identified by the subscribing witness can be introduced.—*Van Zandt v. Shuyler* (Kan. App.) 295.

A copy of a paper certified by an acting commissioner of the general land office with the seal of the office attached, *held* admissible, under Rev. St. U.S. § 891.—*Murray v. Polglase* (Mont.) 505.

That defendant's counsel presented a paper to the witness and requested him to identify it, but did not offer it in evidence, does not entitle the prosecution to introduce the paper.—*People v. Van Eman* (Cal.) 520.

When assessment roll admissible without authentication.—*City of Seattle v. Parker* (Wash.) 369.

#### **Parol evidence.**

Parol evidence is not admissible to vary a written contract.—*Richardson v. Great Western Manuf'g Co.* (Kan. App.) 809.

Parol evidence is not admissible to vary a written warranty.—*Huston v. Peterson* (Kan. App.) 101.

Where a note executed by a corporation is signed by the trustees, evidence is admissible to show that they executed it in their official capacity.—*Shaffer v. Hoenschild* (Kan. App.) 979.

Parol evidence *held* admissible to bring pavilion grounds purchased by a street-railway company within a mortgage covering after-acquired land adapted to its use.—*California Title Insurance & Trust Co. v. Pauly* (Cal.) 586.

In the absence of fraud, accident, or mistake, parol evidence that a note payable in money was, by agreement, payable in work, is inadmissible.—*Stein v. Fogarty* (Idaho) 681.

Parol evidence is admissible to show the proceedings of directors authorizing the execution of a mortgage, where no record of said proceedings was ever made.—*Boggs v. Lakeport Agricultural Park Ass'n* (Cal.) 1106.

Parol evidence is admissible in explanation of the consideration expressed in a written contract.—*Barbre v. Goodale* (Or.) 378.

Parol evidence *held* admissible to show that a contract executed in the name of an agent was in fact a contract of the principal.—*Barbre v. Goodale* (Or.) 378.

In a suit to cancel a grant of a right of way for an irrigation ditch, parol evidence of false representations as to the amount of water the grantee would be able to control *held* admissible.—*Barfield v. South Side Irrigation Co.* (Cal.) 406.

Parol evidence is not admissible to show that persons appearing upon a note as indorsers were in fact liable as sureties.—*Allen v. Chambers* (Wash.) 57.

In an action for commissions, conversations between plaintiff and the purchaser as to the commissions are incompetent.—*Childs v. Ptomey* (Mont.) 714.

#### **Examination.**

Of witness, see "Witness."

#### **EXCEPTIONS, BILL OF.**

See, also, "Appeal"; "Certiorari"; "New Trial." Necessity and sufficiency of bill, see "Appeal."

Under Sess. Laws 1865, p. 92, § 3, which supersedes Mills' Ann. St. § 1477, bills of exceptions in criminal cases may be signed at any

time fixed by the court.—*Van Houten v. People* (Colo. Sup.) 137.

Where an application is made to settle a bill of exceptions, and to have exceptions as set out in an exhibit allowed, and the exhibit is not submitted, the application will be denied.—*Dernham v. Lieualien* (Idaho) 74.

#### **Excessive Damages.**

See "Damages."

#### **Excusable Homicide.**

See "Homicide."

#### **EXECUTION.**

See, also, "Attachment"; "Exemptions"; "Garnishment."

Against land of insane person, see "Insanity."

Facts considered, and *held* that the title conveyed by sale related to the judgment, and not to the date of a claimed prior attachment.—*Pennsylvania Mortg. Inv. Co. v. Gilbert* (Wash.) 941.

There is no authority for supplementary proceedings in aid of execution on a judgment against an insolvent corporation in the hands of a receiver.—*Allen v. Stallicup* (Wash.) 884.

In supplemental proceedings, the court cannot direct a person alleged to have property of the judgment debtor, but who claims an interest therein, to deliver up the property for the satisfaction of the judgment.—*Wallace, Smuin & Co. v. McLaughlin* (Utah) 109; *Symms Utah Grocer Co. v. Same, Id.*

A bill to redeem from a sale after the time for redemption has expired *held* insufficient.—*Bryant v. Stetson & Post Mill Co.* (Wash.) 931.

#### **EXECUTORS AND ADMINISTRATORS.**

See, also, "Wills."

Wages due a clerk for services before and during the last illness of a decedent are included in the term "wages of servant," as used in the act respecting the settlement of estates.—*Oawood v. Wolfley* (Kan. Sup.) 236.

A creditor whose claim is secured by mortgage may enforce his lien, where his claim is presented before the discharge of the administrator, but not within a year.—*Sullivan v. Sheets* (Colo. Sup.) 1012.

The administrator of a mortgagee may bid in the property at foreclosure sale.—*Briggs v. Chicago, K. & W. R. Co.* (Kan. Sup.) 1131.

An administrator cannot retain chattels sold by his decedent, though not delivered under Code Civ. Proc. §§ 1589, 1590.—*Murphy v. Clayton* (Cal.) 613.

An order of sale reciting due publication of the order to show cause was sufficient proof of such publication to admit the administrator's deed as evidence of plaintiff's title.—*Zillmer v. Gerichten* (Cal.) 408.

Administrator *held* personally liable on a note signed by him as such.—*First Nat. Bank v. Collins* (Mont.) 499.

Administratrix cited under Code Civ. Proc. §§ 1394, 1395, for hearing as to sufficiency of bond, and who appears, is bound by order entered therein, no service of such order being required.—*Barrett v. Superior Court of Placer County* (Cal.) 519.

Compliance with an order of court, though out of time, waives its service when such service is required.—*Barrett v. Superior Court of Placer County* (Cal.) 519.

A nonresident widow is entitled to the allowance for maintenance under Code Proc. § 973.—*Griesemer v. Boyer* (Wash.) 17.

It was no ground for denying the widow's application for allowance under Code Proc. § 973, that she had sufficient means of her own with which to maintain herself.—*Griesemer v. Boyer* (Wash.) 17.

### Exemplary Damages.

See "Libel and Slander."

### EXEMPTIONS.

See, also, "Homestead."

From service of summons, see "Writs."

The word "householder," as used in Hill's Ann. Code, § 486, does not include an unmarried man who has no person dependent upon him for support.—*Peterson v. Bingham* (Wash.) 22.

### Expert Testimony.

See "Evidence."

### EXTORTION.

Where the statute authorizes a court to fix the amount of a sheriff's charge, not exceeding a certain sum, an officer who retains the maximum sum named without an order of court is not subject to penalty for charging "greater fees than are allowed by law."—*State Bank v. Brennan* (Colo. App.) 1050.

### Factorizing Process.

See "Garnishment."

### FACTORS AND BROKERS.

In an action for commissions due by virtue of an alleged ratification of the contract by the vendor, a letter from plaintiff to defendant *held* admissible to show the good faith of the parties.—*Courtney v. Continental Land & Cattle Co.* (Mont.) 185.

Evidence in an action for commissions for negotiating a sale examined, and *held*, that the contract was not ratified by the vendor so as to entitle plaintiff to commissions.—*Courtney v. Continental Land & Cattle Co.* (Mont.) 185.

The defense, in an action for commissions, that plaintiff acted for both parties, must be pleaded.—*Childs v. Ptomey* (Mont.) 714.

Evidence of witnesses as to whether they considered plaintiff defendant's agent is inadmissible.—*Childs v. Ptomey* (Mont.) 714.

Evidence *held* insufficient to maintain action for commissions.—*Childs v. Ptomey* (Mont.) 714.

A broker *held* authorized to recover commissions from both parties.—*Childs v. Ptomey* (Mont.) 714.

Evidence in an action for commissions for sale of cattle considered, and *held* that plaintiff was not employed by defendant to negotiate the sale.—*Courtney v. Continental Land & Cattle Co.* (Mont.) 185.

### FALSE PRETENSES.

See, also, "Fraud"; "Fraudulent Conveyances."

An indictment under Hill's Ann. Laws, § 1777, for obtaining by false pretenses a signature to a draft, need not allege that the signature was for defendant's accommodation.—*State v. Hanscom* (Or.) 167.

Evidence on trial for obtaining a signature by false pretenses *held* inadmissible.—*State v. Hanscom* (Or.) 167.

Instructions under an indictment for obtaining a signature for false pretenses examined, and *held* erroneous.—*State v. Hanscom* (Or.) 167.

### False Representations.

See "False Pretenses"; "Fraud"; "Fraudulent Conveyances."

### Fees.

Of attorney, see "Attorney and Client."

### Feme Covert.

See "Husband and Wife."

### FENCES.

Evidence examined, and *held* not to show the establishment of a partition fence such as to compel an adjoining owner to pay one-half of the cost thereof.—*Conklin v. Dust* (Kan. App.) 431.

### Filing.

Stipulations, see "Practice in Civil Cases."

### Findings.

Of referee, see "Reference."

### Fire Insurance.

See "Insurance."

### Fires.

Set by locomotive, see "Railroad Companies."

### FISHERIES.

Puget Sound, as designated in the act for licensing salmon fishing, includes the Gulf of Georgia.—*State v. Crawford* (Wash.) 892.

### Foreclosure.

Of lien, see "Mechanics' Liens."

Of mortgage, see "Mortgages."

### Foreign Corporations.

See "Corporations."

### FORGERY.

Where one, without authority, executes a receipt for money purporting on its face to be executed by him as agent for the person whose name he signs, he is not guilty of forgery.—*People v. Bendit* (Cal.) 901.

### Former Jeopardy.

See "Criminal Law."

### FRAUD.

See, also, "False Pretenses"; "Fraudulent Conveyances."

Representations recklessly made as of one's own knowledge are actionable as fraudulent.—*Cawston v. Sturgis* (Or.) 656.

Evidence examined, and *held* insufficient to show false representations as to a horse purchased and retained for nearly two years.—*First Nat. Bank v. Skinner* (Idaho) 679.

## FRAUDS, STATUTE OF.

Contract for the manufacture of a mining and pumping plant *held* not within the statute of frauds.—Puget Sound Mach. Depot v. Rigby (Wash.) 39.

A mortgage cannot be extended by an oral declaration to secure a different indebtedness contracted after its execution.—Bell v. Coffin (Kan. App.) 861.

An oral contract to manufacture ironwork according to a particular design is not an agreement relating to the sale of personality within the statute.—Heintz v. Burkhard (Or.) 868.

A memorandum of a contract for delivery of railroad ties *held* insufficient to take the contract out of the statute of frauds.—Ellis v. Denver, L. & G. R. Co. (Colo. App.) 457.

A contract for the delivery of railroad ties *held* within the statute of frauds.—Ellis v. Denver, L. & G. R. Co. (Colo. App.) 457.

## FRAUDULENT CONVEYANCES.

In action by a creditor of the mortgagor to set aside the mortgage as fraudulent, the complaint must show that plaintiff was a creditor at the time of the execution of the mortgage.—West Coast Grocery Co. v. Stinson (Wash.) 35.

A general averment in a complaint that the mortgage was "made to defraud creditors and is void" is insufficient.—West Coast Grocery Co. v. Stinson (Wash.) 35.

Defendant to whom plaintiff's debtor conveyed personality in secret trust, *held* liable for the value thereof to plaintiff.—Morrell v. Miller (Or.) 490.

On conveyance by a client to an attorney to secure fees of property in excess of the amount due, *held*, that a second attorney taking a conveyance to secure his fees took it with notice of the first attorney's title.—Morrell v. Miller (Or.) 490.

Purchaser for value and without notice, and before proceedings begun to set aside deed to his grantor as in fraud of creditors, acquires a good title.—Sawtelle v. Weymouth (Wash.) 1101.

### What constitutes.

The mere fact that a creditor seeks to obtain a preference to the exclusion of other creditors does not render the preference fraudulent.—West Coast Grocery Co. v. Stinson (Wash.) 35.

Evidence *held* sufficient to show that a conveyance of land by a husband to his wife was not in fraud of creditors.—Kemp v. Folsom (Wash.) 1100.

A sale by a mortgagee of chattels, worth more than the mortgage debt, to defraud creditors of the mortgagor with the collusion of his vendee, conveys no title.—Collingsworth v. Bell (Kan. Sup.) 252.

A husband may pay a debt due to his wife in preference to paying the claims of his other creditors.—First Nat. Bank v. Kavanagh (Colo. App.) 217.

Where a sale is alleged to be fraudulent, the purchaser may state whether he had any knowledge that his vendor was selling the goods with intent to defraud.—Richolson v. Freeman (Kan. Sup.) 772.

A sale *held* fraudulent as to creditors where the goods remained with the seller, it being shown that the property was bulky and difficult to move.—Autrey v. Bowen (Colo. App.) 908.

Conveyance by a client to an attorney *held* only as security for fees.—Morrell v. Miller (Or.) 490.

Under Gen. St. § 2266, wife cannot prove title to household goods, as against creditors of hus-

band by showing gift from him.—Burchinell v. Butters (Colo. App.) 459.

Husband cannot convey property inherited from deceased wife by gift as against her creditors.—Burchinell v. Butters (Colo. App.) 459.

Chattel mortgage of goods *held* not invalid where the proceeds were applied to the ordinary expenses and payment of claims for which the mortgagee was surety.—Dillon v. Dillon (Wash.) 894.

A mortgage authorizing the mortgagor to retain possession, with power of sale, without accounting to the mortgagee, is invalid as against creditors.—Richardson v. Jones (Kan. Sup.) 1127.

## GARNISHMENT.

Where plaintiff in interpleader deposits the money in court without any order, it is not in the custody of the law, so as to prevent garnishment.—Kimball v. Richardson-Kimball Co. (Cal.) 1111.

Evidence examined and *held* to show that defendant garnishees were indebted to the judgment debtor.—First Nat. Bank of Hailey v. Van Ness (Idaho) 59.

Defendant's interest in a debt owing to him and another, but not as partners, is subject to garnishment.—Perry v. Blatch (Kan. App.) 989.

Garnishment cannot issue as an aid to an action, under Code, § 230, on a debt not due.—Charles P. Kellogg & Co. v. Hazlett (Kan. App.) 987.

A garnishee summons issued without filing a bond should be quashed.—Charles P. Kellogg & Co. v. Hazlett (Kan. App.) 987.

On proof without contradiction that a claim was assigned in good faith before the garnishment thereof, a verdict against the garnishee should be set aside.—Campbell v. Poudre Val. Bank (Colo. App.) 449.

## GOOD WILL.

On sale of a good will, *held*, that the wife, joining with the husband therein, had an interest in the property and business.—Potter v. Ahrens (Cal.) 888.

## Guaranty.

Liability of indorser as guarantor, see "Negotiable Instruments."

## HABEAS CORPUS.

A return in compliance with Civ. Code, § 668, is sufficient, and the petitioner may controvert it by appropriate pleadings.—In re Chipchase (Kan. Sup.) 264.

Under Rev. St. § 8361, a judge may provide for the temporary care of a person alleged to be illegally restrained of his liberty.—In re Dowling (Idaho) 871.

An order releasing petitioner from imprisonment cannot be had on a return showing petitioner at large at the date of the petition.—In re Brydon (N. M.) 691.

A district court judge at chambers has all the powers of a court in habeas corpus proceedings.—In re Dowling (Idaho) 871.

## Harmless Error.

See "Appeal."

## HIGHWAYS.

A complaint alleging an agreement by defendant to pay the road poll tax due from de-

defendant's employees is not a compliance with Laws 1893, p. 151, § 7, relative to the collection of said tax.—*Mason County v. Simpson* (Wash.) 33.

A complaint under Laws 1893, p. 151, should allege the residence of the persons primarily liable for the payment of the road poll tax.—*Mason County v. Simpson* (Wash.) 33.

### Hiring.

See "Master and Servant."

### HOMESTEAD.

Entries under federal laws, see "Public Lands."

A purchaser of land, whose family lived out of the state, did not acquire a homestead by going into possession.—*Dobson v. Shoup* (Kan. App.) 817.

Declaration of intent to claim a homestead without improvement or occupancy is insufficient under Code Civ. Proc. § 322.—*Power v. Burd* (Mont.) 1094.

### HOMICIDE.

On appeal from a conviction of manslaughter on trial for murder, defendant cannot object to the indictment as insufficient to charge murder.—*State v. Steeves* (Or.) 947.

A verdict on prosecution for murder finding "the defendant guilty, as charged in the indictment, of manslaughter," is valid.—*Jones v. Territory* (Okla.) 1072.

A person assailed in his own house is not required to retreat out of it.—*State v. O'Brien* (Mont.) 1091.

When objection to question erroneously sustained without prejudice.—*People v. Shaw* (Cal.) 593.

#### Murder.

Evidence held sufficient to sustain a conviction of murder in the first degree.—*Van Houten v. People* (Colo. Sup.) 137.

Evidence examined and held to sustain a verdict of murder in the first degree.—*State v. Ellington* (Idaho) 60.

#### Indictment.

An indictment setting forth the crime in the language of the statute held sufficient.—*State v. Ellington* (Idaho) 60.

Indictment for murder held to sufficiently allege a deliberate and premeditated killing.—*State v. Metcalf* (Mont.) 182.

Indictment held insufficient for failure to charge that the killing and the unlawful acts were done with premeditated intent to effect deceased's death.—*Holt v. Territory* (Okla.) 1083.

An indictment which does not show that the homicidal act was dangerous to any person other than deceased was insufficient, under St. 1893, § 2078, subd. 2.—*Jewell v. Territory* (Okla.) 1075.

An indictment, though insufficient under the statute, is sufficient at common law, is good on demurrer.—*Jewell v. Territory* (Okla.) 1075.

An indictment failing to charge a premeditated design to effect death held insufficient, under St. 1893, § 2078, subd. 1.—*Jewell v. Territory* (Okla.) 1075.

#### Evidence.

In a prosecution for murder, exclamations by deceased and by witnesses of the homicide held admissible as *res gestæ*.—*State v. Biggerstaff* (Mont.) 709.

When evidence that accused was dissuaded from giving himself up excluded without prejudice.—*People v. Shaw* (Cal.) 593.

Evidence examined, and held that the question whether the killing was willful and deliberate was for the jury.—*Ratcliff v. People* (Colo. Sup.) 358.

### HORSE AND STREET RAILROADS.

See, also, "Carriers"; "Railroad Companies."

Evidence held, as a matter of law, insufficient to show that a street-railway company was negligent in running down a person riding on a bicycle in front of one of its cars.—*Everett v. Los Angeles Consol. Electric Ry. Co.* (Cal.) 207.

Instruction that plaintiff, a child of tender years, cannot recover for injury by street cars if she failed to look for approaching car before attempting to cross street, properly refused.—*Mitchell v. Tacoma Railway & Motor Co.* (Wash.) 528.

Evidence to show noise made by a cable is admissible as one of circumstances surrounding an accident at crossing of street railway.—*Mitchell v. Tacoma Railway & Motor Co.* (Wash.) 528.

### HUSBAND AND WIFE.

See, also, "Divorce"; "Homestead."

The presumption that property conveyed to a married woman becomes her separate estate is not conclusive.—*Santa Cruz Rock Pav. Co. v. Lyons* (Cal.) 599.

As between the grantor and grantee, evidence held to show that land conveyed to the wife, the consideration for which was paid by her husband, was her separate property.—*Nixon v. Post* (Wash.) 23.

The separate property of the wife is not liable for debts of the husband in a business carried on by him for the benefit of the community.—*Sweet, Dempster & Co. v. Dillon* (Wash.) 637.

The good faith of a transaction between husband and wife must be shown by convincing evidence.—*Van Zandt v. Shuyler* (Kan. App.) 295.

A husband may give a mortgage to his wife on community personality in consideration of a loan from her separate estate.—*Dillon v. Dillon* (Wash.) 804.

Community personal property of husband and wife is subject to execution for the husband's individual debts.—*Powell v. Pugh* (Wash.) 879.

Where a community has been in existence for more than seven years before judgment against the husband, it will be presumed that the debt was contracted while the community existed.—*Bryant v. Stetson & Post Mill Co.* (Wash.) 931.

A wife, seeking to vacate a sale of community property on a judgment against her husband, must allege that the judgment was not rendered on a community debt.—*Bryant v. Stetson & Post Mill Co.* (Wash.) 931.

A debt contracted by the husband during the existence of the community is *prima facie* a community debt.—*Bryant v. Stetson & Post Mill Co.* (Wash.) 931.

### Impeachment.

Of witness, see "Witness."

### Imprisonment.

See "Bail"; "Criminal Law."

### Imputed Negligence.

See "Negligence."

**Indemnity.**

In action on lost note, see "Lost Instruments."

**INDIANS.**

An Indian who has severed his tribal relations may be tried in the state courts, whether the crime was committed within or without the reservation.—*State v. Williams* (Wash.) 15.

An Indian retaining his tribal relations may be tried in a state court for an offense committed outside the limits of a reservation.—*State v. Williams* (Wash.) 15.

**INDICTMENT AND INFORMATION.**

See, also, "False Pretenses"; "Homicide"; "Larceny."

For injuries to railroad, see "Railroad Companies."

Where the evidence shows defendant guilty of robbery, he cannot complain that he was convicted of an attempt to rob.—*State v. O'Keefe* (Nev.) 918.

It is not essential that the definitions of the various degrees of murder should be stated in the indictment.—*State v. Ellington* (Idaho) 60.

Under 2 Hill's Ann. Code, § 1204, where an information is set aside because of imperfect verification the court can permit a new information to be filed.—*State v. Williams* (Wash.) 15.

An information in a county containing an Indian reservation against an Indian need not aver that he did not sustain tribal relations, or that the offense was not committed on the reservation.—*State v. Williams* (Wash.) 15.

An information charging the crime as committed "on or about" a certain time is sufficient.—*State v. Williams* (Wash.) 15.

It is not necessary that the prosecuting witness should have actual personal knowledge of the transactions charged in the information.—*State v. Etzel* (Kan. App.) 798.

An indictment need not recite the drawing, selecting, and impaneling of the grand jury.—*Jones v. Territory* (Okla.) 1072.

When the several counts relate to the same acts, which constitutes several offenses, the indictment is insufficient.—*Martin v. Territory* (Okla.) 1067.

**Indorsement.**

Of bills and notes, see "Negotiable Instruments."

**INFANCY.**

See, also, "Parent and Child."

Contributory negligence of infant, see "Railroad Companies."

Custody of child, see "Parent and Child."

Imputed negligence, see "Negligence."

By Rev. St. §§ 2473, 2483, 2534, jurisdiction of the custody of infants is committed to the district courts.—*In re Miller* (Idaho) 870.

A judgment against a minor who did not appear in person or by guardian was voidable.—*York Draper Mercantile Co. v. Hutchinson* (Kan. App.) 315.

**INJUNCTION.**

Against action by assignee, see "Assignment for Benefit of Creditors."

—attachment proceedings, see "Attachment."

—collection of taxes, see "Taxation."

Against erection of public building, see "States and State Officers."

—governor, see "States and State Officers."

—nuisance, see "Nuisance."

Certiorari to review proceedings for contempt in violation of injunction, see "Certiorari."

Statements of conclusions are insufficient foundation for the issuance of an injunction.—*Howard v. Eddy* (Kan. Sup.) 1133.

An injunction will not lie to restrain persons conspiring to destroy a corporation by compelling its members to leave it.—*Silver State Council No. 1 of American Order of Steam Engineers v. Rhodes* (Colo. App.) 451.

Equity has jurisdiction to enjoin the refusal of a water company to furnish water to the lessee of a city electric plant under its contract to supply water to the city.—*Jenkins v. Columbia Land & Improvement Co.* (Wash.) 323.

Injunction perpetually restraining a railroad company from entering on certain lands must be modified to allow exercise of rights subsequently acquired by defendant under right of eminent domain.—*Southern Cal. Ry. Co. v. Southern Pac. R. Co.* (Cal.) 1123.

Granting of preliminary injunction will not be interfered with by appellate court, where based on reasonable showing.—*Anaconda Copper-Min. Co. v. Butte & B. Min. Co.* (Mont.) 924.

Injunction enjoining the grantee of an easement from interfering with the laying of pipes by the grantor held properly granted.—*Peterson v. Machado* (Cal.) 611.

Whether work done was rendered valueless by injunction is for the jury.—*Creek v. McManus* (Mont.) 497.

Evidence is admissible to show that damages resulted from other causes than injunction.—*Creek v. McManus* (Mont.) 497.

When attorney fees are not recoverable as damages from an injunction.—*Creek v. McManus* (Mont.) 497.

Power to punish for contempt for violating injunction pending appeal from the injunction order determined.—*Schwarz v. Superior Court of City and County of San Francisco* (Cal.) 590.

**INSANITY.**

On certiorari to review an order committing a person as insane, record held to sufficiently show that an order was made fixing the time for the examination.—*State v. Third Judicial District Court* (Mont.) 385.

Where the jury under oath give their verdict declaring the person insane, it is equivalent to their certifying under oath that the charge of insanity is correct.—*State v. Third Judicial District Court* (Mont.) 385.

The presumption of continued insanity arising from an adjudication may be overcome by evidence other than an adjudication of restoration.—*Rodgers v. Rodgers* (Kan. Sup.) 779.

The land of an insane ward is subject to execution on a valid judgment rendered against him.—*Pollock v. Horn* (Wash.) 885.

A judgment rendered against an insane surety on an attachment is valid where the surety was sane at the time the bond was executed.—*Pollock v. Horn* (Wash.) 885.

**Insolvency.**

See "Assignment for Benefit of Creditors"; "Fraudulent Conveyances."

**Instructions.**

See "Trial."



**INSURANCE.**

One in possession under an optional contract for the purchase of property has an insurable interest, to extent of his payments on the contract.—*Davis v. Phoenix Ins. Co. (Cal.)* 1115.

Where a policy is based on the condition that the assured is the owner in fee simple, and the insurer accepts a risk, though the application shows that the assured is not the owner in fee, the insurer cannot set up a want of title.—*Davis v. Phoenix Ins. Co. (Cal.)* 1115.

In an action under a life policy, evidence of the disappearance of bodies in certain waters is immaterial, where it is not shown that the insured fell into such waters.—*Martin v. Union Mut. Life Ins. Co. (Wash.)* 53.

**Mutual benefit insurance.**

Evidence in an action on an endowment policy examined, and held insufficient to show payment.—*Osterman v. District Grand Lodge No. 4, I. O. B. B. (Cal.)* 412.

A forfeiture of a mutual benefit policy held not established in the absence of compliance with the formal method of suspension in such case.—*Osterman v. District Grand Lodge No. 4, I. O. B. B. (Cal.)* 412.

Where defendant alleges in an action on a benevolent insurance policy that plaintiff consented that the money should be applied on a sum embezzled by the insured, the burden of proving such issue is on defendant.—*Osterman v. District Grand Lodge No. 4, I. O. B. B. (Cal.)* 412.

Where, in an action on an endowment policy, the answer alleges that all conditions precedent to recovery have been fulfilled, "except as hereinafter set forth," the burden of proving non-performance is on the defendant.—*Osterman v. District Grand Lodge No. 4, I. O. B. B. (Cal.)* 412.

A policy the amount of which was collectible by assessment was not enforceable by mandamus.—*Great Western Mut. Aid Ass'n v. Colmar (Colo. App.)* 159.

A complain' on a mutual insurance policy need not allege demand for assessment and refusal, nor the number of members, nor the amount which would be realized by assessment, nor that an assessment was collected.—*Great Western Mut. Aid Ass'n v. Colmar (Colo. App.)* 159.

Evidence held too indefinite to show a default in not remitting an assessment in time.—*Great Western Mut. Aid Ass'n v. Colmar (Colo. App.)* 159.

Failure to object to nonpayment of an assessment for two months constituted a waiver.—*Great Western Mut. Aid Ass'n v. Colmar (Colo. App.)* 159.

Time within which an assessment could be paid held to be computable from the date insured received notice.—*Great Western Mut. Aid Ass'n v. Colmar (Colo. App.)* 159.

**INTEREST.**

See, also, "Usury."

When interest is payable on deposits by a bank which has suspended business.—*McGowan v. McDonald (Cal.)* 418.

**INTERPLEADER.**

A stakeholder, after defending against the claim of a person to the money in his hands, and withdrawing his interpleader, cannot complain that a judgment in favor of such person may subject him to double liability.—*Brown v. Campbell (Cal.)* 12.

**Interrogatories.**

See "Discovery."

**Intervention.**

In attachment, see "Attachment."

**INTOXICATING LIQUORS.**

Repeal of license law, see "Statutes."

Whether an ordinance imposing a license tax is in fact prohibitive is a question of law.—*Merced County v. Fleming (Cal.)* 392.

On a prosecution for maintaining a liquor nuisance the articles seized by the officer were admissible as evidence.—*State v. O'Connor (Kan. App.)* 859.

Gen. St. 1889, par. 2533, providing for search and seizure, does not contravene Bill of Rights, §§ 10, 15.—*State v. O'Connor (Kan. App.)* 859.

Evidence that the building alleged to be a common nuisance was such before defendant took possession, and that it was afterwards so maintained, was admissible.—*State v. O'Connor (Kan. App.)* 859.

Acquittance of a charge of making an illegal sale does not bar a prosecution for maintaining a liquor nuisance.—*State v. Barber (Kan. App.)* 800.

A conviction of a druggist for a sale of liquors reversed, there being no evidence that defendant did not have a permit.—*Canfield v. City of Leadville (Colo. App.)* 910.

**IRRIGATION.**

Evidence examined, and held insufficient to show an abandonment of the interest in the irrigation ditch.—*Putnam v. Curtis (Colo. App.)* 1056.

The interests of different persons in the same irrigation ditch cannot be adjudicated under Gen. St. § 1766.—*Putnam v. Curtis (Colo. App.)* 1056.

Under acts of congress of 1866, right of way for construction of irrigating ditches was granted over all lands then owned by the United States and unoccupied, which right continues so long as the government holds the title, subject to payment of damages to occupying claimant.—*Tynon v. Despain (Colo. Sup.)* 1039.

Where a ditch is constructed over lands held under government laws, the title to which is in the United States, one to whom the occupant conveys after obtaining patent takes the land subject to the easement of the ditch, though there is no reservation in his deed.—*Tynon v. Despain (Colo. Sup.)* 1039.

Lands covered by Pacific Railroad grants are subject to easements of irrigating ditches where they are authorized by local laws.—*Tynon v. Despain (Colo. Sup.)* 1039.

Irrigation law applies to companies carrying water for hire, and to their patrons, and one cannot appropriate more than the equitable share of water allotted him by the superintendent.—*White v. Farmers' Highline Canal & Reservoir Co. (Colo. Sup.)* 1028.

A contract which entitles a water consumer to draw more water than is his just proportion from the ditch of a company is in contravention of the statute, and cannot be enforced, though it antedates the law, water rights being a matter of public interest, and subject to police regulation by the state.—*White v. Farmers' Highline Canal & Reservoir Co. (Colo. Sup.)* 1028.

**Issues.**

See "Pleading"; "Trial."

**Joinder.**

Of causes of action, see "Action."

**Joint Tenancy.**

See "Tenancy in Common."

**JUDGE.**

See, also, "Courts"; "Justices of the Peace."

Attorney cannot be empowered by court or parties to preside as judge. — *McGarvey v. Hall* (Colo. App.) 909.

After the expiration of the term fixed by Const. art. 24, § 9, for the cessation of authority under territorial government, probate judges were left without office, and without any authority. — *State v. McNally* (Utah) 920.

**JUDGMENT.**

Against infant, see "Infancy."

Appealable judgment, see "Appeal."

Decision of arbitrators, see "Arbitration and Award."

— on appeal, see "Appeal."

In criminal cases, see "Criminal Law."

Modification on appeal, see "Appeal."

Of foreclosure, see "Mortgages."

Set-off in action on judgment, see "Set-Off and Counterclaim."

Taxation of, see "Taxation."

A judgment by default on publication will be set aside where defendant, within three years, makes an application, and files a full answer, with a statement that he had had no actual notice in time to appear. — *Conklin v. Dust* (Kan. App.) 431.

A judgment obtained by fraud against a party not guilty of negligence, who has a meritorious defense which he was prevented from making by the fraud may be stayed and set aside. — *Kimble v. Short* (Kan. App.) 317.

A judgment granted in one department of the superior court of the county and city of San Francisco will not prevail over a subsequent judgment rendered in another department. — *Brown v. Campbell* (Cal.) 12.

A clerical error in the entry of a judgment may be corrected at any time to conform with the judgment actually rendered. — *Birmingham v. Leonhardt* (Kan. App.) 996.

Where a landowner sues a city and the officers thereof in separate suits for damages from the same negligence, a satisfaction of the judgment against the city, which is the greater, satisfies the judgment against the officers. — *Butler v. Ashworth* (Cal.) 4.

Where judgments are obtained in two separate actions for the same tort, and the greater is satisfied, an order directing satisfaction of the lesser includes costs thereof. — *Butler v. Ashworth* (Cal.) 4.

A judgment will not be enjoined when the rights of complainant might have been protected in the original action. — *Howard v. Eddy* (Kan. Sup.) 1133.

**Operation and effect.**

A lien attaches only to the interest of the judgment debtor in the land. — *Smith v. Savage* (Kan. App.) 847.

Under 2 Hill's Code, § 460, a judgment lien does not extend to property previously conveyed by the judgment debtor by deed valid and

binding between the parties. — *Sawtelle v. Weymouth* (Wash.) 1101.

An unrecorded deed takes precedence over a judgment lien acquired after the execution and delivery of the deed. — *Smith v. Savage* (Kan. App.) 847.

**— Res judicata.**

The defense of former adjudication, to be available, must be pleaded. — *Brown v. Campbell* (Cal.) 12.

A judgment not pleaded and the record of which is not introduced in a subsequent action between the parties, cannot operate as a bar. — *Frick Co. v. Carson* (Kan. App.) 820.

Where a judgment is ineffectual to support a plea of res judicata because the time to appeal therefrom has not expired, the pendency of the action in abatement should be pleaded until the judgment should become final. — *Brown v. Campbell* (Cal.) 12.

An adjudication of the validity of a chattel mortgage is not a bar to an action to try the title of his vendee to whom he conveys the property to defraud the mortgage's creditors. — *Collingsworth v. Bell* (Kan. Sup.) 252.

An order confirming a sale in partition unappealed from is conclusive that the purchaser had no valid reason for refusal to comply with his bid. — *Hammond v. Cailleaud* (Cal.) 607.

The judgment of the district court designated by the act of 1879, p. 99, § 19, is res judicata in so far as it determines the respective water rights of the parties thereto, unless opened in the manner provided by statute. — *Louden Irrigating Canal Co. v. Handy Ditch Co.* (Colo. Sup.) 535.

A judgment against a constable is not res judicata against the sureties on his official bond. — *Rodini v. Lytle* (Mont.) 501.

**Collateral attack.**

Where, in an action against a town, the supreme court determined that plaintiff had a valid claim, and therefore his remedy was in mandamus, the town, in a subsequent mandamus proceeding, cannot attack the claim. — *State v. Moss* (Wash.) 373.

An administrator's deed cannot be collaterally impeached where the probate court, in ordering the sale, had jurisdiction of all interested persons and the subject-matter. — *Zillmer v. Gerichten* (Cal.) 408.

The validity of an original judgment cannot be inquired into on mandamus to enforce the same. — *Stevens v. Miller* (Kan. App.) 439.

**Vacation.**

2 Hill's Code, § 1393, does not authorize a court to vacate an order denying the confirmation of the sheriff's sale on petition which does not show any reason therefor not considered at the time the order was made. — *Greene v. Williams* (Wash.) 938.

Under 2 Hill's Code, § 1394, the motion for vacation of an order denying the confirmation of a sheriff's sale must be made within a year after the order to be vacated was made. — *Greene v. Williams* (Wash.) 938.

Where judgment is entered in conformity to the record minutes, it will be set aside on amendment of the minutes to conform to the actual order of the court. — *Kaufman v. Shain* (Cal.) 393.

**Judicial Notice.**

See "Evidence."

**JUDICIAL SALES.**

Where interested parties so act as to depress values, the sale will be set aside. — *Wood v. Drury* (Kan. Sup.) 763.

Liability of purchaser for the difference between his bid and the amount obtained on resale determined.—*Hammond v. Cailleaud* (Cal.) 607.

An order that property be resold at the risk of the purchaser at the first partition sale is binding on him, he having notice and being represented by counsel.—*Hammond v. Cailleaud* (Cal.) 607.

### Jurisdiction.

See "Courts."

In equity, see "Equity."

On appeal, see "Appeal."

Waiver of objections, see "Appearance."

### JURY.

Misconduct as ground for new trial, see "Criminal Law."

Province of, credibility of witness, see "Witness."

—instructions, see "Criminal Law."

View by, see "Criminal Law."

A verdict found by 9 out of 12 jurors in a civil case is valid.—*Smith v. Salt Lake City R. Co.* (Utah) 919.

Sess. Laws 1892, c. 44, providing that a verdict in a civil action may be rendered by nine or more jurors, is not unconstitutional.—*Pratt v. Parsons* (Utah) 620.

A juror testifying that he had an opinion which it would take evidence to remove held incompetent.—*State v. Rutten* (Wash.) 30.

Defendant having failed to exhaust his peremptory challenges, the overruling of his challenges to jurors who did not sit in the case was immaterial.—*Van Houten v. People* (Colo. Sup.) 137.

Where, in a capital case, a juror is excused against defendant's objection, after evidence has been admitted, it is error to retain the other jurors without giving defendant the privilege of re-examining them.—*State v. Vaughan* (Nev.) 193.

On the trial of a defendant jointly indicted for murder as accessory, his co-defendant having been convicted, he can interrogate jurors as to their opinion of his co-defendant's guilt.—*State v. Steeves* (Or.) 947.

That a venire did not expressly direct that one of the jurors should be a practicing physician is not ground for reversal where a proper jury was in fact summoned.—*State v. Third Judicial District Court* (Mont.) 385.

Equitable issues can be tried by jury only by submitting special inquiries.—*Jenks v. Lehman* (Colo. App.) 1045.

A defendant, by allowing equitable issues to be made by a cross complaint, waives a right to a jury trial.—*Frye v. Hill* (Wash.) 1097.

Action held not to have been necessarily an equitable one, so as to prevent a submission of the case to the jury and the entry of judgment for damages on a general verdict.—*Coe v. Waters* (Colo. App.) 156.

### JUSTICES OF THE PEACE.

Appeal from justice, see "Appeal."

Authority to appoint sheriff, see "Sheriffs and Constables."

Certiorari to review judgment, see "Certiorari."

Under Comp. Laws 1876, § 1091, a justice of the peace should require a party demanding a jury to deposit fees.—*People v. Van Tassel* (Utah) 625.

A bill of particulars filed before a justice for the recovery against a railroad company of the

value of stock killed held sufficient.—*Atchison, T. & S. F. R. Co. v. Bartlett* (Kan. App.) 284.

Under Act 1885, p. 230, § 19, the illegality of the service of summons was waived where defendant, after a motion to quash was denied, moved for a change of venue, answered to the merits, and appealed.—*Cunningham v. Bostwick* (Colo. App.) 151.

### Justifiable Homicide.

See "Homicide."

### LANDLORD AND TENANT.

Farm lease construed, and held, that the lessee was the owner of the crop, and it was at his risk until it was averaged and paid for by the landlord under the terms of the lease.—*Holderman v. Smith* (Kan. App.) 272.

A tenancy held to be from year to year, and to require three months' notice to terminate it.—*Wheat v. Brown* (Kan. App.) 807.

Priority of claim by assignees of lease to have leased building, when sold, applied on the rent, determined.—*Frye v. Hill* (Wash.) 1097.

The purchaser of a crop on leased land with notice of the landlord's lien is liable to the landlord for the value of the crop, not to exceed the rent due, but a purchaser without notice of the lien takes the property freed therefrom.—*Scully v. Porter* (Kan. App.) 824.

A foreclosure sale did not affect the right of a tenant from year to year to possession and to the crop if he was not a party to the proceedings.—*Wheat v. Brown* (Kan. App.) 807.

### LARCENY.

See, also, "Embezzlement"; "Robbery."

One who obtains possession of another's money by inducing him to put it up on a bunco game is punishable for larceny.—*People v. Shaughnessy* (Cal.) 2.

An indictment for stealing cattle, under Pen. Code, § 52, need not state their value.—*State v. Young* (Wash.) 881.

An indictment for obtaining the property by fraud held to sufficiently charge larceny.—*Martin v. Territory* (Ok.) 1067.

Where an indictment charged that the property taken belonged to L. as owner, while the proof showed that it belonged to him as agent, there was no variance.—*Martin v. Territory* (Ok.) 1067.

### Laws.

See "Statutes."

### Leases.

See "Landlord and Tenant."

### Legacies.

See "Wills."

### Legislative Power.

See "Constitutional Law."

### Levy.

Of attachment, see "Attachment."

### LIBEL AND SLANDER.

Conviction of attorney for criminal libel, disbarment, see "Attorney and Client."

On judge, see "Contempt."

Where the imputation complained of is a conclusion from certain facts, the plea of justification must aver the existence of a state of facts which will warrant the inference.—*Fenstermaker v. Tribune Pub. Co. (Utah)* 112.

Where one charges a family with criminal conduct, any one of the family may sue therefor on proof that the words had application to him.—*Fenstermaker v. Tribune Pub. Co. (Utah)* 112.

In libel, to render evidence in mitigation of damages admissible, the facts relied on in mitigation must be specially set out in the answer.—*Fenstermaker v. Tribune Pub. Co. (Utah)* 112.

Where the libelous article fails to state the source of information, evidence that the facts were stated to defendant as true by a third person is inadmissible in mitigation of damages.—*Fenstermaker v. Tribune Pub. Co. (Utah)* 112.

In an action for libel in charging plaintiff with the cruel treatment of a child living in his family, evidence of the general reputation of the other members of the family is inadmissible.—*Fenstermaker v. Tribune Pub. Co. (Utah)* 112.

In actions for libel, evidence in mitigation of damages is admissible though no exemplary damages are demanded.—*Fenstermaker v. Tribune Pub. Co. (Utah)* 112.

In an action for libel charging a man with driving a child from his home to starve, evidence of the cruel treatment by his wife of other children is inadmissible.—*Fenstermaker v. Tribune Pub. Co. (Utah)* 112.

In an action for charging plaintiff with having turned a child into a desert that it might starve, statements of the child, when found, and its condition, are inadmissible in support of a plea of justification.—*Fenstermaker v. Tribune Pub. Co. (Utah)* 112.

Failure of defendant to deny an allegation in a complaint that a libel was published of and concerning plaintiff held a waiver of allegations that the libel referred to plaintiff, or of proof thereof.—*Fenstermaker v. Tribune Pub. Co. (Utah)* 112.

An instruction as to policy of the law in regard to publication of a libel by a newspaper held erroneous.—*Fenstermaker v. Tribune Pub. Co. (Utah)* 112.

## LICENSE.

To sell oleomargarine, see "Oleomargarine."

Without proof of the privileges and burdens of a telephone company in a city of the first class or of the necessities of the city, held, that a license tax against the company of \$12 for each business 'phone and \$10 for each residence 'phone is not excessive.—*In re Chipchase (Kan. Sup.)* 264.

Parol license to construct an irrigating ditch on the lands of the licensor cannot be revoked after construction of ditch.—*Tynon v. Despain (Colo. Sup.)* 1039.

## LIENS.

See, also, "Mechanics' Liens."

Of agister, see "Agistment."

Of attachment, see "Attachment."

Of attorney, see "Attorney and Client."

Of judgment, see "Judgment."

Of logger, see "Logs and Logging."

Of mortgage, see "Chattel Mortgages."

Evidence examined, and held that a husband was the "reputed owner" of a lot, within Code Civ. Proc. § 1191.—*Santa Cruz Rock Pav. Co. v. Lyons (Cal.)* 599.

## LIMITATION OF ACTIONS.

A right of action on a domestic judgment, where no execution has issued, is barred in five years.—*Schuyler County Bank v. Bradbury (Kan. Sup.)* 254.

Where a landowner pays taxes for several years, which the tenant agreed to pay, a separate cause of action accrued on each payment.—*Board of Com'rs of Clay County v. Streeter (Kan. App.)* 985.

An action on a city warrant is barred in five years.—*King v. City of Frankfort (Kan. App.)* 983.

Limitations do not begin to run against one employed for an indefinite period at a specified monthly sum until his service ends.—*Ah How v. Furth (Wash.)* 639.

An acknowledgment must recognize a subsisting liability on the debt, and be made to the holder thereof.—*King v. City of Frankfort (Kan. App.)* 983.

Appointment by directors of a corporation, by resolution, of one of their number as superintendent, without providing for compensation, which is implied only, is not a written contract for services.—*McCarthy v. Mt. Tecarte Land & Water Co. (Cal.)* 956.

## Liquidated Damages.

See "Damages."

## Liquor Selling.

See "Intoxicating Liquors."

## Live Stock.

Shipment by carrier, see "Carriers."

## Local Acts.

See "Constitutional Law."

## LOGS AND LOGGING.

A logger's lien does not arise under Laws 1893, c. 132, § 2, on shingles, if they have been sold and removed from the mill.—*Swartwood v. Red Star Shingle Co. (Wash.)* 21.

One employed to haul posts from the place of their manufacture to a purchaser acquires no lien on the posts therefor, within Laws 1893, p. 423, § 1.—*Ryan v. Guilfoil (Wash.)* 351.

## LOST INSTRUMENTS.

Where, pending an appeal from a justice's court, the note sued on is lost by the justice, plaintiff need not indemnify defendant from further liability on the note.—*Winship v. May (Colo. App.)* 904.

In an action on a note on appeal from a justice, testimony held sufficient to sustain a finding that the note had been lost by the justice.—*Winship v. May (Colo. App.)* 904.

## Magistrate.

See "Justices of the Peace."

## MALICIOUS PROSECUTION.

Complaint examined, and held to state a cause of action.—*Runk v. San Diego Flume Co. (Cal.)* 518.

**MANDAMUS.**

To compel issuance of land certificate, see "Public Lands."

Mandamus will not issue when there is an adequate remedy at law.—*Wright v. Kelly* (Idaho) 565.

A writ must be applied for in the first instance ordinarily in the district court.—*Wright v. Kelly* (Idaho) 565.

Constitutionality of an act will not be passed on on an application for a writ to enforce a private right.—*Wright v. Kelly* (Idaho) 565.

In mandamus to compel the levy of taxes for the payment of a judgment, a bond for costs is not required where one has been given in the original action.—*Stevens v. Miller* (Kan. App.) 439.

An amendment to an alternative writ after notice is in the discretion of the court.—*Stevens v. Miller* (Kan. App.) 439.

**To courts and judicial officers.**

Under 1 Code, § 3049, the action of the court in passing on a cost bill is discretionary, and the approval will not be compelled by mandamus.—*State v. Graves* (Wash.) 376.

Mandamus will not be granted to compel a judge to settle a statement of facts, where there has been no refusal.—*State v. Superior Court of Spokane County* (Wash.) 636.

Mandamus will lie to compel a justice of the peace to try a case which he has dismissed because plaintiff refused to deposit fees of a jury summoned by defendants.—*People v. Van Tassel* (Utah) 625.

**To state boards and officers.**

Mandamus will not lie to compel a state board of examiners to direct the auditor to draw warrants in payment of relator's claim, when there were no funds on which to draw them.—*State v. Rickards* (Mont.) 504.

In mandamus, to compel the state auditor to draw warrants of the state capitol fund for payment of the commission, the validity of the commission cannot be questioned.—*State v. Cook* (Mont.) 928.

Mandamus will lie to the secretary of state to compel the filing of an increase of capital stock, under Pol. Code 1895, § 410.—*Home Building & Loan Ass'n of Helena v. Rotwitt* (Mont.) 922.

**To municipal boards and officers.**

Mandamus will not lie to compel the board of examiners to issue a teacher's certificate.—*State v. Hitt* (Wash.) 638.

Mandamus will not issue against one as county commissioner unless it appear that he was at least a de facto officer.—*Wright v. Kelly* (Idaho) 565.

Mandamus will not issue to compel a city treasurer to pay certain warrants, where his term expires pending the proceeding, nor against his successor, unless a party.—*Fox v. Trinidad Waterworks Co.* (Colo. App.) 1051.

The district court cannot compel, by mandamus, the mayor and council of a city of the second class to levy a tax for the payment of a judgment against the city.—*Stevens v. Miller* (Kan. App.) 439.

Mandamus will not lie to compel the county treasurer to pay over moneys due to the city, collected and paid out by his predecessor.—*State v. Mish* (Wash.) 40.

Mandamus will not lie to compel a county treasurer to certify as to moneys collected by his predecessor as penalty and interest on delinquent city taxes.—*State v. Mish* (Wash.) 40.

**Married Woman.**

See "Husband and Wife."

**MASTER AND SERVANT.**

See, also, "Principal and Agent."

A modification of an instruction that an established usage among men in the same employment does not excuse a negligent act, by adding, "unless acquiesced in by the employer," is proper.—*Prosser v. Montana Cent. Ry. Co.* (Mont.) 81.

An allegation that plaintiff was working as a common laborer for a firm who were building a portion of a railway sufficiently showed that said firm were independent contractors.—*Boyle v. Great Northern Ry. Co.* (Wash.) 344.

Those in charge of railroad yards should use reasonable diligence to see that a train being made up will clear cars on another track.—*Atchison, T. & S. F. R. Co. v. Butler* (Kan. Sup.) 767.

Under the statute, an employment at a stated yearly salary, no other time being fixed, is for one year, and this is not changed by a custom of the employer to employ by the month only.—*Rosenberger v. Pacific Coast Ry. Co.* (Cal.) 963.

In an action by an employé wrongfully discharged, to recover salary, the question what he earned or might have earned after his discharge is a matter of defense.—*Rosenberger v. Pacific Coast Ry. Co.* (Cal.) 963.

Evidence examined in an action for injuries to a railroad employé, and *held*, that the foreman was guilty of negligence rendering the railroad company liable.—*Atchison, T. & S. F. R. Co. v. Vincent* (Kan. Sup.) 251.

The master is not liable for the acts of his vice principal which are on a level with those of a fellow laborer, and to the performance of which said laborer did not object.—*Deep Mining & Drainage Co. v. Fitzgerald* (Colo. Sup.) 210.

**Master's liability for injuries to servant.**

A railroad company is liable for injuries to an employé only when it fails to exercise reasonable care.—*Atchison, T. & S. F. R. Co. v. Winston* (Kan. Sup.) 777.

In the absence of evidence that any rules were useful or necessary, a jury is not justified in finding a railroad company negligent in failing to prescribe the same.—*Atchison, T. & S. F. R. Co. v. Carruthers* (Kan. Sup.) 230.

Pleading in an action by a yard switchman for damages caused by the negligent construction of the track *held* sufficient.—*Rouse v. Ledbetter* (Kan. Sup.) 249.

Evidence examined, and *held*, that the master had such knowledge of defects as to render him liable for injuries caused thereby.—*Johnson v. Bellingham Bay Imp. Co.* (Wash.) 870.

Evidence in an action for an injury caused by a defective brake *held* sufficient to take the question of negligence and contributory negligence to the jury.—*Prosser v. Montana Cent. Ry. Co.* (Mont.) 81.

**Assumption of risks.**

An employé obtaining work of a particular kind, holding himself out as competent, assumes the risks incident to the employment.—*McDermott v. Atchison, T. & S. F. R. Co.* (Kan. Sup.) 248.

Special findings in an action by a section man for personal injuries *held* not to show that the injury resulted from unavoidable accident or from a risk assumed.—*Atchison, T. & S. F. R. Co. v. Rowe* (Kan. Sup.) 683.

**Contributory negligence of servant.**

Failure of an employé to notice a defect in the track *held* not evidence of contributory negligence.—*Rouse v. Ledbetter* (Kan. Sup.) 249.

The fact that a rail was carried on the shoulders of plaintiff and others instead of on a handcar, *held* not to show contributory negligence on the part of plaintiff.—*Atchison, T. & S. F. R. Co. v. Vincent* (Kan. Sup.) 251.

Where an act of a brakeman was not per se negligent, evidence that experienced brakemen performed the same act the same way is admissible.—*Prosser v. Montana Cent. Ry. Co.* (Mont.) 81.

Evidence examined, and *held*, that the yardmaster and conductor were not chargeable with negligence contributing to the injury complained of.—*Atchison, T. & S. F. R. Co. v. Carruthers* (Kan. Sup.) 230.

Evidence of conduct of a car inspector in performing his duties *held* to take the question of his contributory negligence to the jury.—*Beaver v. Atchison, T. & S. F. R. Co.* (Kan. Sup.) 1136.

In an action by an employé against a railway company for personal injuries, evidence *held* sufficient to sustain a finding that plaintiff was guilty of contributory negligence.—*Thompson v. Montana Cent. Ry. Co.* (Mont.) 496.

### Material Men.

See "Mechanics' Liens."

### Measure of Damages.

See "Damages."

## MECHANICS' LIENS.

Mechanics' liens were prior to a mortgage negotiated before the building was commenced, but not executed until thereafter.—*Nixon v. Cydon Lodge No. 5, Knights of Pythias of Salina* (Kan. Sup.) 236.

The giving of bond under Acts 1889, c. 168, § 13, did not divest a lien accruing under Act 1872.—*Main Street Hotel Co. of Horton v. Horton Hardware Co.* (Kan. Sup.) 769.

A surety on a contractor's bond *held* not liable for nonperformance of the contract, caused by default of the owner.—*Main Street Hotel Co. of Horton v. Horton Hardware Co.* (Kan. Sup.) 769.

Subcontractors cannot obtain liens in excess of the original contract price.—*Nixon v. Cydon Lodge No. 5, Knights of Pythias of Salina* (Kan. Sup.) 236; *Main Street Hotel Co. of Horton v. Horton Hardware Co.* (Kan. Sup.) 769.

A right to a lien is to be determined by the law in force when the material was furnished, and the mode of enforcement is governed by the law in force when the proceedings are had.—*Whittaker Brick Co. v. First Nat. Bank* (Kan. App.) 792.

Where materials are sold under a general sale without reference to their use, it is insufficient to support a mechanic's lien.—*Colorado Iron Works v. Riekenberg* (Idaho) 681.

Failure to complete a building according to contract, through the fault of the owner, will not prevent a lien from attaching.—*Justice v. Elwert* (Or.) 649.

### Who may claim.

A vendee in a contract to purchase land, authorized by the vendor to contract for erection of buildings on the land, could subject the property to mechanics' liens.—*Shearer v. Wilder* (Kan. Sup.) 224.

The mechanic's lien law does not extend to contracts with a subcontractor.—*Nixon v. Cydon Lodge No. 5, Knights of Pythias of Salina* (Kan. Sup.) 236.

Where a deed is rescinded for fraud, men having furnished material in good faith for build-

ing thereon are entitled to a lien therefor, but not to a personal judgment against the grantor.—*West v. Badger Lumber Co.* (Kan. Sup.) 239.

The right to a lien is determined by the law in force when the right vested, and the enforcement thereof is governed by the law in force at the time of enforcement.—*Nixon v. Cydon Lodge No. 5, Knights of Pythias of Salina* (Kan. Sup.) 236.

### Proceedings to perfect.

Notice of claim for lien *held* sufficient.—*Bolster v. Stocks* (Wash.) 534.

Including by mistake items not furnished in statement for lien does not vitiate lien.—*Bolster v. Stocks* (Wash.) 534.

Claim for mechanic's lien *held* insufficient.—*Leick v. Beers* (Or.) 658.

A defect in a lien, due to the notary's failure to state in the claims his place of residence, is amendable.—*Sullivan v. Treen* (Wash.) 38.

Description of property in notice of mechanics' lien *held* to show a claim on lot and buildings.—*Sullivan v. Treen* (Wash.) 38.

Mortgagees of property on which a lien is claimed whose relation was not changed since the filing of the lien, were not prejudiced by an amendment of a defective verification of lien claim.—*Sullivan v. Treen* (Wash.) 38.

A statement for lien filed by a subcontractor *held* sufficient.—*Nixon v. Cydon Lodge No. 5, Knights of Pythias of Salina* (Kan. Sup.) 236.

A statement for liens *held* not sufficiently itemized.—*Nixon v. Cydon Lodge No. 5, Knights of Pythias of Salina* (Kan. Sup.) 236.

A memorandum of a contract filed in the county recorder's office under Code Civ. Proc. § 1183, need not be signed by the parties.—*Joost v. Sullivan* (Cal.) 896.

Sufficiency of description of material furnished in notices of mechanics' liens considered.—*Bolster v. Stocks* (Wash.) 532.

Evidence examined, and *held*, that the claim that a lien was filed within the statutory time after the completion of the building was not supported by the evidence.—*Joost v. Sullivan* (Cal.) 896.

Fact that wife, who is part owner of property, is not named in statement for lien, will not invalidate it, where she is joined in proceedings to foreclose.—*Bolster v. Stocks* (Wash.) 534.

Memorandum of building contract filed under Code Civ. Proc. § 1183, *held* to sufficiently show the character of the work to be done.—*Joost v. Sullivan* (Cal.) 896.

Subcontractors who furnish material after the contractor's abandonment of the contract must file their statements within 60 days after learning of the abandonment.—*Main Street Hotel Co. of Horton v. Horton Hardware Co.* (Kan. Sup.) 769.

### Enforcement.

A complaint to establish a lien under Act March 31, 1891, must show that the wages for which a lien is asked were payable weekly or monthly.—*Keener v. Eagle Lake Land & Irrigation Co.* (Cal.) 14.

Subcontractors entitled to liens under Act 1872 could enforce them under Act 1899.—*Main Street Hotel Co. of Horton v. Horton Hardware Co.* (Kan. Sup.) 769.

Service of summons on the owner within the statutory period does not preserve the lien as against other incumbrancers not parties.—*Wood v. Dill* (Kan. App.) 822.

Gen. St. §§ 2151, 2152, do not require that the action to enforce a mechanic's lien be brought within the six months, as against third persons

claiming liens on property.—*San Juan Hardware Co. v. Carrothers* (Colo. App.) 1053.

Statements between material man and the contractor as to the value of the material *held* admissible against the owner of the building to show its value.—*Charles v. E. F. Hallack Lumber & Manufacturing Co.* (Colo. Sup.) 548.

Code Civ. Proc. § 638, does not authorize an allowance for attorney's fees in mechanics' lien cases in the supreme court.—*West v. Badger Lumber Co.* (Kan. Sup.) 239.

### Memorandum.

Under statute of frauds, see "Frauds, Statute of."

### Mental Capacity.

See "Insanity"; "Wills."

## MINES AND MINING.

Compensation of mine commissioner, see "States and State Officers."

Tenancy in common, see "Tenancy in Common."

Under Act April 23, 1880, directors are liable on failure of the superintendent to have the accounts required under such act verified.—*Shanklin v. Gray* (Cal.) 399.

A letter of the secretary of the interior to the commissioner of the general land office *held* a judgment of cancellation of an application for a patent to mining lands.—*Murray v. Polglase* (Mont.) 505.

Certain decisions of the register and receiver of the land office on examination of protest against issuance of mining patent, *held* admissible, in an action to determine the right to proceed for a patent.—*Murray v. Polglase* (Mont.) 505.

Evidence, in an action to determine the right to proceed in the United States land office for a patent on certain mineral lands, examined, and *held* admissible.—*Murray v. Polglase* (Mont.) 505.

### Mining partnerships.

Evidence *held* insufficient to establish a partnership between plaintiff and defendant.—*Hodgson v. Fowler* (Colo. App.) 462.

Agreement *held* to create a mining partnership.—*Ashenfelter v. Williams* (Colo. App.) 664.

A subsequent agreement between the members of a mining partnership *held* not to change their relation as such.—*Ashenfelter v. Williams* (Colo. App.) 664.

Incoming partner in a partnership for the operation of a mine *held* not liable for debts contracted by the partnership prior to the time he became a member.—*Patrick v. Weston* (Colo. Sup.) 446.

On formation of a partnership for the operation of a mine by the tenants in common in the ownership of the mine, *held*, that the mine did not become partnership property.—*Patrick v. Weston* (Colo. Sup.) 446.

To constitute a mining partnership, two or more persons must not only acquire or own a mining claim for the purpose of working it, but must actually engage in working it in common.—*Anaconda Copper Min. Co. v. Butte & B. Min. Co.* (Mont.) 924.

### Minor.

See "Infancy"; "Parent and Child."

### Misconduct.

Of jury as ground for new trial, see "Criminal Law."

## Misrepresentation.

See "False Pretenses"; "Fraud."

## Money Had and Received.

See "Assumpsit."

## MORTGAGES.

See, also, "Chattel Mortgages"; "Fraudulent Conveyances."

On wife's separate estate, see "Husband and Wife."

To building and loan association, see "Building and Loan Associations."

Under Gen. St. § 3284, a mortgage of real property is but a security for debt, and not an alienation.—*Orr v. Ulyatt* (Nev.) 916.

A quitclaim deed delivered on the same day as a mortgage, as part of the same transaction, *held* not to show a release of the mortgage.—*Kelly v. E. F. Hallack Lumber & Manuf'g Co.* (Colo. Sup.) 1003.

*Held*, that a finding that the time to pay a certain note secured by a trust deed was extended to a definite time was not justified by the evidence, under the instructions given.—*Jenks v. Lehman* (Colo. App.) 1045.

Validity of the mortgage could not be raised on motion to set aside a sale under decree of foreclosure.—*Haseltine v. Gilleland* (Kan. App.) 88.

### Construction.

A mortgage by a street-railway company of real property "that it may hereafter acquire for use or adapted to use" in its business construed, and *held* to cover pavilion grounds.—*California Title Insurance & Trust Co. v. Pauly* (Cal.) 586.

Deed absolute in form construed to be a mortgage, where the grantee executed a contract to redeem on payment of a certain sum.—*Wilson v. Thompson* (Idaho) 557.

Instrument construed and *held* to constitute a mortgage.—*Purser v. Eagle Lake Land & Irrigation Co.* (Cal.) 523.

A mortgage, when not in conflict with a note secured as to the effect of default in interest, governs the rights of the parties.—*Kansas Loan & Trust Co. v. Gill* (Kan. App.) 991.

Where a mortgage provides that, on failure to pay interest, the mortgagee may declare the whole sum due, the condition exists as long as the default continues.—*Kansas Loan & Trust Co. v. Gill* (Kan. App.) 991.

### Foreclosure.

One who assumed the mortgage was a necessary party to its foreclosure.—*Mudge v. Hull* (Kan. Sup.) 242.

Under Code Proc. § 143, different holders of notes and coupons secured by the same mortgage must be parties to an action to foreclose.—*Bacon v. O'Keefe* (Wash.) 886.

Under 1 Hill's Ann. Code, § 1856, to entitle a person resisting foreclosure, as fraudulent, to have the proceedings transferred to the superior court, he must show that a defense exists in whole or in part and that he has an interest in the subject-matter which entitles him to resist the foreclosure.—*West Coast Grocery Co. v. Stinson* (Wash.) 35.

A complaint for foreclosure against a deceased mortgagor *held* to sufficiently allege a presentation of the claim against the estate.—*Humboldt Savings & Loan Soc. v. Burnham* (Cal.) 971.

Taxes and insurance paid by a mortgagee after his claim against the estate of the mortgagor has been presented may be included in judgment on foreclosure.—*Humboldt Savings & Loan Soc. v. Burnham* (Cal.) 971.

By accepting the benefits of a decree of foreclosure objections thereto were waived.—*Guaranty Sav. Bank v. Butler* (Kan. Sup.) 229.

Depreciation of property owing to general business depression is not ground for suspension of sale of mortgaged premises under decree of foreclosure.—*Thomas v. San Diego College Co.* (Cal.) 965.

Growing crops pass to the purchaser at foreclosure sale as against any person claiming under the mortgagor.—*Shockey v. Johntz* (Kan. App.) 993.

Where a foreclosure sale is for a nominal consideration, a slight circumstance showing bad faith will be ground for setting it aside.—*Iona Sav. Bank v. Blair* (Kan. Sup.) 686.

### Redemption.

Under Code Proc. § 519, the purchaser at a mortgage sale on redemption cannot be made to account for the rents and profits.—*Knipe v. Austin* (Wash.) 25.

An act extending time of redemption from mortgage sales does not affect sales under mortgages executed and recorded before the passage of the act.—*Wilder v. Campbell* (Idaho) 677.

Act Feb. 23, 1896, extending the time for redemption from forced sales, applies to sales for mortgage foreclosures made prior to its passage.—*State v. Sears* (Or.) 482.

### Motion.

See "Practice in Civil Cases."

For judgment on pleadings, see "Pleading."

For new trial, see "New Trial."

## MUNICIPAL CORPORATIONS.

See, also, "Counties"; "Highways"; "Horse and Street Railroads"; "Schools and School Districts"; "Towns."

Licensing sale of oleomargarine, see "Oleomargarine."

Mandamus to municipal boards and officers, see "Mandamus."

Right to penalty on delinquent taxes, see "Taxation."

A city treasurer is included in Const. art. 11, § 8, providing that the salary of any city officer shall not be increased or diminished after his election.—*City of Ballard v. Keane* (Wash.) 27.

Under Denver City Charter, § 45, the governor can remove a fire commissioner appointed by and with the consent of the senate as well as those appointed in vacation to fill vacancies.—*People v. Orr* (Colo. Sup.) 1005.

### Ordinances.

A resolution not published as required by Worley's Consolidation Act, § 68, does not become operative.—*City and County of San Francisco v. Buckman* (Cal.) 396.

City charter construed, and held, that an acting mayor, when presiding at a meeting of the council, had no vote within the provision that ordinances shall be passed by a unanimous vote of the council.—*Cline v. City of Seattle* (Wash.) 367.

An ordinance book showing the regular adoption of an ordinance, and evidence of its due publication, is prima facie proof of its validity.—*Merced County v. Fleming* (Cal.) 392.

An ordinance granting a railroad company the right to enter upon a public street does not justify trespass by the company before the passage of the ordinance.—*Southern Cal. Ry. Co. v. Southern Pac. R. Co.* (Cal.) 1123.

### Contracts.

An extension for performance of a contract for street work need not be indorsed on the contract.—*Buckman v. Landers* (Cal.) 1125.

One dealing with a municipal corporation is bound by the laws regulating the manner of payment by such a corporation of its indebtedness.—*Diggs v. Lobitz* (Okla.) 1069.

One becoming a creditor of a municipality must take notice of the limitations imposed by law on its powers to contract and pay indebtedness.—*Weaver v. City and County of San Francisco* (Cal.) 972.

Contract for rental of hydrants considered, and held that the city was not liable on failure to furnish them as required by the contract, in the absence of demand.—*Ellensburg Water-Supply Co. v. City of Ellensburg* (Wash.) 531.

### Liability for torts.

A city held liable for surface water thrown into a basement as the result of paving the street.—*Stanford v. City and County of San Francisco* (Cal.) 605.

A city is bound to keep its sidewalks in a reasonably safe condition for public travel.—*Lorence v. City of Ellensburg* (Wash.) 20.

Evidence that a sidewalk had been defective for three or four months preceding the injury will charge the city with constructive notice.—*Lorence v. City of Ellensburg* (Wash.) 20.

Where plaintiff had traveled over a defective sidewalk prior to the injury, but testified that she had no knowledge of its defects, the question of contributory negligence was for the jury.—*Lorence v. City of Ellensburg* (Wash.) 20.

The fact that one having notice of a defective sidewalk uses the same does not render him guilty of contributory negligence as a matter of law.—*City of Wichita v. Coggshall* (Kan. App.) 842.

### Fiscal management and taxation.

Unpaid treasury warrants included in funding bonds are payable out of the proceeds of such bonds only.—*Diggs v. Lobitz* (Okla.) 1069.

A warrant issued in payment for the building of a sidewalk is an absolute liability.—*King v. City of Frankfort* (Kan. App.) 983.

Auditor must audit claim approved by proper board or officer, proper in form, due and unpaid, and authorized by law.—*City and County of San Francisco v. Broderick* (Cal.) 960.

Under Consolidation Act, § 71, supervisors of San Francisco cannot subdivide the general fund, and limit the amount to be expended by election commissioners.—*City and County of San Francisco v. Broderick* (Cal.) 960.

Election expenses are payable out of general fund, though in excess of amount estimated, and appropriated by board of supervisors.—*City and County of San Francisco v. Broderick* (Cal.) 960.

The money realized from invalid bonds does not constitute a part of the 5 per cent. indebtedness authorized to be incurred for municipal purposes.—*Petros v. City of Vancouver* (Wash.) 361.

The city council can submit the question of the issuance of bonds for light purposes in connection with a submission for general municipal purposes, each purpose being specified in the ordinance.—*Petros v. City of Vancouver* (Wash.) 361.

Moneys derived from the sale of bonds, and used in enlarging the municipal light plant, was not part of the 5 per cent. indebtedness authorized to be incurred for general municipal purposes.—*Petros v. City of Vancouver* (Wash.) 361.

Exhaustion of only fund from which a claim can be legally paid by a municipality is no defense to an action thereon, but the judgment should specify the fund from which payable.—*Weaver v. City and County of San Francisco* (Cal.) 972.

One who acquiesced in the inclusion of his land within city limits is estopped from denying



his liability for city taxes.—*Seward v. Rheiner* (Kan. App.) 423.

#### Public improvements.

In estimating the number of abutting owners consenting to an improvement, city property should not be considered.—*Armstrong v. Ogden City* (Utah) 119.

A city authorized to grade streets at the cost of the land fronting on the street improved, cannot contract for the grading of a street, the cost to be paid from the general funds of the city.—*Findley v. Hull* (Wash.) 28.

The presumption that the contractor properly performed the work, arising from the assessment, was not overcome by the city engineer's certificate to the contrary.—*Buckman v. Landers* (Cal.) 1125.

The decision of a city council that objections to a public improvement were not filed may be attacked in an action to enjoin the collection of the assessment.—*Armstrong v. Ogden City* (Utah) 119.

Where objections to an improvement have been filed by owners of more than half of the abutting property, their withdrawal after the time for hearing does not give jurisdiction to order the improvement.—*Armstrong v. Ogden City* (Utah) 119.

An ordinance for the construction of a sidewalk is conclusive on the necessity of the walk.—*Seward v. Rheiner* (Kan. App.) 423.

A private contractor, failing to comply with city ordinances relative to work in streets, acquires no authority to do the work, and can confer none on another.—*Smith v. Luning Co.* (Cal.) 967.

#### Assessment of benefits.

Under St. 1888, p. 168, an affidavit of demand and nonpayment of a street assessment warrants a finding of demand publicly made on the lot.—*Buckman v. Landers* (Cal.) 1125.

Objections to an assessment which might have been heard on appeal from the assessment will not be heard in an action on the same.—*Buckman v. Landers* (Cal.) 1125.

Where an assessment is void for failure of the council to acquire jurisdiction, a property owner may seek relief from the assessment in equity.—*Armstrong v. Ogden City* (Utah) 119.

Charter construed, and *held*, that a reassessment for a local improvement was valid, though the assessment district was different from that at the time of the original assessment.—*Cline v. City of Seattle* (Wash.) 367.

Charter provisions construed, and *held* to authorize the reassessment for local improvements, though the first assessment was void for want of jurisdiction.—*Cline v. City of Seattle* (Wash.) 367.

One signing a petition for an improvement, making no objection to the work or the assessment, is estopped from questioning its validity because of a defective notice.—*Wingate v. City of Tacoma* (Wash.) 874.

#### Murder.

See "Homicide."

#### Mutual Benefit Insurance.

See "Insurance."

#### NAVIGABLE WATERS.

See, also, "Riparian Rights."

Statutory provision authorizing abatement of obstruction in navigable streams as nuisance  
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does not exclude jurisdiction of equity to protect rights where legal remedy is inadequate.—*Carl v. West Aberdeen Land & Improvement Co.* (Wash.) 890.

Fact that obstruction in stream is public injury does not prevent individual from suing to protect his private interests.—*Carl v. West Aberdeen Land & Improvement Co.* (Wash.) 890.

Act March 18, 1895, prohibits boom companies organized thereunder from interfering with navigation of navigable stream.—*Carl v. West Aberdeen Land & Improvement Co.* (Wash.) 890.

#### NEGLIGENCE.

See, also, "Death by Wrongful Act."

Contributory negligence of servant, see "Master and Servant."

Of cities, see "Municipal Corporations."

Of master, see "Master and Servant."

Or railroad company, see "Railroad Companies."

Of street-car company, see "Horse and Street Railroads."

One negligently setting a prairie fire is liable for the destruction of the property of others caused thereby.—*Union Pac. Ry. Co. v. McCollum* (Kan. App.) 97.

One who carelessly drove his horse over a traveler on the highway was liable in damages.—*Stanfield v. Anderson* (Ariz.) 221.

In an action for injuries due to fast driving, a city ordinance prohibiting such driving is admissible.—*Johnson v. Thomas* (Cal.) 578.

One who sells an article knowing it to be defective is liable in damages to one who, without knowledge of the defect, was injured while lawfully using the same.—*Lewis v. Terry* (Cal.) 398.

#### Contributory negligence.

A child cannot be held to the same degree of care as an adult.—*Roth v. Union Depot Co.* (Wash.) 641.

An infant two years old, straying upon a railroad track, is not chargeable with contributory negligence.—*Johnston v. Atchison, T. & S. F. R. Co.* (Kan. Sup.) 228.

The negligence of a parent cannot be imputed to the child, in an action for injuries to it.—*Roth v. Union Depot Co.* (Wash.) 641.

Parents of a child two years old were not as a matter of law guilty of contributory negligence in not keeping constant watch over it.—*Atchison, T. & S. F. R. Co. v. McFarland* (Kan. App.) 788.

It is contributory negligence per se to ride on a bicycle between the tracks of an electric street railroad without watching for the approach of cars from behind.—*Everett v. Los Angeles Consol. Electric Ry. Co.* (Cal.) 207.

An instruction on contributory negligence, *held* to be erroneous in limiting said negligence to an act of commission, where it was in issue that plaintiff omitted to perform some act which, if performed, would have protected him from injury.—*Deep Mining & Drainage Co. v. Fitzgerald* (Colo. Sup.) 210.

Evidence in an action for injuries to one run over by defendant's wagon examined, and *held*, that the question of contributory negligence was for the jury.—*Johnson v. Thomas* (Cal.) 578.

Unless plaintiff's case raises a presumption of contributory negligence, the burden of proving it is on defendant.—*Prosser v. Montana Cent. Ry. Co.* (Mont.) 81.

Contributory negligence must be pleaded by defendant, and need not be negated in the complaint.—*Johnson v. Bellingham Bay Imp. Co.* (Wash.) 370.

## NEGOTIABLE INSTRUMENTS.

Action by pledgee, see "Pledge."

Alteration of note, see "Alteration of Instruments."

Effect of draft as assignment, see "Assignment."—of usury, see "Usury."

Parties signing their names on the back of a note before delivery *held* joint makers, and not indorsers.—*Donohoe-Kelly Banking Co. v. Puget Sound Sav. Bank* (Wash.) 359.

A note construed together with a mortgage given to secure it, *held* to show that persons signing individually signed the note in their representative capacity.—*Cabbell v. Knote* (Kan. App.) 309.

### Consideration.

A deed to land and a contract to repurchase if not sold are a sufficient consideration for a note.—*Bank of Clafin v. Rowlinson* (Kan. App.) 304.

The character of the consideration for a note sued on is for the jury.—*Batterton v. Smith* (Kan. App.) 275.

### Indorsement and transfer.

A corporation to whom was transferred a note procured by fraud of a promoter in payment of stock was not a bona fide holder.—*New Mexico Ensor Remedy Co. v. Hobson* (Idaho) 573.

A bank to which was indorsed a note procured through fraud of its officers *held* not a bona fide holder.—*Hardy v. First Nat. Bank* (Kan. Sup.) 1125.

Where there is no evidence as to the date of an indorsement, the presumption is that it was made before maturity.—*Challis v. Woodburn* (Kan. App.) 792.

The indorsee of a bona fide holder takes the paper free from defenses, though he knew of them.—*Hardy v. First Nat. Bank* (Kan. Sup.) 1125.

Evidence examined, and *held* insufficient to show that the indorsee of a note was a purchaser with notice of fraud in the inception of the note.—*First Nat. Bank v. Skinner* (Idaho) 679.

### Sureties.

Under Code Proc. § 758, the issue of suretyship cannot be separately tried in an action on a note against the indorsers only.—*Allen v. Chambers* (Wash.) 57.

The fact that a husband negotiated the loan and received the money on a note signed by himself and wife *held* not notice that his wife was a surety.—*Frank v. Snow* (Wyo.) 78.

### Demand and notice.

Failure to present a joint and several note to each of the makers discharges the indorsees.—*Benedict v. Schmieg* (Wash.) 374.

Depositing a notice of dishonor in the mail addressed to an indorsee in the city, without street or number, is not personal service.—*Benedict v. Schmieg* (Wash.) 374.

### Actions.

A complaint *held* to sufficiently identify the defendants as signers of the note.—*Humboldt Savings & Loan Soc. v. Burnham* (Cal.) 971.

In an action on a note the complaint need not specially aver the consideration.—*Younglove v. Cunningham* (Cal.) 755.

An answer *held* not to set up an independent defense to prevent plaintiff from taking judgment on the pleadings.—*Lamberton v. Shannon* (Wash.) 336.

It is no defense to an action against indorsers that no consideration passed to them from the maker.—*Allen v. Chambers* (Wash.) 57.

Where a complaint on a note alleges that defendant assumed payment in consideration of a

deed under which he has gone into possession, *held*, that an answer was insufficient which failed to deny the allegation of possession.—*Stuyvesant v. Western Mortgage & Investment Co.* (Colo. Sup.) 144.

It is no defense to an action on a note that there was no consideration beneficial to the maker personally.—*Wright v. McKittrick* (Kan. App.) 977.

When one of two payees indorsed the check and deposited it in his own name, his copayee was not a proper party to an action to recover the deposit.—*Meldrum v. Henderson* (Colo. App.) 148.

## NEW TRIAL.

Discretion of court, see "Appeal." In criminal cases, see "Criminal Law." Necessity for motion, see "Appeal."

In computing time for filing motion for new trial, an intervening Sunday must be included.—*Van Lear v. Kansas Trip-Hammer Brick Works* (Kan. Sup.) 1134.

Plaintiff could be required to elect to take judgment for a reduced sum or submit to a new trial.—*Union Pac. Ry. Co. v. Mitchell* (Kan. Sup.) 244.

Where the verdict is not approved by the court, a new trial should be granted, although there have been three prior disagreements.—*Richolson v. Freeman* (Kan. Sup.) 772.

Where the jury have found against the weight of evidence, a new trial is properly granted.—*Cherokee & P. Coal & Mining Co. v. Stoop* (Kan. Sup.) 766.

Under section 3402, subd. 3, where assignments and specifications of error are omitted from the statement on motion for new trial, it may be disregarded.—*Gill v. Hecht* (Utah) 626.

It is in the discretion of the court to refuse amendments adding specifications of error to the statement on new trial.—*Gill v. Hecht* (Utah) 626.

An order granting a new trial as to certain issues only should state in terms the issues to be retried.—*Mountain Tunnel Gravel Min. Co. v. Bryan* (Cal.) 410.

Service of case on motion for new trial *held* to have been made within the time allowed by orders of the court extending the same.—*St. Louis & S. F. Ry. Co. v. Stevens* (Kan. App.) 434.

An order granting a new trial does not vacate the judgment until the order becomes final by failure to appeal or by affirmation on appeal.—*Pierce v. Birkholm* (Cal.) 205.

## Non Compos Mentis.

See "Insanity."

## NONNEGOTIABLE INSTRUMENTS.

A third person writing his name on the back of a nonnegotiable note either before or after delivery becomes a guarantor.—*Rogers v. Schulenburg* (Cal.) 899.

### Notes.

See "Negotiable Instruments."

### Notice.

Of appeal, see "Appeal."

Of assignment, see "Assignment for Benefit of Creditors."

Of claim for lien, see "Mechanics' Liens."

Of nonpayment, see "Negotiable Instruments." To purchaser, see "Vendor and Purchaser."

**NOVATION.**

One seeking a release from liability because of a novation must show the undertaking with the creditor and agreement to discharge from liability.—*Lowe v. Blum* (Okla.) 1063.

**NUISANCE.**

Obstruction of navigable river, see "Navigable Waters."

Municipal corporation may sue in its own name to enjoin a nuisance in its streets.—*City and County of San Francisco v. Buckman* (Cal.) 396.

Digging into and tearing up a street unlawfully is a nuisance, within Civ. Code, § 3479.—*City and County of San Francisco v. Buckman* (Cal.) 396.

**Objections.**

First raised on appeal, see "Appeal."

**OFFICE AND OFFICER.**

Bank officers, see "Banks and Banking."

Corporate officers, see "Corporations."

County officer, see "Counties."

Liability of surety on sheriff's bond, see "Sheriffs and Constables."

Of school districts, see "Schools and School Districts."

Right of woman to hold office, see "Schools and School Districts."

State officers, see "States and State Officers."

Bank commissioners cannot be removed, under Pen. Code, § 772.—*Kilburn v. Law* (Cal.) 615.

An accusation, under Pen. Code, § 772, for the removal of an officer, is a criminal proceeding.—*Kilburn v. Law* (Cal.) 615.

**Offset.**

See "Set-Off and Counterclaim."

**OLEOMARGARINE.**

A city cannot license a sale of oleomargarine irrespective of Act April 12, 1893, providing for a sale in marked packages only.—*Haines v. People* (Colo. App.) 1047.

**Opinion Evidence.**

See "Evidence."

**Orders.**

Appealable orders, see "Appeal."

**Ordinance.**

See "Municipal Corporations."

**PARENT AND CHILD.**

See, also, "Infancy."

Under Rev. St. §§ 2483, 2534, a temporary order for the custody of a minor child may be issued by the judge of the district court.—*In re Miller* (Idaho) 870.

**Parish.**

See "Counties."

**Parol Contract.**

See "Frauds, Statute of."

**Parol Evidence.**

See "Evidence."

**PARTIES.**

On appeal, see "Appeal."

To action on note, see "Negotiable Instruments." To foreclosure proceedings, see "Mortgages."

Comp. Laws 1884, §§ 1890-92, in regard to intervention, relate only to actions at law.—*Union Trust Co. of New York v. Atchison, T. & S. F. R. Co.* (N. M.) 701.

Under Code Civ. Proc. § 22, it was proper to permit the assignee of an account to be substituted as plaintiff after the action had commenced, and to prove the assignment, though it was not pleaded.—*Campbell v. Irvine* (Mont.) 626.

An action by a state's attorney in his own name on a county treasurer's bond can be amended by substituting the county as plaintiff.—*Hume v. Kelly* (Or.) 380.

In an action against a landlord for breach of a contract to furnish water for irrigation, the landlord cannot bring in as a party a corporation which had agreed to furnish him water.—*Knowles v. Leggett* (Colo. App.) 154.

Where a city is sued by an incorrect name, but answers, and goes to trial, and judgment is rendered, without objection, against it in its proper name, any error is waived.—*City of Kingfisher v. Pratt* (Okla.) 1068.

Defect of parties plaintiff cannot be first urged on appeal.—*Jenkins v. Columbia Land & Improvement Co.* (Wash.) 328.

**PARTITION.**

A husband making improvements on land in which his wife is a part owner, under the belief that the land belongs to her, cannot recover the value of the improvements in an action by the other tenant in common for partition.—*Leake v. Hayes* (Wash.) 48.

Right of tenant in common in partition proceedings to recover taxes on the land paid by him while in possession.—*Leake v. Hayes* (Wash.) 48.

Right of tenant in common making improvements on the common estate to recover therefor in partition.—*Leake v. Hayes* (Wash.) 48.

Liability in partition of a tenant in common for rental of the common estate, where he enters on the estate, which at the time yielded no crop, and improved it so as to make it productive.—*Leake v. Hayes* (Wash.) 48.

**PARTNERSHIP.**

Mining partnership, see "Mines and Mining."

Contract construed, and held to create a partnership for the sale and development of mining claims.—*Haskins v. Curran* (Idaho) 559.

One partner has power to execute a chattel mortgage in the firm name to secure a firm debt.—*West Coast Grocery Co. v. Stinson* (Wash.) 35.

An insolvent partnership could transfer its entire property to pay an individual debt of a member.—*Myers v. Tyson* (Kan. App.) 91.

Evidence of the amount of purchases was not admissible to show whether there was a profit or a loss, in the absence of evidence of the amount of sales or of the prices charged for goods sold.—*Taggart v. Bundick* (Kan. Sup.) 243.

Members of a firm, appropriating partnership property in payment of debts for which the

partners so acting were alone liable, are liable to the other partner for his share of the funds so appropriated.—*Patrick v. Weston* (Colo. Sup.) 446.

On express promise by a partner to repay to another his share of advances made by the latter for the firm, the amount can be recovered in an action at law without dissolution or accounting.—*Haskins v. Curran* (Idaho) 559.

## Pawn.

See "Pledge."

## PAYMENT.

Effect of payment of usury, see "Usury."

Evidence examined, and held insufficient to support a plea of payment.—*Edmunds v. Black* (Wash.) 330.

The lapse of 27 years raises a presumption of payment of notes which is not overcome by the fact of the nonresidence and absence of the payee.—*Courtney v. Staudenmayer* (Kan. Sup.) 758.

## Penalties.

Penalties and liquidated damages, see "Damages."

## Penitentiary.

Appropriation for, see "States and State Officers."

## Performance.

Of contract, see "Contracts."

## Personal Injuries.

See "Carriers"; "Counties"; "Damages"; "Death by Wrongful Act"; "Highways"; "Horse and Street Railroads"; "Master and Servant"; "Municipal Corporations"; "Negligence"; "Railroad Companies."

## Petition.

See "Pleading."

## PLEADING.

Assignment, see "Assignment."

Harmless error in rulings on, see "Appeal."

In action on bills and notes, see "Negotiable Instruments."

—on contract, see "Contracts."

In particular actions and proceedings, see "Account Stated"; "Attachment"; "Creditors' Bill"; "Death by Wrongful Act"; "Ejectment"; "Malicious Prosecution"; "Quieting Title—Removal of Cloud"; "Quo Warranto"; "Replevin."

Negligence, see "Negligence."

A count expressly abandoned cannot thereafter be considered.—*Denver & R. G. R. Co. v. Wheatley* (Colo. App.) 450.

In an action against a corporation to foreclose a mortgage, it is not necessary to specially plead ratification of the execution of the mortgage.—*Boggs v. Lakeport Agricultural Park Ass'n* (Cal.) 1106.

Held error, on the overruling of plaintiff's motion for judgment on the pleadings, to render judgment for defendant.—*Floyd v. Johnson* (Mont.) 631.

The sufficiency of a petition cannot be questioned by a motion to set aside a sheriff's sale under the judgment rendered in the case.—*Birmingham v. Leonhardt* (Kan. App.) 996.

A statement in an action for personal injuries that a pending action for the same cause was

dismissed after the filing of a plea in abatement alleging the pendency of said action was a sufficient reply to said plea.—*Boyle v. Great Northern Ry. Co.* (Wash.) 344.

When copy of account sued on is delivered to adversary, within Code Civ. Proc. § 454.—*McCarthy v. Mt. Tecarte Land & Water Co.* (Cal.) 391.

A complaint for goods sold and delivered failing to allege the date of sale and the reasonable value or agreed price of the goods is cured by verdict.—*Nicolai Bro. Co. v. Krimble* (Or.) 865.

## Petition or complaint.

The petition should not allege a denial or avoidance of facts which may be set up in defense.—*Frick Co. v. Carson* (Kan. App.) 820.

Subsequent causes of action may refer to the statement of facts set out in the first cause.—*Aulbach v. Dahler* (Idaho) 322.

A complaint is not demurrable on the ground of the pendency of another action, unless such fact appears on the face of the complaint.—*Jackson v. McAuley* (Wash.) 41.

## Demurrer.

Code Civ. Proc. § 430, does not authorize demurrer on the ground that complaint in an action to abate an embankment does not allege plaintiff's special damage or interest.—*Silva v. Spangler* (Cal.) 617.

A joint demurrer by defendants is properly overruled if the complaint is good against any of them.—*Rogers v. Schulenburg* (Cal.) 890.

Demurrer to the whole complaint is properly overruled where one of the causes of action is well pleaded.—*Barbre v. Goodale* (Or.) 378.

A general demurrer will be overruled if any count is sufficient.—*Palmer v. Breed* (Ariz.) 219.

By failing to demur to an ambiguous complaint, the defect is waived.—*Aulbach v. Dahler* (Idaho) 322.

Objection that complaint is ambiguous or uncertain is waived if not raised by demurrer.—*Silva v. Spangler* (Cal.) 617.

## Answer.

Totally inconsistent defenses are not allowable under the code practice.—*Seattle Nat. Bank v. Carter* (Wash.) 331.

Defenses inconsistent, to the extent of being untrue, are not sufficient to put plaintiff upon proof.—*Allen v. Olympia Light & Power Co.* (Wash.) 55.

In an action against a maker of a note, allegations in the answer showing the nonliability of the sureties should be stricken out as immaterial.—*Allen v. Olympia Light & Power Co.* (Wash.) 55.

In an action to recover for injuries done to an irrigating ditch, defendant cannot, under a denial of the right to maintain the ditch, prove its illegal enlargement or defective construction.—*Tynon v. Despain* (Colo. Sup.) 1039.

## Verification.

A contract held sufficiently pleaded under Code, § 108, to require a verified denial.—*Limerick v. Barrett* (Kan. App.) 853.

By filing an unverified reply to an answer setting up a contract the execution and legal effect of the contract were admitted.—*Limerick v. Barrett* (Kan. App.) 853.

Where the answer of defendant sets up a counterclaim which is verified, it must be taken as true unless the denial thereof is also verified.—*Aiken v. Franz* (Kan. App.) 306.

The affidavit of an attorney verifying a pleading should show that he has personal knowledge of the facts stated therein.—*Aiken v. Franz* (Kan. App.) 306.

**Amendment.**

A motion to amend an answer by alleging defect of parties plaintiff comes too late after verdict.—*Gilland v. Union Pac. Ry. Co.* (Wyo.) 608.

An amendment to an answer asked after plaintiff had introduced his testimony *held* properly denied where it would have been of no avail.—*Price v. Scott* (Wash.) 634.

The trial amendment of a complaint on a judgment to show a judgment of the supreme court, instead of the circuit court, *held* not prejudicial.—*Edmunds v. Black* (Wash.) 330.

**Pleading and proof—Variance.**

Variance, in action for commissions, *held* fatal.—*Childs v. Ptomey* (Mont.) 714.

Acceptance of personal property in payment may be shown under a general plea of payment.—*Edmunds v. Black* (Wash.) 330.

Plaintiff having alleged deceit as a ground for recovery, judgment for him was not sustained by a finding of mistake.—*Hallowell v. Smith* (Kan. App.) 89.

In the absence of demurrer for an amendable defect in a pleading, variance between it and the proof is immaterial.—*State Bank v. Norduff* (Kan. App.) 312.

A party who sues on a contract cannot in the same action recover under another, inconsistent with his pleadings and evidence.—*Newell v. Nicholson* (Mont.) 180.

Where complaint sets forth a bill of items on which plaintiff seeks to recover, the proof must correspond to the allegations.—*City of Seattle v. Parker* (Wash.) 369.

**Objections waived.**

Variances cannot be urged for the first time on appeal.—*Aulbach v. Dahler* (Idaho) 322.

A variance between the complaint and evidence cannot be first complained of on appeal.—*Denver & R. G. R. Co. v. Rosuck* (Colo. App.) 456.

Where no motion for judgment or objection to the introduction of testimony was made on account of a variance, it will not be considered on appeal.—*Cunningham v. Bostwick* (Colo. App.) 151.

A complaint on a mutual insurance policy *held* not subject to an objection, first raised on appeal, that it did not show the number of members, or the amount which could be collected by assessment.—*Great Western Mut. Aid Ass'n v. Colmar* (Colo. App.) 159.

On appeal by plaintiff in ejectment, defendant, for the first time, may, in order to sustain the judgment, raise the question that the description in the complaint is fatally defective.—*Tracy v. Harmon* (Mont.) 500.

Where no objection is made to the pleading, that a material fact is found on a defective pleading is not error.—*Kimball v. Richardson-Kimball Co.* (Cal.) 1111.

**PLEDGE**

A pledgee of a note before maturity can recover the full amount of the note if the makers have no defense, but if they have a defense, and he was not aware thereof, he can recover only the amount of his debt.—*Bank of Claflin v. Rowlinson* (Kan. App.) 304.

To constitute a valid pledge as collateral security, the security must be delivered to the creditor before the lifetime of the debtor.—*Heilbron v. Guarantee Loan & Trust Co.* (Wash.) 932.

In replevin by the purchaser from the pledgee of property pledged, to recover the property from the pledgor, who had taken it from his possession, the fact that he in good faith claimed the absolute title will not defeat his right to

recover possession as owner of the pledgee's rights.—*Williams v. Ashe* (Cal.) 595.

Where the pledgee sells the absolute property in the pledge to a bona fide purchaser, the purchaser is entitled to retain the pledge until the original debt is discharged.—*Williams v. Ashe* (Cal.) 595.

**Possession.**

See "Adverse Possession."

**POWERS.**

A general clause in a power of attorney must be taken to refer to the matter with reference to which the power is specifically conferred.—*Smyth v. Lynch* (Colo. App.) 870.

**PRACTICE IN CIVIL CASES.**

See, also, "Abatement and Revival"; "Appearance"; "Arbitration and Award"; "Assumpsit"; "Attachment"; "Certiorari"; "Continuance"; "Costs"; "Courts"; "Damages"; "Death by Wrongful Act"; "Discovery"; "Ejectment"; "Evidence"; "Exceptions, Bill of"; "Execution"; "Garnishment"; "Interpleader"; "Judgment"; "Jury"; "Justices of the Peace"; "Limitation of Actions"; "Mandamus"; "New Trial"; "Parties"; "Pleading"; "Quieting Title—Removal of Cloud"; "Replevin"; "Set-Off and Counterclaim"; "Specific Performance"; "Trespass"; "Trial"; "Trove and Conversion"; "Venue in Civil Cases"; "Witness"; "Writs."

The continuance of a hearing on certain motions is within the discretion of the trial court.—*Gurney v. Steffens* (Kan. Sup.) 241.

A fact admitted on the hearing is not within Code Civ. Proc. § 283, providing that a stipulation must be filed with the clerk.—*Hearne v. De Young* (Cal.) 1108.

An order for substitution of attorneys not asked for at the proper time will not be thereafter entered *nunc pro tunc*.—*State v. Langley* (Wash.) 875.

Erroneous granting of motion without notice is without prejudice, where motion to set it aside is filed and heard.—*Thomas v. San Diego College Co.* (Cal.) 965.

A stipulation as to facts is admissible as an admission, and is binding on the court.—*Blankinship v. Oklahoma City Light & Water Power Co.* (Okla.) 1088.

**Preferences.**

See "Assignment for Benefit of Creditors."

**Preliminary Injunction.**

See "Injunction."

**Presumption.**

Of negligence, see "Negligence."  
Of payment, see "Payment."  
On appeal, see "Appeal."

**Principal and Accessory.**

See "Criminal Law."

**PRINCIPAL AND AGENT.**

Corporate agents, see "Corporations."  
Embezzlement by agent, see "Embezzlement."  
Service of summons on agent, see "Writs."

A salesman authorized to solicit orders cannot cancel contract after delivery of the goods.—*Brigham v. Hibbard* (Or.) 383.

Evidence examined, and held sufficient to show a ratification of an agent's contract by his principal.—*Pope v. J. K. Armsby Co.* (Cal.) 589.

An allegation that a contract was made by defendant is sustained by proof that it was made by his agent.—*Root v. Fay* (Ariz.) 527.

## PRINCIPAL AND SURETY.

Liability of surety on sheriff's bond, see "Sheriffs and Constables."

Sureties on notes, see "Negotiable Instruments."

One whose name was signed to a bond without authority was not bound to make inquiries.—*Smyth v. Lynch* (Colo. App.) 670.

Mere silence of one whose name was signed to a bond without authority held not to constitute ratification.—*Smyth v. Lynch* (Colo. App.) 670.

Under a declaration on a bond in general terms it may be proved that a defendant who did not sign the bond ratified the affixing thereto of his name by another.—*Smyth v. Lynch* (Colo. App.) 670.

One who ratified the affixing to a bond of his signature as surety was bound thereby, though no consideration passed to him at the time of ratification.—*Smyth v. Lynch* (Colo. App.) 670.

Where a bond recites that it was given under contract duly entered into, the sureties are estopped to dispute its validity.—*Price v. Scott* (Wash.) 634.

Proof of a judgment against a principal on a bond by a contractor to a school district for the protection of mechanics and material men is prima facie sufficient for judgment against the sureties.—*Ihrig v. Scott* (Wash.) 633.

Where a surety gives a mortgage to secure a contract and a note not connected with the contract, the discharge of the mortgage as to the contract will not discharge it as to the note.—*Parke & Lacy Co. v. White River Lumber Co.* (Cal.) 202.

## Priorities.

Between lien and mortgage, see "Mechanics' Liens."

## Privilege.

Of witness, see "Witness."

## Privilege Tax.

See "License."

## PRIZE FIGHTING.

To constitute prize fighting there must be an intent by the contestants to inflict bodily harm on each other.—*State v. Purtell* (Kan. Sup.) 782.

It is sufficient if defendants engage in a fight for a prize, and the fact that one was awarded to each does not prevent a conviction.—*State v. Purtell* (Kan. Sup.) 782.

## Probate.

Of will, see "Wills."

## Probate Courts.

See "Courts."

## Process.

See "Writs."

## PROHIBITION, WRIT OF.

Prohibition will not lie to prevent a private person from acting.—*State v. Superior Court of King County* (Wash.) 43.

After the court has sustained a demurrer to a complaint to restrain the enforcement of a judgment, prohibition will not issue to prevent the court from interfering with said judgment.—*State v. Superior Court of King County* (Wash.) 43.

Prohibition to prevent proceedings before a district court will not be issued unless it is clear that it is acting outside of its jurisdiction.—*In re Miller* (Idaho) 870.

A writ will lie prohibiting the court from paying out money from a fund deposited to await the determination of the suit pending an appeal.—*State v. Superior Court of King County* (Wash.) 877.

Prohibition will not lie unless the supreme court has jurisdiction, and the lower court is acting without authority.—*Clifford v. Parker* (Wash.) 717.

A writ will lie to stay proceedings in the superior court in a case where no facts could be alleged which would give such court jurisdiction.—*Kilburn v. Law* (Cal.) 615.

Prohibition will not issue when there is an adequate remedy at law.—*Bellevue Water Co. v. Stockslager* (Idaho) 568.

## Promissory Notes.

See "Negotiable Instruments."

## Protest.

See "Negotiable Instruments."

## Publication.

Of ordinance, see "Municipal Corporations."  
Of summons, see "Writs."

## Public Improvements.

See "Municipal Corporations."

## PUBLIC LANDS.

Admissibility of patent in action to quiet title, see "Quieting Title—Removal of Cloud."

An application for purchase of tide lands under Act March 26, 1890, under an advertisement of the commissioners of February 21, 1896, is not affected by Act March 28, 1896.—*State v. Forrest* (Wash.) 51.

An application under Laws 1896, c. 178, to purchase tide lands, should be accompanied with the plat and the field notes.—*State v. Forrest* (Wash.) 51.

In mandamus to compel the land commissioner to accept an application for purchasing tide lands under Laws 1896, c. 178, the allegation that the applicant presented a duly-certified plat of the survey with the field notes is sufficient.—*State v. Forrest* (Wash.) 51.

Homestead entry may be mortgaged before issuance of patent.—*Orr v. Ulyatt* (Nev.) 916.

Where the patentee of land as a government homestead conveys it, on a subsequent reconveyance to him the land is divested of its homestead qualities.—*De Lany v. Knapp* (Cal.) 598.

The heirs of a deceased timber-culture claimant are to be determined by the laws of the state in which the land lies.—*Cooper v. Wilder* (Cal.) 591.

Heirs of one who entered land as a timber-culture claim take as donees from the United

States, and not by descent.—*Cooper v. Wilder* (Cal.) 591.

Whether land is "suitable for cultivation," within Const. art. 17, § 3, allowing state land to be granted to actual settlers only, is a question of fact.—*Albert v. Hobler* (Cal.) 1104.

Land is "suitable for cultivation," within Const. art. 17, § 3, though it does not produce "ordinary agricultural crops in average quantities."—*Albert v. Hobler* (Cal.) 1104.

Tide lands, where there are no abutting up-land owners or improvers, are subject to sale under Act March 26, 1890.—*State v. Forrest* (Wash.) 51.

The state cannot assert title to land situated below the line of ordinary high tide, but within the meander line, patented by the United States.—*Cogswell v. Forrest* (Wash.) 1098.

The official survey of a Mexican land grant, after confirmation by congress, is conclusive on collateral attack.—*Colorado Fuel Co. v. Maxwell Land-Grant Co.* (Colo. Sup.) 556.

### **Punishment.**

For contempt, see "Contempt."

### **Quantum Meruit.**

See "Assumpsit."

### **Quiet Enjoyment.**

See "Covenants."

## **QUIETING TITLE — REMOVAL OF CLOUD.**

See, also, "Ejectment."

Under Code Civ. Proc. 1887, § 255, plaintiff need only allege that he is the owner in fee simple and in possession, without defining the adverse claim which he seeks to have determined.—*Amter v. Conlon* (Colo. Sup.) 1002.

Where the statute makes a tax deed prima facie evidence of title, a complaint alleging that a tax deed is regular on its face sufficiently shows its apparent validity.—*Day v. Schnider* (Or.) 650.

In a suit to cancel a tax deed, naming in the complaint several reasons why it is invalid is not a joinder of several causes of suit.—*Day v. Schnider* (Or.) 650.

Where plaintiff claims under a deed from a corporation, the articles of incorporation are admissible.—*Colorado Fuel Co. v. Maxwell Land-Grant Co.* (Colo. Sup.) 556.

Certain patents from the government to the grantees of Mexican land grants, and mesne conveyances thereunder, held admissible.—*Colorado Fuel Co. v. Maxwell Land-Grant Co.* (Colo. Sup.) 556.

### **Qui Tam and Penal Actions.**

Action to recover penalty for disposing of mortgaged chattels, see "Chattel Mortgages."

## **QUO WARRANTO.**

Jurisdiction of court of appeals, see "Courts."

A petition in quo warranto against a county treasurer held to state a cause of action.—*State v. Kelly* (Kan. App.) 299.

A county attorney held a proper person to prosecute a quo warranto proceeding.—*State v. Kelly* (Kan. App.) 299.

An action to enjoin one from taking an office did not preclude an action for quo warranto

against him after he had taken the office.—*Snow v. Hudson* (Kan. Sup.) 280; *Same v. Edwards*, Id.

## **RAILROAD COMPANIES.**

See, also, "Carriers"; "Corporations"; "Eminent Domain"; "Horse and Street Railroads"; "Master and Servant."

An indictment under Pen. Code, § 218 [St. 1891, p. 283] for throwing a switch with intent to derail a passenger train "and" boarding a passenger train with intent to rob, held not bad for duplicity.—*People v. Thompson* (Cal.) 743.

Rev. St. U. S. § 5263, prohibits a railroad company from granting an exclusive franchise along its right of way to any telegraph company.—*Union Trust Co. of New York v. Atchison, T. & S. F. R. Co.* (N. M.) 701.

The right of a telegraph company to establish lines on the right of way of a railroad in the hands of a receiver may be adjudicated in the foreclosure proceeding.—*Union Trust Co. of New York v. Atchison, T. & S. F. R. Co.* (N. M.) 701.

### **Liability for negligence.**

Negligence cannot be presumed from the fact of injury.—*Atchison, T. & S. F. R. Co. v. McFarland* (Kan. App.) 788.

To run a train through a city at a greater speed than that permitted by ordinance is negligence per se.—*Chicago, R. I. & P. Ry. Co. v. Kennedy* (Kan. App.) 802.

Whether the train was running too fast for the safe ejection of a trespasser was for the jury.—*Union Pac. Ry. Co. v. Mitchell* (Kan. Sup.) 244.

Instructions in an action for eviction of a trespasser held properly to define defendant's liability.—*Union Pac. Ry. Co. v. Mitchell* (Kan. Sup.) 244.

### **Accidents at crossings.**

Whether it was negligence for the company to maintain buildings so as to obstruct the view of the track from the crossing, was for the jury.—*Chicago, R. I. & P. Ry. Co. v. Williams* (Kan. Sup.) 246.

Contributory negligence is not imputed as a matter of law to a child 10 years old, who failed to look for a train before attempting to cross the track.—*Chicago, R. I. & P. Ry. Co. v. Kennedy* (Kan. App.) 802.

One who drove at a trot over a crossing held not guilty of contributory negligence as a matter of law.—*Atchison, T. & S. F. R. Co. v. Shaw* (Kan. Sup.) 1129.

Whether a traveler whose view of the track was obstructed should have stopped to look before attempting to cross, was for the jury.—*Chicago, R. I. & P. Ry. Co. v. Williams* (Kan. Sup.) 246.

### **Injuries to persons on track.**

Acquiescence by a railroad in the use of its right of way for foot travel imposes a duty of ordinary diligence to avoid injuring persons on the track.—*Roth v. Union Depot Co.* (Wash.) 641.

An engineer who saw a child on the track in time to have stopped the train held guilty of negligence in not stopping it.—*Union Pac. Ry. Co. v. Ure* (Kan. Sup.) 776.

Railroad company held guilty of gross negligence in allowing cars unattended to run down a grade over a track used as a pathway.—*Roth v. Union Depot Co.* (Wash.) 641.

Evidence examined, and held sufficient to go to the jury on the question whether an engineer saw an infant standing on the track be-

fore his train.—*Johnston v. Atchison, T. & S. F. R. Co.* (Kan. Sup.) 228.

#### — Stock killing cases.

In an action for stock killed at a railway crossing, the propriety of locating a depot at such crossing cannot be inquired into.—*Chicago, R. I. & P. R. Co. v. Clonch* (Kan. App.) 1140.

Evidence examined, and *held* insufficient to show liability of defendant for stock killed on its track.—*Denver & R. G. R. Co. v. Wheatley* (Colo. App.) 450.

#### — Fires.

A railroad company is required to exercise only ordinary care to prevent the setting of fires by locomotives.—*St. Louis & S. F. Ry. Co. v. Hoover* (Kan. App.) 854.

Evidence examined, and *held* sufficient to take the case to the jury as to whether the fire destroying plaintiff's property was communicated to it by the engine of defendant.—*St. Louis & S. F. Ry. Co. v. Stevens* (Kan. App.) 434.

Where damage by fire was occasioned entirely by the negligence of defendant railway company, it is liable therefor.—*St. Louis & S. F. Ry. Co. v. Stevens* (Kan. App.) 434.

A railroad company is not liable for fires set by an engine of approved construction, in good repair, and skillfully managed.—*Union Pac. Ry. Co. v. Motzner* (Kan. App.) 785.

Evidence examined, and *held* sufficient to support a verdict against defendant for injuries by fire set on its right of way.—*Atchison, T. & S. F. Ry. Co. v. Scrafford* (Kan. App.) 308.

If plaintiff in an action for damages resulting from a fire recovers, he is entitled to an attorney's fee.—*St. Louis & S. F. Ry. Co. v. Hoover* (Kan. App.) 854.

It is error to render judgment for an attorney's fee in an action against a railroad company for damages by fire where no proof is offered on the subject.—*Atchison, T. & S. F. Ry. Co. v. Scrafford* (Kan. App.) 308.

Evidence examined and *held* that a moderate wind carrying fire from stacks set on fire by an engine was not the proximate cause of injuries to plaintiff's property.—*Union Pac. Ry. Co. v. McCollum* (Kan. App.) 97.

One who, by negligence in the use of its property, has suffered damage by fire set by a passing engine, cannot recover therefor.—*St. Louis & S. F. Ry. Co. v. Stevens* (Kan. App.) 434.

An owner of land adjoining a railroad right of way is required to use such care for the protection of his property against fire as an ordinarily prudent person would use under the circumstances.—*St. Louis & S. F. Ry. Co. v. Stevens* (Kan. App.) 434.

Failure of one living four miles from a railroad to surround his premises with fire guards *held* not contributory negligence as a matter of law.—*Union Pac. Ry. Co. v. McCollum* (Kan. App.) 97.

One granted permission to pasture cattle on wild prairie *held* not a necessary party to an action for damages by fire.—*Gilland v. Union Pac. Ry. Co.* (Wyo.) 508.

The burning of an orchard by fire communicated by a locomotive is an injury to the land, and the measure of damages is the depreciation in market value.—*St. Louis & S. F. Ry. Co. v. Hoover* (Kan. App.) 854.

### RAPE.

Circumstantial evidence that the charge was the result of a conspiracy was admissible.—*People v. Knight* (Cal.) 6.

In a prosecution for an assault with intent to commit rape, the intent is a question for the jury.—*People v. Webster* (Cal.) 1114.

Prosecutrix being under the age of consent, a charge as to whether she made outcry was properly refused.—*People v. Knight* (Cal.) 6.

It is error for the court to assume that the prosecutrix is under the age of consent.—*People v. Webster* (Cal.) 1114.

Prosecutrix in a rape case could be cross-examined as to whether she had had intercourse with any other than defendant.—*People v. Knight* (Cal.) 6.

### Ratification.

Of town bonds, see "Taxation."

Of unauthorized acts of agent, see "Principal and Agent."

— of corporate officer, see "Corporations."

— of trustee, see "Trusts."

### Real Action.

See "Ejectment"; "Quieting Title—Removal of Cloud."

### Real Estate.

See "Boundaries"; "Deed"; "Easements"; "Mechanics' Liens"; "Mines and Mining"; "Mortgages"; "Public Lands."

### Reconvention.

See "Set-Off and Counterclaim."

### RECORDS.

Of chattel mortgage, see "Chattel Mortgages." On appeal, see "Appeal."

— in criminal case, see "Criminal Law."

The court on satisfactory evidence, can amend the records after judgment.—*Kaufman v. Shain* (Cal.) 393.

Evidence examined, and *held* to justify an amendment of the records by striking out an order directing judgment of dismissal.—*Kaufman v. Shain* (Cal.) 393.

A form of entry signed by the judge is not a public record, the changing of which is prohibited by Cr. Code, § 1853.—*Whalley v. Tongue* (Or.) 717.

### Redemption.

From mortgage sale, see "Mortgages."

### REFERENCE.

Where a referee fails to find on all issues of fact, the court may remand the cause to him without further consent of parties.—*Robinson v. Nelson* (Idaho) 64.

Where a referee fails to comply with the order of reference the court can compel a strict compliance therewith.—*Robinson v. Nelson* (Idaho) 64.

A referee must find specifically the facts and the law.—*Walker v. Hosack* (Kan. Sup.) 781.

### REFORMATORIES.

Act March 11, 1889, creating a reformatory, does not make the school a state's prison.—*Ex parte Nichols* (Cal.) 9.

### Release and Discharge.

Of mortgage, see "Mortgages."

Of surety, see "Principal and Surety."

### Repeal.

Of statute, see "Statutes."



## REPLEVIN.

By chattel mortgagee, see "Chattel Mortgages."

Comp. Laws, p. 244, § 6, relating to procedure, where plaintiff fails to prosecute, must be strictly followed.—*Elsberg v. Fietze* (N. M.) 680.

### Demand.

A demand is not necessary to make the detention of plaintiff's property wrongful, when held by an officer on execution against a third person.—*Burgwald v. Donelson* (Kan. App.) 100.

Where a petition alleges that defendant company is composed of three persons, which is not denied, a demand on one of them is sufficient.—*La Crosse Milling Co. v. Williams* (Kan. App.) 288.

If it appears that a demand would have been unavailable, it need not be shown to have been made.—*State Bank v. Norduff* (Kan. App.) 312.

### Pleading.

A petition alleging plaintiff's ownership and right of possession and defendant's wrongful detention as of the time when the action was brought is sufficient.—*Burgwald v. Donelson* (Kan. App.) 100.

Either party may show any fact that will defeat his adversary's lien or postpone the same.—*State Bank v. Norduff* (Kan. App.) 312.

Amendment of the ad damnum on a showing that it called for a sum greater than the actual value held proper.—*Autrey v. Bowen* (Colo. App.) 808.

Complaint in replevin alleging that plaintiff "on and after" a certain time was the owner of certain property, held sufficient.—*Williams v. Ashe* (Cal.) 595.

### Evidence.

Evidence examined, and held sufficient to take the case to the jury.—*La Crosse Milling Co. v. Williams* (Kan. App.) 288.

In replevin by wife from attaching creditor of husband, where the wife proves title by gift from husband, proof of husband's insolvency when gift was made is admissible under general denial.—*Burchinell v. Butters* (Colo. App.) 459.

Defendant may introduce anything under a general denial which controverts the wrongful detention alleged.—*Scully v. Porter* (Kan. App.) 824.

## Reply.

See "Pleading."

## Rescission.

Of contract, see "Equity."  
—to convey, see "Vendor and Purchaser."

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## Review.

On appeal, see "Appeal."  
—in criminal case, see "Criminal Law."

## REVIEW, WRIT OF.

A writ of review will lie to the district court where it exceeds its jurisdiction in contempt proceedings.—*Levan v. Third District Court* (Idaho) 574.

### Revival.

See "Abatement and Revival."

### Revocation.

Of license, see "License."

## RIPARIAN RIGHTS.

See, also, "Waters and Water Courses."

Accretions formed on the north bank of a river running southeast held to belong to the respective tracts lying due north thereof.—*McCaman v. Stagg* (Kan. App.) 86.

### Roads.

See "Easements"; "Highways"; "Municipal Corporations."

## ROBBERY.

Evidence held sufficient to warrant conviction.—*State v. O'Keefe* (Nev.) 918.

## SALE.

See, also, "Fraudulent Conveyances"; "Vendor and Purchaser."

Effect of statute of frauds, see "Frauds, Statute of."

Illegal liquor sale, see "Intoxicating Liquors."  
Liability of seller for negligence, see "Negligence."

Mortgage or sale, see "Chattel Mortgages."  
Sufficiency of complaint, see "Pleading."

Where goods are sold to be paid for on certain conditions, in an action for the price it must be shown that the conditions have been fulfilled.—*Holt Live-Stock Co. v. Watkins* (Colo. Sup.) 121.

Contract of sale of machinery subject to test held not to pass title before test made.—*Gates Iron Works v. Cohen* (Colo. App.) 667.

Evidence held to sustain a finding that title passed before delivery.—*Kneeland v. Renner* (Kan. App.) 95.

Evidence held insufficient to show breach of warranty.—*Huston v. Peterson* (Kan. App.) 101.

Warranty construed, and held to warrant cart sold as to workmanship for one year, with privilege of having the same, if defective, replaced free of cost.—*Watson v. Beckett* (Kan. App.) 787.

Where property was delivered on condition that if it was satisfactory a certain price would be paid therefor, whether the condition was fulfilled was a question for the jury.—*Cannon v. Griffith* (Kan. App.) 829.

Damages and attorney's fees allowed under Gen. St. 1889, par. 3892, do not become due on failure to satisfy a conditional sale note.—*Curd v. Bowr* (Kan. App.) 846.

Where machinery was sold conditionally with a guaranty that it would accomplish certain results, title remained in the vendor until full payment, but he was not entitled to possession till default in payment, and the vendee was not bound to pay unless the guaranty was fulfilled.—*Richardson v. Great Western Manufg Co.* (Kan. App.) 809.

Where goods are delivered under a valid contract, the seller can recover the price without formal acceptance.—*Brigham v. Hibbard* (Or.) 383.

Evidence in an action for price examined, and held to warrant a judgment for plaintiff.—*Colorado Iron Works v. Riekenberg* (Idaho) 681.

## SCHOOLS AND SCHOOL DISTRICTS.

Officers of a school district cannot create a district liability for building a schoolhouse unless authorized by the electors.—*School Dist. No. 80 v. Brown* (Kan. App.) 102.

The county commissioners cannot reduce the levy of a school tax by the school district.—*Seward v. Rheiner* (Kan. App.) 423.

Under Laws 1889-90, p. 848, a woman is qualified to hold the office of county superintendent of schools.—*Russell v. Guptill* (Wash.) 340.

The provisions of the school act of March 27, 1890 applies to school districts organized in cities of 10,000 or more inhabitants.—*Holmes & Bull Furniture Co. v. Hedges* (Wash.) 944.

Const. art. 8, § 6, relating to the indebtedness of school districts, does not require legislative assent to the holding of an election to increase such indebtedness.—*Holmes & Bull Furniture Co. v. Hedges* (Wash.) 944.

## Secondary Evidence.

See "Evidence."

## Sentence.

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## Separate Estate.

Of married woman, see "Husband and Wife."

## SET-OFF AND COUNTER-CLAIM.

Set-off of usurious interest, see "Usury."

Right to set off against the assignee of a judgment a judgment subsequently obtained determined.—*Whitehead v. Jessup* (Colo. App.) 1042.

## SHERIFFS AND CONSTABLES.

Sufficiency of return to summons, see "Writs."

Under Mill's Ann. St. § 2794, a justice has no authority to appoint a special constable unless some legal right is liable to be jeopardized.—*Cunningham v. Bostwick* (Colo. App.) 151.

A sheriff is entitled to mileage under 1 Sess. Laws, 1890-91, p. 174, § 2, subd. 18, for taking a prisoner arrested without warrant to prison.—*Warner v. Fremont County* (Idaho) 327.

Sureties on a sheriff's bond are not liable for a recovery against their principal under a penal statute.—*State Bank v. Brennan* (Colo. App.) 1050.

Where a sheriff receives an affidavit and notice for foreclosure of a chattel mortgage, held, he must sell the chattels, notwithstanding an attachment may be placed in his hands thereafter.—*Blumauer-Frank Drug Co. v. Branstetter* (Idaho) 575.

A sheriff is not called upon to determine whether the chattel mortgage under which an affidavit and notice of sale were issued is valid.—*Blumauer-Frank Drug Co. v. Branstetter* (Idaho) 575.

Affidavit and notice for the foreclosure of a chattel mortgage, under Rev. St. 1887, are process, and protect the sheriff in the execution thereof.—*Blumauer-Frank Drug Co. v. Branstetter* (Idaho) 575.

## Slander.

See "Libel and Slander."

## Societies.

See "Building and Loan Associations"; "Corporations."

## Solicitor.

See "Attorney and Client."

## Special Acts.

See "Constitutional Law."

## SPECIFIC PERFORMANCE.

An action will not lie to enforce an entire contract, if any part of the consideration is illegal.—*Ream v. Sauvain* (Kan. App.) 982.

## Spirituuous Liquors.

See "Intoxicating Liquors."

## STATE LEGISLATURE.

Laws 1861, c. 17, relating to the convening of the legislature in joint session, is directory only.—*Snow v. Hudson* (Kan. Sup.) 260; *Same v. Edwards*, Id.

The exercise by the legislature of its power over the revenues of the state, within constitutional limits, cannot be reviewed.—*Parks v. Commissioners of Soldiers' & Sailors' Home* (Colo. Sup.) 542; *Same v. People*, Id.

## STATES AND STATE OFFICERS.

Mandamus to state boards and officers, see "Mandamus."

Right of governor to appoint city officer, see "Municipal Corporations."

The erection of a public building in a certain place will not be enjoined on the ground that, if it were erected in another place, certain expenses would be saved to the state.—*State v. Lord* (Or.) 471.

Under Act March 21, 1898, the state capitol commission could sell warrants for par on the letting of a contract for the building.—*State v. McGraw* (Wash.) 176.

Warrants may be drawn on the capitol fund in excess of the fund on hand for compensation of the capitol commissioners.—*State v. Cook* (Mont.) 928.

Injunction will not lie to enjoin the governor and other state officers from executing provisions of a law alleged to be unconstitutional.—*State v. Lord* (Or.) 471.

## Appropriations.

Appropriations in excess of the constitutional limits are void.—*Parks v. Commissioners of Soldiers' & Sailors' Home* (Colo. Sup.) 542; *Same v. People*, Id.

Appropriations in excess of the revenue take effect after preferred appropriations, according to priority of date.—*Parks v. Commissioners of Soldiers' & Sailors' Home* (Colo. Sup.) 542; *Same v. People*, Id.

In the event of deficiency, appropriations for the expenses of the executive, legislative, and judicial departments, and interest on public debts, are entitled to preference.—*Parks v. Commissioners of Soldiers' & Sailors' Home* (Colo. Sup.) 542; *Same v. People, Id.*

State officers holding positions by election or appointment, *held* entitled to have their salaries included in the general appropriation bill.—*Parks v. Commissioners of Soldiers' & Sailors' Home* (Colo. Sup.) 542; *Same v. People, Id.*

That an auditor issues warrants upon a later appropriation, is no defense to an action by a party having a prior right.—*Parks v. Commissioners of Soldiers' & Sailors' Home* (Colo. Sup.) 542; *Same v. People, Id.*

Where several appropriations of the same grade are made the same day, and there is a deficiency, priority will be given as of the time of day when they took effect.—*Parks v. Commissioners of Soldiers' & Sailors' Home* (Colo. Sup.) 542; *Same v. People, Id.*

The penitentiary and insane asylum have no preference in matters of appropriation over institutions, resort to which is voluntary on the part of the inmates.—*Parks v. Commissioners of Soldiers' & Sailors' Home* (Colo. Sup.) 542; *Same v. People, Id.*

The prohibition of payment of money from the state treasury, unless within two years after the appropriation, does not apply to disbursements from the state capitol building fund.—*State v. McGraw* (Wash.) 176.

#### Officers and agents.

The mining commissioner is entitled to his salary, without reference to the date at which the appropriation took effect.—*Parks v. Commissioners of Soldiers' & Sailors' Home* (Colo. Sup.) 542; *Same v. People, Id.*

The superintendent of instruction is not entitled to receive the compensation attached to ex officio offices, from two of which he was relieved by St. 1893, p. 82, though appropriations for such salary were made by the legislature.—*State v. La Grave* (Nev.) 470.

Under Const. art. 4, § 1, executive officers are such as the constitutional convention deem indispensable, and the legislature, when necessary, subsequently create.—*Parks v. Commis-*

*sioners of Soldiers' & Sailors' Home* (Colo. Sup.) 542; *Same v. People, Id.*

The state board of examiners are not required to pass on the claims for services of the members of the state capitol commission.—*State v. Cook* (Mont.) 928

Under Act 1895, the state board of equalization can extend a levy for the support of the state normal school on the assessment for 1895.—*Parks v. Commissioners of Soldiers' & Sailors' Home* (Colo. Sup.) 542; *Same v. People, Id.*

### Statute of Frauds.

See "Frauds, Statute of."

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## STATUTES.

Special laws, see "Constitutional Law."

Where two acts are enacted in a revision of the statute, effect, as far as possible, will be given to each.—*Congdon v. Butte Consolidated Ry. Co.* (Mont.) 629.

One act will not repeal by implication another act passed at the same session, unless they are irreconcilably repugnant.—*Congdon v. Butte Consolidated Ry. Co.* (Mont.) 629.

The adoption of the Civil Code did not repeal Laws 1865, p. 92, in so far as said laws apply to signing bills of exceptions in criminal cases.—*Van Houten v. People* (Colo. Sup.) 187.

Laws 1889, c. 228, regulating licensing saloons, did not, by implication, repeal *Mills' St.* § 4403, subd. 18.—*Canfield v. City of Leadville*, (Colo. App.) 910.

Gen. St. 1883, § 944, making one convicted of crime incompetent to testify, was repealed by Gen. St. 1883, pp. 1062, 1063.—*Trackman v. People* (Colo. Sup.) 662.

#### Reception of evidence.

An independent provision, which did not enter into the general scope of the act, may be unconstitutional without invalidating the other portions.—*McGowan v. McDonald* (Cal.) 418.

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Tax deed as cloud on title, see "Quieting Title—Removal of Cloud."

The penalty and interest collected upon city taxes levied for the benefit of a city belong to the city.—*State v. Mish* (Wash.) 40.

Neither the county clerk nor the county commissioners have authority under Gen. St. 1889, par. 6918, to add to the valuation of property listed for taxation or place other property on the roll without notice.—*Dykes v. Lockwood Mortg. Co.* (Kan. App.) 268.

A judgment has no situs for taxation apart from the domicile of the owner.—*Dykes v. Lockwood Mortg. Co.* (Kan. App.) 268.

Where the county board is unable to complete the equalization within the statutory time, the county court may complete the work at an adjourned session the week after the adjournment of the equalization board.—*Godfrey v. Douglas County* (Or.) 171.

That certain assessments were equalized by the county board *held* not to show that another assessment was also equalized.—*Godfrey v. Douglas County* (Or.) 171.

Evidence held insufficient to show that land purchased by the county at a tax sale was re-offered for sale.—*Charlton v. Kelly* (Colo. App.) 455.

Under *Mills' Ann. St. § 3888*, lands, after being first offered for sale for delinquent taxes without being sold, must be offered from day to day until the sale is concluded, and the county cannot become the purchaser thereof except in default of bidders.—*Charlton v. Toomey* (Colo. App.) 454.

A county cannot collect from the owner for publishing a delinquent tax list a sum in excess of the actual amount paid therefor.—*Truesdell v. Peck* (Kan. App.) 990.

Where a tax deed under which plaintiff in ejectment holds is adjudged invalid, he is entitled to recover the amount of taxes paid, with interest and costs.—*Booge v. Ritchie* (Kan. App.) 1144.

A tax deed held not invalid because part of the taxes were levied for the preceding year, but not extended on the tax rolls for that year.—*Walker v. Douglas* (Kan. App.) 1143.

The collection of taxes will not be enjoined unless the property is exempt or the taxes were levied by persons not authorized.—*Seward v. Rheiner* (Kan. App.) 423.

### Tenancy from Year to Year.

See "Landlord and Tenant."

### TENANCY IN COMMON.

See, also, "Partition."

In mines, see "Mines and Mining."

A tenant in common in a junior mining claim cannot buy in a senior conflicting location, and assert it against his cotenant.—*Franklin Min. Co. v. O'Brien* (Colo. Sup.) 1016.

Where two cotenants convey a conflicting claim which they have purchased to a corporation of which they own all the stock, they cannot thereby defeat the right of another cotenant to the benefits of their purchase of the conflicting claim.—*Franklin Min. Co. v. O'Brien* (Colo. Sup.) 1016.

Extracting ore from a vein on a mining claim by a part owner, from its own shaft on another claim, and for its own benefit, is assuming exclusive ownership, as against its cotenant, and may be enjoined by the latter.—*Anaconda Copper Min. Co. v. Butte & B. Min. Co.* (Mont.) 924.

### Testament.

See "Wills."

### Testimony.

See "Evidence"; "Witness."

### Theft.

See "Embezzlement"; "Larceny"; "Robbery."

### Tide Lands.

See "Public Lands."

### TIME.

Of taking appeal, see "Appeal."

To file motion for new trial, see "New Trial."

When the last day for pleading falls on Sunday, that day is to be excluded.—*Pemberton v. Duryea* (Ariz.) 220.

### Title.

See "Ejectment"; "Public Lands"; "Quieting Title—Removal of Cloud."

Tax title, see "Taxation."

To support ejectment, see "Ejectment."

—trover, see "Trover and Conversion."

### TORTS.

See, also, "Death by Wrongful Act"; "False Imprisonment"; "Intoxicating Liquors"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Trespass"; "Trover and Conversion."

Liability of county, see "Counties."

Measure of damages, see "Damages."

Liability of an architect for disclosure of the owner's intention to erect a proposed building for loss of rent by the owner from the vacation of the building in place of which the new building is to be constructed.—*Havens v. Donahue* (Cal.) 962.

### TOWNS.

See, also, "Counties"; "Highways"; "Municipal Corporations"; "Schools and School Districts."

Where the voters and taxpayers at the first opportunity repudiate the bonds, they do not ratify them.—*Faulkenstein Tp. of Stanton County v. Fitch* (Kan. App.) 276.

Where funding bonds issued for canceled warrants were surrendered to the township and destroyed, the township could not thereafter issue other bonds for the indebtedness represented by the warrants.—*Faulkenstein Tp. of Stanton County v. Fitch* (Kan. App.) 276.

The board of county commissioners must canvass the votes cast at the township bond election.—*Faulkenstein Tp. of Stanton County v. Fitch* (Kan. App.) 276.

A purchaser of township funding bonds must take notice of the township records.—*Faulkenstein Tp. of Stanton County v. Fitch* (Kan. App.) 276.

### Transfer.

See "Assignment."

### TRESPASS.

Trespass will not lie for herding sheep on uninclosed land to which the fence law applies.—*Walker v. Bloomingcamp* (Or.) 175.

### TRIAL.

See, also, "Appeal"; "Appearance"; "Certiorari"; "Covenants"; "Evidence"; "Exceptions, Bill of"; "Judgment"; "Jury"; "New Trial"; "Pleading"; "Practice in Civil Cases"; "Reference"; "Witness."

Conduct in criminal cases, see "Criminal Law."

Discretion of court, see "Appeal."

Right to jury trial, see "Jury."

It is error to allow an action to be tried in the absence of counsel, in violation of an agreement in open court for a continuance.—*Denver & R. G. R. Co. v. Roberts* (Colo. App.) 460.

It is substantial error to force a plaintiff to trial at a term prior to that at which the action first became triable.—*Bostwick v. Blair* (Kan. App.) 297.

It was proper to have the testimony of a witness read to the jury on their request.—*Cannon v. Griffith* (Kan. App.) 829.

The introduction of evidence by plaintiff after motion for nonsuit is in the discretion of the court.—*Kelly v. E. F. Hallack Lumber & Manufacturing Co.* (Colo. Sup.) 1003.

A refusal to open plaintiff's case, after motion for nonsuit, to admit evidence, *held* proper.—*Martin v. Union Mut. Life Ins. Co.* (Wash.) 53.

### Objections to evidence.

Allowing plaintiff, over defendant's objection, to prove material facts by incompetent evidence is prejudicial error.—*Western Union Tel. Co. v. Getto-McClung Boot & Shoe Co.* (Kan. App.) 849.

When bill of particulars is objectionable, defendant must move for an order to exclude evidence before proceeding to trial.—*McCarthy v. Mt. Tecarte Land & Water Co.* (Cal.) 391.

An objection to a hypothetical question as not stating the facts should point out wherein it is defective.—*Prosser v. Montana Cent. Ry. Co.* (Mont.) 81.

### Instructions.

Written instructions must be given if requested.—*Wheat v. Brown* (Kan. App.) 807.

Instructions embraced in the general charge are properly refused.—*Willard v. Whinfield* (Kan. App.) 314; *St. Louis & S. F. Ry. Co. v. Stevens* (Kan. App.) 434; *City of Wichita v. Coggeshall* (Kan. App.) 842; *St. Louis & S. F. Ry. Co. v. Hoover* (Kan. App.) 854.

Possible error: in an instruction is without prejudice where it concerns a matter about which there is no contention.—*Rawson v. Ellsworth* (Wash.) 934.

Where the defect of parties plaintiff has not been objected to by amended answer, an instruction as to such defect is properly refused.—*Gilland v. Union Pac. Ry. Co.* (Wyo.) 508.

The giving of an incomplete instruction is not error, without request to make it more full.—*McQuillan v. City of Seattle* (Wash.) 893.

An instruction incorrectly stating certain facts to be conceded *held* reversible error.—*Holderman v. Smith* (Kan. App.) 272.

An instruction that the jury might render a general or a special verdict is properly refused when the court is not asked to submit special findings.—*Prosser v. Montana Cent. Ry. Co.* (Mont.) 81.

An instruction *held* not to be an adverse comment upon expert evidence nor upon the weight of the testimony.—*Wills v. Lance* (Or.) 487.

An instruction that statements as to verbal admissions should be received with caution is erroneous as a charge on the evidence.—*Knowles v. Nixon* (Mont.) 628.

It is error to instruct as to gross negligence when there is no evidence in regard thereto.—*Atchison, T. & S. F. R. Co. v. Winston* (Kan. Sup.) 777.

It is error to charge that there is no evidence to prove a defense of counterclaim, when there is any evidence on such issue.—*Haskins v. Curran* (Idaho) 559.

Instructions not justified by the evidence are properly refused.—*St. Louis & S. F. Ry. Co. v. Stevens* (Kan. App.) 434.

An instruction is erroneous when not supported by any evidence in the case.—*Deep Mining & Drainage Co. v. Fitzgerald* (Colo. Sup.) 210.

An instruction not based on the evidence is reversible error, unless no other verdict than the one rendered could have been given.—*Martin v. Union Mut. Life Ins. Co.* (Wash.) 53.

### Taking case from jury.

Where evidence for plaintiff would not sustain verdict in his favor one should be directed for defendant.—*Root v. Fay* (Ariz.) 527.

If there is any evidence tending to prove the material allegations, a demurrer to evidence is properly overruled.—*City of Wichita v. Coggeshall* (Kan. App.) 842.

If there is any evidence sustaining the material allegations, a demurrer to the evidence is properly overruled.—*Atchison, T. & S. F. R. Co. v. Ditmars* (Kan. App.) 838.

A demurrer to the evidence should not be sustained where there is proper evidence to establish every material allegation.—*Hagan v. American Building & Loan Ass'n* (Kan. App.) 1138.

When the evidence makes a prima facie case, a demurrer thereto is properly overruled.—*Atchison, T. & S. F. R. Co. v. Bartlett* (Kan. App.) 284.

### Verdict.

A party has a right to request answers to particular questions of fact pertinent to the issues.—*Atchison, T. & S. F. R. Co. v. Butler* (Kan. Sup.) 767.

A refusal to submit particular questions of fact is harmless error, where responsive answers could only be consistent with the general verdict.—*Swift v. Wyatt* (Kan. App.) 984.

In a case tried by a jury the submission of special questions does not dispense with a general verdict.—*Bell v. Coffin* (Kan. App.) 861.

The jury will not be compelled to answer unfair questions.—*Atchison, T. & S. F. R. Co. v. Shaw* (Kan. Sup.) 1129.

Special findings examined, and *held* to conflict with and overturn the general verdict.—*McDermott v. Atchison, T. & S. F. R. Co.* (Kan. Sup.) 248.

### Trial by court.

Exceptions to findings not taken until nearly a year after such findings are made and filed will not be considered on appeal.—*Ballard v. First Nat. Bank* (Wash., 1938).

Where, in a suit to cancel a note as without consideration, the consideration alleged is the settlement of an account, the court is not required to find what items entered into the account.—*Scott v. Bourn* (Wash.) 372.

Findings of fact by the court cannot overcome facts agreed to by the parties.—*Seward v. Rheiner* (Kan. App.) 423.

The court must, on request, find on all the issuable facts.—*Seward v. Rheiner* (Kan. App.) 423.

### Trial of Right of Property.

See "Attachment."

## TROVER AND CONVERSION.

Plaintiff in conversion must recover on the strength of her own title.—*Van Zandt v. Shuyler* (Kan. App.) 295.

Measure of damages for conversion is value of property, and not cost of replacing it.—*Burchinell v. Butters* (Colo. App.) 459.

### Trustee Process.

See "Garnishment."

## TRUSTS.

See, also, "Executors and Administrators."

Evidence *held* to establish a resulting trust.—*Campbell v. First Nat. Bank* (Colo. Sup.) 1007.

Plaintiff's allegations of a resulting trust *held* not to be supported by the evidence.—*Hodgson v. Fowler* (Colo. App.) 462.

Evidence *held* to show that the identity of the proceeds of a check deposited with a bank for collection was destroyed.—*Meldrum v. Henderson* (Colo. App.) 148.

A lease by a mortgagor to the vice president of a bank holding the mortgage *held* not to make such vice president a trustee for the bank.—*Kincaid v. Thompson* (Wash.) 352.

Evidence examined, and *held* that the beneficiaries in a deed of trust ratified the action of the trustee in reconveying the property to them, instead of selling it, as provided by the deed.—*Witter v. McCarthy Co.* (Cal.) 969.

After a resultant trust has been executed, it is too late to urge acts which might have discharged the trust property in the hands of the trustee.—*Campbell v. First Nat. Bank* (Colo. Sup.) 1007.

Plaintiffs, obtaining a decree of foreclosure as trustees, have not the absolute control of the enforcement of the decree, as against the persons for whose benefit the trust exists.—*Thomas v. San Diego College Co.* (Cal.) 965.

### Uses.

See "Trusts."

### USURY.

See, also, "Interest."

A party having dealings with a bank for years, and having paid usurious interest on loans, cannot set off against a note subsequently given for money borrowed such usurious interest.—*Morrison v. State Bank* (Kan. App.) 441.

Under Rev. St. U. S. §§ 5197, 5198, a person paying usurious interest to a national bank may recover twice the total amount paid.—*First Nat. Bank v. McInturff* (Kan. App.) 839.

Under Rev. St. U. S. §§ 5197, 5198, a note containing usurious interest bears no interest whatever, and a payment thereon is a payment on the principal.—*First Nat. Bank v. McInturff* (Kan. App.) 839.

### Vacation.

Of judgment, see "Judgment."  
Of mortgage sale, see "Mortgages."

### Variance.

Between pleading and proof, see "Pleading."

### VENDOR AND PURCHASER.

See, also, "Covenants"; "Deed"; "Fraudulent Conveyances"; "Sale"; "Specific Performance."

A purchaser must take notice of recitals in deeds making up his chain of title.—*Zear v. Boston Safe-Deposit & Trust Co.* (Kan. App.) 977.

A purchaser is presumed to have notice of the contents of a mortgage filed for record, though by mistake of the register the amount is incorrectly stated in the record.—*Zear v. Boston Safe-Deposit & Trust Co.* (Kan. App.) 977.

Payment of taxes by the grantee in an unrecorded deed and occasional improvements to the land are insufficient to charge a subsequent purchaser with notice of the deed.—*Jerome v. Carbonate Nat. Bank* (Colo. Sup.) 215.

Under a contract to convey certain lands free of incumbrances on payment of a certain mortgage thereon by the vendee, *held* that he was not entitled to such a conveyance until after such payment.—*Stuyvesant v. Western Mortgage & Investment Co.* (Colo. Sup.) 144.

A contract by defendant to convey lots to plaintiff, and to join in a deed to purchasers from plaintiff, and apply payments made by them on plaintiff's purchase notes, construed, and *held* that defendant was not bound to join

in a deed to a purchaser to whom plaintiff advanced the money.—*Wolff v. Helbig* (Colo. Sup.) 133.

A bona fide purchaser at execution sale of land apparently divested of its homestead qualities *held* not affected by the fact that the conveyance by which the homestead quality was so divested was fraudulent as to creditors of the grantor.—*De Lany v. Knapp* (Cal.) 598.

A judgment creditor is not a bona fide purchaser, within the statute.—*Smith v. Savage* (Kan. App.) 847.

Before a contract for the purchase of land can be rescinded on the ground of the failure to deliver a good deed, demand must have been made for the deed.—*Duggar v. Dempsey* (Wash.) 357.

Grantee *held* not precluded from recovery for fraudulent representations by the grantor as to the area of a lot which is irregular in shape.—*Cawston v. Sturges* (Or.) 656.

### VENUE IN CIVIL CASES.

A party may waive the right to have a cause tried in a particular county.—*Hearne v. De Young* (Cal.) 1108.

Action to recover on a note, and to foreclose pledge of collateral notes and certificates of stock in corporations is transitory.—*State v. Superior Court of King County* (Wash.) 887.

An action for specific performance, to have certain conveyances set aside and for partition, and, if specific performance cannot be decreed, to have the moneys advanced by plaintiff declared a lien, is local.—*State v. Superior Court of Snohomish County* (Wash.) 19.

The court could vacate an order changing the venue to allow the case to be tried before a judge pro tem.—*Mudge v. Hull* (Kan. Sup.) 242.

Where the complaint fails to show defendants' residence, one of them seeking a change of venue must show nonresidence in the county where suit was brought.—*Hearne v. De Young* (Cal.) 1108.

### Venue in Criminal Cases.

See "Criminal Law."

### Verdict.

See "Trial."

### Verification.

Of pleading, see "Pleading."

### View by Jury.

See "Criminal Law."

### Villages.

See "Municipal Corporations"; "Towns."

### Wages.

See "Master and Servant."

### Waiver.

Of objections to pleadings, see "Pleading."  
Of privilege, see "Witness."

### WAREHOUSEMEN.

A receipt by a weigher who stores property without charge, reciting its weight, is not a warehouse receipt.—*Sinsheimer v. Whitely* (Cal.) 1109.



**Warranty.**

See "Sale."

**WATER COMPANIES.**

See, also, "Navigable Waters"; "Riparian Rights."

A water company supplying a city with water for fire purposes is not liable to a citizen whose property is destroyed through an insufficient supply of water.—*Bush v. Artesian Hot & Cold Water Co.* (Idaho) 69.

**WATERS AND WATER COURSES.**

Shingle mills are within statute prohibiting pollution of streams with sawdust.—*State v. Kroenert* (Wash.) 876.

In an action concerning water rights, where it does not appear that the water is within a water district, or that there is any water master, a demurrer for nonjoinder of the water master is bad.—*Boulware v. Parke* (Idaho) 680.

**Ways.**

See "Easements"; "Highways."

**Widow.**

See "Executors and Administrators."

**Wife.**

See "Husband and Wife."

**WILLS.**

See, also, "Executors and Administrators."

It is error to admit a will to probate, in the absence of proof that deceased was of sound mind.—*In re Baldwin's Estate* (Wash.) 984.

**WITNESS.**

See, also, "Evidence."

Absence as ground for continuance, see "Continuance."

Repeal of statute as to competency of witness, see "Statutes."

The approval of a cost bill in a criminal case with fees of witnesses stricken out is a disapproval of such witness' fees.—*State v. Graves* (Wash.) 376.

Where a cost bill in a criminal case is sent to the prosecuting attorney for inspection, he should specify the items which, in his opinion, should be allowed.—*State v. Graves* (Wash.) 376.

Accused is entitled to have only necessary witnesses subpoenaed at the public expense.—*State v. Graves* (Wash.) 376.

**Competency.**

Communications between husband and wife are privileged.—*Van Zandt v. Shuyler* (Kan. App.) 295.

Claim of personal privilege must be made by the witness himself.—*Bradford v. People* (Colo. Sup.) 1013.

Accused who voluntarily becomes a witness waives the privilege of refusing to testify.—*Bradford v. People* (Colo. Sup.) 1013.

In an action for a balance due by decedent, plaintiff can testify as to the character of the work, and that he worked at deceased's house.—*Ah How v. Furth* (Wash.) 639.

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In an action for services rendered decedent, plaintiff can introduce his pass book.—*Ah How v. Furth* (Wash.) 639.

Where the foreclosure of a subcontractor's lien is revived against the owner's administratrix, plaintiffs are competent witnesses.—*Jooat v. Sullivan* (Cal.) 896.

That one of the parties to an action cannot testify as to a conversation with decedent, does not preclude a third person from testifying thereto.—*Fry v Fry* (Kan. Sup.) 235.

**Examination.**

Isolated question *held* properly excluded.—*People v. Shaw* (Cal.) 593.

Where a party uses his adversary to prove fraud in a transaction, a wide latitude of examination should be permitted.—*Griffis v. Whitson* (Kan. App.) 813.

It is error to allow witnesses to reiterate their testimony under the guise of rebuttal.—*People v. Van Eman* (Cal.) 520.

When bank book may be used to refresh a witness' memory of deposits made.—*McGowan v. McDonald* (Cal.) 418.

Though defendant in a criminal case has offered himself as a witness, he cannot be recalled as a witness for the state, and compelled to testify in its favor.—*State v. Lewis* (Kan. Sup.) 265.

**Cross-examination.**

When improper cross-examination without prejudice.—*People v. Shaw* (Cal.) 593.

Cross-examination *held* improper as not based on the testimony in chief.—*Wills v. Lance* (Or.) 487.

A cross-examination of defendant in a criminal prosecution on matters not testified to by him is erroneous.—*People v. Van Eman* (Cal.) 520.

Cross-examination of prosecutrix in a rape case *held* too narrowly restricted.—*People v. Knight* (Cal.) 6.

Cross-examination of a physician in a rape case *held* improperly restricted.—*People v. Knight* (Cal.) 6.

One asked as to the whereabouts of a certain receipt cannot be cross-examined as to the purpose for which it was given.—*Schreyer v. Turner Flouring Mills Co.* (Or.) 719.

It was error to refuse to permit a witness, on cross-examination, to be asked whether he was testifying by guess.—*State v. Rutten* (Wash.) 30.

**Credibility.**

The credibility of a witness is for the jury alone.—*State v. Barber* (Kan. App.) 800.

Where it is sought to impeach a witness by his written statement, the writing must be shown to him.—*State v. Steeves* (Or.) 947.

To impeach a witness by testimony at a coroner's inquest, it is necessary that a copy made thereof be first shown him.—*State v. O'Brien* (Mont.) 1091.

Statements of a witness on cross-examination on immaterial issues, for the purpose of attacking his credibility, cannot be disproved.—*Fenstermaker v. Tribune Pub. Co.* (Utah) 112.

A deposition of defendant on his preliminary examination is admissible for purposes of impeachment.—*People v. Hawley* (Cal.) 404.

Where a codefendant is placed on the stand by the state, and denies certain statements, the state cannot impeach him by showing contradictory statements in a confession involuntarily made.—*State v. Steeves* (Or.) 947.

When refusal to recall a witness for the purpose of impeachment not reversible error.—*People v. Shaw* (Cal.) 593.

That the state introduces evidence tending to show a different state of facts than that testified to by a witness for defendant is not an impeachment of the witness. — *State v. Nelson* (Wash.) 637.

### Women.

Right to vote, see "Elections and Voters."

### Work and Labor.

See "Assumpsit."

### WRITS.

See, also, "Attachment"; "Certiorari"; "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Prohibition, Writ of"; "Quo Warranto."

A judgment against a party not served is void as to him. — *York Draper Mercantile Co. v. Hutchinson* (Kan. App.) 315.

A nonresident in attendance as plaintiff in the United States court is not exempt from service in an action in a state court. — *Gynn v. McDanel* (Idaho) 74.

Indorsement on the summons as to the amount for which judgment would be taken in case of default *held* not necessary. — *Mudge v. Hull* (Kan. Sup.) 242.

A copy of a summons examined, and *held* insufficient notice to the defendant to give jurisdiction. — *Jones v. Marshall* (Kan. App.) 840.

Sheriff's return may be questioned, and the truth shown as to the facts on which jurisdiction depends. — *Jones v. Marshall* (Kan. App.) 840.

A return on a summons in an action against a corporation *held* insufficient. — *Mathias v. White Sulphur Springs Ass'n* (Mont.) 921.

Comp. Laws 1887, div. 1, § 75, does not repeal section 72, allowing service on the managing agent of a domestic corporation. — *Congdon v. Butte Consolidated Ry. Co.* (Mont.) 629.

An affidavit of service on an agent of the defendant corporation, instead of on the corporation, was sufficient. — *Keener v. Eagle Lake Land & Irrigation Co.* (Cal.) 14.

Affidavit for publication, under Code Civ. Proc. 1887, § 73, is sufficient if it sets forth the ultimate facts in the language of the statute. — *Ervin v. Milne* (Mont.) 706.

Where personal claims are joined with others in relation to which constructive service is allowed, and service is obtained by publication, it will be set aside. — *Zimmerman v. Barnes* (Kan. Sup.) 764.

A defect in an affidavit to procure notice by publication may be amended after publication notice has been published. — *Weaver v. Lockwood* (Kan. App.) 311.

### Wrongful Attachment.

See "Attachment."











